

# **SOUTH DAKOTA V. WAYFAIR: HOW DOES IT IMPACT YOU?**

In June 2018, the U.S. Supreme Court in a 5-4 decision overturned two longstanding court rulings (*Quill Corp. v. North Dakota* [1992] and *National Belle Hess, Inc. v. Department of Revenue of Ill* [1967]) in which the court concluded that a "...business need not have a physical presence [nexus] in a state to satisfy the demand of due process." As a result, a business without a physical presence in a state that passes the state's economic threshold for revenue or number of transactions in that state can be legally obligated to collect and remit sales tax to that state.



**VS.**



## **Background**

South Dakota, like most other states, taxes the retail sales of goods and services in the state, and sellers are required to collect and remit the tax to the state. Up until the *Wayfair* decision, states could not require a seller that has no physical presence (nexus) in the state to collect sales tax. In-state consumers were responsible for paying a use tax generally at the same rate, a tax which is near impossible to enforce because of the infrequency and small charges of each individual purchase.

Therefore, the South Dakota legislature passed a law requiring out-of-state sellers to collect sales tax "as if the seller had a physical presence in the state" on sales exceeding \$100,000 or 200 sales transactions in a calendar year and sent out notices of lawsuit to sellers whom it felt met this threshold but were not collecting sales tax. Several sellers, including Wayfair, fought back through the courts, but the Supreme Court ultimately ruled in favor of South Dakota.

## **Decision**

The Supreme Court ruled that South Dakota, and other states, have the right to require tax collection from sellers with no physical presence in a state, if they meet specific economic thresholds. Some states now mirror South Dakota's transaction threshold of \$100,000 or 200 sales transactions in a calendar year, while other states transaction threshold varies from \$10,000 to \$500,000 in sales. Five states have no sales tax so they will have no transaction threshold.

## **California**

On Dec. 11, 2018, the California Department of Tax and Fee Administration (CDTFA) released Special Notice L-565 addressing remote sales tax collection requirements for out-of-state retailers because of the *Wayfair* decision. The Notice stated that beginning April 1, 2019, retailers located outside of California are required to register with the California Department of Tax and Fee Administration (CDTFA), collect the California use tax, and pay the tax to the CDTFA based on the amount of their sales into California, even if they do not have a physical presence in the state. It applies to a retailer if during the preceding or current calendar year:

- The retailer's sales into California exceed \$100,000, or
- The retailer made sales into California in two hundred (200) or more separate transactions.

On April 25 the California passed legislation (AB 147) which supersedes the December 11, Special Notice L-565. It changed the criteria for out-of-state with no presence in California and for in-state

retailers to \$500,000 per year in sales (note it dropped the \$100,000 and 200 transactions test and added the \$500,000 threshold for both remote sellers and in-state).

The remote seller who meets the new threshold still has to register with CDTFA and collect and remit use tax, including district tax, on all sales into the state.

## How Does This Impact You?

Let's assume your company has a physical presence in California and sells to customers in the state.

Annual sales under \$500,000. If your sales are under \$500,000, and you sell and deliver printed material to a client in a city or county in which you have no physical presence, you don't have to collect tax on sales into that city or county, although it may be wiser to collect and remit tax as you have in the past just to cover yourself.

Annual sales over \$500,000. If your sales are over \$500,000, and you make a taxable sale of printed material to a client in California, you now are required to tax the sale at the rate of that city or county regardless of whether you have physical presence in that city or county—That is, you must collect the state rate of 7.25% plus any additional district tax for that city or county.

### Recommendations:

#### Sales over the Internet to Other States

- If you have no physical presence in a state in which you sell/ship products or services to customers, then you have to determine the sales by dollar amount and number of transaction you in the calendar year.
- Once you determine that you have to collect and remit tax to a state, you need to register with the state and implement a system on how to track transaction.
- There are resources that will help you understand *Wayfair* in greater detail and identify the economic nexus law for different states if they currently have one. See, for example,
- Sales Tax Institute: <https://bit.ly/2Jqvnnj>
- Taxjar: <https://bit.ly/2uq03h2>

#### Sales to California Clients

- For California-based companies that have annual sales under \$500,000, you don't have to collect sales tax for shipments into California cities and counties.
- For California-based companies that have annual sales over \$500,000, you now have to collect and remit tax on shipments into California cities and counties, at the tax rate of those cities and counties.