

US Supreme Court Gives States Expansive Authority to Collect Sales Taxes.

by George Mastrodonato

On June 21, 2018, the United States Supreme Court issued its long-awaited decision in *South Dakota v. Wayfair*. In this case the Court ruled that South Dakota (and, by implication, all states) can make out-of-state retailers collect sales taxes on internet or other sales of goods and services into the destination state, even where the seller does not have “nexus” or a “physical presence” in the state.



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The Court ruled 5 to 4 that “physical presence” in the taxing state was no longer the rule for that state to require a retailer to collect and remit the sales tax. The “physical presence” requirement went back to at least 1967, when the Court (in a case known as “National Bellas Hess”) limited the authority of states to tax out of state sellers. The Court later reaffirmed National Bellas Hess and the physical presence requirement in 1992, when it decided the *Quill v. North Dakota* case. *Quill Corporation* at the time sold goods through catalogs, not the internet, but the factual circumstances were approximately the same.

Until recently, when the Court overruled its own precedents, internet sales were largely free from sales taxes unless, as noted, the out of state seller maintained some form of “physical presence” (maintaining property, an office or stock of goods, soliciting sales, providing installation services, etc.) within the taxing state. This did not mean the goods went untaxed if nexus was lacking. Under the law, the buyer was still liable for use tax but this tax was rarely collected by the state because it had to be paid voluntarily and directly by the buyers/consumers themselves. Many people did not know they had that obligation and those that did, for the most part, ignored it. The result was most of these taxes went uncollected.

A concern of the Court in overruling its prior precedents was the decision’s impact on small businesses and startups. Here, the Court did suggest that the states’ eCommerce taxing powers were still not unlimited. The 2016 South Dakota law under review contained provisions that exempted small retailers from the duty to collect the tax and the tax when enacted was not made retroactive as to prior sales. The Supreme Court did not indicate either way, whether its *Wayfair* decision was retroactive or prospective.

South Dakota imposed the sales tax collection obligation only on remote sellers whose annual sales into the state exceeded \$100,000 or totaled at least 200 transactions in a year. The Court found these provisions to limit the impact of the law on small businesses to be reasonable. It

would not be surprising to see other states adopt these limitations when they amend their sales tax laws to conform to the new ruling, because the Court has already approved them. But, it would also not be surprising if some states pushed these boundaries further, i.e., lowered the thresholds or assume the Court's ruling was retroactive.

The state of Washington, like South Dakota, has always pushed the outer limits of nexus principles. For example, Washington enacted "economic nexus" for service businesses back in 2010. Economic nexus as the basis to incur B&O tax liability was expanded to wholesalers (but not retailers) in 2017. However, for retailers selling through "platforms" -- companies like Amazon -- Washington imposed a sales tax collection obligation beginning in September 2015 with the "click-through" nexus law (RCW 82.08.052).

What should Washington retailers selling to customers in other states do now? For those internet retailers already collecting sales taxes and remitting them in all states where sales are made, there is probably nothing to do. For those not collecting and remitting, it is probably too early to panic or even go out and register in all states where retail sales are made.

But, it might be prudent at this time to focus on those states where significant sales are made because those states pose the greatest potential tax liability and risks. Check those states' revenue departments' websites to see how they are responding to the *Wayfair* decision. It may be they will be offering an amnesty program for past due taxes if a new taxpayer establishes a registration by a certain date.

There are also software programs available to assist with sales tax compliance in multiple states. It may be worth the investment to purchase one of these programs and begin to collect and remit the tax. One such company is Avalara Inc., based in Seattle, which offers a tax-compliance service many smaller retailers find beneficial.

What if you are an out of state retailer making sales into Washington? If you are located outside Washington and making sales into this state, it might behoove you to register and start collecting sales tax as soon as possible. The Washington State Department of Revenue is currently offering a "Penalty Reduction Program" where retailers can come forward and register to begin collecting and remitting tax. Penalties will be forgiven but tax and interest will be due for sales back to January 1, 2014. This program is set to expire on June 30, 2018, and it is unclear whether it will be extended. A similar voluntary compliance program offers comparable relief.

Unfortunately, in the wake of the *Wayfair* ruling there are no good options for retailers affected by the decision, especially small businesses. It is possible that Congress will step in, but Congress has failed to legislate on this issue for more than 50 years when the states were complaining they were losing tax revenues and certain "brick and mortar" retailers were complaining that catalog and internet retailers had a competitive advantage.

Nevertheless, any changes in any of the states will not happen overnight. The details about what states will change their laws to comply with the Supreme Court's ruling and who will now be impacted by this significant change in sales tax jurisprudence will still have to be worked out. It goes without saying that, in the end, the states will be the winners and taxpayers will be the losers.

We would be happy to answer any questions you might have, assist with registration and reporting requirements or consult with you on planning strategies and options. Please do not hesitate to contact us.