Healthcare tax checkups

Podcast transcripts

Episode 7: State telemedicine tax issues

Announcer (00:03)

This is Healthcare tax checkups, a KPMG podcast series featuring KPMG leaders on emerging and perennial tax issues impacting the healthcare industry. This episode explores state tax issues faced by telemedicine providers.

Lori Robbins (00:19)

Hello, everyone and thank you for tuning into this podcast episode. I'm Lori Robbins, deputy tax industry leader of KPMG's healthcare tax practice. With me are John Harper and Justin Stringfield. John Harper is a director in KPMG's Washington national tax, state and local tax group. With more than 38 years of public accounting and 34 years of state and local tax advisory experience. John has a strong background in providing state and local tax advisory services, including income branch tax compliance, outsourcing engagements, accounting for income tax provision reviews, audit representation, due diligence and some other tax planning services. Based in Nashville, John serviced a number of healthcare industry clients. Justin Stringfield is a managing director in KPMG's Nashville's state and local tax practice. He has worked on a broad range of US indirect tax engagements for clients in the healthcare industry. His responsibilities include assisting clients with taxability determinations, audit defense, indirect tax, overpayment recoveries, volunteer disclosure agreements, private letter ruling requests and indirect tax planning.

Lori Robbins (01:32)

John and Justin, thank you both for joining us. Today we'll be talking about state tax issues that arise in telemedicine, a hot topic today, and what clients should be thinking about in this space. John, I want to start with you, what are states doing with regard to the taxation of telemedicine generally? Given the increased use of telemedicine, are states modifying tax statutes to take into account this development? Are they ramping up their enforcement surrounding audits of telemedicine providers and their nexus to the state? I mean, what trends are we seeing in this space generally?

John Harper (02:07)

Lori, well, we're not really seeing any states modifying existing guidance to deal specifically with telemedicine. However, states did during the Covid pandemic emergency periods, adopt different rules for determining whether a remote working employee in the state would create a filing and or a withholding obligation for an out-of-state employer in that state. A number of states created temporary rules that provided that a remote working employee who did not create a filing responsibility for their employer. However, most of those special rules have expired in regard to the entity providing the telemedicine service. The first step is to determine whether providing such services to a patient in the states creates an income tax filing obligation, either as a taxable or as an exempt entity in that state having some sort of physical presence in the state, whether an employee, even if working remotely, an agent or some type of physical property in the state is sufficient to create a filing obligation.

John Harper (03:09)

Having patients, that is customers in the state, may also create a filing obligation in the number of states. The US Supreme Court casing Bobby and Wayfair was a sales tax case, but it clearly indicated that an economic or virtual presence is sufficient to give rise to a filing, and in that case, a collecting obligation for sales tax. It is constitutionally no different for income taxes. A number of states have what are called factor of presence or filing access standards. Other states have economic presence nexus standards. Finally, other states have not updated their guidance to indicate whether they would follow Wayfair's economic, a virtual presence tests for income tax purposes. But you'd look at the individual state's test to determine whether you were taxable in that state in which you have customer and or employees providing services. Once the state determines it has a filing responsibility it must also determine... especially if it's an exempt entity, whether the provision of the telemedicine service results in UBI.

John Harper (04:15)

If it's a taxable entity or an exempt entity that has UBI, then the entity must determine whether it's telemedicine services or sourced to that state the customer is located in. Many states have in recent years adopted so-called market or customer sourcing rules, which would generally indicate that the location of the customer is where the receipts from the provision of the telemedicine services should be sourced. However, some states still have cost of performance or income producing activity tests for sourcing receipts, and in those states, the receipts typically are a source to the location where the services are performed. However, some states such as Florida and Texas have interpreted their cost of performance rules to source receipts to the customer's location. In essence, the states are applying the existing, but constantly evolving income tax nexus and sourcing rules to determine the taxability of telemedicine services.

Lori Robbins (05:12)

Thanks, John, that's helpful and I'm glad you raised that UBI point in there. Because of course, obviously the majority of telemedicine providers are tax exempt for federal income tax purposes. So that's, good to know. Justin, I want to turn to you a bit to talk about indirect taxes here and I want to know how does one look at telemedicine for indirect tax purposes? Is this considered a service? Is it a product? Is it a hybrid or a mix of the two? And what are the indirect tax implications of providing telemedicine to patients?

