

Alabama Department of Revenue Adopts Regulation Addressing Seller Nexus for Local Sales & Use Tax Purposes

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Overview

The Alabama Department of Revenue (“Department”) recently adopted Ala. Admin. Code r. 810-6-5-.04.02,¹ which addresses the local sales and use tax obligations of sellers with regard to transactions occurring on or after January 1, 2014.² The new regulation creates seller responsibility to collect and remit local sales or use tax by imposing the same standards applicable for determining whether a seller is obligated to collect and remit state-level sales and use tax. In this Tax Alert we provide background information regarding local sales and use taxation in Alabama and we then summarize the new regulation.

Background

Long-standing regulation, Ala. Admin. Code r. 810-6-3-.51 (Repealed eff. Sept. 5, 2013), precluded imposition of local sales and use tax where the seller delivers in its own truck an item purchased outside the taxing jurisdiction, provided such seller had no salesmen soliciting orders within the destination locality.³ Addressing similar facts, the Alabama Court of Civil Appeals in *Yelverton’s Inc. v. Jefferson County, Alabama*, 742 So. 2d 1216, (Al. Civ. App. 1997) cited this regulation as authoritative in holding that the local tax did not apply to a taxpayer that made intrastate deliveries from its retail store to other municipalities within Alabama.⁴ *Yelverton’s* and Ala. Admin. Code r. 810-6-3-.51, prior to its repeal, are representative of the accepted concept in Alabama that local sales and use tax parallels state sales and use tax law, thus requiring physical presence in order to require a seller to collect and remit tax.⁵

Ala. Admin. Code r. 810-6-5-.04.02, as originally proposed in what might be construed as an attempted move away from a physical presence standard, would have required a seller to collect and remit a locality’s sales and use tax if the seller “purposefully avails itself of economic markets of the local jurisdiction” or “purposely direct[s] its business activities towards the consumers of that jurisdiction.”⁶ This proposed, far-reaching standard represented a substantial departure from the established nexus principles contemplated Ala. Admin. Code r. 810-6-3-.51 and *Yelverton’s* and was, accordingly, not well received by the business and professional community. In an apparent response to this unfavorable reaction, in July 2013 the Department provided notice of its withdrawal and re-issuance of Prop. Ala. Admin. Code r. 810-6-5-.04.02. The reissued regulation, as recently adopted, is discussed below.

Recently Adopted Ala. Admin. Code r. 810-6-5-.04.02

Recently adopted Ala. Admin. Code r. 810-6-5-.04.02, which applies to transactions occurring on or after January 1, 2014, specifies that:

The threshold applicable for determining whether a seller is obligated to collect and remit the state sales or use tax associated with an interstate transaction shall also be applied . . . to determine whether the seller is obligated to collect and remit local sales and use tax by examining the contacts the seller has within each local jurisdiction⁷

¹ Ala. Admin. Code r. 810-6-5-.04.02 (filed Oct. 25, 2013, eff. Nov. 29, 2013) accessible at: <http://revenue.alabama.gov/rules-fa/810-6-5-.04.02.pdf>. Ala. Admin. Code r. 810-6-5-.04.02(6).

² Ala. Admin. Code r. 810-6-5-.04.02(6).

³ Ala. Admin. Code r. 810-6-3-.51(2) (Repealed eff. Sept. 5, 2013).

⁴ *Yelverton’s Inc. v. Jefferson County, Alabama*, 742 So. 2d 1216, 1223-1224 (Al. Civ. App. 1997).

⁵ See, *Yelverton’s Inc.*, 742 So. 2d at 1221.

⁶ Prop. Ala. Admin. Code r. 810-6-5-.04.02 (Apr. 23, 2013).

⁷ Ala. Admin. Code r. 810-6-5-.04.02(3) (eff. Nov. 29, 2013).

The new regulation states further: “For purposes of determining whether the seller lacks sufficient physical presence with the local jurisdiction to create an obligation to collect and remit the local jurisdiction’s sale or use tax, the seller should refer to and must apply the [state sales and use tax] provisions of Rule 810-6-2-.90.01”⁸ One “condition” described in Ala. Admin. Code r. 810-6-2-.90.01 that would require a seller to collect and remit tax is the “delivery within the State of Alabama by means of a vehicle owned by the selling entity.”⁹ The recently adopted regulation includes an example with similar facts and concludes that a seller using its own delivery trucks and its own employees is responsible for collecting and remitting the applicable local tax.¹⁰ This example from the recently adopted regulation represents a departure from the now repealed but previously long-standing Ala. Admin. Code r. 810-6-3-.51, which did not appear to impose a tax obligation on sellers that made deliveries in their own trucks.¹¹ Note, however, that the recently adopted regulation would not impose an obligation to collect and remit where the seller used a common carrier or US mail to perform the delivery, provided the seller has “no other contact” with the destination locality.¹²

Considerations

The recently adopted regulation contains no safe-harbors or de minimis thresholds, but it may create more certainty than what would have existed under the previously proposed regulation. Although some ambiguities remain, the Department’s adoption of a regulation that parallels the state nexus rule would appear to help ease the administrative burden for sellers in their efforts to comply with local sales and use tax requirements.

Contacts

For additional information regarding Alabama state and local sales and use tax, please contact either of the following Multistate Tax professionals.

Kathy Saxton
Director
Deloitte Tax LLP, Atlanta
katsaxton@deloitte.com
(404) 220-1878

Doug Nagode
Senior Manager
Deloitte Tax LLP, Atlanta
dnagode@deloitte.com
(404) 220-1330

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⁸ Ala. Admin. Code r. 810-6-5-.04.02(4) (eff. Nov. 29, 2013).

⁹ Ala. Admin. Code r. 810-6-2-.90.01(4)(a).

¹⁰ Ala. Admin. Code r. 810-6-5-.04.02(5)(a)1 (eff. Nov. 29, 2013).

¹¹ Ala. Admin. Code r. 810-6-3-.51(2) (Repealed eff. Sept. 5, 2013).

¹² Ala. Admin. Code r. 810-6-5-.04.02(5)(a)2 (eff. Nov. 29, 2013). See also, Ala. Admin. Code r. 810-6-2-.90.01(3)-(5) for other indices of “substantial nexus.”