

Nikki Dobay: Hello, and welcome to GeTtin' SALTy, a state and local tax policy podcast hosted by Greenberg Traurig. My name is Nikki Dobay, shareholder in the Portland, Oregon, and Sacramento, California offices. I'm very pleased to be joined once again by Joe Bishop-Henchman, executive director, and CEO of the National Taxpayers Union. I think I got that right, Joe, you'll correct me if I'm wrong.

Joe Bishop-Henc...: It's a promotion, but appreciate it.

Nikki Dobay: All right.

Joe Bishop-Henc...: I'm executive vice president.

Nikki Dobay: [00:00:30] Okay. All right. I like to give people promotions wherever I can. Executive vice president at the National Taxpayers Union, and a frequent guest on this podcast, Joe always has great thoughts. He recently had the privilege of testifying in front of the Subcommittee on Fiscal Responsibility and Economic Growth, the committee were going to refer to as the FREG. He got to talk about the burdens placed on small [00:01:00] businesses when it comes to sales tax collection. We're going to have a great conversation about his testimony, and what the committee is thinking about. Joe, thank you so much for joining me today.

Joe Bishop-Henc...: Always a pleasure, Nikki.

Nikki Dobay: Joe, I think one thing that was really interesting from my perspective about this is nobody seemed to know that there was going to be a hearing on this. Can you catch us up on how this hearing came about, and when you learned about it? It just happened [00:01:30] last week. When did you find out that you were going to be testifying in front of Congress?

Joe Bishop-Henc...: Oh, you don't find out much beforehand, or at least I don't. Maybe other people do. But maybe a week or so, ahead of time is when I got the invitation, and started preparing for it. But the story really starts back in 2018 when the Supreme Court handed down their decision in South Dakota versus Wayfair [00:02:00] that authorized states to collect sales tax on internet transactions. Eagle-eyed people may notice that before 2018, sometimes internet transactions didn't have sales tax charged on them, whereas after 2018, it's a rare time when they're not. Usually, there are. That's a result of that decision.

It hasn't all gone seamlessly.

Nikki Dobay: What?!

Joe Bishop-Henc...: There's been a lot of compliance issues that people have raised. [00:02:30] I've actually filed a lawsuit about it in one state, and are thinking about it in two others. Other people have filed lawsuits. Then there's also legislative efforts at the state level. Maybe one now bubbling up at the federal level. That's where

this hearing came from of, what could be done about reducing administrative, and compliance burdens associated with sales tax collection?

Nikki Dobay: Okay. You didn't have long to prepare.

Joe Bishop-Henc...: Yes.

Nikki Dobay: What was kind [00:03:00] of your angle with respect to the committee? And, just talk about your comments to them, and message.

Joe Bishop-Henc...: Whenever I testify, I try to define the problem, tell a story about it, and offer a solution. That's what I tried to do in my five minutes that I had in front of the senators about the problem. We've got somewhere between 10 and 12,000 sales tax jurisdictions across the country. If you are [00:03:30] selling just in one of those jurisdictions, maybe it's not too big of a deal for you, or even if it's a couple of them, it's not too big of a deal. But if you're selling in all 50 states, it can be a big compliance burden.

For big business, they have large compliance departments to address this. Maybe it's not the best use of those dollars. Maybe we should simplify the system even for large businesses, and redirect that money, [00:04:00] and that time towards other uses. But for small businesses, it can be very crushing.

The Government's Accountability Office, the GAO, did a series of studies where they think it's tens of thousands of small businesses aren't even complying correctly with sales tax. That's not good. It's not good if in the next round of state budget shortfalls, there's a big enforcement crackdown on all of this.

[00:04:30] To me, it's really incumbent on government, federal and state, to do everything they can to make this as easy as possible for everyone involved. That's what we talked about. I talked a little bit about a client that we had in our litigation against Louisiana, Halstead Bead, which is an Arizona-based jewelry wholesaler. They've done the hard work of calculating up how much they spend on compliance, and they've got this [00:05:00] worst-case scenario for sales tax compliance, because they have a high-volume business, but every sale is relatively low dollar. For every dollar of sales tax they're collecting, they're actually spending \$2.64 in compliance costs.

