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Sellers

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Michael T. Dillon • Jul. 31, 2018

In this three-part series, I will dive into what the U.S. Supreme Court’s decision to throw out the physical presence requirement for sales tax nexus is all about, offer advice to remote sellers, and break down the impact on those sellers and the particular states they do business in. [Read Part 2 — Read Part 3]

Here is part one discussing the U.S. Supreme Court’s decision and offering actionable advice for remote sellers.

[Free CPE Webcast: Implementing the Supreme Court's Sales Tax Decision in Wayfair

The Supreme Court held that *Quill Corp. v. North Dakota* and *National Bellas Hess Inc. v. Department of Revenue of Illinois* – which held that a state cannot require an out-of-state seller with no physical presence in the state to collect and remit sales taxes on goods the seller ships to consumers in the state – was overruled, upheld the South Dakota nexus threshold and remanded the case for further proceedings consistent, with removal of the physical presence nexus standard.

OVERVIEW

Physical Presence Gone – No New Standard: Calling the physical presence rule of *Quill* "unsound and incorrect," Justice Kennedy delivered the opinion for the 5 to 4 majority, in which Justices Thomas, Ginsburg, Alito and Gorsuch joined. While disposing of the physical presence rule, the Court chose not to establish a new standard, relying on the existing Commerce Clause doctrine to address taxpayer concerns regarding any undue burdens created by state tax laws. The Court also upheld South Dakota's law as constitutionally permissible under existing doctrine, though it admitted that only substantial nexus was at issue before them. The Court also did not address retroactivity issues, and acknowledged that South Dakota and other state nexus laws may contain defects that impose undue burdens on interstate commerce aside from the nexus threshold. The Court remanded the case for further proceedings consistent with the overturning of the physical presence standard.

What Now? As such, states may now require remote sellers with no physical presence in a state to collect sales tax on sales of taxable products and services delivered to customers in that state. This ruling does not just affect online retailers, but all sellers of taxable goods and services that make sales in a state in which they lack physical presence. However, as I explain in more detail below – in addition to South Dakota, Hawaii, Illinois, Indiana, Iowa, Kentucky, Louisiana, Maine, North Dakota and Rhode Island – Vermont and Wyoming adopted the South Dakota economic nexus law with a *de minimis* threshold of $100,000 in annual sales or 200 individual

enforced as is, or modified to reflect South Dakota-style provisions. As for the remaining 27 states that impose a state sales tax, they will have to determine whether their existing laws provide sufficient "economic nexus" basis through which to assert jurisdiction over remote sellers of taxable goods and services, whether they must amend their laws to adopt the South Dakota standard, or attempt an even lower threshold, perhaps with retroactive application.

What Should Remote Sellers Do? Rest assured that states – with or without changing their current nexus standards – will heighten enforcement and audit activity of remote sellers. Expect many states to send out mass mailings and bulletins advising remote sellers of their obligations to register and remit taxes in light of the *Wayfair* decision. This applies not only to internet retailers of products, but also remote sellers of services, such as software, information, data services and communications. It is incumbent on taxpayers to begin considering six points:

1. Historical sales by state.
2. Nexus-creating activities under existing state nexus provisions.
3. Registrations where they determine nexus exists or the risk of nexus is material.
4. Resolving any historical exposure proactively and anonymously through Voluntary Disclosure Agreements.
5. Implementing sales tax compliance software solutions and processes.
6. Implementing processes for tracking sales activity to determine when they exceed sales thresholds in states that adopt economic nexus standards.

State nexus provisions may create multistate sales tax compliance obligations for them now and potentially for prior periods, even before states begin to act.

What's Next: Part 2

As you can see in part one, the U.S. Supreme Court's decision in Wayfair is an

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Sales Tax