



Simplified Sellers Use Tax (SSUT) Update

**Alabama Association of School Business Officials (AASBO)
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Kane Burnette's primary practice involves serving as bond counsel to municipalities, counties, boards of education and public corporations throughout Alabama on both publicly underwritten and privately placed tax-exempt financings.

Kane is particularly active in the public education sector, where he has represented both public universities and boards of education on tax and finance matters, and he currently serves on the faculty of the University of Alabama's academy for finance training for new school superintendents and chief school financial officers.

In addition to bond counsel engagements, he has served as company counsel and bank counsel in letter-of-credit backed transactions, as lender's counsel in direct placement transactions and as trustee's counsel. He also advises municipal clients on economic development and incentive matters. Kane has experience in representing governmental bodies in compliance matters before the Internal Revenue Service and the U.S. Securities and Exchange Commission.

As an Alabama-licensed Certified Public Accountant (currently inactive), Kane worked in the Birmingham office of Ernst & Young LLP before attending law school.

Practices

- Public Finance
- Distressed Municipal Finance
- Corporate and Securities

Education

- University of Alabama School of Law, J.D., 2009, *magna cum laude*
- University of Alabama, Master of Accountancy, 2003
- University of Alabama, B.S., 2002, Accounting *summa cum laude*

Licensed In

- Alabama

Accolades

- Listed in *Chambers USA*, Banking & Finance: Public Finance, 2020
- Listed in *Mid-South Super Lawyers*, "Rising Stars," Government Finance, 2016-2019
- Listed in *B-Metro*, "Top Lawyers," 2019-2020

Professional and Community Activities

- National Association of Bond Lawyers
- American Institute of Certified Public Accountants
- Alabama Society of Certified Public Accountants
- Alabama Council of School Board Attorneys
- Mountain Brook Lacrosse, Treasurer

You May Not Know

Kane is from Tuscaloosa, attended Tuscaloosa City Schools and has three degrees from the University of Alabama. He serves on the Board of Trustees of the University of Alabama Chapter of Alpha Tau Omega fraternity.

What is a Sales Tax?

- Definition under Alabama law:

“There is levied... a privilege or license tax against the person on account of the business activities” of such person measured against “gross sales.”

(§ 40-23-2 Code of Alabama 1975, as amended)

What is a Sales Tax? (continued)

- privilege or license tax; (what privilege?)
- against the person; (what person?)
- measured against.

The focus of a sales tax is operation of a business “*within this state.*” If a business does not operate “*within this state,*” sales tax does not apply.

What is a Use Tax?

“An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property....”

(§ 40-23-61)

Use tax does not apply on a transaction where sales tax was paid.

(§ 40-23-62(1))

What is a Use Tax? (continued)

- storage;
- use; or
- other consumption.

Unlike a sales tax, the focus of a use tax historically has been on the consumer.

Use Tax – Self-Reporting

Except in limited circumstances (for example, registration of a motor vehicle purchased out of state), historical compliance rates for these consumer use tax statutes have been low because they rely on the consumer self-reporting. Compare with compliance rates for voluntary reporting of cash wages. Surprised?

Enforcement of Use Tax

Many states, including Alabama, have statutes requiring vendors not operating within the state (and therefore not subject to sales tax) to nevertheless collect use tax from the consumer.

(§ 40-23-67)

Challenges to State Use Tax Statutes

Some out-of-state businesses have challenged the constitutionality of statutes, like the one in Alabama, requiring vendor collection of use tax.

Prior to 2018, the U.S. Supreme Court said an out-of-state vendor generally had to have a “physical presence” in a state in order for that state to enforce sellers’ use tax statutes, like Alabama’s.

Enter SSUT

In 2015, the Alabama Legislature adopted “The Simplified Seller Use Tax Remittance Act,” which created a voluntary use tax remittance program for “eligible sellers.”

“Eligible Seller” is defined as “a seller that sells tangible personal property or a service, but does not have a physical presence in this state....”

(§ 40-23-191)

Purpose of SSUT – Anticipating a Shift

In light of the increasing popularity of online sales, and the corresponding loss of revenue to state and local governments (think Amazon), many observers anticipated the U.S. Supreme Court to eventually break with precedent and declare that “physical presence” would no longer be required in order for states to enforce collection of use tax on out-of-state vendors.

Purpose of SSUT – Anticipating a Shift (continued)

Out-of-state businesses feared that, in the event of a change in law from the U.S. Supreme Court, they could be subject to complying with the laws of:

- each state;
- each county government within each state; and
- each municipal government within each county government.