That's because they actually want to do it. They want to follow the law, and do what they're supposed to do. Be good Americans. There's a lot of businesses that aren't even doing that because they don't want to spend that money. Hopefully, [00:05:30] we don't wait until they're caught to do something about it.

Nikki Dobay: What was the reaction of the committee to your comments? From those of us who weren't in the room, are we going to see any kind of movement in this area at the federal level? Because I think that's been the million-dollar question.

Joe Bishop-Henc...:

Yeah, it is a good question. People followed [00:06:00] this issue like you, and many of our colleagues in the tax world know that this isn't the first time that Congress has had this in front of them in the lead, up to the Wayfair decision in 2018, in the years before, there were a flurry of bills attempting to come up with a solution to this problem. It's not new. It's been around for a while.

What's changed is, maybe the default position. Because [00:06:30] the 2018 decision was kind of a big win for the states. It allowed them to collect under certain conditions. Now, what's being faced, both in litigation and in follow on legislation, is what are the parameters of that power? How much of a threshold should it be before a business has to start collecting? How complex can the compliance be before it becomes constitutionally problematic?

I mentioned our Louisiana [00:07:00] lawsuit. Louisiana at the time, didn't have state level sales tax collection. Instead, they devolved it to their local governments, which they call parishes there, what we might call counties in a different ... You had 63 different parishes not only having their own forms and their own collection mechanisms, but also their own ways of defining the tax base, their own definitions of products. [00:07:30] A business like Halstead Bead would have to file over 750 tax returns a year just for that one state.

Something Brad from Halstead always tells me is, complexity is not so much one jurisdiction doing goofy things. It's the aggregation of having to do either different things, different ways, or even more problematically, the same thing, different ways, hundreds [00:08:00] or thousands of different jurisdictions.

You always get the example of an exemption certificate, which if you're a seller, you probably have a bunch of these, where if one of your buyers is exempt from tax, they have to go get an exemption certificate, and leave it on file with you. They're different for every state, even though it has the same information on it. We have all these businesses out there getting 46 different exemption certificates for really no reason at all.

[00:08:30] That's what I'm on the lookout for, and that's what I tried to convey to the Senate is, this is not about destroying federalism or state sovereignty. This is about finding what are the things like that where we don't really need to do them 46 different ways or 11,000 different ways, where we can just make things simpler for all businesses.

Nikki Dobay:

Those points are spot on. I've been doing a lot of work in the [00:09:00] lodging and accommodation space for online travel companies, which these are big companies. To your point, they do tend to have larger, although not all of them, tax compliance shops, but there, there's thousands of jurisdictions. These are all very locally based taxes.

One thing we have been urging is post-Wayfair, we do think burdens requires state level administration. [00:09:30] I think that if I were to say what's the

constitutional standard, I think that is it. But we all live in the real world, and we know when the Supreme Court is going to take another one of these cases, and really impose that. We've been very much working on similar issues. Where can we have some common forms? Can we have some common rules about filing? Can we have quarterly filings? Can we have annual filings [00:10:00] if the tax is going to be below a certain threshold for that particular jurisdiction?

To me, it's all pretty low hanging fruit that will really help businesses, large in this situation, small in the context you're talking about, comply. If they can comply better, I think the states and locals will get more money. It's hard for me to understand why [00:10:30] the states and locals sometimes bristle at that. But hopefully, the committee didn't bristle at those very practical solutions that you're offering.

Joe Bishop-Henc...:

Yeah, I know you're always at a lot of these government meetings, the Multistate Tax Commission, the Streamlined Sales and Use Tax Agreement meetings. You're always there raising these issues, and trying to get answers for businesses. I always appreciate that. I think that's a [00:11:00] good framework that we can build on. I don't think any of that stuff is perfect. We're always working to improve it, but it's certainly better than everybody doing their own thing for no reason whatsoever.