Justin Stringfield (05:48)

Lori, that's a good question. The answer is typically driven by how the medical provider is charging the patient or the medical plan for those telemedicine services. So, when we think about, or talk about the provision of medical services, generally those services are not subject to sales and use tax in most states. But as you think about telemedicine services, those services are typically delivered through a technology platform, which can bring about additional sales and use tax considerations. So, as traditional medical providers are moving more into the telemedicine space, we are seeing some of those providers recoup the cost of the technology through a charge specific to the technology to the patient or to the plan. So, that charge may be an explicit charge for accessing the platform through which the telemedicine service is being provided. In other cases, we've seen a data related charge, but regardless of what that charge looks like, because it is related to access to a platform it could have sales and use tax implications.

Justin Stringfield (07:08)

There are a number of states that are out there that impose tax on digitally or electronically delivered goods or services like software as a service, data processing, information services. And so, those separate charges between a provider and a patient or a plan that are related to the technology could have sales and use tax implications, depending on the state. In addition to the technology platform required to deliver telemedicine services, the medical provider in many cases must also rely on medical devices like blood pressure monitors, heart monitors that are in the possession of the patient and are needed to retrieve the medical data that's required to treat the patient. So, in a traditional medical setting those types of devices are typically found at the medical provider's office, so when I walk into my doctor they obviously already have a thermometer, a blood pressure monitor, the heart rate monitor, but in a remote medical service setting, oftentimes the patient is required to be in possession of that in order for the doctor to receive the medical data information that he or she needs.

Justin Stringfield (08:37)

In some cases, the medical provider may be selling those devices to patients. And so, depending on the state in which that patient resides and the exemptions that may be afforded by that state's sales and use tax laws, there could be a sales and use tax implication related to the sale of those devices from the provider to the patient. If the medical provider does not sell the devices to the patient they may still give those devices to the patient, and this could create a use tax obligation on the part of the medical provider. And this may be in jurisdictions where the medical provider has not historically done business. Those are sales and use tax items on the charge between the provider and the patient, but there's also considerations on purchase side for the provider as well. Because the provision of telemedicine services requires a significant investment in technology in order to deliver those services.

Justin Stringfield (08:37)

While tax exempts are generally exempt from tax, they are taxed on net income that they earn from carrying on business activities that aren't related to their charitable or exempt missions. Then, if the expense of is attributable to those unrelated businesses are more than the income from those businesses, such that there's a loss rather than a profit, that loss can be carried over as a net operating loss or NOL and deducted against, or potentially deducted against, unrelated business taxable income, or UBTI, in future years.

Lori Robbins (10:47)

That's interesting from a sales and use or indirect tax perspective, it sounds very fact specific and each scenario could give rise to some consequences. It really depends on exactly what's being pulled into the telemedicine that's being provided.

Justin Stringfield (11:05)

That's exactly right.

Lori Robbins (11:05)

Very interesting. I think Justin, in this regard, you've been actively working with healthcare organizations for quite some time on telemedicine tax issues, this was something that we saw starting to take shape very early in the pandemic in full force really quickly. And given that this is sort of a fact specific scenario, especially on the indirect side, I'm wondering what kind of questions you've been getting from healthcare providers with regard to the taxation of telemedicine? What can our listeners learn from what others have asked about? What are you seeing in the market?

Justin Stringfield (11:56)

So, one of the most common questions that we get is around nexus. So, typically you have a traditional medical provider that may have locations in one, two or a handful of states, and so they've historically only had nexus in those one or two states. And typically the first call that we get is from someone in the tax department that has recently attended a meeting or a call and learned that the business is either providing telemedicine services or will be moving into the space of providing telemedicine services in additional states. And sometimes the new states are limited to the region where the traditional medical provider is located, but more often it's anywhere in the country. And so, the business wants to understand what this does to the company's nexus profile where it will have new tax responsibilities and obligations.

