North Dakota Office of State Tax Commissioner

Sales Tax Newsletter

Ryan Rauschenberger,
Tax Commissioner

Special edition June 2017

2017 Legislative Rundown

This newsletter provides a summary of the bills passed by the 2017 North Dakota Legislative Assembly that primarily affect North Dakota's sales tax laws. The sales tax exemption for Internet access charges, which will be effective this year, was approved during the 2015 legislative session; otherwise, the bills described below were approved by the legislative assembly and signed into law by Governor Burgum in 2017. For the text of the bills and other legislative information, see 65th Legislative Assembly.

Inside this issue:

Internet Access Charges Exempt From Sales Tax Beginning July 1, 2017

All charges for Internet access will be exempt from sales and use taxes effective July 1, 2017. North Dakota has been one of the few states permitted to tax Internet access after Congress approved the original Internet Tax Freedom Act in 1998. However, during the 2015 legislative session, the North Dakota Legislative Assembly approved and the governor signed Senate Bill 2096, which exempts all charges for internet access beginning July 1, 2017.

Under North Dakota Administrative Code Section 81-04.1-01-09.1 [Effect of Rate Changes], services covering a period starting before and ending after the effective date of a rate decrease (from 5 percent to 0 percent in this case) the new rate will apply to bills rendered after the effective date of the change. Therefore, the taxability of Internet access service for any billing cycle that includes part of June and continues into July will depend upon when the service provider issues a statement for that service. Service for the June/July cycle will be subject to state and local sales tax if the Internet provider issued the invoice for the service before July 1. Service for the June/July cycle will be exempt from tax if the invoice was issued after June 30.

Statutory change: *Amended imposition of tax on communication services under N.D.C.C 57-39.2-02.1.*
Effective date: *July 1, 2017.*

HB 1178 - Prepaid Wireless 911 Fee Rate Increase

House Bill 1178 increases the prepaid wireless fee rate from 2 percent to 2.5 percent effective July 1, 2017. The fee is applied to the selling price of all prepaid wireless service and is collected by the retailer selling the service. The 2.5 percent fee is in lieu of the traditional 911 fee, which is collected on landline services and traditional contract wireless plans.

Under North Dakota Administrative Code Section 81-04.1-01-09.1 [Effect of Rate Changes], services covering a period starting before and ending after the effective date of a rate increase, the new rate shall apply to the first period starting on or after the effective date.

A publication of the Tax Administration Division

ND Tax
NORTH DAKOTA

Office of
State Tax Commissioner
600 E Blvd. Ave., Dept 127
Bismarck, ND 58505-0599
701.328.2770
taxinfo@nd.gov
www.nd.gov/tax

Prepaid wireless service is any telecommunications service that provides the right to use a mobile wireless service as well as other non-telecommunications services, which are paid for in advance and sold in predetermined units or dollars which decline with use in a known amount. Prepaid wireless telecommunication services are commonly sold by department stores, electronics stores, grocery stores, convenience stores and similar businesses. If you sell prepaid wireless service and have not been registered to collect the 2.5 percent fee, please contact the Sales and Special Taxes Compliance Section at 701.328.1246 or salestax@nd.gov.

Statutory change: *Amended fee rate in N.D.C.C. 57-40.6-14.*
Effective date: *July 1, 2017.*

HB 1354 - Disclosure of Deductions and Credits

Legislation passed in 2015 requires the North Dakota Legislature to review North Dakota's economic-development tax incentives every six years as a means of determining if they are serving their intended purposes in an equitable and cost-effective manner. The first six-year review cycle was initiated during the 2015-16 interim period, during which the Political Subdivision Taxation Committee conducted a review of selected income and sales tax incentives. During the course of its interim work, the committee found that it was unable to conduct a complete review of certain incentives because the confidentiality protections in the income and sales tax laws prevented the Office of State Tax Commissioner from disclosing data when only a few taxpayers claimed the incentive.

This bill changes the confidentiality provisions to provide that, upon receipt of a written request from the chairman of Legislative Management or the chairman of a legislative standing committee, the Office of State Tax Commissioner must disclose the amount of any tax deduction or tax credit claimed or earned by a taxpayer. The Office of State Tax Commissioner is required to provide notice to taxpayers of the possible disclosure of any tax deduction or credit claimed or earned by them. This bill does not authorize the Office of State Tax Commissioner to disclose a taxpayer's name, social security number, federal employer identification number, or other information that is confidential under North Dakota's tax law.

