

Why isn't Amazon collecting sales tax in Ohio?

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The Ohio Tax Credit Authority recently approved tax breaks for Amazon.com valued at \$81 million over 15 years for a subsidiary's new facility in Ohio. Despite that, the company will not be required to collect sales tax in the state on the online purchases that consumers make. The result is tens of millions of dollars a year in lost revenue, hurting Ohio's ability to finance needed public services, and privileging Amazon with a continued price advantage over Main Street Ohio retailers who must collect the tax. Ohio should go back and renegotiate the deal, because it has struck a very bad one: in 21 out of 23 states in which Amazon has or will soon have a facility, it is collecting the state's sales tax.

Under a 1992 U.S. Supreme Court decision, companies are not required to collect sales tax unless they have a physical presence in a state. The tax is still due on such purchases, and Ohio, like other states, asks residents to declare it on income-tax forms, which most people don't do. However, retailers don't have to collect it unless they have such a presence. This creates what the tax law calls "nexus."

Amazon.com is collecting sales tax on customer purchases in 21 states, covering more than half of the U.S. population.¹ Two more states, Maryland and Minnesota, said this week that Amazon would start collecting the tax on Oct. 1,² bringing the total to 23. After years of efforts to avoid

Key findings

- Amazon.com will soon be collecting sales tax in 23 states, including all but two where the tax is levied and it has a facility
- Ohio has approved \$81 million in tax breaks over 15 years for an Amazon "cloud computing" data center
- Amazon still doesn't have to collect sales tax in Ohio, costing the state millions of dollars a year in tax revenue and disadvantaging Main Street retailers
- Ohio should renegotiate its deal with the company

¹ See: www.amazon.com/gp/help/customer/display.html?nodeId=468512. Amazon collects the tax in Arizona, California, Connecticut, Florida, Georgia, Indiana, Kansas, Kentucky, Massachusetts, Nevada, New Jersey, New York, North Carolina, North Dakota, Pennsylvania, Tennessee, Texas, Virginia, Washington, West Virginia and Wisconsin. Altogether, 45 states levy sales tax. Amazon said in its annual 10-K statement to the Securities & Exchange Commission that, "More than half of our revenue is already earned in jurisdictions where we collect sales tax or its equivalent." (p. 12). See <http://www.sec.gov/Archives/edgar/data/1018724/000101872414000006/amzn-20131231x10k.htm>

² Schwartz, Eric Hal, "Amazon will start charging sales tax in Maryland next week," InTheCapital, Sept. 22, 2014 <http://inthecapital.streetwise.co/2014/09/22/amazon-maryland-sales-tax/> and Nick Halter, "Amazon will soon collect Minnesota sales tax; is a same-day shipping center next?" Minneapolis/St. Paul Business Journal, Sept. 22, 2014, at <http://www.bizjournals.com/twincities/news/2014/09/22/amazon-minnesota-sales-tax-same-day-shipping.html>

collecting the tax, the company has agreed in numerous states to begin doing so.³ In Texas, it began collecting tax in 2012 after the *Dallas Morning News* noted that the company had a warehouse in Irving, Texas, and the state's Comptroller of Public Accounts presented Amazon with a \$269 million bill for back taxes. The company initially argued that its local warehouse was owned by an independent subsidiary. However, the two sides eventually came to an agreement; Amazon avoided paying much in back taxes, but agreed to start collecting the tax.⁴ Amazon began collecting sales tax in Indiana this year. According to the *Indianapolis Business Journal*, then-Governor Mitch Daniels and an Amazon executive said when the agreement was announced in 2012 that it could lead to Indiana collecting at least \$20 million more in annual sales-tax revenues.⁵ While the exact amount Amazon would collect in Ohio is unknown, it clearly would amount to tens of millions of dollars a year.⁶

Amazon reaps a price advantage over in-state retailers in states that have sales taxes where it does not have to collect the tax.⁷ For years, Amazon fought against having to collect it, even in states where it had warehouses, on the grounds that these were separately incorporated, unaffiliated businesses. However, it now collects the tax in every state that collects a sales tax and where it has a facility, except Michigan and South Carolina.⁸ In a number of states, the company has agreed to start collecting the tax as a part of opening new facilities there.

