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Supreme Court Issues a Decision in *South Dakota v. Wayfair Inc.*

On June 21, 2018, the United States Supreme Court ruled 5-4 in favor of South Dakota in *South Dakota v. Wayfair Inc.*, a historic sales tax decision overturning the "physical presence" test that had been in place since *Quill Corp. v. North Dakota* (1992) and *National Bellas Hess, Inc. v. Department of Revenue* (1967). Before the *Wayfair* case, companies had to have a physical presence in a state to be liable for sales tax. The *Wayfair* decision changed the nexus test to include "economic and virtual presence." All states, not just South Dakota, now have broader authority to assess sales tax, significantly raising revenue for the states. Below is a summary of the key takeaways:

Key Takeaways from the SCOTUS case:

- Interstate sellers can collect sales tax whether or not they have a physical presence in the state.
- "Economic and virtual presence" is the new threshold for nexus to impose sales tax.
- The case will bar retroactive application of the sales tax.
- The ruling opens the door to other states to impose sales and use tax statutes comparable to South Dakota.
- Brick-and-mortar retailers will now compete on a level playing field with online retailers.

Tipping the Scales

Justices Clarence Thomas, Neil Gorsuch, Samuel Alito, Ruth Bader Ginsburg, and Anthony Kennedy were in the majority and sided with South Dakota. Chief Justice John Roberts and Justices Stephen Breyer, Elena Kagan and Sonia Sotomayor were in the dissent, arguing *Quill* should not be overturned and Congress should make the decision due to the complexities that the *Wayfair* case will have across states, especially those with non-uniform sales tax procedures.

In the opinion, the Court presented ways to minimize litigation by remote sellers, including a transactional safe harbor, non-retroactive application, and membership in the Streamlined Sales and Use Tax Agreement.

Importance to South Dakota

Particularly because South Dakota has no state income tax, the state puts substantial reliance on sales and use taxes for the revenue to fund essential services. Sales and use taxes account for over 60 percent of South Dakota's general fund. Previously, the Supreme Court's decisions in *Bellas Hess* and *Quill* did not allow South Dakota to collect sales tax if the business lacked a physical presence in the state.

Without physical presence, South Dakota had to rely on residents to pay the use tax owed on their purchases from out-of-state sellers. In this new decision, the Supreme Court ruled that the "substantial nexus with the taxing state" rule was satisfied as South Dakota's threshold to impose sales tax on $100,000 in sales or 200 transactions "could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota."

What to Expect Going Forward

States are analyzing how this decision affects marketplace providers in their respective jurisdictions and are expected to issue swift guidance in the coming weeks. The verdict in the *Wayfair* case is considered a victory for brick-and-mortar businesses unable to compete with the sales tax advantages online retailers previously enjoyed.

Questions

If you have any questions about economic nexus provisions and the impact of the *Wayfair* decision, please contact one of the FTI Consulting professionals below.

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