
Supreme Court to Revisit Tax Nexus Test

By Kenneth S. Wear, Christine M. Green / Jan 30, 2018

The U.S. Supreme Court has agreed to hear *South Dakota v. Wayfair, Inc.* (“*Wayfair*”).^[1] Its decision has the potential to change the way online retailers and other remote vendors do business by permitting states to collect sales tax on remote transactions. Many remote vendors are reluctant to charge state sales taxes to customers in states in which the vendors have no physical presence. With the rise of consumers’ preference for ordering goods and services online as opposed to traditional brick-and-mortar shopping, many states feel cheated out of sales tax revenue.

Wayfair concerns South Dakota Senate Bill 106, passed into law in 2016, which requires out-of-state sellers to comply with South Dakota’s sales tax laws as if the sellers had a physical presence in South Dakota. However, the law only applies to sellers with more than \$100,000 in revenue from sales in South Dakota or more than 200 separate in-state transactions per year. In 1992, the Court held in *Quill Corp. v. North Dakota* (“*Quill*”)^[2] that sellers must have more than de minimis physical presence in a state in order for the state to require the seller to collect sales taxes from consumers in the state. Some online retailers have continued to cling to this decision’s physical presence requirement as a way to avoid collecting sales taxes. In *Quill*, the Court invited Congress to implement legislation governing when states may impose the collection of sales tax on out-of-state sellers. Although federal legislation has been proposed in the last several years, nothing has moved forward. Various efforts by states to impose sales tax obligations on online retailers have come to be referred to as “Amazon taxes”. As of April 2017, Amazon itself began collecting sales tax in all states that impose such taxes. The Court will review the physical presence standard established in *Quill* when deciding *Wayfair*. South Dakota has admitted that the law is intended as a direct challenge to *Quill*. Reports are that oral arguments will take place in April with a decision sometime this June.

Online retail giants like *Wayfair* are certainly worried about the potential of a *Quill* reversal. However, smaller retailers may have a lot more on the line given that compliance with state sales tax rules can be costly, time-consuming, and burdensome. The thresholds in South Dakota’s law are no doubt targeted to alleviate concerns that the law is too burdensome on small businesses. Given the changes in retail trends that have occurred since 1992, many feel that a *Quill* reversal is well overdue.

[1] *State v. Wayfair, Inc.*, 901 N.W.2d 754 (S.D. 2017), cert. granted sub nom. *South Dakota v. Wayfair, Inc.*, 2018 WL 386568 (U.S. Jan. 12, 2018) (No. 17-494).

[2] 504 U.S. 298 (1992).