

SESSION OF 2017

SUPPLEMENTAL NOTE ON HOUSE BILL NO. 2400

As Amended by House Committee on Taxation

Brief*

HB 2400, as amended, would require sellers that do not have a physical presence in Kansas with an annual gross revenue from the sale of tangible personal property exceeding \$100,000, or have more than 200 separate transactions, in the state to collect and remit sales taxes.

For the purpose of determining whether the sales tax provisions of the bill are valid under state and federal law, the Department of Revenue (Department) would have discretionary authority to bring a declaratory judgment action in district court against a seller who meets the above criteria. The district court would act on the declaratory judgment as expeditiously as possible. Upon the filing for a declaratory judgment, the court would grant an injunction against the State from enforcing the sales tax provisions against a party to the action. If a court would enter a judgment against a seller, or would lift or dissolve an injunction, the Department would enforce the sales tax provisions of the bill as of the date of the court's actions. Attorneys and related expenses would not be awarded for an action brought under the bill.

Nothing in the bill would affect the obligation of a purchaser to remit the applicable use tax when the seller does not collect and remit sales tax.

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

Background

Purchasers owe applicable sales or use taxes on purchases made from out-of-state businesses, but based upon a ruling of the U.S. Supreme Court, *Quill v. North Dakota* 504 U.S. 298 (1992), states cannot require an out-of-state business to collect and remit those taxes because the business has no physical presence in the state. In an attempt to address the concerns identified in *Quill*, the National Governors Association and the National Conference of State Legislatures (NCSL) created the Streamlined Sales and Use Tax Agreement (Streamline Agreement) in 1999. Kansas is a member of the Streamline Agreement, which attempts to minimize costs and administrative burdens on retailers that collect sales tax, particularly retailers operating in multiple states. Federal legislation has been introduced multiple times to grant Streamline states the authority to collect sales tax, but Congress has not taken action yet.

In 2010, Colorado enacted legislation that imposed notification and reporting requirements on out-of-state retailers that do not collect sales tax in that state. The constitutionality of the law was challenged in federal court. On February 22, 2016, the U.S. Court of Appeals for the Tenth Circuit (Tenth Circuit), which is the circuit that has jurisdiction over Kansas, upheld the constitutionality of the Colorado law. On December 12, 2016, the U.S. Supreme Court denied to hear the case, allowing Colorado to begin enforcing its law.

The bill was introduced by the House Committee on Taxation. During the House Committee hearing, representatives of the League of Kansas Municipalities (LKM) and the City of Manhattan (Manhattan) spoke in favor the bill, providing estimates of the amount of loss revenue due to remote sales. LKM estimated cities in Kansas did not collect a minimum of \$50.7 million in 2015. Manhattan estimated it has not collected approximately \$5.0 million since 2011.

There was no opponent testimony.

Representatives from the Department provided neutral testimony, stating the bill was similar to legislation enacted in South Dakota in 2016. A Department representative explained that during the Colorado litigation described above, when the U.S. Supreme Court remanded that case to the Tenth Circuit, Justice Kennedy wrote a concurring opinion suggesting the *Quill* ruling should be reexamined. This has led some states to enact legislation that would seek a declaratory judgment. The declaratory judgment action in South Dakota was found in favor of the sellers at the circuit court level. That case will be appealed to the South Dakota Supreme Court. After that Court's ruling, the U.S. Supreme Court could be petitioned to hear the case.

At its initiative, the House Committee received information from NCSL surveying the actions taken by states in 2016 and 2017. In 2016, seven states adopted a change in tax policy to encourage the collection of sales tax from remote sellers. Three states adopted policies similar to the notification approach taken by Colorado, and four states adopted policies similar to the economic nexus approach taken by South Dakota. In 2017, 58 bills or regulatory changes have been proposed in the 28 states considering the taxation of remote sales. Twenty-one proposals include an economic nexus, and 10 include notification provisions. The remaining proposals provide other alternatives, such as conformity to the Streamline Agreement.

The House Committee amended the bill to:

- Authorize the Department to seek a declaratory judgment;
- Direct the district court to proceed on such an action brought under the bill in an expeditious manner;
- Provide for an injunction on the enforcement of the bill until the matter has been resolved;

- Prohibit the award of attorneys or related expenses; and
- Clarify the purchaser's obligation to remit the use tax owed to Kansas, if applicable.

According to the fiscal note prepared by the Division of the Budget, in consultation with the Department, the Kansas Department of Transportation, LKM, and the Kansas Association of Counties (KAC), the bill, as introduced, would increase revenues by \$2.0 million in FY 2018 and FY 2019, which would include an additional \$1.7 million to the State General Fund (SGF) and \$300,000 to the State Highway Fund each year. The Department estimates it would cost \$600 from the SGF in FY 2018 to reissue sales tax publications. KAC and LKM indicate the bill would increase local sales tax collections by an unspecified amount. The fiscal effect associated with the bill is not reflected in *The FY 2018 Governor's Budget Report*.