

What To Do Before The Return Of The Amazon Tax

By Robert W. Wood

If you buy online, will you be stung paying sales tax? It can be hard to tell until you're nearly finished checking out and see your total. Whenever possible, we probably all like to avoid paying sales tax when buying online from merchants out-of-state. That's been true for decades when we bought via mail order or telephone. In fact, the rules for catalogs and the Internet are the same.

If the merchant has a store or other facility in California - that's nexus - we pay tax even if we buy online. But Amazon tax laws import nexus based on far less, and that continues to brew controversy. The constitutionality of such taxes is being litigated in New York and other states as the number of online purchases continues to grow and state tax revenues continue to shrink.

A lot has happened in California in the last six months. On June 28, Gov. Jerry Brown signed ABx1 28, an Amazon tax law "clarifying" the obligations of out-of-state retailers to collect use tax on sales to California residents. The Amazon tax took effect immediately, and like many "clarifications," it charted new ground.



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The law required Amazon and many other online retailers meeting certain criteria - generally with affiliates or subsidiaries in California - to collect use tax on shipments to California. Sales tax applies when you buy tangible personal property at retail in California. Use tax is the flip side of the sales tax.

In fact, use tax applies if you buy over the phone, through the mail or on the Internet, and bring the merchandise into California. Use tax applies no matter what. However, the selling merchant has an obligation to collect the use tax from you and remit it to California only if it has "nexus" with the state. Sales or use tax is borne by the buyer, but sellers are the collection mechanism.

Fighting California's new tougher nexus law, Amazon promised a ballot initiative to strike down California's tax. However, a few months later Amazon reached a compromise deal with legislators that obviated that vote. In September, California passed AB 155, repealing the recently passed Amazon tax. Its immediate impact was a one-year reprieve.

Online retailers are not required to collect California sales or use tax until Sept. 15, 2012. However, this deal is contingent on the federal government not passing any law that usurps this one before July 2012. Three federal Amazon tax bills are pending - any one of them would allow California and other states to tax online sellers like Amazon. The passage of one of these pieces of federal legislation might seem inevitable, but Washington is in gridlock.

Some people debate the constitutionality of Amazon taxes because the U.S. Constitution prevents states from taxing "interstate commerce." However, most people agree that Congress can change the playing field and enable the states to require use tax collection even if the merchant does not have a store or other traditional nexus in the state.

In 1992, in *Quill v. North Dakota*, the U.S. Supreme Court ruled that a retailer must collect sales tax from an out-of-state customer only if it has a physical presence (such as a store, warehouse or office) in the customer's state. Amazon tax laws impute nexus for much less, but the Supreme Court in *Quill* seemed to invite Congressional action.

So what should you do now? One cynical answer is to buy as much as you can online now before the rules change. You'll *still* be taxed on online purchases from merchants having physical stores in California (say, if you buy from Macy's website). But you likely will not have to pay sales tax on other online purchases until Sept. 15, 2012. There could be federal legislation before then, but I doubt it.

That brings us to use tax. Move up Move down California already can and does tax you on Internet purchases you have shipped to California. These purchases are subject to use tax, and there is clearly no constitutional prohibition on it. It is only the collection mechanism for the use tax that is debatable. So how do you pay the use tax?

In California, you report it yourself. In fact, your annual California income tax return (Form 540) has a line for just that purpose. If you buy items whether for personal or business use, they face California use tax at the same rate you would have paid if you had bought them *in* California. Realistically, does anyone pay it? Yes and no.

Here we must draw a distinction between businesses and individuals. Businesses have always had these issues, especially businesses that make retail sales and therefore hold a California seller's permit. They must file California sales and use tax returns, and use tax is policed and audited as much as sales tax.

But any business in California (even service businesses like law firms that do not hold a seller's permit) is subject to audit for use tax compliance. These audits do occur. Most advisers would not recommend that businesses ignore use tax duties. That is especially true when you consider purchases of expensive computers and other office equipment online. Businesses are penalized for failing to remit use tax frequently, and California's income tax agency (Franchise Tax Board) and sales/use tax agency (State Board of Equalization) do cooperate. California historically didn't enforce use tax except against businesses, but that is changing.

With individuals and online purchases for personal use, the picture is cloudier. For decades, you "should" have been reporting your catalog, phone and now online purchases. Yet there were few repercussions in the past. Consumers today may face relatively little risk, particularly where purchases are small. However, the California income tax return form now requires you to list use tax. Ignoring this line carries risk, especially if your numbers are big. Whatever you do in the short term, you should assume that online purchases in California will most likely be subject to sale or use tax soon. Clicking just won't be the same.

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