That's what I talked about. Senator Hassan who chaired the committee, she's a senator from New Hampshire. New Hampshire is a state that doesn't have a sales tax. I think she's very attuned to what she's hearing from constituents on these issues, because [00:11:30] New Hampshire businesses don't have a sales tax, but they have to collect the sales tax for all their sales in the rest of the country.

Similarly, Senator Wyden from Oregon, either chair or ranking member of the overall Finance Committee, he was there at the hearing, asked some very good questions, and he, again, is from Oregon, another state without a sales tax. Probably one where he's hearing about this [00:12:00] issue from constituents. On the Republican side, we heard from Senator Grassley, he sat through the whole hearing, and asked some very good questions.

I think there's certainly bipartisan engagement on recognizing that this is a problem, and trying to figure out what to do about it. Whether that's getting more members into that streamlined sales tax agreement, coming up with federal minimum standards, or finding some way to kind of rein in the worst actors [00:12:30] at the state and local level, or a combination of all of those. I think the benefits will be everybody.

Here at NTU, we just had a delegation from Finland in last week, and we have delegations from all the world visiting. We kind of talk about our tax code in a lot of different ways with these delegations. But the one that always shocks them is when we talk about state and local sales tax. It's just inconceivable [00:13:00] to non-Americans visiting, and learning about this. That we have

11,000 of these, and a lot of them set their own rules. That it's kind of a wild west on that.

They'll ask questions like, "How is that a good use of people's time or resources?" I try to be a good American, and defend our country, but ...

Nikki Dobay: Okay, it's the same. Do you have any answer for that?

Joe Bishop-Henc...: I think they're raising a point there, and could [00:13:30] probably do this in a better way. US Constitution, of course, has this provision of the Commerce Clause, which a lot of people fight over what it means, how broad can it be. But at least the original understanding of it was preventing states from doing death by a thousand cuts on the national economy with their taxes and regulations. That's why this is in front of Congress, and potentially something could be done there.

Nikki Dobay: [00:14:00] Yeah. I was in a meeting in London earlier this year. US sales tax was a topic of conversation. Yes, I experienced the similar outrage of, "Why doesn't the federal government just tell them not to do this?" I kind of wanted to say, "Well, I think you guys might have had something to do with this a while ago." We didn't really get into that too much. But to this point, I think this is one, and I do want to reiterate this, because as [00:14:30] you say, I go, and talk to the state folks a lot. I do understand federalism and state sovereignty, but this is just an area where I think a little more cooperation, and uniformity, a little bit of it would go a real long way.

The other thing I would like to get back to, is something that you about with the small businesses. Again, that was really your focus at this hearing, was on how small businesses are dealing with [00:15:00] this. I think it's important to reiterate this. There are small businesses like Halstead Beads that are complying, doing everything they can to comply, and they're spending a lot of money doing it. There's businesses in the middle that I think are overwhelmed, and trying to comply. Then there's the businesses that really either they don't know because they're trying to start a small business, they're not thinking about sales tax, or they [00:15:30] just decided it's something that's too difficult to deal with or too overwhelming. They're just going to put their head in the sand.

Those are the businesses that I get really scared for, because this isn't their tax. If they don't collect it, and they get caught, then they're going to have to pay it. To your point, that's crushing to these businesses. Did the committee respond to that? [00:16:00] Do they understand that that is a frightening thing for people trying to start a small business?

Joe Bishop-Henc...: Yeah. I know you've encountered this in your work, where you have clients or potential clients coming to you with, "We're selling this thing. We're doing it on the cloud, or we're selling it digitally, and we want to follow the law. So, what is it? Is it taxable or is it not?"

I know [00:16:30] people joke about it, but we've had these long-running things dealing with grocery, and food [inaudible 00:16:38] because most states tax meals at a higher rate, but exempt the groceries. If the prepared yogurt you buy in the morning comes with a spoon, does that suddenly move it from tax-free to punitively taxed? These definitions really matter.

