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In Landmark Wayfair Ruling, the U.S. Supreme Court Calls Quill Rule "Unsound and Incorrect"

by **Rebecca Newton-Clarke, J.D. (Senior Editor, Checkpoint Catalyst)**

The United States Supreme Court today overturned two and a half decades of sales and use tax jurisprudence in *South Dakota v. Wayfair* [1](#) , ruling the physical presence standard established in *Quill v. North Dakota* [2](#) "unsound and incorrect" and remanding the case to the South Dakota Supreme Court for further proceedings. ([South Dakota v. Wayfair, Inc., U.S. S.Ct., Dkt. No. 17-494, 06/21/2018](#) .)

Justice Kennedy authored the majority opinion, joined by Justices Ginsburg, Alito, and Gorsuch. Justices Thomas and Gorsuch filed concurring opinions. Justice Roberts dissented, joined by Justices Breyer, Sotomayor, and Kagan.

In the case, three major internet retailers challenged South Dakota's economic nexus law. The law asserts nexus against an out-of-state retailer if the retailer made more than \$100,000 taxable sales of property or services into the state or made taxable sales into South Dakota in 200 or more transactions.

Quill required that an out-of-state retailer have some physical presence in a state, either property, activities, or representatives, before a state could assert jurisdiction to tax that retailer.

The *Wayfair* court characterized the physical presence standard as a "judicially created tax shelter," noting that many retailers with a physical presence have been at a disadvantage to larger ones that do business across the country but limit their presence to one or two states. The opinion cites the argument of Walter Hellerstein, co-author of *State Taxation*, that "while nexus rules are clearly necessary," the Court "should focus on rules that are appropriate to the twenty-first century, not the nineteenth." [3](#)

In recent years, a growing number of states have enacted economic nexus laws that intentionally flout the physical presence requirement by asserting nexus based on the number and/or dollar amount of sales into the state. A number of states have also enacted detailed notice and reporting laws for

out-of-state sellers. Often these are tied to a dollar threshold of taxable sales into the state. Many are cumbersome and impose stiff penalties for noncompliance; a handful are explicitly the default alternative to registering to collect and remit the tax under elective economic nexus provisions.

With the vast majority of states urging the Court to reach this result, their appetite for asserting nexus against out-of-state retailers is not in question. It is important to bear in mind that many states have laws on the books that by their plain language exceed the physical presence standard and assert nexus based on remote solicitation and resulting in-state sales. Traditionally, taxing agencies in those states tended to accept the physical presence standard and have adopted regulations or issued guidance to that effect, but with the physical presence rule eradicated, those are likely to be repealed or rescinded in short order. A number of states have laws asserting nexus to the greatest extent permitted by the U.S. Constitution and federal law. Businesses can expect to see rapid expansion of nexus assertions in light of the Wayfair standard.

Our **Checkpoint Catalyst Topic # 1050** provides an in-depth look at the current sales and use tax nexus landscape. We will be providing further coverage and analysis of the *Wayfair* case in the days, weeks, and months to come. Please visit our South Dakota v. Wayfair Resource Center at:

<https://tax.thomsonreuters.com/wayfair>

1 State v. Wayfair Inc., (2017, S.D.) 2017 S.D. 56 , 901 N.W.2d 754 , cert. granted, U.S. S.Ct., Dkt. No. 17-494, 01/12/2018

2 Quill Corp. v. North Dakota By and Through Heitkamp, (1992, U.S.) 504 U.S. 298 , 112 S. Ct. 1904 , 119 L. Ed. 2d 91 .

3 See Hellerstein, Deconstructing the Debate Over State Taxation of Electronic Commerce, 13 Harv. J. L. & Tech. 549, 553 (2000).