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## Pennsylvania Tax Assessments: Top 5 Issues to Look Out For in Assessments by Jennifer Karpchuk

*The Legal Intelligencer*

In an article published on June 6 in *The Legal Intelligencer*, Chamberlain attorney Jennifer Weidler Karpchuk discusses, “Pennsylvania Tax Assessments: Top 5 Issues to Look Out For.”

### Industry Standards

Karpchuk notes that an increasing number of assessments are being made using “industry standards” – basing the assessment on the average sales of other taxpayers in a similar industry. When such a comparison is conducted, an assessment is made by the Pennsylvania Department of Revenue (Department of Revenue) when it believes a taxpayer underreported its sales and corresponding sales and use tax (SUT) liability. Karpchuk notes that there are some issues with this approach, “The inherent problem with using industry standards is that the ‘standard’ represents an average. With an average, some taxpayers will fall above the standard, while some will inevitably fall below the standard. Further, this approach assumes that the taxpayers being used for the sample are representative of the industry as a whole and that the particular taxpayer in question fits within a standard mold.” She suggests that, “Taxpayers who receive assessments based upon industry standards should request as much detail as possible regarding the basis of the standard used in order to potentially challenge it.”

### SUT Assessment Leading to PIT Assessment

Karpchuk clarifies a key point with respect to SUT and personal income tax (PIT) assessments. When assessed for SUT, business owners may also be assessed for PIT related to the increased income of said sales. She notes, “It is important to understand that these are two separate assessments and two separate and distinct liabilities, both of which must be separately appealed.”

### SUT Assessed for Failure to Prove Payment of Tax

Karpchuk also cautions that the Department of Revenue is increasingly issuing assessments for lack of documentation of payment – i.e., without a check or proof of total payment of the invoice, the claim that tax was indeed paid pursuant to the invoice is denied. She notes that this problem affects business small and large, generally in opposite ways – too little documentation and too much data to sort through, respectively. “This leaves businesses in the untenable position of being assessed sales or use tax on items that, pursuant to an invoice, they very likely already paid.”

## Pennsylvania Tax Assessments: Top 5 Issues to Look Out For in Assessments by Jennifer Karpchuk, *Continued*

### 'Wayfair' and Economic Nexus

In *South Dakota v. Wayfair*, 585 U.S. (2018), the United States Supreme Court ruled that out-of-state online retailers can be required to collect sales tax from their customers without the retailers having a physical presence in the state, overturning more than 50 years of precedent. In response, the Department of Revenue issued SUT Bulletin 2019-01, in which it announced that, based upon *Wayfair*, substantial economic nexus satisfied Pennsylvania's definition of maintaining a place of business in the Commonwealth. Karpchuk provided this analysis, "By looking to gross sales and not taxable sales, the pool of individuals who will fall within the threshold is certainly widened – thereby necessarily increasing the likelihood that a remote seller or marketplace seller or facilitator will be subject to Pennsylvania's collection and remittance requirements... Those remote sellers, marketplace facilitators or referrers who fail to comply with either Act 43 (requiring remote sellers, marketplace facilitators and referrers with at least \$10,000 in taxable Pennsylvania sales during the immediately preceding 12-month period to file an election to either: register for a sales tax license to collect and remit sales tax on Pennsylvania sales; or comply with detailed notice and reporting requirements) or the Department's Bulletin may be subject to various penalties and this will certainly be an audit and assessment issue in the near future."

### Withholding

As an employer, failure to withhold the correct amount of tax from your employees can leave you vulnerable to tax, interest or penalties. Karpchuk notes, "[I]t is not uncommon that errors are made in payroll that result in too little withholding – whether the fault of the employer or a payroll company." Act 43 added additional withholding complexities by creating a withholding obligation for certain payors of Pennsylvania-source income and lessees of Pennsylvania real estate to nonresidents. Karpchuk details that, pursuant to Act 43, anyone that leases Pennsylvania real estate to a nonresident or pays Pennsylvania-source nonemployee compensation or business income to a nonresident individual or disregarded entity that has a nonresident member is required to file a Federal Form 1099-MISC and to withhold PIT, currently at a rate of 3.07%, from such payments. She adds, "However, withholding is optional for payors paying a payee less than \$5,000 annually. Therefore, a company is expected to anticipate in advance whether it will need to withhold... Prior to Act 43, proper withholding was already an audit and assessment issue. However, now that companies are having difficulty dealing with the practical implications of implementing the new withholding requirements, that issue may be heightened."

Karpchuk concludes the article by noting that, "Being aware of potential issues in advance can help to take some of the mystery and shock out of the audit and assessment process and allow taxpayers to better understand and appropriately challenge assessments."

To view the full article, [click here](#).

