DECIPHERING THE WAYFAIR DECISION

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THE DECISION

On June 21, 2018, the Supreme Court of the United States ("SCOTUS") rendered their decision on *South Dakota v. Wayfair*. In its decision, SCOTUS indicated, "the physical presence rule of *Quill* is unsound and incorrect", thereby overturning the decision that came from the *Quill case.* The opinion of the Court also stated "…a business need not have physical presence in a State to satisfy the demands of due process".

Simply put, SCOTUS decided *Quill* was outdated in terms of how business was currently being conducted. *Quill* hinges upon the physical presence standard, meaning a company must maintain minimal contacts in a state giving them substantial physical presence in the state before the company was subject to registering to collect and remit sales and use tax. In Justice Kennedy's opinion of the Court, he writes, "this Court should not prevent States from collecting lawful taxes through a physical presence rule that can be satisfied only if there is an employee or building in the State".

The *South Dakota v. Wayfair* decision changes how businesses must view sales and use tax nexus. Not only do businesses still need to adhere to the substantial physical presence rule, they must also follow the economic nexus rule as set forth in this decision. While a specific definition of "economic nexus" does not exist, the consensus is a company has nexus with the appropriate taxing authority only if it exceeds a certain threshold of sales into the State. The company does not need to have any other connection to the State such as employees, independent representatives, inventory, etc. Since sales and use taxes are a state tax, each State determines their own threshold.

In the *South Dakota v. Wayfair* case, South Dakota deemed their threshold for economic nexus to be $100,000 in sales or 200 transactions for the previous or current calendar year. It is important to note the Court's decision did not specifically rule in favor of this threshold being the new bright line test for economic nexus. In fact, the opinion of the Court indicated the threshold seemed reasonable and did not discriminate against interstate commerce. Ultimately, it is important to note for the full implications of this decision to spread. We may see Congress get involved with this decision as a bill preventing states from subjecting internet sellers was already introduced.

One other thing of importance with this decision is this change with economic nexus will not be enforced retroactively. The decision as well as some states have already indicated they want to work with businesses on a prospective basis and will not enforce any change due to economic nexus retroactively.

BUSINESS OUTLOOK

Many businesses are now questioning how to adhere properly to these changes. Businesses that sell into multiple states (by any means) should continue to track changing nexus laws and develop an internal plan to ensure compliance. This plan should include when to review sales to determine whether you have met a threshold for a state. The frequency of when a company should review their sales will depend on each state's specific threshold. If the threshold hinges upon a calendar year, then a business may develop a plan to review their sales as part of their year-end procedures. If the state's threshold adheres to a rolling 12-month period, then a business may develop a plan to review their sales on a more frequent basis than an annual basis.

While a business may meet the economic nexus threshold before meeting the physical presence standard in a state, businesses must still regularly review their business operations to ensure they have not established substantial physical presence in a state where they have not established economic nexus.

What a business must keep in mind is that once they meet the threshold for either physical presence or economic nexus or both, they should register and begin collecting and remitting the appropriate sales and use taxes in that state where the threshold was met.

UNDERSTANDING THE NEW REQUIREMENTS

Prior the decision for *South Dakota v. Wayfair,* many states started implementing some new economic nexus requirements. Likewise, other states had already implemented use tax reporting requirements. In these states, out-of-state retailers may register to collect and remit sales and use taxes. However, as an alternative to voluntarily registering in the state, the company would need to comply with use tax reporting. While it varies in each state, generally, a state will have four (4) requirements to comply with:

1. Display a statement on the website indicating use tax may be due;
2. Display a statement on the customer's invoice indicating use tax may be due;
3. At the end of the calendar year, send a statement to all customer's in the state listing their purchases for the year along with displaying a note use tax may be due; and

4. At the end of the calendar year, send a statement to the State listing all customer information including their personal information, items purchased, amounts, and dates.

As of July 28, 2018, the list referenced below indicates each state's current requirement regarding internet and/or out-of-state businesses.

State	Effective Date	Threshold	Details
Alabama	**October 1, 2018**	**$250,000 in gross sales**	
Colorado	**July 1, 2017**	**$100,000 gross sales**	**Use Tax Reporting Law Only To Date**
Connecticut	**December 1, 2018**	**$250,000 gross sales AND 200 transactions in current or prior period**	
Georgia	**January 1, 2019**	**$250,000 or 200 transactions in current or prior year**	
Hawaii	**July 1, 2018**	**$100,000 gross sales OR 200 transactions in current or prior period**	
Illinois	**October 1, 2018**	**$100,000 gross sales OR 200 transactions in current or prior period**	
Indiana	**October 1, 2018**	**$100,000 gross sales OR 200 transactions in current or prior period**	**Currently pending resolution of litigation**
Iowa	**January 1, 2019**	**$100,000 gross sales OR 200 transactions**	**Must have cookie nexus as well**

State	Effective Date	Threshold	Details
		in current or prior period	
Kentucky	July 1, 2018	$100,000 gross sales OR 200 transactions in current or prior period	
Louisiana	June 21, 2018	$100,000 gross sales OR 200 transactions in current or prior period	
Maine	October 1, 2017	$100,000 gross sales OR 200 transactions in current or prior period	
Massachusetts	October 1, 2017	$500,000 sales AND 100 transactions or instate software / cookies	Under litigation but still enforced
Minnesota	July 25, 2018	$100,000 AND 10 sales or 100 transactions	
Mississippi	December 1, 2017	$250,000 gross sales in the prior twelve months	
New Jersey	October 1, 2018	$100,000 gross sales OR 200 transactions in current or prior period	Legislation passed pending governor's signature
New Mexico	Unknown	Unknown	New Mexico has legislation and will evaluate August 6, 2018

State	Effective Date	Threshold	Details
North Dakota	October 1, 2018	$100,000 gross sales OR 200 transactions in current or prior period	
Ohio	January 1, 2018	$500,000 sales or instate software/cookies	Under litigation – enforcement stayed
Oklahoma	July 1, 2018	$10,000 gross sales in current or prior year or comply with notice and reporting rules	Economic nexus will follow use tax reporting laws effective 4/10/18; however, initial election not due until 7/1/18
Pennsylvania	April 1, 2018 TPP April 1, 2019 Digital Goods	$10,000 gross sales in current or prior year or comply with notice and reporting rules	Use Tax Reporting Laws only to date
Rhode Island	July 31, 2018	$100,000 gross sales OR 200 transactions in current or prior period	
South Carolina	Unknown	$100,000 gross sales OR 200 transactions in current or prior period	July 9, 2018, South Carolina issued a letter indicating they were drafting guidance
South Dakota	June 21, 2018	$100,000 gross sales OR 200 transactions in current or prior period	
Tennessee	July 1, 2017	$500,000 gross sales OR 200 transactions	Litigation pending – enforcement stayed

State	Effective Date	Threshold	Details
		in current or prior period	
Utah	**January 1, 2019**	**$100,000 gross sales OR 200 transactions in current or prior period**	**Legislation passed pending governor's signature**
Vermont	**July 1, 2018**	**$100,000 gross sales OR 200 transactions in current or prior period**	
Washington (Sales Tax)	**January 1, 2018**	**$10,000 gross sales in current or prior year or comply with notice and reporting rules**	**Use Tax Reporting Laws only to date**
Washington (B&O Tax)	**July 1, 2017**	**$285,000 gross sales**	
Wisconsin	**October 1, 2018**	**$100,000 gross sales OR 200 transactions in current or prior period**	
Wyoming	**July 1, 2017**	**$100,000 gross sales OR 200 transactions in current or prior period**	**Currently pending litigation**

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