



What's Next After the Death of Physical Presence?

July 10, 2018

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Overview

1. How did we get here?
2. What's with *Wayfair*?
3. State Response to *Wayfair*
4. Next Steps After *Wayfair*
5. Louisiana Special Session Recap

How Did We Get Here?

History of Physical Presence

- *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967)
 - Bellas Hess was a mail order business that did not have any presence in Illinois
 - Advertised nationwide by twice yearly distribution of catalogs
 - Ultimately held that physical presence was required for nexus under both the Due Process and Commerce Clause

History of Physical Presence

- *Quill Corporation v. North Dakota*, 504 U.S. 298(1992)
 - Quill, like Bellas Hess, was a mail order business that did not have any presence in North Dakota
 - Advertised nationwide via catalogs, national advertisements, and telephone calls
 - Ultimately held that while physical presence is not required for nexus under the Due Process Clause, physical presence is still required for substantial nexus under the Commerce Clause

Recent Nexus Developments

- Continued legislative erosion of physical presence
 - Affiliate nexus
 - Click-through nexus
 - Promulgation of economic nexus rules, despite existence of *Quill*
 - Notice and reporting requirements
- Previous judicial attempts at overruling *Quill*
 - *Direct Marketing Association v. Brohl*, 135 S.Ct. 1124 (2015)

What's with Wayfair?

What's With Wayfair? – Background Information

- South Dakota's Law:
 - A remote seller will have nexus if:
 - Gross revenue from sales in South Dakota exceeds \$100,000; or,
 - Makes 200 separate sale transactions into the state
- Procedural History
 - South Dakota passed this law in 2016
 - They immediately brought a declaratory judgment action to begin litigation over the constitutionality of the law
 - Ultimately, the South Dakota Supreme Court invalidated the law, invoking *Quill's* physical presence test
 - South Dakota appealed to the U.S. Supreme Court

What's With Wayfair? – Supreme Court Opinion

- 5-4 opinion overturning *Quill*'s physical presence test
- Majority opinion stated that *Quill* was “flawed on its own terms”
- Physical presence test “creates rather than resolves market distortions”
 - Likened *Quill* to a judicially created tax shelter
 - Indicated that *Quill* actually but in-state businesses at a “competitive disadvantage” to remote sellers
- Improper to ask Congress to act to correct “a false constitutional premise” the Court created

What's With Wayfair? – Supreme Court Opinion

- Opinion solely focused on overturning *Quill*
- Supreme Court left open the idea that similar laws may not fair as well as South Dakota's
- Supreme Court focused on following fairness factors, indicating that South Dakota's law should pass other constitutional attacks:
 - South Dakota's membership in the Streamlined Sales and Use Tax Agreement
 - Lack of retroactivity
 - Requiring collection only if the retailer "does a considerable amount of business in the state"

State Response to Wayfair

State Response to Wayfair

- The decision in *Wayfair* does **not** automatically turn on collection in all states
- Approximately ½ of the states have enacted laws that are contingent on the outcome in *Wayfair*
- Effective dates will vary
- Other items to consider:
 - Whether sales thresholds are on a calendar year/rolling basis
 - Whether sales thresholds apply to all sales or just taxable sales
 - Whether sales thresholds apply to gross receipts or some other tax base amount

State Response to Wayfair – Specific Examples

- 24 states currently have economic nexus statutes
 - HI, KY, MA, OK, PA, RI and VT: Currently effective
- Hawaii – Passed in 2018, effective 7/1/18
 - \$100,000 or 200 transactions
 - TPP, services, intangible property sold in state
 - Previous or current calendar year sales
 - Prospective application
 - Not SSUTA member
 - Business Privilege Tax (Gross receipts) – most services taxable

State Response to Wayfair – Specific Examples

- Vermont – Economic nexus law effective 7/1/18
 - \$100,000 or 200 transactions
 - TPP only
 - Previous 12 months (rolling)
 - Prospective application only
 - SSUTA Member

