

Sales/Use/Indirect:

Pennsylvania: Retailers Selling through Online Marketplace's Merchandise Fulfillment Program Lack Nexus

Case No. 179 MD 2021, Penn. Commw. Ct. (9/9/22). In a case involving the Pennsylvania Department of Revenue's (Department) attempt to seek back sales and personal income taxes against thousands of out-of-state retailers whose only connections to Pennsylvania were limited to having their merchandise stored as inventory in a third-party online marketplace's in-state warehouse as part of the online company's fulfillment program, the Pennsylvania Commonwealth Court (Court) held the Department failed to show that these out-of-state sellers had sufficient contacts with Pennsylvania. While the Department argued that storing inventory in the Pennsylvania warehouse constituted an in-state physical presence for the merchants, the Court concluded that based on the provided facts, the Department could *not* require them to collect and remit Pennsylvania sales tax or pay Pennsylvania personal income tax. The Court highlighted that the online marketplace, rather than the various merchant sellers, determines the location to which goods are shipped and that even where a participating seller has paid to participate in the online marketplace's "inventory placement service," the merchant has no control over its merchandise once the online marketplace receives it. Under the facts, once the merchandise is purchased by a customer, the online marketplace is responsible for shipping it to the customer, and the identity and location of the purchaser is not disclosed to the respective merchant. The Court reasoned that it is "hard pressed to envision" how, in these circumstances, a merchant has placed its merchandise in the stream of commerce with the expectation that it would be purchased by a customer located in Pennsylvania, or has availed itself of Pennsylvania's protections, opportunities, and services.

URL: https://www.pacourts.us/assets/opinions/Commonwealth/out/179md21_9-9-22.pdf

Regarding the Department's mailing of "Business Activities Questionnaire Requests" to the out-of-state merchants indicating that "failure to provide the information requested will result in additional enforcement actions," the Court explained that Pennsylvania's tax code does *not* grant the Department "unfettered authority to seek business information from any person or entity it desires for the purpose of determining its status as a taxpayer," and that due process requires a connection between the taxing authority and the person or entity it seeks to tax, as well as "some act" indicating the alleged taxpayer has availed itself of the taxing authority's protections, opportunities, and services. The Court also explained that just because the merchants were not yet formally assessed any of the taxes at issue did not mean their due process claims were premature, because failing to respond to the questionnaire may have yielded enforcement actions. Please contact us with any questions.

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