[00:17:00] What I left the committee with, the very last thing I said was, "Yeah, sales tax is important for business because you have to get it exactly right. If you over-collect, you're subject to a class action lawsuit from your consumers, from your purchasers, your customers. If you under-collect, obviously, the state can come after you for what you didn't collect, and penalties. If you end up losing on that, it's not like you [00:17:30] can go back, and collect it from your customers. So, you just eat that cost."

It's really, really important for businesses to know what their sales tax obligations are. I don't know whether you agree with this or not, but I think too often, government plays coy about that. It's very difficult to get those answers. Maybe for a lot of people, they can calm you, and fight your battles. But you're just one person, and your firm's just one firm. [00:18:00] We can't solve this problem that way completely. We have to have some kind of larger action on.

Nikki Dobay:

Yeah, I think those are great points. I remember when NCSL, the National Conference on State Legislators, were working on the marketplace model, post-Wayfair, all of a sudden the states were going to be overwhelmed by all the small businesses that were going to be required to remit. They came up with the marketplace collection laws, which helped them streamline [00:18:30] the funds coming in. There was a real push to get some class action protection in there, audit protection for the marketplaces. Because, again, that is a way to really help these small businesses in many ways.

But if you're now taking those small businesses' collection responsibilities, and putting them onto the marketplace, we really need those protections in place. I think that's true. I think the states really need to think hard about [00:19:00] not letting perfect be the enemy of good. Let's get to a place where we don't have to get perfect on sales tax. Can we get to a 90%? I think 90%'s pretty good. But protecting the businesses that are trying their best, and doing everything they really can, working in good faith, and making sure the states understand, they've deputized all of these businesses. This is not their tax. They've become [00:19:30] agents of the state to do this. They feel like either the states or the federal government really need to help protect them, and make this better, easier, more simple, all of those things.

Joe, one question I'd love to get your thoughts on. The \$100,000 threshold in Wayfair, that's a number that's always bothered me. Do you think the Supreme Court just biffed that one? Should that alone [00:20:00] have made Wayfair unconstitutional?

Joe Bishop-Henc...: I think the Supreme Court recognized that they're not legislators, and so they didn't come up with a 100,000 that was in the South Dakota Law, that they were deciding whether it was constitutional or unconstitutional. They said, "A \$100,000 in South Dakota sales probably excludes most small businesses, and provides a safe harbor from them. [00:20:30] That's probably only hitting businesses that are able to comply. We're fine with that."

Obviously, they've never said anything since about, is a \$100,000 in South Dakota and a \$100,000 in Florida, for instance, the same thing? Because Florida obviously has many more people, a much larger economy. What is interesting is, South Dakota Law originally was a \$100,000 or 200 transaction. That's the threshold. There's been a big movement [00:21:00] in the states, like half the states have dropped the transaction number as a requirement, and just moved to the dollar threshold. Which I think is a good move, and I hope more states do that.

Talking about Brad Scott, that Arizona business selling in Louisiana, they didn't come anywhere close to a \$100,000. What was kicking them into compliance was that they had over 200 transactions. That can make a lot of difference for a lot of small businesses. [00:21:30] You mentioned earlier, "Where is this issue come from? Who's complaining about it?" It's small businesses who are complaining about it.

I think big businesses, I certainly hope they would appreciate reduction in compliance costs, and the benefits that would come with simplification. But it's not killing them the way that it is some of these businesses. That's what senators are hearing from. That's certainly something we're attuned to because we work with a lot [00:22:00] of business owners with the National Taxpayers Union. Hopefully, we can get something out of that, moving in that direction.

Another reform that I talked about was what Texas has done. Texas, it gives you a choice. You can either collect from each of the local tax jurisdictions in Texas, of which there are over 1,600. Or you can collect an alternative single rate for all the local jurisdictions. The state calculates what kind [00:22:30] of the average sales tax would be if you averaged all of these 1,600 jurisdictions together, and you can just collect that for all of your sales in Texas. Then the state takes the responsibility of making sure that money goes where it's supposed to go.

