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OBSERVATIONS

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Supreme Court Ruling – Sales Tax

June 28, 2018

In a 5-4 vote and an opinion written by Justice Kennedy on June 21, 2018, the US Supreme Court decided *South Dakota v. Wayfair, Inc.* Basically, this opinion states that physical presence is not a necessary requirement in determining nexus rules (i.e. whether a business has a connection to a state). The Court overturned *Quill Corp. v. North Dakota, 504 U.S. 298 (1992)* which had set forth a constitutional requirement that a business have a physical presence in a state in order for a state to assess a sales tax. The Court ruled that *Quill* is “unsound and incorrect” and that “*stare decisis* can no longer support the Court’s prohibition of a valid exercise of the States’ sovereign power.”

The new ruling permits states to subject businesses which conduct sales online as remote sellers to collect sales taxes if the customer is a state resident. Currently, 46 of 51 jurisdictions assess a sales tax; some states, such as New York, have both a state and local sales tax. This opinion only addressed nexus for sales tax purposes, leaving open for now the issue for income tax purposes.

This opinion provides that states are not constitutionally barred from requiring companies not physically in a state, but which ship to a resident in a particular state, to collect sales and use tax. In *South Dakota v. Wayfair, Inc.*, the South Dakota legislature had enacted a law to require out of state sellers, with no South Dakota presence, to collect and remit sales tax. The threshold for an out of state seller was annual South Dakota sales of \$100,000 or 200 or more transactions. The Supreme Court decision paves the way for other states to enact similar laws. Although the Supreme Court acknowledged South Dakota’s *de minimus* requirement for applicability, the Court did not require such a requirement to pass constitutional muster (but the majority opinion stated that a *de minimus* argument could be made under other theories). On the other hand, the Court acknowledged that Congress could pass legislation to limit the imposition of state sales tax on interstate trade.

This ruling potentially imposes the burden of knowing and understanding state sales tax laws nationally and, to the extent that a state imposes a tax, the obligation of collecting and remitting the sales tax.

For business in the State of New Hampshire, which does not have a sales tax, this will probably force New Hampshire businesses to collect taxes for other states. The burden of this obligation could severely impact small businesses when implementing systems to comply. The majority opinion express faith that “...software that is available at a reasonable cost...” will become available. For now, online retailers face the prospect of complying with sales taxes in a multitude of jurisdictions.