State Response to Wayfair – Specific Examples

- 21 states do not currently have economic nexus statutes.
- Many states are making plans to enact economic nexus statutes/rules:
 - Texas – Recently released press release indicates they are investigating rules that need to be updated and expect amended rules in place by early 2019
 - Wisconsin – Recently released press release says they will enact rules similar to South Dakota law and expect they will be ready for enforcement by 10/1/18

State Response to Wayfair – Specific Examples

- Louisiana Act 5 2018 Second Special Session enacted economic nexus law.
 - Designated the Louisiana Sales and Use Tax Commission for Remote Sellers as the entity to create a simplified system for collection from remote sellers subject to LA sales tax collection
 - Held Initial meeting on 6/29, second meeting is 7/11
 - 4 Department of Revenue members and 4 local collector members
 - Duties: Create uniform base, create and utilize software similar to SSUTA states, utilize one monthly report with information for distribution of appropriate tax to local jurisdictions; creation of single statewide audits.
 - January 1, 2019? – Target date

State Response to Wayfair – Other Considerations

- Exempt Sales
- Potential Income Tax Ramifications
 - Factor presence nexus
 - Decreasing thresholds
- Increased Audit Activity / Nexus Questionnaires

Next Steps After Wayfair

Next Steps After Wayfair

- Review current nexus footprint
 - Existing obligations will not go away—increased audit and nexus questionnaire activity may uncover these
 - Determine liabilities and assess risk
 - Consider VDA programs, as appropriate
- Review post-*Wayfair* Nexus
 - Assess new filing obligations
 - Consider registration where applicable

Next Steps After Wayfair

- Review product taxability in states with nexus
 - Is product TPP, a service, a bundled transaction?
 - Make taxability determinations by state
 - Consider exemption certificate status where applicable and request from customers
- Consider existing technology and potential needs
 - What do you have?
 - Can it handle the increased requirements?
 - Consider tax decisions for sales, tracking sales by state, increased compliance.
 - Do I need new or additional software?

Next Steps After Wayfair

- Multi-State registration and compliance
 - Complete state registrations where applicable
 - Develop sales tax calendar to track return due dates
- Monitor sales tax updates
 - Verify state by state sales on monthly basis for potential new registrations required
 - Follow updates regarding state law effective dates, threshold changes and taxability of products being sold

Next Steps After Wayfair

- Prepare for increased audit and nexus questionnaire activity
 - Make necessary personnel aware of new criteria and the need to be on the lookout for activity from new states
 - Determine who will handle nexus questionnaires and ensure that entire tax team knows who the point of contact will be

Louisiana Legislative Update

Regular Session: Act 687

- Louisiana Student Tuition Assistance and Revenue Trust Kindergarten through Twelve Program (START K12)
- Contributions not currently deductible for LA income tax purposes, but growth is tax free.
- State deduction may come in 2019 Legislative session, when taxes can be legislated.
- Limited to \$10,000 in expenses per year per beneficiary.

Special Session: Act 1

- Clean penny” reduced to .45% from 1% and extended to June 30, 2025.
- Full state sales tax rate now 4.45%
- Continued suspension of various exemptions through June 30, 2025.
- State is down to only three tax rates, 4.45%, 0% and 2% (business utilities only).

Special Session: Act 1

- Decreased sales tax rate of the following notable items:
 - MM&E, purchase of property for lease, rebates on new cars, repairs in LA when returned out-of-state, repairs of parts returned to drilling rigs offshore, other constructions permanently attached to the ground.
 - All of these items will now be completely exempt from state sales tax.
 - Business Utilities will be subject to 2% state sales tax.

Special Session: Act 1

- Increased sales tax rate of the following notable items:
 - Out-of-state repair labor, Museum admissions, custom software, patient aids prescribed for home use, all sales tax holidays, one of a kind art in cultural districts.
 - All of these items are now subject to 4.45% state sales tax.



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