An Interview With George Isaacson

Texas Takes Lead in Drafting States’ Response in Gillette

U.S. Supreme Court Unlikely to Advance Law on Unitary Business

A New Crop of Tax Commissions Is in Bloom

Missouri Is a Model MTC State

Watch Out, New York — De Blasio’s Coming

Property Tax Incentives for Renewable Energy
An Interview With George Isaacson

by Doug Sheppard

When it comes to the taxation of remote sales and e-commerce, it would be difficult to find any issue from the past quarter-century or so that George Isaacson, a senior partner at Brann & Isaacson in Lewiston, Maine, hasn’t been involved with. As tax counsel with the Direct Marketing Association, he has filed amicus curiae briefs in state and federal courts, served on the National Tax Association’s Communications and Electronic Commerce Tax Project, testified before Congress and the federal Advisory Commission on Electronic Commerce, and spoken at tax conferences too numerous to mention — although we will mention his appreciated appearance on a Tax Analysts panel in 2010 in spite of an impending blizzard. (For coverage of the conference, see State Tax Notes, Feb. 15, 2010, p. 463.)

Isaacson has criticized federal legislation to allow states to require tax collection on remote sales, most recently as the Marketplace Fairness Act of 2013 (MFA, S. 743), which is why State Tax Notes thought it would be interesting to get his views on the latest version and other current developments.

**Tax Analysts:** Given the repeated past failures of similar legislation, were you surprised when the Marketplace Fairness Act passed the U.S. Senate in May? Why or why not?

**George Isaacson:** I was surprised and also disappointed in the way that the Senate dealt with the issue. U.S. Senate Finance Committee Chair Max Baucus, D-Mont., justly complained that the bill, as drafted, had numerous flaws and should have gone through the ordinary process of a hearing before his committee, along with consideration of appropriate amendments to make the legislation less burdensome on businesses. He correctly summed up the problem in his speech on the Senate floor in opposition to the bill when he stated that enactment of the Marketplace Fairness Act would be “an abdication of the responsibility given to Congress under the Commerce Clause. We have the duty to recognize that the state sales tax systems are still too complicated and would burden interstate commerce if imposed on more businesses. . . . Circumventing the committee process allowed this bill to come to the floor full of so many unanswered questions.”

The bill’s proponents clearly outmaneuvered the opponents of this legislation in hustling the bill through the Senate without a committee hearing and without even permitting amendments to be considered. This is no way to conduct the nation’s business, especially when it involves such an important segment of the American economy.

**TA:** What do you think the bill’s chances are in the U.S. House?

**George Isaacson:** Betting on Congress is no more certain than betting on the ponies, so I will refrain from making predictions. I am pleased, however, that U.S. House Judiciary Committee Chair Bob Goodlatte, R-Va., has stated that the Marketplace Fairness Act, in the form passed by the Senate, is not acceptable. He has explained that the current sales and use tax systems of the various states present interstate businesses with a jumble of disparate compliance requirements in terms of rates, exemptions, definitions, filing procedures, multiple audits, etc. The chairman is not going to permit the MFA, or similar legislation, simply to sail through the House. Instead, he has stated that he will subject any legislation to careful scrutiny.

Goodlatte’s views have been succinctly explained in his announcement of seven principles that any legislation providing for an expansion of state taxing authority must satisfy. The keystone and common thread of these principles is the need for true simplification of the existing sales and use tax system and an assurance of fair treatment of remote sellers when compared with in-state retailers. In return for expanded tax jurisdiction, he believes that state...
governments must make their tax systems "so simple and compliance so inexpensive and reliable as to render a small business exemption unnecessary." I think Goodlatte has aided all parties — including state governors, big-box retailers, and catalog/Internet merchants — by setting the bar for this tax reform debate in the House. We now have a much clearer set of standards, and all interested parties should direct their efforts at developing draft legislation that will meet these guidelines.

The principles can be readily achieved if a genuine and collaborative effort is made to reform the current system. Let me give you just a few examples of what I believe are realistic — not pie-in-the-sky — measures that would simplify sales tax collection and remittance by catalog and Internet companies:

- one tax rate (combined state and local) for remote sales into a state, which could be no higher than the lowest combined rate in that state;
- a common menu of defined products for taxation and exemption, with states permitted to tax and exclude products from that menu;
- a uniform sourcing rule for remote sales applicable to all state and local destinations in the country;
- scheduling of all state sales tax holidays to a single time period and to a limited set of goods (for example, clothing and hurricane supplies); and
- adoption of a base-state reporting and remittance model, similar to that used in the International Fuel Tax Agreement.

The latter model would incorporate the following:

- sales tax collected from the consumer at the destination-state rate and remitted to a single base state designated by the retailer, along with a spreadsheet of taxable sales by destination state;
- the base state distributes the tax revenue to the participating states; and
- a single audit is conducted by the base state on behalf of all participating states.

