

WAYFAIR PAVES THE WAY TO CHANGE - AND CONFUSION

Date: 27 June 2018

U.S. Tax Alert

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In a 5-4 decision in *South Dakota v. Wayfair, Inc.*, the Supreme Court overturned its decades-old holding that a company without a physical presence in a state is not subject to the state's taxing authority. According to the *Wayfair* decision, merely having a certain minimum threshold level of economic activity in a state may be sufficient to establish substantial nexus under the Commerce Clause of the U.S. Constitution.

WHAT THE CASE SAID:

Wayfair addressed South Dakota legislation that imposes sales and use tax requirements on businesses that deliver more than \$100,000 of goods or services into the state or engage in at least 200 transactions for delivery of goods or services into the state. For years, the Supreme Court's decision in *Quill Corp. v. North Dakota* had prohibited states from imposing such collection requirements on retailers that lacked a physical presence in the state. The *Wayfair* opinion, however, held that the South Dakota legislation does not violate the Commerce Clause substantial nexus requirement. The Court explicitly overruled *Quill*'s physical presence standard in favor of a "case-by-case analysis of purposes and effects."

WHAT IT MEANS:

The *Wayfair* decision represents a sea change that creates more questions than answers. For example, what amount of economic activity in a state is sufficient to give rise to substantial nexus? What kinds of activities directed toward a state can give rise to substantial nexus? Will states attempt to apply the *Wayfair* decision retroactively? Do laws like South Dakota's comply with other Commerce Clause requirements? Will online retailers and remote sellers — and/or states — push for uniform tax administration among the states (such as broader conformity with the Streamlined Sales and Use Tax Agreement)?

IMPACT ON FOREIGN ENTITIES?

Treaties that may provide favorable U.S. federal income tax treatment for non-U.S. companies may not protect against state tax obligations. *Wayfair* raises additional questions for non-U.S. retailers. Does the decision apply equally to non-U.S. companies making sales into U.S. states? How does the Court's new substantial nexus analysis interact with the Foreign Commerce Clause and the Import-Export Clause?

EXPANDING STATE TAXATION?

Even before *Wayfair*, many states had attempted to expand the reach of not only sales and use taxes but also income and other taxes. Both U.S. and non-U.S. multistate sellers of goods or services should closely monitor

states' reactions to *Wayfair*, including the South Dakota courts' resolution of any outstanding constitutional challenges. Some states have already enacted laws similar to South Dakota's. Others are considering legislation, and some states may attempt to expand tax obligations by regulation and/or interpretation. Many states may move aggressively to collect additional tax revenue by seeking to impose — perhaps retroactively — sales and use tax collection requirements on out-of-state retailers based on in-state activities other than sales. Stay tuned for the fights that these efforts will surely trigger.

WHAT'S NEXT?

Change — and lots of it. Businesses should consult with their tax advisers, including for updates about how various states plan to take advantage of the Court's decision. Companies should also watch for — and respond carefully to — correspondence or other inquiries from states and should monitor their own economic presence and activities in all states in which they are not currently collecting and remitting sales and use taxes.

[1] No. 17-494, 2018 WL 3058015 (U.S. June 21, 2018).

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

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