

Impact of New State Remote Sales and Use Tax Laws on Gaming

BLOCKCHAIN AND DIGITAL CURRENCY | ESPORTS AND ELECTRONIC GAMING | TAX | JULY 3, 2019



Steven Blickensderfer

This article examines the impact of new state laws that have emerged since the Supreme Court's decision in *Wayfair*, which would permit the collection of sales and use tax on remote transactions. This article specifically discusses whether and to what extent the participants in the e-gaming industry—including video game developers and publishers, online media platforms, and the gamers themselves—may be subject to state sales and use taxation under these new remote nexus sales and use tax laws.

Microtransactions and Loot Boxes

Many of today's video games, including popular online games like *Fortnite*, allow players to make in-game purchases of virtual goods, known as "microtransactions." Microtransactions provide a revenue source for game developers and are common in "free-to-play" games. While some in-game items offered for sale are functional and can offer a competitive edge to a player, most of these items, such as rare characters or weapon skins, are purely cosmetic and do not affect gameplay. However, that does not make these in-game items any less attractive for gamers or less profitable for developers. It is estimated that the total player spend on in-game items reached \$30 billion in 2018. That figure is expected to grow by 60 percent to \$50 billion by 2022.

There are a variety of ways that microtransactions are structured in games. Some games allow players to purchase items directly via in-game stores using fiat currency. Others require the purchase of virtual currencies, like V-Bucks in *Fortnite*, which players use to obtain items. Depending on the game, in-game items and virtual currencies may also be obtained as a reward for in-game conduct.

In an increasing number of games, players can obtain in-game items indirectly by purchasing digital crates or "loot boxes," which are essentially digital mystery boxes containing items of varying rarity. Players can purchase loot boxes directly using fiat currency in certain games, while others require players to first purchase a key or to use in-game virtual currencies.

There are also certain game styles that lend themselves to unique in-game product sales. In battle royale-type games like *Apex Legends*, for instance, developers sell season or battle passes for real or virtual currency. Those passes reward players for playing for a predetermined length of time by offering in-game items and/or loot boxes in exchange for real or virtual currency.

Under *Wayfair* and the new state sales and use tax statutes that are designed to capture online transactions, it appears that game developers selling in-game items for real or virtual currencies may now be required to collect sales taxes on microtransactions as the game developers may qualify as marketplace facilitators and gamers engaging in microtransactions may qualify as marketplace sellers should they reach the required statutory thresholds created by these new laws.

They are offering products for sale and creating a system through which in-game items are being purchased, delivered, stored, and used for a set price. Even when in-game items are purchased using virtual currencies rewarded for in-game conduct, developers should be aware that sufficient levels of these activities by players may trigger state level sales and use tax collection obligations.

External Marketplaces for In-Game Items

Some games allow players to transfer and sell in-game items to each other via marketplaces which exist outside of the game itself. In Counter-Strike: Global Offensive, a popular competitive multiplayer first-person shooter, players can sell or trade their own in-game items or loot boxes containing randomized items to other gamers in exchange for other in-game items or money, with rare skins in high demand selling for thousands of dollars.

The game's developer, Valve, is also the entity responsible for the Steam Marketplace, which enables the trading, buying, and selling of in-game items in CS:GO and other games. But that is not always the case. In most instances, third parties, often gamers themselves, operate external marketplaces for in-game items.

These external marketplaces for in-game items would probably satisfy all three prongs of the test for marketplace provider under Florida's bill such that they would be obligated to collect and remit sales tax for sales conducted by players, who would appear to qualify as marketplace sellers, made on their platforms should those players' sales meet the qualifying thresholds.

Those marketplaces facilitate the sale of the seller's product through a marketplace, transmit or otherwise communicate the offer or acceptance between the buyer and seller, list the products for sale, and promote products on the marketplace, among other things. If there are sufficient sales made into a jurisdiction, the players could be qualifying marketplace sellers and the marketplaces could owe sales tax for those transactions.

Virtual Goods and Virtual Real Property

Similarly, in certain massively multiplayer online games, players can buy and sell between themselves virtual real property, sometimes at prices near real-life prices per square foot. In 2011, for instance, a virtual planet in Entropia Universe sold for \$6 million. And in Second Life, an online virtual world in existence since 2003, billions of dollars in virtual goods have been exchanged over the years, with some users making a living offline by buying, selling, and managing in-game virtual real property.

When conducted on a large enough scale, the players selling valuable virtual goods and virtual real property whose transactions exceed the state law thresholds may trigger the state nexus and require the game developer itself to collect and remit sales taxes from players. Although virtual real estate may correspond to real property within the context of the virtual system, it is likely to be considered "intangible personal property" or "products transferred electronically" by the law, and thus sufficient amounts of these transactions across jurisdictions may qualify as retail sales and thus trigger sales and use tax obligations.

Virtual Currencies on Live Streaming Services

Further still, live streaming services such as Twitch and Mixer, as well as popular streamers may find themselves subject to online sales tax in multiple states. Many of these streaming platforms use virtual currencies that users can purchase for fiat currency or earn by watching streams. Those virtual currencies, in turn, are often used to purchase animated stickers and screen effects, sending custom messages to stand out on stream, subscribing to access unique content, or to tip streamers.

Payment in these virtual currencies to watch streamers over these platforms may qualify as a sales transaction and, if the requisite sales thresholds are met, these streamers may be considered marketplace sellers, (especially in jurisdictions whose laws include as qualified sales "products transferred electronically") which may trigger state sales and use tax payment obligations. While broadcasting a stream may not seem like a taxable "product," offering a stream could be considered a taxable "service" in some states in the same vein as the purchase of a movie ticket or of a pay-per-view event.

States have taken a variety of approaches to the taxation of video streams like pay-per-view and video on demand. Popular streamers who make sufficient sales into a jurisdiction (i.e., have sufficient numbers of views by customers in a given state or who net enough revenue from viewers from a given state) may also be required to pay sales tax for those transactions if streaming is interpreted by the state taxation authority as a taxable transaction.

If you are concerned about whether your venture or business requires you to collect and remit sales and use tax for third parties as a marketplace facilitator or whether you qualify as a marketplace seller, you should consult with qualified counsel.

For more information, read parts 1 and 2 of the series.

Reproduced with permission from Copyright 2019 The Bureau of National Affairs, Inc. (800-372-1033) www.bna.com. Originally published in Bloomberg Law (June 2019).

©2020 Carlton Fields, P.A. Carlton Fields practices law in California through Carlton Fields, LLP. Carlton Fields publications should not be construed as legal advice on any specific facts or circumstances. The contents are intended for general information and educational purposes only, and should not be relied on as if it were advice about a particular fact situation. The distribution of this publication is not intended to create, and receipt of it does not constitute, an attorney-client relationship with Carlton Fields. This publication may not be quoted or referred to in any other publication or proceeding without the prior written consent of the firm, to be given or withheld at our discretion. To request reprint permission for any of our publications, please use our Contact Us form via the link below. The views set forth herein are the personal views of the author and do not necessarily reflect those of the firm. This site may contain hypertext links to information created and maintained by other entities. Carlton Fields does not control or guarantee the accuracy or completeness of this outside information, nor is the inclusion of a link to be intended as an endorsement of those outside sites.