These are concrete, pragmatic suggestions that could be implemented quickly and relatively easily by the states — if they are willing to work together to achieve greater uniformity. The problem is that states want to have their cake (more tax revenue) and eat it too (not be forced to simplify, and make more administratively uniform, their tax systems).

Remember, the states are asking Congress to impose new and substantial burdens on businesses that have been constitutionally protected from such state impositions in the past. In return for such expanded tax authority, the states should be willing to give something in return — in other words, tax simplification. That is the balance that Goodlatte is demanding.

One of Goodlatte's principles calls for fair procedures by which an out-of-state company subject to tax collection obligations has "direct recourse to protest unfair, unequal or discriminatory rates and enforcement." A major problem with the MFA is that a company that protests a tax assessment, because it believes the state has acted beyond its authority and is in violation of federal statutory or constitutional law, must nonetheless pursue its appeal through arcane and expensive procedures before state administrative hearing officers and state court judges. These individuals often lack knowledge of federal law and tilt in favor of state revenue departments.

If remote sellers are to become subject to state taxing authority, even though they have no tax nexus in a state, then at a minimum the out-of-state company should have access to federal court to address violations of its federal rights. Therefore, as part of the quid pro quo for expanded state tax jurisdiction over interstate commerce, the Tax Injunction Act (28 U.S.C. section 1341) should be repealed — or at least made inapplicable to legal challenges brought by companies with no physical presence in a taxing state. Providing federal court jurisdiction is the only meaningful way to protect those companies' constitutional rights and enforce statutory limitations on the scope of state taxing power.

Moreover, when it comes to contested assessments, another win-win for both states and businesses would be recourse to mediation before an independent alternative dispute resolution organization. Such mediation will usually result in a settlement, with the state getting its money sooner and the taxpayer avoiding the expense and delay of protracted administrative and judicial appeal procedures. If mediation fails, the parties reserve all their rights to slug it out in the conventional manner.3

Finally, I give kudos to Goodlatte for raising the important issue of protection of sensitive customer data. State revenue departments are notoriously lax in protecting taxpayer information. Under the MFA, states would have access to millions of customer names, addresses, and purchase transaction information, yet the legislation fails to establish standards for protecting the confidentiality of that information.

Federal legislation should require an audit of each state revenue department — undertaken by an independent, nationally recognized data security firm — to examine the data breach security (anti-hacking) measures that are in place, as well as the states' privacy protocols and practices.

The thing that strikes me about Goodlatte's principles is that people on both sides of the debate have seen them in a positive light. The National Governors Association, for example, also commended them in a press release. But by the same token, there have also been critics who say they add nothing new. Richard Pomp, for one, said: "There is not a new issue raised. This is nothing more than an attempt to kidnap the debate, throw sand in the eyes of the House, and try to stop the bill." What's your response to Pomp's take?

George Isaacson: Rick's a friend and usually pretty astute, but I think he is off target with his harsh criticism of the Goodlatte principles. The chairman has drawn seven lines in the sand, setting the requirements for meaningful and realistic state tax reform as conditions to the House approving a bill expanding state tax authority. He has indicated that he will support legislation that satisfies these principles. To the best of my knowledge, professor Pomp has not pointed to a single one of those tax reform objectives that would not, in fact, make the current system simpler, fairer, and more efficient. It is now up to the industry and the states to present proposals that meet those objectives, and that is what I tried to do in response to your earlier question.

In regard to the press release by the National Governors Association welcoming Chairman Goodlatte's principles, I hope that this statement heralds a sincere change in attitude on the part of governors toward achieving real progress in making their disparate sales tax systems more uniform and easier for businesses to administer. The real proof of their sentiments will be seen in whether the governors follow through with new substantive reform proposals or simply press on with their efforts to stampede the flawed Marketplace Fairness Act through Congress.

One of Goodlatte's principles states that "laws should be so simple and compliance so inexpensive and reliable as to render a small business exemption unnecessary." Would the Direct Marketing Association support any bill without a de minimis provision? Are there compliance burdens that smaller retailers should not have to bear, regardless of the level of simplification?

George Isaacson: I certainly can speak for myself on this issue. I applaud Bob Goodlatte's goal of making compliance so simple and inexpensive that all retailers can do so without undue burden. The base-state model I suggested earlier in this interview would be one giant step in getting there. One problem with statutory small business exceptions is deciding where to draw the line on what constitutes a small business. The Small Business Administration, for example, generally defines a small business in the retail trade as having less than $7 million in average annual receipts. The MFA, however, has a small business exception of only $1 million, with no explanation by its proponents of how this figure was derived.

Moreover, government tax policy that encourages business not to grow is problematic as a matter of economic policy. Just look at the Affordable Care Act, with its small business exception for employers with fewer than 50 full-time employees. The effect has been for many businesses to reduce their employee count or abandon expansion plans. In addition, many companies are converting full-time positions to part-time employment. I join Congressman Goodlatte in favoring true simplification that will relieve the arduous aspects of tax collection for all retailers.

