
Supreme Court Allows States to Require Sales Tax Collection by Out-of-State Sellers

By Forrest M. "Teo" Seger / Jun 22, 2018

For over fifty years, states have been prohibited from requiring an out-of-state seller that lacked a physical presence in the taxing state to collect and remit sales tax on sales into the state. Yesterday, in a historic decision, the United States Supreme Court did away with that prohibition.

In its decision in *South Dakota v. Wayfair, Inc.*,¹ the Supreme Court grappled with requirements emanating from the Commerce Clause that out-of-state sellers must have a "substantial nexus" with a particular state before that state could require the seller to collect and remit sales tax.² Since the Court's 1967 decision in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*,³ "substantial nexus" with a state required the seller to have a more-than-de minimus physical presence in that state. The Court reaffirmed the physical presence requirement in *Quill Corp. v. North Dakota* in 1992.⁴ In the intervening decades, however, the rise of e-commerce and the ubiquity of the internet have bolstered the arguments that physical presence is an arbitrary and outdated requirement.

To bring this issue to a head, South Dakota passed Senate Bill 106 into law in 2016,⁵ which was explicitly intended to force the Supreme Court to reconsider the physical presence requirement first outlined in *Bellas Hess*.⁶ The Bill requires out-of-state sellers that, on an annual basis, deliver more than \$100,000 of goods or services or engage in 200 or more separate transactions for the delivery of goods or services into South Dakota comply with the state's sales tax laws as if the sellers had a physical presence in the state. In yesterday's ruling in favor of South Dakota, the State's gamble paid off.

In the *Wayfair* opinion, the Court concluded that "physical presence is not necessary to create a substantial nexus," explicitly overruling *Bellas Hess* and *Quill*.⁷ Absent the physical presence requirement, substantial nexus is simply established when the out-of-state business "avails itself of the substantial privilege of carrying on business" in that state.⁸ This is a much lower threshold, and the Supreme Court concluded that, "based on both the economic and virtual contacts" that *Wayfair* had with South Dakota, the nexus was "clearly sufficient."⁹ The Court also approved of the sales thresholds required for the South Dakota tax collection requirement to apply, saying that "[t]his quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."¹⁰

What does this mean for online or out-of-state retailers? Expect that South Dakota's law is only the beginning. All states that impose sales tax have been closely watching this lawsuit and have been eagerly awaiting this outcome. Businesses can anticipate that the majority—if not all—sales tax states will enact similar legislation in the near future.

This, of course, means that retailers may soon be tasked with knowing the state and local sales tax laws for states across the country. A monumental task—especially for small and midsize businesses—and one that has the potential to reshape the retail landscape.

[1] *South Dakota v. Wayfair, Inc.*, 558 U.S. ____ (2018).

[2] *Id.* at 11.

[3] 386 U.S. 753 (1967).

[4] 504 U.S. 298 (1992).

[5] *See Wayfair* at 3.

[6] *See id.*

[7] *Id.* at 22.

[8] *Id.*

[9] *Id.*

[10] *Id.*