

South Dakota v. Wayfair

Overview:

Before Wayfair: For determining sales tax nexus, states had no jurisdiction over sellers unless the sellers had a physical presence in the state. As a result, most remote sellers did NOT charge sales tax.

After Wayfair: South Dakota can now require out-of-state remote sellers with no physical presence to collect and remit sales tax.

Effect: Businesses should expect to see states increase their nexus assertions.

Wayfair - what is it:

On June 21, 2018 the Supreme Court issued an opinion on South Dakota v. Wayfair, Inc. that overturns the previous long-standing precedent stating that sellers must have “physical presence” in a state before the state can compel the seller to collect and remit sales tax. This precedent had been in place for decades.

At issue, South Dakota codified a law in March of 2016 that required certain remote sellers, who do not have physical presence in the state, to collect and remit South Dakota sales tax. The law declared that out-of-state remote sellers have sales tax nexus in South Dakota if during the current or previous calendar year they:

1. had gross revenue from sales of taxable goods and services delivered into the state exceeding \$100,000; or
2. Sold taxable goods and services for delivery into the state in 200 or more separate transactions.

Wayfair, Inc. is an e-commerce firm that sells home goods remotely. Wayfair did not have a physical presence in South Dakota. However, they exceeded the gross sales and volume thresholds set by the new South Dakota law.

South Dakota, believing they had jurisdiction over Wayfair, demanded that Wayfair collect sales tax from their South Dakota customers. When Wayfair refused, South Dakota brought the above-mentioned law suit against Wayfair.

The Wayfair case examined the constitutionality of the South Dakota economic nexus law. The Court ruled that the physical presence rule created an unjust marketplace which favored remote sellers, and caused states to lose out on enormous amounts of tax revenue. The court ruled that the *activities* of remote sellers and not their *physical presence* is the correct standard for determining “substantial nexus.”

Effects of South Dakota v. Wayfair:

In recent years, several states have enacted economic nexus laws, like South Dakota's, that ignore the physical presence requirement by asserting nexus based on a stated sales volume or dollar amount. The Wayfair ruling may make these state laws constitutional, if the states do not make the law retroactive and have adopted the Streamlined Sales & Use Tax Agreement (which reduces the compliance burden for multistate sellers).

In the wake of Wayfair, businesses should expect to see a rapid expansion of nexus assertions. For instance, beginning October 1, 2018, the Minnesota Department of revenue will require out-of-state remote sellers to collect and remit the applicable sales tax on sales delivered into the state.

Will states begin to broaden the scope of these laws to include income tax? Time will tell.

Please contact us if you would like to discuss how this Supreme Court decision may affect you and your business.

Sincerely,

Thoresen Diaby Helle Condon & Dodge, Inc.