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Louisiana: Online marketplace not a “dealer” required to collect parish sales taxes

The Louisiana Supreme Court, reversing an appeals court decision, held that an online marketplace facilitator was not a “dealer” required to collect and remit Jefferson Parish sales and use tax on transactions in which third-party retailers sold goods using the taxpayer’s online marketplace.

The case is: *Normand v. Wal-Mart.com USA, LLC*, No. 19-0263 (La. January 29, 2020). Read the [decision](#) [PDF 644 KB]

Background

The taxpayer operated an online marketplace through which it made sales of its own goods and also facilitated sales for third-party retailers.

In its role as a marketplace, the taxpayer advertised the retailers’ products, provided a vehicle for placing orders, and processed payments. In return, it received a commission from each third-party sale. Under the contract with the third-party retailers, the third-party retailers remained the “seller” of record—they were responsible for fulfilling all orders and all customer service aspects of a transaction, such as order cancellations, returns, and refunds.

The taxpayer collected Jefferson Parish sales and use taxes on sales of its own products via the marketplace, but did not collect parish sales and use taxes on the third-party sales. The Parish Tax Collector filed a “Rule for Taxes” to attempt to recover unpaid sales taxes on the marketplace sales. The taxpayer asserted that it was not a “dealer” required to collect and remit tax with respect to the third-party transactions.

Eventually, both a trial court and an appeals court ruled in favor of the Jefferson Parish Tax Collector, holding that the term “dealer” encompassed a broader group of persons than a “seller” and that the taxpayer was a dealer required to collect sales taxes on the marketplace sales.

High court’s decision

The Louisiana Supreme Court held that in this case, the “dealer” was the third-party retailer that transferred title and physical possession of its own property to purchasers. The online marketplace, in the court’s view, was not a party to the sales transactions, but was acting as a facilitator.

The high court first denied the Tax Collector’s motion to dismiss the appeal on the basis that it was untimely filed under the rules for summary proceedings. In short, the litigation had commenced as a summary proceeding for the collection of unpaid taxes, but there was substantial deviation throughout the litigation from the strict deadlines accorded summary proceedings. The high court found that because the Tax Collector failed to object along the way, it had waived its right to strict compliance with the procedural requirements for a summary proceeding, thus “implicitly converting” the matter from a summary proceeding to an ordinary proceeding.

The high court then turned to the merits of the case, and agreed with the lower courts that the term “dealer” was broad and was not limited to only persons who were “sellers.” However, after further reviewing the statutory and regulatory provisions requiring a dealer to collect on retail sales made to in-state customers, the high court determined that “there can only be one dealer required to collect sales tax from the purchaser.” And, in a retail sale of the type occurring in the case at hand, the “dealer” was the third-party retailer that transferred title and physical possession of its own property to purchasers. The online marketplace, in the court’s view, was not a party to the sales transactions, but was acting as a facilitator. The high court also examined the provision of Louisiana law enacted in the 1990s in which retailers marketing and selling into Louisiana by various remote means (e.g., catalogs, television, and computers) were to be considered dealers. While finding that this law was intended to subject a broad range of entities to Louisiana jurisdiction, it was not applicable here because it did not make the marketplace a “dealer” with respect to the sales to consumers by third parties that occurred through the marketplace.

The Louisiana Supreme Court likened the taxpayer to an auctioneer who facilitates sales by third-party retailers. It noted, however, that special provisions had been enacted to require auctioneers to register as dealers and to collect and remit applicable sales and use taxes on sales they facilitate. There would have been no need for legislation specifically addressing auctioneers if this type of a third-party facilitator was a dealer under Louisiana law. After indicating that its interpretation was consistent with the actions of the Louisiana Department of Revenue and the other 63 parishes that were not seeking collection by the marketplace, the court observed that without specific legislation applicable to an online marketplace, double taxation could result if both online marketplaces and third-party retailers were required to collect tax on the same transaction. The court also held that, based on the terms of its agreement with third-party retailers, the taxpayer did not contractually assume the tax obligation of third-party retailers for sales made through the online marketplace.

KPMG observation

Because this decision involved a question of statutory interpretation (e.g., who is a dealer under Louisiana law), there does not appear to be a constitutional matter upon which to appeal. Interestingly, there was a dissenting opinion, with two justices concluding that the motion to dismiss should have been granted, and the other stating that the marketplace should be considered a dealer.

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