



A DEEPER LOOK

Wayfair-What Does This Mean?

On June 21, 2018, in a 5-4 decision, the U.S. Supreme Court, in *South Dakota v. Wayfair, Inc.* overruled its 1992 *Quill Corp. v. North Dakota* decision in holding that an out of state seller can be required to collect sales tax without being physically present in a state. South Dakota's statute provides that there is nexus if a seller has more than \$100,000 of sales into the state or more than 200 separate transactions. The statute also states it could not be applied retroactively.

The Court acknowledged the changing times as to how businesses operate today. In discussing *Quill*, Justice Kennedy stated, "Modern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*." Further on, he wrote, "A virtual showroom can show far more inventory, in far more detail, and with greater opportunities for consumer and seller interaction than might be possible for local stores. Yet the continuous and pervasive virtual presence of retailers today is, under *Quill*, simply irrelevant." In reaching its decision, the Court found that the statute did not burden interstate commerce because a) it was not retroactive and b) South Dakota, being a party to the Streamlined Sales and Use Tax Agreement, there is a single tax rate and access to software to assist out of state retailers in computing the tax.

There are currently 21 states that have a similar collection and/or notice requirement. There are another 10 or so states whose existing law or

regulation allows for sales tax collection without the physical presence requirement.

It appears that the *Wayfair* decision establishes a safe harbor for other states to follow. This decision raises several new questions:

1. What does this mean for states like Ohio, Massachusetts and Iowa that have either law or regulations asserting nexus by having a cookie on a computer?
2. Some state statutes do not contain the anti-retroactive provision like South Dakota's. Would this be constitutional?
3. Will other states be emboldened to adopt a law with lower thresholds?
4. If a state seeking to impose the tax is not part of the Streamlined Sales and Use Tax Agreement, how is the out of state retailer going to comply with the various state and local sales tax rates? It has been said there are an estimated 10,000 state and local taxing jurisdictions.
5. What does this mean for states that currently have a similar statute for income tax purposes?
6. Will other states be emboldened to adopt a similar law for income tax purposes?

Unless or until Congress acts, an analysis of each states sales and income tax rules would be necessary to ensure your business is compliant.

If you would like more information regarding the Wayfair decision, please contact your Gettry Marcus Advisor.

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