

Sales and use tax: Supreme Court overrules physical presence requirement

by Jessica Lehmen, CPA | June 25, 2018 | williamskeepers.com

In the June 21st decision of *South Dakota v. Wayfair, Inc. et al.*, The Supreme Court of the United States drastically altered the landscape of state sales and use tax collection for online and other remote retailers.

Background: Physical Presence

In the 1992 decision *Quill Corp v. North Dakota* the court established a requirement for the retailer to have physical presence in a state to create sufficient nexus to cause the retailer to collect sales or use tax in that state. Due to the changing way business is done and the prevalence of online retailing, states have been working to whittle away at the definition of what is “physical”. Many states, like Missouri, have adopted provisions such as “click-through” and affiliate nexus that no longer require the presence of the seller, but only the in-state presence of the seller’s affiliates. Some states have proposed that apps on consumers’ phones and cookies left on consumers’ computers from their website visits are proof of physical presence.

South Dakota v. Wayfair

South Dakota passed a law effective May 1, 2016 to deliberately challenge this physical presence standard. South Dakota’s law requires an out-of-state seller to collect taxes from its customers if the seller meets either of the following criteria in the previous or current calendar year;

1. The seller’s revenue in South Dakota exceeds \$100,000; or
2. The seller had two hundred or more separate transactions with South Dakota customers.

The *Wayfair* case challenged this law and the Supreme Court decided 5 to 4 in South Dakota’s favor. This opens the door for many other states to pass similar legislation and in fact, more than 20 states have already passed some variation of the nexus standard and/or an information reporting requirement for out-of-state sellers. Some of those requirements were waiting for the *Wayfair* decision before they came into effect. In the Supreme Court’s decision, Justice Kennedy stated that forty-one States, two Territories, and the District of Columbia asked the court to reject *Quill*’s physical presence test. Congress has also considered, but not yet passed, legislation intended to help simplify the sales tax rules across the board. Many states have joined the Streamlined Sales and Use Tax Agreement which has as a similar goal of simplification.

How does this affect you?

If you are a seller and make sales across state lines, now is the time to reassess your sales and use tax collection requirements. Whether or not to collect is only the first complexity involved. Each state has different rates and rules on what is taxable.

If you are a consumer and like to purchase either online or from other out-of-state sellers, those sellers are more likely to be required to collect tax from you on your future purchases if they aren’t already. Keep in mind that if a sale is taxable and the seller is not required to collect the tax, often times you, as the consumer, are required to pay the tax by filing a consumer’s use tax return.

If you have any questions about this issue and how it might affect you or your business, please contact your WK advisor at (573) 442-6171 or (573) 635-6196.