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MEMORANDUM

TO: Governor's Council on Tax Reform

FROM: Mark A. Burghart
Secretary of Revenue

RE: Update on Notice 19-04 and Post *Wayfair* Issues

DATE: October 16, 2019

INTRODUCTION

On September 25, 2019, the Department of Revenue presented testimony on the United States Supreme Court decision in *South Dakota v. Wayfair, Inc.* and Notice 19-04 – Sales Tax Requirements for Retailers Doing Business in Kansas. Since that testimony was presented, there have been certain developments regarding the Notice. Set forth below is an explanation of those recent developments and related commentary.

RECENT DEVELOPMENTS

On September 30, 2019, the Attorney General issued Attorney General Opinion No. 2019-8 for which the following synopsis was provided:

“Kansas has no legally adopted standard by which the Department of Revenue may comply with the command of K.S.A. 79-3702(h)(1)(F) that the statute be applied only to those retailers required “to collect and remit tax under the provisions of the constitution and laws of the United States.” The Department’s new policy interpreting the scope of K.S.A. 79-3702(h)(1)(F), as described in Notice 19-04, is of no force or legal effect because it was not lawfully adopted in compliance with Kansas law.”

A complete copy of the opinion is attached.

SALIENT POINTS REGARDING THE IMPACTS OF WAYFAIR, NOTICE 19-04 AND ATTORNEY GENERAL OPINION NO. 2019-8

- The only holding in the *Wayfair* case was that the physical presence requirement established in *National Bellas Hess v. Illinois Department of Revenue* and upheld in *Quill v. North Dakota* was incorrect and those cases were overruled.
- The U.S. Supreme Court recognized the continuous and pervasive virtual presence of retailers today and noted that sufficient nexus arises when an out-of-state retailer avails itself of the substantial privilege of carrying on business in a given state.
- *Wayfair* did not expressly hold that a statutory “safe harbor” based on the value of goods or services sold or number of transactions is required by the Commerce Clause. Attorney General Opinion No. 2019-8., p.5.
- A legislative plan to structure the compensating tax code to take advantage of a favorable United States Supreme Court ruling setting aside the physical presence requirement set forth in *National Belles Hess* and *Quill* has been in place for 29 years.
- K.S.A. 79-3705c, enacted in 1945, requires retailers doing business in the state and making sales of tangible personal property for use, storage or consumption to collect the compensating use tax from the consumer.
- K.S.A. 79-3702(h)(2)(A)(vii), enacted in 2003, provides that a retailer shall be presumed to be doing business in the state if the retailer conducts any activities in the state that are significantly associated with the retailer’s ability to establish and maintain a market in the state for the retailer’s sales.
- K.S.A. 79-3702(h)(2)(D), enacted in 2003, further provides that this presumption may be rebutted by demonstrating that the activities of the retailer in the state are not significantly associated with the retailer’s ability to establish or maintain a market in this state.
- The statutes in question are plain, unambiguous and self-executing.
- Notice 19-04 did nothing more than publicize the *Wayfair* decision, the controlling statutes and the directions for how retailers can begin to comply with the Kansas statutes.
- The Notice is not a regulation with the force of law and the Department has never contended that the Notice had the force and effect of law; no regulation is required because the controlling statutory provisions are self-executing.
- Kansas statutes are presumed to be constitutional and unless deemed otherwise by a court of competent jurisdiction, the Department is obligated to enforce the statutes as enacted by the Legislature.
- 3,200 out-of-state retailers have registered since June 21, 2018, the date *Wayfair* was issued; 600 of those registrations occurred after August 1, 2019, the date Notice 19-04 was released by the Department.

- Gross compensating use tax receipts for the first quarter of FY2020 were \$14 Million greater than the same time period for FY2019 due in part to increased compliance.
- The application of the collect and remit requirements in K.S.A. 79-3705c to out-of-state retailers equalizes the treatment for in-state and out-of-state retailers thus eliminating the competitive advantage that out-of-state retailers have enjoyed for 52 years.
- The release of Attorney General Opinion No. 2019-8 has created confusion with out-of-state retailers and could negatively impact the number of registrations and compensating tax payments.