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“Does the United States now have a VAT?” and other frequently asked questions about *South Dakota v. Wayfair, et al.*

By **Kenneth Silverberg**

Many of our clients and friends have asked questions about how their businesses will be affected by the *Wayfair* decision, which was issued by the U.S. Supreme Court on June 21, 2018. This FAQ document attempts to answer those questions of which we are currently aware, and it will be updated as we learn more.

The FAQ in this document are organized under the following headings.

- I. GENERAL QUESTIONS**
- II. IMPACT ON BUSINESSES ENGAGED IN REMOTE SELLING**
- III. ENFORCEMENT ISSUES**
- IV. RESOURCES FOR COMPLIANCE**

If you would like to be notified whenever these FAQ are expanded or modified, please provide us with your contact information [here](#).

I. GENERAL QUESTIONS

A. What did the Supreme Court decision do?

By a 5–4 majority, the Court explicitly overruled its 1967 *National Bellas Hess* decision and its 1992 *Quill* decision. The majority stated the Court was wrong in 1992 when it held in *Quill* that the Commerce Clause of the U.S. Constitution prevented imposing a duty to collect and remit sales taxes on a business that lacked substantial physical presence in-state.

This had the immediate effect of reversing the decision of the South Dakota Supreme Court, which struck down as unconstitutional S.B. 106, the remote seller bill enacted by the South Dakota legislature in 2016. The remote seller bill **was not unconstitutional**, so the three cases in dispute were remanded to South Dakota, where enforcement now may continue. The three companies

whose cases were decided are Wayfair, Inc.; Overstock.com, Inc.; and Newegg, Inc., all major national retailers.

South Dakota's 2016 remote seller bill had been custom-drafted for this challenge of the physical presence rule, and it moved through the courts quickly on the basis of declaratory judgment and summary judgment, so this precise question could be isolated. Presumably, the South Dakota Department of Taxation will now proceed to audit and assess those three companies for the failure to collect and remit sales tax on sales to customers in South Dakota.

B. Who is now required to collect and remit South Dakota sales taxes?

S.B. 106 imposes a sales tax collection duty "as if the seller had a physical presence in the state" on any business selling tangible personal property, products that are electronically delivered or services delivered into South Dakota, and who, for either the previous or the current calendar year:

1. has sales revenue exceeding \$100,000 or
2. has 200 or more separate transactions.

The law says the duty to collect the tax will not be applied retroactively. However, there would appear to be no reason why the Department of Revenue could not immediately impose the duty to collect and remit sales tax on a vendor who satisfied the minimums during 2017 or on a year-to-date basis in 2018.

C. Does the *Wayfair* decision change the law anywhere else other than South Dakota?

No. It merely removes one impediment that has prevented states from imposing on remote sellers the duty to collect and remit sales taxes.

U.S. sales taxes are only imposed by states or localities such as cities or counties. Not every state has a sales tax, but in total there are more than 10,000 separate government jurisdictions that do impose sales taxes.

These 10,000 laws are not uniform. Goods and services are defined differently, tax rates and collection procedures vary and state and local laws are constantly changing. Twenty-plus states have adopted a "Streamlined Sales and Use Tax Agreement," in an effort to standardize definitions and procedures, but there is still very little that is uniform.

Merely by way of illustration, on June 14, 2018, the governor of Connecticut signed new legislation that was intended to take advantage of the expected *Wayfair* decision. Its new S.417 takes effect on December 1, 2018, and will require out-of-state retailers to collect Connecticut sales tax if they have at least \$250,000 of gross receipts or 200 or more retail sales made from outside Connecticut to destinations within the state during the 12-month period ended on the September 30 immediately preceding the monthly or quarterly period with respect to which liability for tax is determined.

Thus, the same number of transactions or the same dollar value of transactions in South Dakota and Connecticut might give rise to a duty to collect South Dakota's sales tax but not Connecticut's.

II. IMPACT ON BUSINESSES ENGAGED IN REMOTE SELLING

A. Does the U.S. now have a VAT and must I collect it on sales to all U.S. customers?

No. VAT or GST are national tax regimes used in much of the world but not in the United States. There are many other differences between sales/use tax and VAT/GST. Of critical importance is the fact that U.S. sales tax collection duties are imposed by state or local law and enforced by state or local tax authorities. Since there is no national sales tax in the U.S., the Internal Revenue Service and the U.S. Treasury Department play no role in administering or enforcing sales tax collection duties.

