

Department of Finance and Administration

Legislative Impact Statement

Bill: SB140

Bill Subtitle: TO PROVIDE FOR THE COLLECTION OF SALES TAX RATHER THAN USE TAX ON SALES BY CERTAIN REMOTE SELLERS.

Basic Change :

Sponsor: Senator Files

SB140 would add a new code section to the Arkansas Gross Receipts Tax Act of 1941, § 26-52-101 *et seq.*, to require out-of-state sellers having no physical presence in Arkansas to collect Arkansas sales tax in accordance with Arkansas law. Out-of-state or “remote” sellers subject to the provisions of the bill would include those sellers meeting either of the following criteria in the previous calendar year or the current calendar year:

- (1) A seller having gross revenue from sales of products and services delivered into Arkansas that exceeds one hundred thousand dollars (\$100,000); or
- (2) A seller who has sold products and services for delivery into Arkansas in at least two hundred (200) separate sales transactions.

To enforce the collection requirements of SB140, the state may bring a declaratory judgment action in circuit court against any seller the state believes meets the criteria of the bill to establish the obligation to collect and remit sales tax. The filing of the declaratory judgment action by the state serves as an administrative injunction prohibiting the state from enforcing the tax collection obligation upon the seller until the declaratory judgment action is resolved in favor of the state. If the declaratory judgement is resolved in favor of the state, the state may assess and apply the obligation to collect the tax from that date forward.

SB140 would be effective on the first day of the second calendar month following the effective date of the act.

Revenue Impact :

Under the provisions of the bill, state and local sales tax assessments against an out-of-state seller could begin following a favorable result from a declaratory judgement action brought by the state. The revenue impact from out-of-state sellers volunteering to begin tax collections resulting from passage of SB140 is not known

Taxpayer Impact :

An out-of-state seller having no physical presence in Arkansas would be required to collect and remit the sales tax due following a favorable result from a declaratory judgement action brought by the state. An out-of-state seller having no physical presence in Arkansas meeting the sales volume criteria of SB140 could voluntarily register with the Department of Finance and Administration (DFA) to collect and remit sales tax.

Resources Required :

None.

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Time Required :

Adequate time is provided for implementation.

Procedural Changes :

Updates to the sales tax rules will be promulgated.

Other Comments :

The legislation mirrors that previously adopted in the State of South Dakota which is currently being litigated in South Dakota state courts.

Legal Analysis :

Current U.S. Supreme Court case law interpreting the Commerce Clause of the U.S. Constitution provides that an out-of-state or "remote" seller must have nexus, meaning a physical presence in a state, to be required to collect that state's sales and use taxes from in-state purchasers. *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992). The *Quill* case involved catalog orders, and the Supreme Court ruled that North Dakota's imposition of a use tax collection requirement violated the Commerce Clause because only Congress can regulate interstate commerce. The Quill Corporation did not have sufficient constitutional nexus sufficient to be required to collect North Dakota's sales and use tax.

Consequently, as internet commerce has grown, state revenues on sales of tangible personal property and taxable services have declined because many internet sellers are not required to collect tax. Local sellers are required to collect sales tax, thus putting them at a price disadvantage with internet sellers. Instate purchasers are required to submit use tax on internet purchases but many do not and many are unaware of this requirement.

SB140 adds a section to the gross receipts tax laws to extend the requirement to collect Arkansas sales and use tax to out-of-state sellers who deliver tangible personal property or services into the state if either of two (2) criteria are met in the previous calendar year or the current calendar year: (1) the seller's gross revenue from sales into the state exceeds one hundred thousand dollars (\$100,000); or (2) the seller made sales into the state in at least two hundred (200) separate transactions. Under those conditions, the remote seller is treated as if it had a physical presence for nexus purposes.

The bill imposes tax on sales of tangible personal property and services along with sales of any product "transferred electronically." This provision could conflict with the Streamlined Sales and Use Tax Agreement and may be constitutionally suspect because Arkansas does not currently tax the sale of products transferred electronically. Extending collection requirements for sales of products transferred electronically creates two different tax bases. In other words, out-of-state sales of electronically transferred products would be taxed while in-state sales of electronically transferred products would not. Under Section 301 of the Streamlined Sales and Use Tax Agreement, states must administer all sales and use taxes in the same manner on the same tax base. Further, this provision of the bill would treat in-state and out-of-state commerce differently, which states are constitutionally

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prohibited from doing.

The bill also creates possible ambiguity or a potential conflict with current law related to a requirement that out-of-state sellers collect tax if an in-state affiliate has nexus under § 26-52-110. The "nexus affiliate" collection requirement does not set forth a threshold or a set number of transactions. That section also provides that if an out-of-state seller does not have an affiliate, it is presumed to be doing business in the state if it has a relationship with an Arkansas resident who refers potential purchasers to the remote seller, through an internet website link or otherwise, which results in gross receipts from purchasers in the state exceeding ten thousand dollars (\$10,000) during the preceding twelve (12) months. It may be recommended that this possible ambiguity and potential conflict be cured by amending the bill.

Proposed § 26-52-111(g) of the bill provides that a purchaser has no claim against an out-of-state seller if the sales tax was over-collected because any provision of the bill is later deemed unlawful. This provision appears to acknowledge that the purchaser owes use tax upon his or her purchase of items from an out-of-state seller, but the term "over-collected" is unclear. It may be preferable to provide instead that "the seller is not liable to a purchaser if it was not required to collect sales tax because any provision of the bill is later deemed unlawful".