I don't think that solves everything, but it solves a lot. It helps make things a lot easier for businesses who are selling in Texas. I really did compliment them on that.

Nikki Dobay: Joe, any kind [00:23:00] of final thoughts, takeaways from the hearing, next steps or what you see happening maybe in the near term on this?

Joe Bishop-Henc...: There's a lot of bills happening at the state level, some good, some bad. There's a lot of litigation. I know you're involved with some of them. Then we'll see how it goes federally. I think we're all waiting to see how the election plays out.

Nikki Dobay: There's an election.

Joe Bishop-Henc...: I know, right? It'd be kind of funny. [00:23:30] At least somebody told me this morning that the House is going to flip, but the Senate's also going to flip. We'll be back where we started. But if that happens, this is one of those rare bipartisan or nonpartisan issues. You've got Democrats and Republicans on both sides of it.

I've talked to maybe 20 or 30 Senate Office staffs on this issue. It's maybe one or two senators who are like, "No, I don't want to do anything on this issue." Everybody [00:24:00] else is, "Oh, yeah, this is problem. We need to do something about this. This is a problem." Maybe it hasn't bubbled up to be anybody's or everybody's top three priorities.

A lot of other stuff going on on the same day I testified. They were passing the budget for the year, kind of. [inaudible 00:24:18] Congress passes budgets anymore. But what really worries me is, we hit another round of state budget shortfalls, and [00:24:30] hungry state offices decide, "Let's see who's not been complying since 2017 on these Wayfair Laws, and try to go after them." Hopefully, we address it before it gets to that point.

Nikki Dobay: Yeah. I think that's an excellent point. I hope that, too. That this is something that either Congress or the states collectively take on. But sometimes, as we know, we need that push, [00:25:00] and that state overreach for there to be some real action.

Joe, thank you so much for this conversation. I'm sure there'll be more on this. Before I let you go, a quick surprise, non-tax question. We've come into fall. It's the pumpkin spice latte season, but then I also noticed there's already things happening for the holiday season in December. Are you a person that appreciates [00:25:30] this earlier and earlier encroachment on our lives of holidays? Pumpkin spice coming out in September, and all the holiday decorations now being out.

I am not the biggest holiday person in the world, so it always just freaks me out, because it means the year is coming to an end. But, where are you at on that? Are you one that embraces these? I don't know if it's Starbucks. Or, who's pushing this? But what are your thoughts on the earlier and earlier [00:26:00] decorations coming out this time of year?

Joe Bishop-Henc...: Yeah. It's my favorite time of year. I love the holiday lights, the decorations, and the carols. I almost wish it could be year round. I guess I might be the opposite of you on that. It'd be interesting. My husband helps refugees who come to the

United States, to acclimate to the United States. One just arrived from Senegal. He's being point person [00:26:30] for us. This not being totally familiar with the cultures and traditions of Senegal, this might be his first Christmas.

I don't know. I think that strikes it is a big, very meaningful thing for a lot of people, Christmas. A lot of people's childhood, happiest memories are often associated with the holidays. I think that's a good thing. Bring it on. More Christmas.

Nikki Dobay:

All right. All right. Okay. I love that. Thank you. You're making me appreciate the lights even more. [00:27:00] I think for me, it's like I'm such a summer person, so it's like, "Oh, summer's ending. It's going to not be warm, and sunny." But those are my issues.

But I love, love, love that response. Joe, thank you so much again for joining me. Thank you for testifying on this very important issue to the subcommittee. You're wonderful representative for the small businesses out there. I'm sure, we will be back talking about this again soon.

Thank you to [00:27:30] the listeners for joining us today. I'm sorry if there are any technical issues with this podcast. I was not traveling with my handy dandy portable mic, so I do apologize if this isn't as clean as we normally try to make it. But please do join us again soon on the next GeTtin' SALTY.