Ohio approved the subsidies for Amazon subsidiary Vadata Inc., which would employ 120 workers and spend \$1.11 billion to build a data center here that would provide cloud computing

³ Elkind, Peter with Doris Burke, "Amazon's War on Taxes," *Fortune*, June 10, 2013.

⁴ Ibid and Billy Hamilton, "What an Amazon Sales Tax Deal Looks Like," *State Tax Today*, Sept. 4, 2012

⁵ Ibj.com, "Indiana reaches online sales tax deal with Amazon.com," Jan. 9, 2012, at <http://www.ijb.com/indiana-reaches-online-sales-tax-deal-with-amazoncom/PARAMS/article/31851>

⁶ Amazon reported \$44.5 billion in North American sales last year (see the company's 10-K statement for 2013). If Ohio sales amounted to just 2 percent of that total – a smaller share than Ohio's share of the North American population – that would have brought sales-tax revenue last year of more than \$50 million, based on Ohio's state sales tax rate of 5.75 percent. That does not include local piggyback sales taxes of counties and transit agencies. Unfortunately, the Ohio General Assembly last year approved a budget bill that directs additional sales tax collected voluntarily by out-of-state sellers that are not legally required to collect the tax to go into a fund for income-tax cuts. This revenue instead should go into the General Revenue Fund, where it could be used for needed public services.

⁷ Mazerov, Michael, "Amazon's Arguments Against Collecting Sales Taxes Do Not Withstand Scrutiny," Center on Budget and Policy Priorities, Revised Nov. 29, 2010, at <http://www.cbpp.org/cms/index.cfm?fa=view&id=2990> See also Janet Cho, "E-fairness proponents hope 2013 Marketplace Fairness Act will collect billions in unpaid online taxes," *The Plain Dealer*, March 2, 2013, at http://www.cleveland.com/business/index.ssf/2013/03/e-fairness_proponents_hope_2013_marketplace_fairness_act_will_collect_billions_in_unpaid_online_taxes.html In Ohio, Amazon's advantage includes the 5.75 percent state sales tax and piggyback local sales taxes, which range from 0.75 percent to 2.25 percent and averaged 1.28 percent in Fiscal Year 2013. See Footnote 4, <http://www.policymattersohio.org/repeal-apr2014>.

⁸ See www.amazon.com/Locations-Careers/b?ie=UTF8&node=239366011.

services.⁹ The vast bulk of the subsidy -- \$77 million -- would come from a new sales-tax exemption, enacted by the General Assembly in 2011, that covers data center equipment purchases at the project location.¹⁰ If Vadata chooses to go forward with the project in Ohio, another \$4 million would go to the company in the form of a job creation tax credit, based on a payroll of \$9.6 million a year.¹¹ The law for the sales-tax exemption requires that the tax credit authority determine, among other things, that, "Receiving the exemption is a major factor in the taxpayer's decision to begin, continue with, or complete the capital investment project."¹² However, the Ohio Development Services Agency noted in response to a public records request that information given to tax credit authority members is not a public record.¹³

Asked whether Amazon would have to collect sales tax on online consumer purchases made in Ohio, the state taxation department said it would not, citing a 1995 Ohio Supreme Court ruling involving Saks Fifth Avenue and its catalogue subsidiary, SFA Folio Collections Inc.¹⁴ The court ruled that Saks was not required to collect sales tax on Folio's sales in Ohio, despite the fact that Saks stores in Cincinnati and Cleveland had Folio catalogues available and accepted returns of

⁹ Governor John R. Kasich, Communications Department, "Nine Companies Expected to Invest \$1.1 Billion, Impacting 1,787 Jobs," Aug. 25, 2014, at <http://www.governor.ohio.gov/Portals/0/08.25.14%20TCA%20Release.pdf>. See also Scopes of Work for the project, Ohio Development Services Agency, and draft minutes (not yet officially approved) of the Ohio Tax Credit Authority, Aug. 25, 2014. The total does not include local incentives. Dublin is offering the company 68 acres of land worth \$6.75 million, as well as a payroll performance incentive that could return up to \$500,000 to the company over 10 years, while Hilliard is offering a 15-year, 100 percent real-estate tax abatement valued at \$5.4 million, plus wage-tax rebates and the waiving of fees for permits that total another \$200,000. *Columbus Business First* reported that the project is expected to be split into as many as three parts to provide the necessary redundancy. See Brian Ball, "Hilliard bidding to land Amazon data center," *Columbus Business First*, Sept. 23, 2014, at <http://www.bizjournals.com/columbus/news/2014/09/23/hilliard-bidding-to-land-amazon-data-center.html> and Steve Wartenberg, "Hilliard competing with Dublin to lure Amazon data center," *The Columbus Dispatch*, Sept. 23, 2014, at <http://www.dispatch.com/content/stories/business/2014/09/23/Hilliard-interested-in-luring-Amazon-data-center.html>

¹⁰ Ohio Revised Code, Section 122.175 A company must invest \$100 million and maintain an annual payroll of \$5 million to qualify. The exemption covers both the state sales tax and local sales taxes.