B. Do remote sellers now have a duty to collect and remit sales tax in every state?

No. This question is answered by state and local law, not federal law. As noted in FAQ #I.C. above, the same level of business might obligate a business to collect the tax for one state but not for others.

C. Did the Wayfair decision change any of the rules by which remote sellers are subject to state income tax?

No. It is generally agreed that the “substantial physical presence” standard of the *Quill* case only applied to sales tax collection obligations.

Congress has spoken on the question of a *de minimis* rule for state income tax nexus. P.L. 86-272¹ provides that a business may not be subjected to a state’s net income tax if its in-state activities are limited to soliciting orders for the sale of tangible personal property that is shipped to customers from out-of-state, and those orders must be approved out-of-state. Like the *Quill* standard, many critics believe P.L. 86-272 is an anachronism that fails to deal in a meaningful way with the realities of 21st century commercial transactions.

III. ENFORCEMENT ISSUES

A. What are the pros and cons of voluntarily complying?

Some of our clients have expressed the opinion that they really want to comply with their sales tax collection duties. They believe that sales taxes are not really a tax on their business, and they only become a cost factor if the business makes a mistake and neglects its duty to collect. Other clients have noted the complexity of complying with many state and local laws as a significant additional cost of doing business.

It’s important to note that the cost of an assessment for the failure to collect sales tax might have a disproportionate impact on the bottom line of the business. Many businesses work on tight profit margins on net sales. Such businesses can ill afford a sales tax assessment from a state in which it earns a significant portion of its sales volume, since the sales tax rate may be higher than the typical profit margin.

For some businesses, the most important consideration is what their competitors are doing about sales tax. No one wants to lose sales to a competitor because of different sales tax collection policies.

B. How can South Dakota or any other state find remote vendors and make assessments?

¹ Interstate Income Act of 1959, codified as 15 U.S.C. §§ 381-384.

It is obviously very difficult for a state or locality to enforce the duty to collect and remit sales taxes. For large and prominent national retailers like Wayfair.com, Overstock.com and Newegg.com, state tax auditors might now find it productive simply to make direct contacts and issue administrative summonses for sales and sales tax collection records. But for smaller, regional or specialty businesses, it is much less likely that there will be direct contact from a state in which there is no physical presence.

We do expect to see an increase in whistleblower activity targeting remote sellers who fail to collect and remit sales taxes. In some cases, the whistleblowers might be competitors who will be trying to level the playing field by ensuring that no competitor has an unfair pricing advantage due to avoiding its sales tax duty.

C. What are the chances I will get caught if I do not comply?

We do not advise clients on this question. However, we do represent businesses that for one reason or another failed to comply with their duty to collect and remit sales taxes. There are often mitigating factors that can reduce the financial consequences, if those factors are properly argued to an administrative or judicial tribunal.

IV. RESOURCES FOR COMPLIANCE

A. South Dakota Department of Revenue

The Department has a website with additional information on compliance with S.B. 106. The link is [here](#). The Department will require a new registrant to complete a business tax license application, which can be found [here](#).

B. Streamlined Sales Tax (“SST”) Governing Board

Currently it is possible for a business to come into compliance with its collection duties in 24 states by registration and filing through the states that participate in this activity. This generally is a more efficient way to comply, to take advantage of the available amnesty programs and to benefit from software that has been paid for by the states and is made available to registered businesses at no cost. The SST operation also maintains arrangements with seven commercial service-providers who will help large businesses comply through automation.

It is likely that the *Wayfair* decision will motivate additional states to join this voluntary coalition of state revenue agencies. Information is available [here](#).

C. Other commercial service providers

There is an entire industry of service providers that will help businesses come into compliance with their sales tax collection duties. These include most accounting firms and a number of specialized consulting firms such as Avalara, Inc.; Rand Group; and Vertex, Inc.²

² Nixon Peabody does not endorse any service provider firms, nor does it have preferential arrangements or any economic interest in such firms. These three firm names are provided merely to illustrate the existence of a sub-industry of consultants who provide this service.

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