

Alert | State & Local Tax/Retail



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Imposing a Tax Collection Obligation on Internet Sellers--*South Dakota v. Wayfair*

This week the [U.S. Supreme Court heard oral arguments for *South Dakota v. Wayfair*](#), regarding whether physical presence is required within a state for sales and use tax purposes, specifically addressing internet sellers. The case is challenging the Court's 1992 decision in *Quill v. North Dakota*, 504 US 298, which upheld a decision from 1967 (*National Bellas Hess v. Illinois*, 386 US 753) and requires physical presence within a state in order to impose an obligation to collect sales and use tax on a vendor.

In *Quill*, the Court said that the judicial principle of *stare decisis* ("let the decision stand") applied in this instance since the mail order business in question had grown in reliance on the physical presence test and noted that Congress is the appropriate branch to deal with issues raised by the Commerce Clause of the U.S. Constitution.

Now, 26 years after *Quill*, the continued and ever-increasing growth of internet sales claimed detriment to bricks and mortar local retailers have led states to enact laws trying to limit or work around the physical presence requirement. One such effort was taken in Colorado where the legislature imposed an information reporting requirement on vendors selling into the state. In 2015, this law was reviewed by the U.S. Supreme Court in *Direct Marketing v. Brohl*. In that case, Justice Kennedy raised the question of whether *Quill* needed to be reconsidered and South Dakota took the hint.

The law enacted in South Dakota sought to impose the sales and use tax collection obligation based on a theory of “economic nexus” and set a threshold of \$100,000 worth of sales or 200 individual sales delivered in the State would cause a vendor with no physical presence in South Dakota to be obliged to collect tax. The law provided that it would only be effective if the U.S. Supreme Court revised the rule in *Quill* and set up the procedural path to get to the Supreme Court.

On April 17, 2018, the Court heard [oral arguments](#) in *Wayfair*. As with any oral argument, it is difficult to predict the outcome based on the questions from the bench, but what is clear is that the Court is not unified; a clear majority does not appear to be present on either side of the issue and a lot of questions were raised by the Justices about what it could and should do.

From a review of [the transcript](#), it seems that several Justices had serious concerns about what overruling *Quill* would mean in terms of upsetting current expectations and leading to confusion and interminable litigation as states enact laws on threshold amounts to establish nexus (if any) and retroactivity. The U.S. Solicitor General’s representative, answering a question about minimum contacts, said that if the Court overturns *Quill*, one in-state sale by an internet seller would be sufficient nexus for imposing the sales & use tax collection liability; he also stated that if the Court overrules *Quill*, current Supreme Court jurisprudence would require the decision to be retroactive rather than prospective in application.

There was also a discussion of retroactivity—the South Dakota statute states that the collection responsibility will be imposed if and when the Supreme Court overturns *Quill*—other states have not been as clear (Connecticut is attempting to impose its tax on internet sellers now). There were also questions about whether Congress would act and differing interpretations of its failure to act since *Quill* was decided in 1992—one side saying Congress’ inaction shows acceptance of *Quill*’s physical presence standard and others saying Congressional inaction is not meaningful. It appeared that all of the Justices agreed that Congress could more easily fashion a workable rule and make such a rule prospective (three senators and the chair of the House Judiciary Committee submitted a brief stating Congress was about to act but held off once this case was added to the calendar).

Ultimately, even if *Quill* is reversed in some manner, whether the Court will set a standard for establishing nexus (either a dollar threshold or number of transactions) or let each state enact their own laws and await further litigation will be of great importance to retailers across the country. A decision in this case should be issued before the close of the Court’s term on June 30.

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