

**WHAT *WAYFAIR* MEANS FOR YOU:
THE CHANGING SALES TAX LANDSCAPE**

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September 7, 2018

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This is not intended to be legal advice and should not be relied upon. This is intended only as a general summary and not as specific tax advice that may be relied upon for any particular circumstances. For advice, please consult with your tax advisor.

Nexus

- ❖ Nexus: Generally, the threshold of contact that must exist between a taxpayer and a state before the state has jurisdiction to tax the taxpayer.
 - Due Process Clause: Minimum connection between a state and the person, property or transaction it seeks to tax.
 - Commerce Clause: Requires “substantial nexus” between the taxed activity and the taxing state.

Nexus: Physical Presence

- ❖ *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967)
 - Sellers that solicited sales by mail and then delivered goods in a state would be unduly burdened by having to collect sales tax for that state.
 - Mail and common carrier deliveries are not sufficient connections with a state to justify the state imposing a sales tax collection requirement on a business.
 - A business must have a physical presence in a state to have nexus for sales tax purposes.

- ❖ *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992)
 - The Supreme Court expressly declined to overrule the bright-line test established in *National Bellas Hess*.
 - “[T]he continuing value of a black line rule in this area and the doctrine and principles of stare decisis indicate that the *National Bellas Hess* rule remains good law.”

Pre-Wayfair: States react to *Quill*

- ❖ “Cookie” Nexus
- ❖ “Click Through” Nexus
- ❖ Notice and Reporting Requirements
- ❖ Economic Nexus

South Dakota Senate Bill 106

- ❖ Effective May 1, 2016
- ❖ Economic nexus law that requires an out-of-state seller to collect and remit South Dakota sales and use tax if the Seller:
 - Has gross revenue from sales in South Dakota exceeding \$100,000; or
 - Engages in 200 or more separate transactions within the state.

South Dakota Senate Bill 106

- ❖ Aimed at bringing the principles of *Quill* and *Bellas Hess* before the Supreme Court.
- ❖ “Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law.” S.B. 106, Section 8(8).

South Dakota Senate Bill 106

- ❖ S.B. 106 contained a provision allowing a fast track appeals process.
- ❖ Circuit Court entered summary judgment for Wayfair.
- ❖ Upon direct appeal to the South Dakota Supreme Court, S.B. 106 was held unconstitutional.
- ❖ U.S. Supreme Court accepted review on January 12, 2018 and heard oral arguments in April 2018.

South Dakota v. Wayfair

- ❖ U.S. Supreme Court decided *South Dakota v. Wayfair Inc.*, 138 S.Ct. 2080 (2018) on June 21, 2018.
- ❖ 5-4 Decision
- ❖ Narrow decision:
 - *Quill* and *Bellas Hess* overruled
 - Physical presence test is incorrect
 - Did not declare South Dakota's law valid

South Dakota v. Wayfair: Opinion

- ❖ Delivering the opinion, Justice Kennedy concluded:
 - *Quill*'s physical presence requirement was “unsound and incorrect” and “flawed on its own terms.”
 - “Rejecting the physical presence rule is necessary to ensure that artificial competitive advantages are not created by this Court's precedents” since “[m]odern e-commerce does not align analytically with a test that relies on the sort of physical presence defined in *Quill*.”

South Dakota v. Wayfair: Factors

- ❖ Remote sellers have a competitive advantage
- ❖ Consumers have low rate of compliance with use tax laws
- ❖ Disincentive for businesses to have a physical presence in multiple states
- ❖ Present realities of the interstate marketplace

South Dakota v. Wayfair: S.B. 106

- ❖ Justice Kennedy did suggest S.B. 106 would be upheld because of three specific aspects of the law:
 - A “reasonable degree of protection” is afforded to small sellers due to its numeric thresholds (> \$100,000 in sales or 200+ transactions);
 - Law prohibits retroactive collection; and
 - South Dakota is part of the Streamlined Sales and Use Tax Agreement (SSUTA).

South Dakota v. Wayfair: Dissent

- ❖ Author: Chief Justice Roberts
- ❖ Doctrine of *stare decisis*
- ❖ Costs of decision
- ❖ Burden will fall disproportionately on small business
- ❖ Incorrect branch of government

Post-*Wayfair*: S.B. 106

- ❖ U.S. Supreme Court remanded the case back to the Supreme Court of South Dakota
- ❖ Supreme Court of South Dakota reversed *Wayfair*'s motion for summary judgment, and remanded the case back to the Circuit Court
- ❖ Circuit Court
 - Will decide whether to dissolve the injunction and/or conduct further proceedings
- ❖ Settlement?

Post-Wayfair: Congressional Action

❖ Pending Congressional Bills

- Remote Transactions Parity Act of 2017 (H.R. 2193) (RTPA)
- Marketplace Fairness Act of 2017 (S.976) (MFA)
- No Regulation Without Representation Act of 2017 (H.R. 2017) (NRAA)
- Stop Taxing Our Potential (STOP) Act (S. 3180)

Post-Wayfair: State Action

- ❖ 26 states, including South Dakota, have dollar and/or transaction economic sales tax nexus laws pending or enacted
 - AL, CT, HI, IA, IL, IN, KY, LA, MA, MD, ME, MI, MN, MS, NC, ND, NJ, NY, OH, SC, SD, TN, UT, VT, WA, WY
- ❖ 4 states have elective regimes where remote sellers choose to either collect and remit sales tax or satisfy reporting and notification requirements
 - GA, OK, PA, RI
- ❖ Wisconsin has stated that it will release guidance on its economic nexus threshold
- ❖ 19 states and the District of Columbia have no dollar or transaction economic nexus threshold
 - AK, AR, AZ, CA, CO, DC, DE, FL, ID, KS, MO, MT, NE, NH, NM, NV, OR, TX, VA, WV

Questions after *Wayfair*

- ❖ Will a state's sales tax nexus be enforceable?
- ❖ When do retailers have to start collecting sales tax?
- ❖ How long will retailers have to collect sales tax in a jurisdiction once it meets the threshold?
- ❖ What happens if a state does not provide software?

Impact of *Wayfair*: Next Steps

- ❖ Analyze sales footprint by conducting nexus studies
- ❖ Analyze economic nexus requirements in the states where footprint exists
- ❖ Determine types of products (or services) being sold into the states
- ❖ Put in place procedures for collecting resale or exemption certificates
- ❖ Monitor the laws of the states
- ❖ Be prepared to register and file in new states

Impact of *Wayfair*: M&A

❖ Due Diligence

- Greater scrutiny of sales tax during due diligence phase
- Determine target's compliance and analyze exposure

❖ Tax Representations

- Stronger representations regarding sales tax

❖ Tax Covenants

- Ensure transaction documents properly allocate sales tax responsibilities between the parties

Impact of *Wayfair*: M&A

- ❖ Indemnities
 - Allocate sales tax risks between the parties
- ❖ Document Retention
 - Resale and exemption certificates
- ❖ Tax Clearance Letters
 - Stronger emphasis on obtaining tax clearance letters to reduce the risk of successor liability
- ❖ Responsible party liabilities

Questions?