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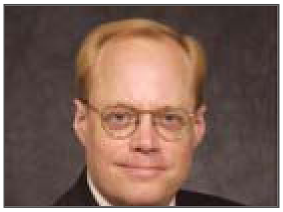

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Online Sales Tax Inevitable, Senate Passes Marketplace Fairness Act

The controversy over the pending Marketplace Fairness Act (S.336/H.R.684), is dizzying. First, the big news. The Senate passed it. See Symbolic Senate Vote Demonstrates Support For Marketplace Fairness Act. But it really wasn't the Act itself but rather a budget amendment, and only in the Senate. So will it pass?

Not necessarily, but regardless, the days of tax-free clicks are numbered. The Marketplace Fairness Act doesn't impose a federal tax or even a new state tax. Online sellers are already required to collect sales tax from customers in their own states. But under the Supreme Court's 1992 holding in *Quill v. North Dakota*, retailers don't always have to collect.

They must collect sales tax from out-of-state customers only if they have a physical presence (store, warehouse or office) in the customer's state. Since then, a growing number of states are extending sales taxes to online retailers with in-state sales affiliates. Amazon recently started collecting tax in Pennsylvania, Texas, California and Connecticut and according to the Marketplace Fairness Act website, is now allied with supporters of the bill. eBay opposes it.

Some of the claims about the law are hyperbolic. Opponents say it would obliterate the physical presence standard, something they assert is a baseline protection shielding taxpayers from harassment by out-of-state collectors. It's hard to support that claim, although there's no question the law would help harmonize brick-and-mortar and online sales.

Another claim is that the law would force remote retailers to interrogate their customers about where they live, look up regulations in thousands of taxing jurisdictions across the country, and then collect and remit taxes for distant authorities. See Letter to Congress: Oppose the Marketplace Fairness Act! Of course, customers already must state a delivery address, and credit card companies verify them too.

Opponents also invoke ultra-complexity, claim interstate commerce will be harmed, and say online sellers will be burdened with 9,600 separate taxing jurisdictions, each with its own unique definitions, holidays, and rates. They claim the law triggers a massive expansion in state tax collection authority, dismantling a vital taxpayer protection upon which virtually all tax systems are based. Most of this is at least overstated.

The Marketplace Fairness Act seems workable, encouraging uniformity and allowing states to collect taxes that in many cases are already owed. See Online Sales Taxes Done Right. Yet the debate is so heated that passage into law still seems unlikely. Why, then, do I suggest that paying tax will soon be inevitable?

States already have the power to tax and 45 states exercise it. Many states have amended their law to define physical presence differently than in the past. Some of those laws are being tested in court. Eventually, the Supreme Court could even get in on the act. The physical presence of today might not be interpreted the same as it was in 1992 in *Quill*.

Besides, even where sellers aren't forced to collect sales tax at point of sale, all of us (in 45 states and DC) should be paying use tax ***after*** we click. States are getting better at enforcing it, too, including use tax reporting on income tax returns. So however the emotion-riddled debate over Marketplace Fairness ends up, the days of tax-free clicks are probably not long for this world.

Robert W. Wood practices law with Wood LLP, in San Francisco. The author of more than 30 books, including Taxation of Damage Awards & Settlement Payments (4th Ed. 2009 with 2012 Supplement, Tax Institute), he can be reached at Wood@WoodLLP.com. This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.