



ATTORNEYS AT LAW

June 21, 2018

**Supreme Court dramatically expands ability of states to collect sales tax from out of state online sellers.**

On June 21, 2018, in South Dakota v. Wayfair Inc. et al the United States Supreme Court reversed decisions made in 1968 and 1992 that required out of state sellers have a physical presence in a state before that state can impose sales tax collection obligations on those out of state sellers. The 5-4 decision states its 1992 decision, Quill v. North Dakota, was "unsound and incorrect."

The court strongly suggested that South Dakota's law, which requires out of state online sellers to collect sales tax if they have more than 200 sales in the state or revenue from sales in the state in excess of \$100,000, is constitutional. The court said the 4 prong test of the 1977 Supreme Court case, Complete Auto Transit v. Brady, should govern the analysis of whether out of state online sales are taxable by a state. Those criteria are:

1. tax applies to an activity with substantial nexus in the taxing state
2. tax does not discriminate against interstate commerce
3. tax is fairly apportioned
4. tax is fairly related to the services the state provides

The court found that the first prong was satisfied by the statute applying the collection obligation only to sellers with material amounts of sales in South Dakota so the sellers have availed themselves of the "privilege" of selling in the state. The court also suggested the tax does not discriminate against interstate commerce and was fairly apportioned but those issues were not specifically resolved in the decision. The case was remanded back to the South Dakota Supreme Court for analysis under the Complete Auto Transit 4 part test where it is likely the South Dakota statute will be upheld.

The majority rejected a dissent by Justice Roberts that the issue should be handled by Congress noting the court was correcting a legal standard of physical presence set by the court in the first place.

It is too early to tell what all the effects of this decision will be but it is very likely that all states with a sales tax will enact statutes requiring out of state sellers to collect sales tax which meet the 4 criteria described above. Online sellers need to be aware that different states

presently have, or may enact, different standards for the level of business when they impose sales tax obligations on our of state sellers.

If you have any questions about the effect of this decision on your business please contact Mike Wenig at [mwenig@tuggleduggins.com](mailto:mwenig@tuggleduggins.com) or (336) 271- 5216 or Vaughn Ramsey at [vramsey@tuggleduggins.com](mailto:vramsey@tuggleduggins.com) or (336) 271- 5234 to discuss how this ruling affects the obligation of your business to collect sales tax in other states. Failure to collect sales tax in other jurisdictions when legally required can expose your business to crippling penalties so this decision is ignored at one's peril.

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