Statutory change: *Created a new subsection under N.D.C.C. § 57-01-02.*
Effective date: *Tax incentives awarded on or after August 1, 2017.*

SB 2199 - Tax Relief for Disaster Remediation Work by an Out-of-State Business

This bill creates a new chapter in North Dakota law to provide exemptions from state and local tax obligations, including related registration requirements, to an out-of-state business or out-of-state employee who is in North Dakota during a disaster response period to perform disaster or emergency remediation work because of a state- or presidentially-declared disaster or emergency.

Out-of-State Business and Out-of-State Employee: An "out-of-state business" means an entity that (1) did not have a business presence in North Dakota before the disaster, (2) has a valid license to do business from its principal state of business, and (3) is in North Dakota to perform disaster or emergency remediation work at the request of an officer or agency of North Dakota, a political subdivision, or a business registered to do business in North Dakota. This includes an out-of-state business affiliated with a North Dakota-registered business solely through common ownership. A North Dakota agency means Job Service North Dakota, North Dakota Office of Secretary of State, North Dakota Office of State Tax Commissioner, and North Dakota Workforce Safety and Insurance.

An “out-of-state employee” means an individual who (1) is not a legal resident of North Dakota, (2) is employed by an out-of-state business, and (3) if applicable, has a valid license from the principal state of employment.

Disaster Response Period: The exemptions provided under the new law only apply during the “disaster response period,” which is a period that begins ten days before, and ends sixty days after, the end of the declared disaster or emergency. This period may be extended by executive order of the governor. An out-of-state business or out-of-state employee who remains in North Dakota after the end of the disaster response period is subject to all applicable state and local tax requirements.

Disaster or Emergency Remediation Work: The exemptions are allowed for performing “disaster or emergency work,” which means the repair or replacement of critical infrastructure that has been or is under threat of being damaged, impaired or destroyed as a result of a state or presidentially-declared disaster or emergency. “Critical infrastructure” means real and personal natural gas, electrical and telecommunication transmission property so vital to the state that the incapacity or destruction of that natural gas, electrical transmission or distribution system, or telecommunications transmission system would have a debilitating impact on public health or safety and the economic and physical security of the state or region.

Exemptions: The following exemptions apply to an eligible out-of-state business or out-of-state employee:

- An out-of-state business is not considered to have established a business presence in North Dakota that would subject the business or its out-of-state employees to any state or local taxes or fees, including those related to unemployment insurance and workers’ compensation, and any tax administered by the North Dakota Office of State Tax Commissioner.
- An out-of-state business or out-of-state employee is not subject to any filing or payment requirements for any state or local tax administered by Job Service North Dakota, North Dakota Office of Secretary of State, North Dakota Office of State Tax Commissioner, and North Dakota Workforce safety and Insurance.

  Note: *An out-of-state employee’s sole remedy for a workplace injury during a disaster response period is the employee’s out-of-state employer’s workers compensation policy. Also, see “Non-exempt transaction taxes and fees” below for items that are not exempt from state or local tax under the new law.*
- An out-of-state business or out-of-state employee is not required to pay any use tax on equipment used or brought into North Dakota temporarily for use during the disaster response period, provided the equipment is removed from North Dakota within a reasonable period of time after the end of the disaster response period.
- All activity of an out-of-state business conducted in North Dakota during a disaster response period is disregarded for purposes of the filing requirements for any state or local tax on, or measured by, net or gross income or receipts. This includes a corporation income tax return for a unitary or combined group that includes an out-of-state business. For purposes of apportioning the business income of an out-of-state business or any member of its affiliated group, the apportionment factors (property, payroll and sales) attributable to the business’ activity during the disaster response period are not sourced to North Dakota.
- An out-of-state employee is not considered to have established a presence in North Dakota that would subject the employee or the out-of-state business to any filing and payment requirements under North Dakota’s income tax law, including income tax withholding, or to any filing and payment requirements for any other state or local tax or fee. See “Non-exempt transaction taxes and fees” on page 4 for items that are not exempt from state or local tax.