With over 10,000 sales & use tax jurisdictions in the U.S., the compliance burdens are significant.

Purpose of SSUT – Anticipating a Shift (continued)

By voluntarily opting into SSUT, out-of-state vendors could, with respect to Alabama, reduce uncertainty and complexity that might follow in the wake of a change in law.

Participants in SSUT and their customers are exempt from paying any sales and use tax (other than SSUT) that may be levied on a transaction at either the State or local level.

(§ 40-23-193(a))

Wayfair Decision – Clarity?

In its 2018 *South Dakota v. Wayfair* decision, the U.S. Supreme Court overruled precedent by discarding the old “physical presence” requirement. It is now permissible for a state to enforce a use tax remittance statute against an out-of-state vendor that, by virtue of the volume and dollar amount of transactions involving delivery into that state, has a “substantial nexus” to the state.

In *Wayfair*, the Court found that annual sales into South Dakota of at least \$100,000 or 200 separate transactions was sufficient for a “substantial nexus.”

Use Tax Transaction - Hypothetical

Manufacturer in New York sells \$100,000 piece of equipment to Company in Decatur, Alabama. New York business has no physical presence in Alabama but decides to comply with Alabama law requiring vendor to collect use tax from Company. How much use tax does Manufacturer collect and to whom does it remit payment?

- State of Alabama (4%) = \$4,000
- Morgan County (1%) = \$1,000
- City of Decatur (4%) = \$4,000
- TOTAL (9%) = \$9,000

Use Tax Transaction - Hypothetical

Manufacturer's recordkeeping responsibilities could quickly become burdensome and time-consuming if Manufacturer makes frequent sales throughout the State of Alabama.

How is SSUT Different?

Manufacturer could instead decide, voluntarily, to enroll in SSUT. Under SSUT, the payment is as follows:

- State of Alabama (8%) = \$8,000
TOTAL (8%) = \$8,000

Why does this matter to Boards of Education?

- Use tax and SSUT matter for Boards now because proceeds of these taxes are used for public school funding.
- Use tax and SSUT also matter for Boards in the future because (a) online/out-of-state retail (“clicks-and-mortar”) continues to grow relative to traditional storefront retail (“bricks-and-mortar”), and (b) future legislation modeled on SSUT could have wide-ranging effects to local funding sources.

Distribution of Use Tax Proceeds (State 4%)

- Remote Use Tax (tangible personal property)
 - State General Fund 75%
 - Educational Trust Fund 25% (\$11,862,146 in FY20)
- Use Tax
 - State General Fund 53%
 - Education Trust Fund 47% (\$171,835,152 in FY20)

Distribution of Use Tax Proceeds (local)

- County and municipal use tax proceeds are allocated jurisdiction by jurisdiction; some proceeds are allocated for public school purposes, while others are allocated for general or other purposes.

Distribution of SSUT Proceeds (Total 8% rate)

- SSUT
 - State of Alabama 50%
 - General Fund (75%) (37.5%)
 - Educational Trust Fund (25%) (12.5%)
 - All Counties 20%
 - All Municipalities 30%

Recent Proposed Legislation

- HB418 (not enacted)
 - Would have expanded SSUT considerably by eliminating “affiliated nexus” provisions and by raising 8% SSUT rate by (likely) 1%.
- For example, under current law, Best Buy is not eligible for SSUT because it has a physical presence in the State. Under HB418, Best Buy could create and use a business affiliate to handle all orders at www.bestbuy.com, and all online sales for the company would then go through SSUT, rather than going through the ordinary use tax distribution.

Illustration – Flow of Funds to BOE

Rarewatches.com sells luxury wristwatches online and has a single office/warehouse building in Montana. In 2018, the company sold \$1,000,000 of watches to Alabama residents, all of whom live in the City of Tuscaloosa, using the company's website.

Q: Does sales tax apply to these transactions?

A: No. Under Alabama law, rarewatches.com does not operate a business within the state, so sales tax does not apply.

Illustration – Flow of Funds to BOE

- Q: Is rarewatches.com required to collect use tax on each purchase?
- A: Yes. Under Alabama law and following the *Wayfair* decision, rarewatches.com – because of the dollar volume of annual sales to Alabama – will be required to collect use tax on each purchase.

