

## Alert | State & Local Tax



September 2017

### **South Dakota Supreme Court Holds Economic Nexus Is Unconstitutional For Sales and Use Tax Purposes**

On Sept. 13, 2017, the South Dakota Supreme Court affirmed the trial court's decision that South Dakota's imposition of a sales and use tax collection requirement on certain out of state retailers without a physical presence in South Dakota is unconstitutional under the Commerce Clause of the U.S. Constitution based on *Quill v. North Dakota*, 504 U.S. 298 (1992). See *South Dakota v. Wayfair, et al.*, 2017 S.D. 56 (S.D. 2017). South Dakota is expected to file a petition for writ of certiorari requesting that the U.S. Supreme Court exercise its discretion to review the South Dakota Supreme Court's decision and to revisit the physical presence standard outlined in *Quill*.

On March 22, 2016, the South Dakota Legislature enacted S.B. 106, effective May 1, 2016, which imposed a sales and use tax collection requirement on out of state retailers exceeding an annual sales threshold of \$100,000 or 200 separate transactions in South Dakota. Under the procedures provided in the legislation, South Dakota filed a declaratory judgement action seeking a determination that it may require out of state retailers without a physical presence in South Dakota to collect and remit sales and use tax.

On March 6, 2017, the South Dakota Sixth Judicial Circuit granted the remote sellers' motion for summary judgment on the basis that the state was prohibited from imposing a sales and use tax collection requirement on remote sellers without a physical presence within the state under *Quill*. South Dakota appealed the decision to the South Dakota Supreme Court, which affirmed the trial court's decision. The state is expected to seek U.S. Supreme Court review of the physical presence standard by the Dec. 12, 2017, deadline (plus potential extension of time to file).

Several other states, including Alabama, Indiana, Maine, Massachusetts (under a slightly different theory), Tennessee, Vermont, and Wyoming, have adopted similar economic nexus provisions for sales and use tax purposes, and these provisions currently are also in the process of being challenged. Some states have also adopted information reporting requirements which provide that out of state sellers must inform the state and/or customers about the customers' taxable purchases. Taxpayers should continue to monitor developments regarding the progress of these cases, as well as the adoption of economic nexus provisions information reporting requirements in other states.

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