Justin Stringfield (12:58)

A lot of times our first call is specific to income tax, but quickly after conversation and a couple of questions, we end up addressing a lot of indirect tax issues as well. We also get a lot of questions related to payroll tax, just as a patient can be anywhere in a telehealth model, the doctor or medical professional can also be anywhere. And so, we see a lot of companies that have historically had a limited footprint now that the doctors or the medical providers can be located anywhere they have employees located in states where the company historically did not have employees, which obviously impacts the nexus profile. And so, there's questions not only on nexus, but like I said, payroll taxes as well because they have employees in new states.

Justin Stringfield (14:00)

Then we've also received questions related to what I would call provider taxes in certain states and whether the fact that they are delivering medical services into these states where they don't have a physical facility, whether those provider taxes apply as well. So, Lori, the questions really are across the board that we're getting on this, but like I said, I think the most prevalent are in the space of nexus and then payroll taxes.

Lori Robbins (14:33)

That's very helpful, very insightful. I want to turn back to you John, and Justin feel free to chime in as well. But John, what recommendations do you have for those healthcare organizations that are practicing telemedicine, especially across state Lines?

John Harper (14:52)

Well, Lori, for income tax purposes, I would suggest that the tax personnel actively monitor in which states you have employees that are living and working, and also in regards to your company's foray and to telemedicine, the states in which may now have patience. Out-of-state entities generally have to register with the secretary of state, it may have to register with the department of revenue, and that may apply to tax exempts even if they do not have UBI in a state, they may have to separately apply for exemption in the state. And so, it's important to keep up with all those filing responsibilities, even though tax may not be due.

John Harper (15:36)

In addition, not for profits may be required to separately register with the attorney general in certain states. So, there are a lot of different registrations that can be required without necessarily the payment of tax. Also, you should continually monitor the in-state activity in regards to the different states in which you're providing telemedicine services, those state's nexus or filing thresholds, just to determine whether a filing obligation is due, even though no tax may be due. So Justin, what about sales taxes?

Justin Stringfield (16:12)

Yes, so John, from a sales and use tax perspective, I think I would first recommend that a company not just assume there are no sales and use tax implications. So, if you hear that your company is moving into the provision of telemedicine services or has already moved into that space, I think there are some questions that you may want to ask. The first one being around the types of charges a patient or a plan is receiving in conjunction with the telemedicine services. As we previously discussed, there are a number of indirect tax related items that may be driven by how the medical provider is charging its patients, how the provider is procuring technology and how contracts or agreements may be structured. I know Lori and John, you both have mentioned tax exempt entities, I would also recommend from a sales and use tax or indirect tax perspective that not for profit providers also consider these issues as well.

Justin Stringfield (17:12)

Many states do offer not for profit exemptions for sales and use tax, but a lot of times these exemptions apply to purchases and may not always extend to sales by those not for profit entities. And so, I think all entities, whether for profit or not for profit, that are in the business of providing telemedicine services need to consider the sales and use tax implications around how these services are billed to patients and to medical plans. And then I think finally, I would also recommend that the tax group review invoices, contracts, agreements that are drafted and executed specific to these services, whether that be on the sales side or the purchase side.

Justin Stringfield (18:03)

I know that we've seen instances where contracts or agreements are finalized without input from the tax group, and the final language within the contract or agreement is unfavorable from a sales and use tax perspective. And so, these are the documents that will be reviewed upon audit. And so, I think my recommendation is to make sure that the tax department or representative from the tax department has a seat at the table in reviewing those agreements.

Lori Robbins (18:33)

Thank you, John and Justin for sharing your experience and your knowledge in this space, this has been a great discussion. To our podcast listeners, thank you for tuning into this episode. For more information about the taxation issues associated with telemedicine generally, please out the article written by myself, John, Justin, and others here at KPMG, a link to which can be found on this podcast's episodes webpage. If you have any questions about the topics we discussed today, please reach out to one of us or your local KPMG representative.

Announcer (19:07)

Thank you for listening to KPMG's healthcare tax checkups, for more information visit the healthcare and life sciences homepage. We'll see you next time.