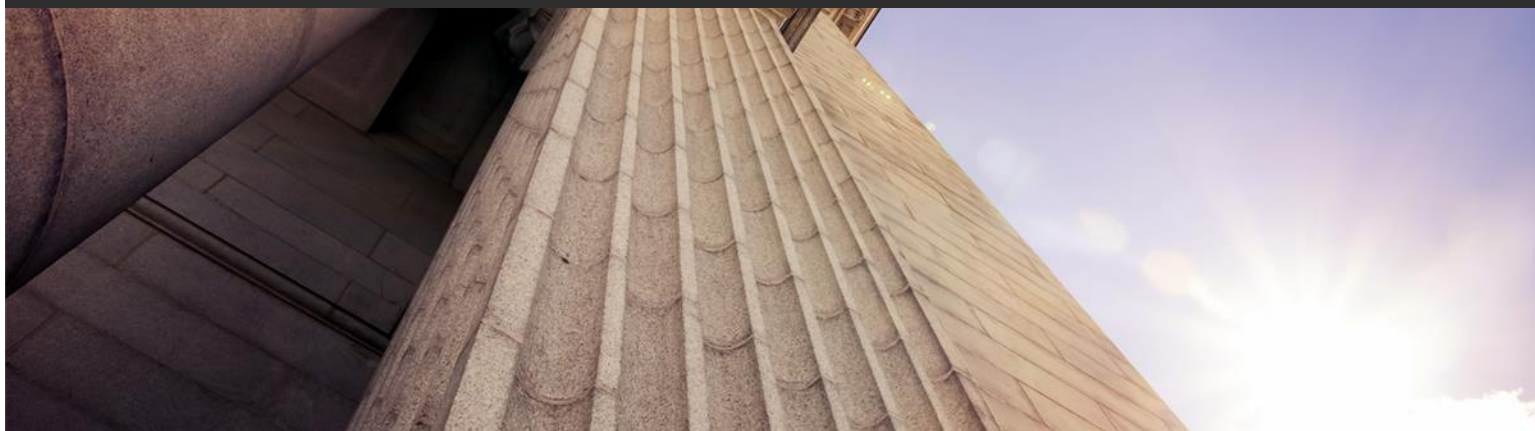


Alert | State & Local Tax/Retail



June 2018

***South Dakota v. Wayfair*: Supreme Court Holds No Physical Presence Required for Online Retailer to be Required to Collect Sales Tax**

On June 21, 2018, the U.S. Supreme Court in *South Dakota v. Wayfair, Inc., et al.*, decided (5-4 although not the usual liberal/conservative split) that an online retailer does not have to maintain a physical presence in a state in order to be required to collect the state's sales and use tax. This opinion overturns the pre-internet era 1992 precedent of *Quill v. North Dakota*, finding that *Quill* was erroneously decided. This decision says that the doctrine of stare decisis cannot support upholding *Quill*, and that the internet revolution made the Court's erroneous holding in *Quill* "all the more egregious and harmful." The opinion says that a taxpayer cannot rely on stare decisis where the purpose is tax avoidance. Although the Court did not address whether this decision is retroactive, because the South Dakota law at issue is not retroactive, it did not limit its holding prospectively.

This decision will likely be a legal tsunami for the online retail industry. States which have already adopted legislation similar to the South Dakota bill will now be pursuing online vendors for taxes. States which have enacted nexus rules based on the presence of cookies on a customer's computer (including Massachusetts) might likewise move into enforcement mode since the Court stated that it "should not maintain a rule that ignores these substantial virtual connections to the State." States which have not yet enacted legislation to require companies to collect tax even without a physical presence in the state may scramble to do so, and it is possible that many states will make this change through administrative action.

In the meantime, online retailers will need to quickly adjust to the new tax landscape and begin collecting taxes in the states which have enacted rules to require collection. It is possible that Congress may act to blunt the impact of this case by enacting legislation to regulate what states can and cannot do regarding tax requirements. Legislation to require tax collection has languished in Congress for many years, but today's decision could be the impetus for Congress to act; and it may also be an impetus for online retailers to push for some uniformity and simplification of the sales tax rules.

Ultimately, the Court remanded the case to the South Dakota Supreme Court on the question of “whether some other principle in the Court’s Commerce Clause doctrine might invalidate the Act” and commented on what it saw as the good parts of the South Dakota law—it is not retroactive, it imposes the collection requirement on a merchant “only if it does a considerable amount of business in the State” (\$100,000 in sales into the state or 200 transactions) and that South Dakota is a member of the Streamlined Sales & Use Tax Agreement which requires some uniformity in rules and administration (along with 20 other states). Although it is unlikely the South Dakota Supreme Court will find anything that violates some other principle of Commerce Clause doctrine—it does give time before that court can issue a decision—or for Congress to act.

While GT will be monitoring the legislative and administrative reactions of the states as well as any federal legislation, businesses must plan for the inevitable onslaught of proposals and enactments requiring filing returns and collecting tax in multiple jurisdictions.

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