Illustration – Flow of Funds to BOE

- Rarewatches.com is eligible for participation in SSUT because it is a seller of tangible personal property without a physical presence in Alabama.
- If the company does not participate in SSUT, each taxing jurisdiction may require rarewatches.com to collect use tax on purchases.
- Scenario 1: assume rarewatches.com does NOT elect to participate in SSUT.
 - State (4%) = \$40,000 (\$10,000 to ETF)
 - County (3%) = \$30,000 (\$13,500 to local BOEs)
 - City (3%) = \$20,000

Illustration – Flow of Funds to BOE

- Scenario 2: rarewatches.com decides to sign up for SSUT
 - SSUT (8%) = \$80,000
 - \$10,000 to ETF
 - \$30,000 to State General Fund
 - \$40,000 to municipalities (\$24,000) and counties (\$16,000) throughout the State.
 - Unless otherwise directed by local law, municipalities and counties are not required to use these funds for public school purposes.

Illustration – Flow of Funds to BOE

- Comparison
 - Scenario 1 (non-SSUT)
 - \$23,500 of total \$100,000 use tax collected used for public school purposes (23.50%)
 - Scenario 2 (SSUT)
 - \$10,000 of total \$80,000 use tax collected used for public school purposes (12.5%)
- Bottom Line
 - Under current law, participation in SSUT does not diminish funding of ETF, however...
 - In jurisdictions with significant local sales/use tax funding of schools, SSUT may reduce local funding.

SSUT in Context - ETF Receipts

EDUCATION TRUST FUND RECEIPTS FY 2010 THROUGH FY 2020

	ACTUAL FY 14-15	ACTUAL FY 15-16	ACTUAL FY 16-17	ACTUAL FY 17-18	ACTUAL FY 18-19	ACTUAL FY 19-20
BEER TAX	22,838,290	22,909,170	22,231,590	21,871,509	22,594,709	22,313,702
HYDROELECTRIC TAX	712,505	508,723	473,797	411,576	401,355	508,205
INCOME TAX	3,725,299,372	3,722,129,992	3,892,525,501	4,208,436,406	4,548,470,728	4,657,167,330
INSURANCE PREMIUM TAX (1)	30,993,296	30,993,346	30,993,296	30,993,296	30,993,296	30,993,296
MISCELLANEOUS				7,121	5,009	36,521
MOBILE TELECOMM TAX	19,991,675	17,700,484	15,904,023	10,402,545	11,924,391	9,804,426
SALES TAX	1,623,588,330	1,744,468,414	1,811,657,811	1,908,442,758	2,013,911,327	2,084,997,958
STORE LICENSES	171,927	129,773	112,337	139,424	125,217	108,039
UNCLASSIFIED	655,678	5,167	(25)	20		14,705
USE TAX (2)	218,666,927	151,801,741 (6)	151,598,885	159,169,978	150,447,230	171,835,152
USE TAX REMOTE	3,429,765	4,985,996	6,913,726	8,122,483	11,251,938	11,862,146
USE TAX SIMPLIFIED SELLER (3)	0	280,461 (7)	6,545,297	9,849,026	23,292,598	46,259,499
UTILITY TAX	401,700,962	376,625,096	387,966,309	395,433,475	401,311,662	388,005,780
SUBTOTAL	6,048,048,728	6,072,538,363	6,326,922,546	6,753,279,616	7,214,729,459	7,423,906,759
TRANSFERS & REVERSIONS	292,344	397,699	404,672	285,763	546,744	664,981 (4)
TOTAL	6,048,341,072	6,072,936,061	6,327,327,218	6,753,565,379	7,215,276,203	7,424,571,740 (5)

(1) Capped at FY 1992 level by Act 1993-679.

(2) Beginning in FY 2016, use tax receipts include a decreased distribution pursuant to Act 2015-539.

(3) Pursuant to Act 2015-448, the Simplified Sellers Use Tax Remittance Act was effective beginning in FY 2016.

(4) Excludes one-time transfer of \$15,000,000 from Educational Trust Fund Advancement and Technology Fund and temporary transfer of \$301,665,743 from the Budget Stabilization Fund for cash flow purposes.

(5) Represents real revenues.

(6) Totals may not sum due to rounding.

(7) Pursuant to Act 2015-448, the Simplified Sellers Use Tax Remittance Act was effective beginning in FY 2016.

Sharing of SSUT Revenues

- Voluntary
 - What are folks seeing?
- Legislative
 - Update on Morgan County litigation

Collections in Your Jurisdiction

My Alabama Taxes - MAT

Questions and Answers