Non-Exempt Transaction Taxes and Fees: Certain taxes and fees are not exempted under the new law. An out-of-state business and out-of-state employee are still subject to, and must pay, the following state and local taxes and fees:

- Fuel taxes
- Sales or use taxes on materials or services purchased, consumed or used in North Dakota
- Hotel taxes
- Car rental taxes or fees on vehicles acquired for use in North Dakota

Notification of Presence in North Dakota for Disaster or Emergency Remediation Work: An out-of-state business that enters North Dakota for the sole purpose of responding to a request to carry on qualifying disaster or emergency remediation work must provide written notice of this to Job Service North Dakota, North Dakota Office of Secretary of State, North Dakota Office of State Tax Commissioner, and North Dakota Workforce Safety and Insurance. If an out-of-state business is affiliated with a North Dakota-registered business through common ownership, the North Dakota-registered business is required to provide the notification on behalf of the out-of-state business affiliate. The notice must include all of the following for the out-of-state business:

- Name
- Principal business address
- Federal employer identification number
- State of domicile
- Date of entry into North Dakota
- Contact information (if applicable, include tax matters person)
- Proof of workers' compensation insurance coverage for its employees

Statutory change: *Created N.D.C.C. ch. 37-17.5.*
Effective date: *August 1, 2017.*

SB 2283 - Tax Incentive Eligibility Contingent on No State or Local Tax Delinquency

This bill adds a new section to the law governing the general powers and duties of the tax commissioner. The new section requires taxpayers to be current on all state and local tax obligations, and in some cases requires taxpayers to obtain state and local tax clearances, before claiming certain state and local tax incentives claimed or granted on or after August 1, 2017. The new requirements are summarized below.

General Requirement: A person may not claim a state or local tax incentive identified under N.D.C.C. § 54-35-26 unless the person has satisfied all state and local tax obligations and tax liens of record for taxes owed to North Dakota or any of its political subdivisions. Following are the tax incentives identified under N.D.C.C. § 54-35-26:

- Renaissance zone credits and exemptions
- Research expense credit
- Agricultural commodity processing facility investment credit
- Biodiesel fuel production facility construction or retrofit credit
- Biodiesel fuel blending credit
- Biodiesel fuel equipment credit
- Seed capital investment credit
- Internship program credit

- Angel fund investment credit
- Workforce recruitment credit
- Soybean or canola crushing facility construction or retrofit credit
- Manufacturing automation equipment credit
- New or expanding business income or property tax exemption
- Manufacturing and recycling equipment sales tax exemption
- Coal severance and conversion tax exemptions
- Oil and gas gross production and oil extraction tax exemptions
- Fuel tax refunds for certain users
- New jobs credit from income tax withholding
- Development or renewal area incentives
- Sales and use tax exemption for materials used to construct a fertilizer or chemical processing facility
- Sales and use tax exemption for materials used in compressing, gathering, collecting, storing, transporting, or injecting carbon dioxide for use in enhanced recovery of oil or natural gas
- Sales and use tax exemption for enterprise information technology equipment and computer software used in a qualified data center

State Tax Incentive: To claim a state tax incentive (identified in the above list), a person must attach to the applicable return or other document a copy of a property tax clearance record obtained from each North Dakota county in which the person has a 50 percent or more ownership in real property.

Local Tax Incentive: Before a city or county may grant a local tax incentive (identified in the above list), the person applying for the incentive must not be delinquent on any property tax in North Dakota. In addition, the person must provide to the city or county a copy of a state tax clearance record obtained from the North Dakota Office of State Tax Commissioner, and a copy of a property tax clearance record from each county in which the person has a 50 percent or more ownership in real property.

Personal Liability: If a person applying for a state or local tax incentive is a corporation or passthrough entity, any officer, partner, governor or managing member charged with the responsibility for the filing and payment of state or local taxes on behalf of the entity is subject to the state or property tax clearance record requirements.

Disallowance of State Tax Incentive: If a person fails to comply with these provisions, the tax commissioner is required to disallow any state tax incentive (identified in the above list) claimed by the person, and assess any tax due resulting from the disallowance under the applicable audit and assessment provisions of law.