¹¹ The \$77 million and \$4 million amounts are estimated, based on the potential tax credit if all elements approved by the Tax Credit Authority are met. "The Ohio Development Services Agency doesn't have an executed agreement with Vadata," said Stephanie Gostomski of ODSA in an email. "The Tax Credit Authority approval is the first step in possibly receiving tax credits from the state. If this company chooses to do business with Ohio, an executed agreement will be signed." Email from Stephanie Gostomski, Public Information Officer, Ohio Development Services Agency, Sept. 2, 2014

¹² ORC Section 122.175(D)(4).

¹³ Email from Hannah Smith, Ohio Development Services Agency, Sept. 9, 2014. Smith noted that, "Pursuant Ohio Revised Code Section 122.171, "financial information and other information submitted" to ODSA or to the TCA "by an applicant for or recipient of a tax credit . . . and any information taken for any purpose from such statements or information, are not public records subject to section 149.43 of the Revised Code." Furthermore, Ohio Revised Code Section 122.36 protects materials submitted to ODSA that is commercial or financial information."

¹⁴ SFA Folio Collections, Inc. v. Tracy, <http://law.justia.com/cases/ohio/supreme-court-of-ohio/1995/1995-ohio-130.html>

merchandise that Folio had sold, because Folio lacked a physical presence in Ohio. It also rejected the tax commissioner's argument that the two were part of a unitary business. The state taxation department said it believes the SFA Folio Collections ruling applies, and wrote, "the Amazon subsidiary (VaData) is sufficiently detached/removed from Amazon retail to not cause a nexus connection."¹⁵

However, despite similar court rulings in Pennsylvania (involving Bloomingdale's By Mail¹⁶) and Connecticut (SFA Folio Collections Inc.¹⁷), Amazon is collecting sales tax on retail purchases in both of those states. The company has stopped asserting that it doesn't have to collect the tax because the in-state facilities in both states are owned by a corporate subsidiary that is legally separate from Amazon's online retailing arm.

Leaving aside the legal question of whether Amazon or Ohio would prevail in court, the plain fact is that Amazon is collecting the tax almost everywhere it has a major operation. Moreover, Ohio is not merely hosting an Amazon facility, it is providing what is likely to be more than \$80 million in tax breaks. This gives the state leverage with which to negotiate the same arrangement that a number of other states already have: Amazon should collect the sales tax. Providing major benefits to the company while allowing it to maintain its tax advantage over Ohio mom-and-pop retailers that must charge the tax represents a huge missed opportunity. Ohio has not yet finalized its deal with Amazon. If the company chooses to do business with Ohio, an executed agreement will be signed. Ohio should go back and renegotiate to ensure that the company is forced to compete on a level playing field with in-state retailers by collecting Ohio state and local sales tax.

¹⁵ Email from Gary Gudmundson, Ohio Department of Taxation, Sept. 17, 2014. Asked whether sales tax would be charged on the services provided by the cloud computing operation itself, the department said that "Cloud Computing" is "taxable as an automatic data processing service if used in business and the customer receives the benefit of the service in Ohio." (Email from Gary Gudmundson, Sept. 18, 2014) This suggests that some tax will be collected, though how much of the benefit will be received in Ohio – and tax collected – remains to be seen.

¹⁶ Bloomingdale's by Mail Ltd. v. Pennsylvania Department of Revenue, at http://www.leagle.com/decision/1989320130PaCommw190_1289.xml/BLOOMINGDALE'S%20v.%20DEPT.%20OF%20REVENUE

¹⁷ SFA Folio Collections Inc. v. Bannon, at http://www.leagle.com/decision/1991437217Conn220_1420.xml/SFA%20FOLIO%20COLLECTIONS.%20INC.%20v.%20BANNON