Unlike past versions of the legislation, the current bill does not require compliance with the Streamlined Sales and Use Tax Agreement, let alone interstate uniformity in terms of definitions. Can the bill still claim to simplify sales tax administration absent those requirements?

George Isaacson: The MFA is a slapdash, quick, and dirty scheme to expand state tax jurisdiction and impose significant new burdens on interstate
commerce, with barely a nod at real simplification. The act does nothing to reduce the problem of varying tax rates among 9,000 state and local tax jurisdictions, to harmonize definitions of taxable and exempt products, to lessen the complexity of reporting and remittance, or to avoid a parade of audits by every state for which tax collection is made. In addition, the MFA does nothing about the serious problem of what I call "home cooking," that is, the biased treatment that out-of-state companies often receive before state administrative agencies and state courts when appealing tax assessments.

The Streamlined Sales and Use Tax Agreement began to address at least some of these concerns in a limited way. The fact that the MFA does not even require states to comply with the "low bar" simplification requirements of the SSUTA demonstrates the fact that the legislation passed by the Senate carries no meaningful promise of tax reform. It leaves entirely in place the current "crazy quilt" of state laws, regulations, and procedures that characterizes the problem with the current system.

**TA:** At our conference back in February 2010, you said of federal streamlining legislation: "I think it's naive on the part of the states to think that that kind of congressional legislation, either in the first instance or over the long haul, would come without substantial strings attached." Have your views on that changed? If a bill such as the Marketplace Fairness Act passed, would there still be other unintended ramifications?

**George Isaacson:** The states would like Congress simply to wave its golden wand, repeal the Supreme Court's 1992 Quill decision, and grant them free rein to export major elements of their tax systems across state borders. This may be a classic case of "be careful what you ask for." Once Congress becomes involved with the issue of how much burden state taxes place on interstate commerce, it is reasonable to expect that Congress will be urged to revisit that issue from time to time at the urging of various industry groups. To date, Congress has generally (but not completely, for example, P.L. 86-272) kept away from state tax issues. Once the states open this door, however, they may find it difficult to swing it back shut.

**TA:** Overstock.com and Amazon.com have appealed the New York Court of Appeals' ruling in the Amazon case to the U.S. Supreme Court. Do you think the Court will grant certiorari?

**George Isaacson:** The odds are always long on the Supreme Court granting cert, but Overstock and Amazon have raised important constitutional issues, so they certainly have a crack at the Court reviewing the New York Court of Appeals' decision. I have been involved in submitting an amicus brief in support of their petition for certiorari.

**TA:** There has now been Amazon litigation in New York and, as you know very well, Colorado and Illinois. Do you see that type of litigation arising in any of the other states with "Amazon" laws?

**George Isaacson:** It is common in state tax circles to watch the course of pending test case litigation rather than joining the rush to the courthouse. The New York, Illinois, and Colorado lawsuits all involved affirmative challenges to the legislation in question. If states start to enforce so-called Amazon bills by issuing tax assessments to remote sellers (or, in the case of the Colorado law, imposing penalties for failure to turn over customer transaction information), then I would anticipate that catalog companies and Internet merchants will file protests and appeals.

**TA:** Where do you see the recent trend of state Amazon legislation going? Will the tax collection deals that Amazon has cut with various states perhaps result in that sort of legislation declining—or at least leveling off?

**George Isaacson:** I would not presume to divine the mood and motives of state legislators. The irony of these Web affiliate nexus laws is that they have mostly harnessed in-state businesses rather than remote sellers. Most Internet merchants have terminated their relationships with affiliates located in states with these so-called Amazon laws (in other words, terminated their contracts with in-state websites that link visitors to the remote seller's website) in order to stay outside the reach of these statutes. The result is that the in-state organizations, many of which are nonprofits, lose the referral revenue that they previously earned. There does not seem to be much logic in the states' approach as a matter of public policy.

**TA:** On a lighter note, I think it might be interesting to recount the story of how you unwittingly joined a law firm that already had your name built in. Many assume that the firm is named after you.

**George Isaacson:** Brann & Isaacson was started back in 1926 by Louis Brann, who went on to become a two-term governor of Maine, and Peter Isaacson, who helped reorganize many of the banks in Maine that had closed their doors during the bank holiday of the Great Depression. Peter Isaacson, who passed away in 1980, was only a very distant relative, and I did not know him personally growing up. However, following my graduation from the University of Pennsylvania Law School, I clerked for a judge in Maine who had previously been a partner at Brann & Isaacson. Peter Isaacson contacted his old law partner to inquire whether any of the judge's former law clerks might be interested in joining his firm. I was practicing in another law firm at the time, but when I learned that Brann & Isaacson was counsel to L.L. Bean (I'm an avid fly fisherman), I snapped at the bait.

* SALT Shakers

---

172  State Tax Notes, October 21, 2013