Statutory change: *Created a new section under N.D.C.C. ch. 57-01.*
Effective date: *Applies to tax incentives claimed or granted on or after August 1, 2017.*

SB 2298 - Requirement for Out-of-State Retailers to Collect Sales or Use Tax

The current requirement for out-of-state businesses to collect North Dakota sales or use tax was determined by the United States Supreme Court in *Quill v. North Dakota, 504 U.S. 298 (1992)*. In the Quill case, the U.S. Supreme Court determined that a state may not require an out-of-state retailer to collect its state or local sales and use taxes unless the seller has some type of physical presence within the state. The Supreme Court also stated that the U.S. Congress has the ability to pass federal law requiring out-of-state business to collect tax without a physical presence if it chooses to do so.

ND Tax
NORTH DAKOTA

In 2016, several states passed laws or adopted rules that challenge the Quill decision and the current physical presence standard. SB 2298 supports those challenges and establishes an economic nexus standard that will apply in North Dakota if the U.S. Supreme Court overturns the Quill decision. Under SB 2298, an out-of-state retailer will be required to register and collect North Dakota's sales or use tax if it (1) has gross sales of tangible personal property and other taxable items in North Dakota exceeding $100,000, or (2) sells tangible personal property and other taxable items for delivery into North Dakota in two hundred or more separate transactions.

Senate Bill 2298 will become effective on the date the U.S. Supreme Court issues an opinion overturning the Quill decision or otherwise confirming that a state may constitutionally impose its sales or use tax on an out-of-state seller meeting the $100,000 sales or 200 separate transaction threshold stated above.

Statutory change: *Created new section to N.D.C.C. Ch. 57-39.2 and Ch. 57-40.2*
Effective date: *The date the U.S. Supreme Court issues opinion overturning Quill v. North Dakota or otherwise confirming constitutionality of collection requirement similar requirements in Senate Bill 2298.*

SB 2330 - Installed Dairy Farm Equipment

Under current law, qualifying farm machinery and equipment is subject to 3 percent farm machinery gross receipts tax rather than 5 percent sales or use tax. Farm machinery includes any mechanical unit used directly and principally for the purpose of producing agricultural products and includes machinery used in dairy farming. However, prior to the effective date of Senate Bill 2330, farm machinery does not include machinery that is installed or attached to real property.

Effective July 1, 2017, SB 2330 expands the definition of qualifying farm machinery to include installed machinery and equipment used in a dairy farm milking operation. To qualify, the installed equipment must be used directly and exclusively in a facility for the collection, handling, storage, heating and cooling related to a milking operation of a dairy farm. The expanded definition means installed equipment such as robotic milking equipment, milk pipelines, coolers and automated feeding systems installed by contractors into a milking facility will qualify for the 3 percent farm machinery gross receipts tax rate.

Statutory change: *Amended definition of farm machinery in N.D.C.C. 57-39.5-01.*
Effective date: *July 1, 2017.*

Expiration of Sales Tax Exemptions for Construction of Wind Farms and Telecommunications Infrastructure Development

Two separate sales tax exemptions either have expired or will expire during the fiscal year ending June 30, 2017. Bills introduced during the 2017 legislative session attempted to extend or make permanent these exemptions; however, both bills failed to pass allowing the exemptions to expire under current statute.

The first exemption allowed to expire is for production equipment and other tangible personal property used to construct a wind-powered electrical generating facility. The expired exemption, which is found in N.D.C.C. § 57-39.2-04.2, was available for wind-powered electrical generating facilities on which construction was completed before January 1, 2017.

The second exemption, which will expire June 30, 2017, is for tangible personal property used to construct or expand a telecommunications service infrastructure. To qualify for the exemption, the tangible personal property must have been incorporated into a telecommunications infrastructure owned by a telecommunications company. Beginning July 1, 2017, the exemption, which was previously found in N.D.C.C. § 57-39-.2-04.9, will no longer apply.

Please note:

Beginning in 2018, all local sales tax rate change notifications will be made electronically and will no longer be provided by mail. Information regarding local tax changes is available through email updates. You may sign up for email notifications online at www.nd.gov/tax. In the lower-left of the homepage, click on "Subscribe" under Email Updates, and follow the instructions. There are nine lists to which you may subscribe. To receive the sales tax rate change notifications, make sure you are subscribed to the "ND Sales and Special Taxes" list. You may also view the local sales tax rate change notifications at www.nd.gov/tax/salesanduse/streamlinetax/ratechange.

Contact us:
Sales Tax Compliance
Phone: 701.328.1246
Email: salestax@nd.gov