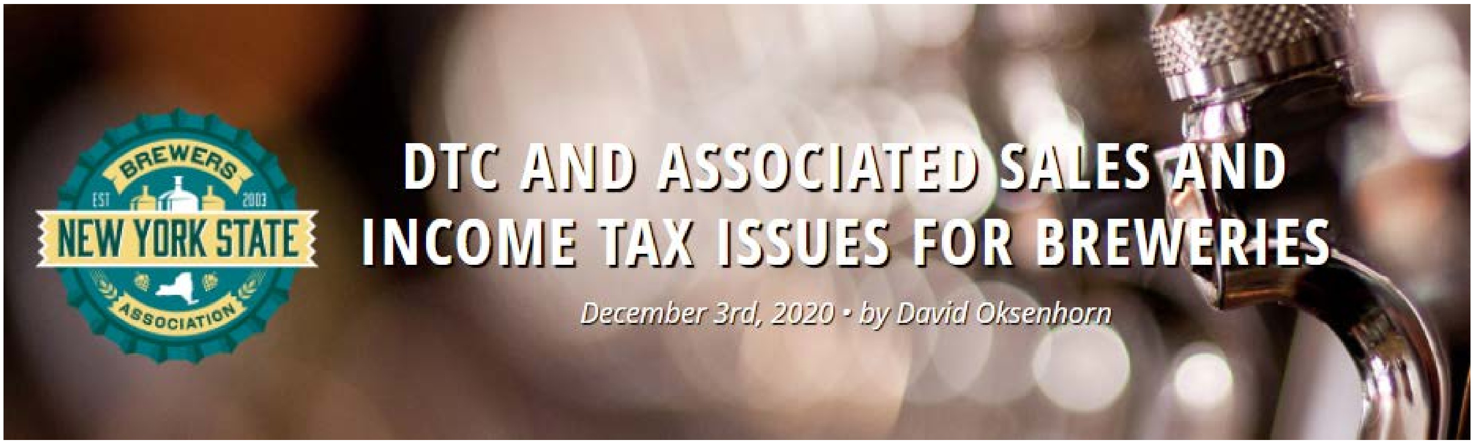

DTC AND ASSOCIATED SALES AND INCOME TAX ISSUES FOR BREWERIES

December 3rd, 2020 • by David Oksenhorn

With the COVID crisis still in full swing, many breweries are hurting. Extended closures of tasting rooms and select re-openings with reduced capacity have led to dramatically decreased sales. Many breweries look to their tasting rooms as their primary revenue stream, with most sales coming in the form of draft sales, with some to-go sales such as crowler, growler, or can sales.

To help stop the bleeding, many breweries that had not previously done much, if any, sales beyond their own walls are now looking towards other channels. Some have utilized distributors or online retailers within New York. However, a number have also begun to extend their reach to offer product direct to consumer (DTC) on their own websites, shipping beer out of New York State for the first time. This bid to revive sales can create new and often unforeseen issues relating to sales and income taxes.

First, some background. Back in the good old days, retailers had to have a physical presence within a state to be required to collect sales tax for sales in that state. However, on June 21, 2018, the United States Supreme Court ruled in favor of South Dakota and its economic nexus provisions for sales tax collection (South Dakota v. Wayfair, Inc.), overturning its prior decision in Quill (Quill Corp. v. North Dakota). The South Dakota statute requires remote retailers with annual in-state sales exceeding $100,000 or 200 separate transactions to collect and remit sales tax. In the two years since the decision, almost every state has issued or modified its economic nexus laws to capitalize on the new revenue opportunity.

Breweries need to pay special attention to every state in which they are selling DTC, to ensure they are addressing regional sales tax requirements. Breweries also need to look out for potential issues relating to income tax filing requirements. As we all know, brewing ain't all sunshine and crushing session beers; it's one of the most highly regulated of industries. You need a license for pretty much everything, and getting a freshie DTC out-of-state is generally no exception. Obtaining licenses in other states may require registration, and generally, filing with any state agency will be considered voluntary nexus. This means that by registering with the secretary of state of another state to obtain a license to ship beer to that state from New York may require an income tax filing, in addition to the collection of sales tax in that state. States have different thresholds triggering these requirements (i.e., gross sales to state), which could also possibly lead to income tax filing requirements.

Additional sales and income tax requirements shouldn't hinder a brewery from selling DTC out of New York, but it should be something to keep in mind if venturing into this territory, to ensure no filing requirements are missed.

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