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Sales Tax for Remote Sellers: Missouri's Response in a Post-Wayfair World

By Hannah Meehan*

In June 2018, the Supreme Court overturned a long-running ban on states collecting sales tax from companies that did not have a physical presence within the state.[1] In *Quill Corp v. North Dakota*, the court established two nexus tests that states must satisfy.[2] Due to the unfair advantage of lower prices for e-commerce, there were numerous state efforts to challenge this ban. Following South Dakota's attempt, the Court overturned *Quill* and held that states can impose sales tax on remote sellers for sales within the state.[3] As states scramble to address this, Missouri lags behind and has yet to pass legislation imposing an economic nexus test.

Pre Wayfair

In *Quill*, the state supreme court determined that Quill Corp was obliged to collect and remit use tax to the state from its sales to state customers.[4] The Supreme Court reversed this decision, and established two "nexus" tests that states must satisfy before they can impose tax obligations on remote sellers; the due process nexus test, and the commerce clause nexus test .[5] Under the due process element, the state must only show that the remote seller has purposefully availed itself of the market in that state.[6] The issue lay with the commerce clause test, which required sellers to have a physical presence within the state before there was any duty to collect sales tax.[7] This has had a significant impact on internet sales in the following years, as the lack of obligation on sellers to collect tax allowed them to profit from discounted prices.[8]

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[1] *S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2096 (2018).

[2] 504 U.S. 298, 312 (1992), *overruled by S. Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

[3] *Wayfair, Inc.*, 138 S. Ct. at 2096.

[4] *Quill Corp.*, 504 U.S. at 301.

[5] *Id*. at 312, 319.

[6] *Id*. at 306.

[7] *Id.* at 314-15.

[8] *Wayfair, Inc.*, 138 S. Ct. at 2097.

The Aftermath

In response, numerous states challenged this ban after being called upon by Kennedy to take a run at *Quill*,[9] and South Dakota succeeded.[10] Passing legislation that compelled out-of-state retailers to pay sales tax, South Dakota quickly wound up in the Supreme Court.[11] In an opinion delivered by Justice Kennedy, the Court held that *stare decisis* did not bind it to *Quill*'s incorrect holding,[12] and the Court did away with "physical presence," seemingly replacing it with an "economic presence" requirement and approving South Dakota's economic nexus law.[13]

A lot of states already have general economic nexus provisions, and though there will need to be some amendments and clarifications to update pre-existing law, there has been a swift response by states in the past year.[14] However, as of the date of this article, Missouri has not yet enacted an economic nexus rule. Though Missouri had proposed numerous bills to both the House and the Senate, none were adopted this year. Some of the complications stem from the fact that Missouri has over 2200 local tax jurisdictions, so there has been lengthy discussion as to how the tax should be collected and distributed.[15]

Missouri's Response

While some of the bills suggested similar thresholds and implementation, there were some subtle differences, such as whether to impose a sales tax or a use tax.[16] A sales tax is imposed on the price of tangible personal property sold at retail, and use tax is imposed on the storage, use, or

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[9] *Direct Mktg. Ass'n v. Brohl,* 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring).
[10] *Wayfair, Inc.,* 138 S. Ct. at 2096.
[11] *Id*. at 2088.
[12] *Id.* at 2096.
[13] *Id.* at 2099.
[14] Norman S. Newmark; Rochelle Friedman Walk; Robert V. Jr. Willeford, *Cross Border State Sales and Use Taxation after South Dakota v. Wayfair: A New Paradigm for E-Commerce*, 3 BUS. ENTREPRENEURSHIP & TAX L. REV. 16, 26-29 (2019) (data table showing state responses).
[15] MO. DEPT. OF REVENUE, SALES AND USE TAX RATE TABLES (Oct. 2019), https://dor.mo.gov/pdf/rates/2019/oct2019.pdf .
[16] Kaitlyn Schallhorn, *Next Steps: 'Wayfair' Internet Sales Tax*, MISSOURI TIMES (June 25, 2019), https://themissouritimes.com/62632/next-steps-wayfair-internet-sales-tax/.

consumption of tangible personal property in the state.[17] As an example of some of the bills, the Missouri Senate Bill 46, a combined bill of SB 46 and SB 50, proposed to establish an economic nexus, establishing a threshold for sellers with no physical presence before they are obligated to collect and remit use tax.[18] A tax collection is required if the seller: (1) has gross revenue from sales of tangible property delivered to Missouri of at least $100,000; or (2) sells tangible property into Missouri in 200 or more separate sales.[19] This would apply not only to direct retailers, but also to marketplace facilitators who meet the above criteria, such as Amazon, Etsy, etc.[20] Given the extensive local-tax jurisdictions which could massively complicate compliance, Missouri also proposed to adopt a simplified tax program which would allow participants to remit a set tax percentage for most sales, which the Department of Revenue would then distribute to local governments.[21] Senate Bill 189 proposed the same threshold requirements, but instead of the simplified system, it would require the Department of Revenue to maintain a mapping program which records and displays the use tax of local jurisdictions.[22] Though no legislation was passed, the similarity of the bills gives a hint as to the likely economic nexus threshold which could eventually be enacted, and hopefully there can be agreement on the details by the next legislative session so that businesses can prepare for future tax plans.

Edited by Jessica Gottsacker

[17] Mo. DEPT. OF REVENUE, https://dor.mo.gov/business/sales/ (last visited Oct. 11, 2019).
[18] Mo. S.B. 46, 100th Gen. Assemb. (2019).
[19] *Id.*
[20] *Id.*
[21] Mo. S.B. 50, 100th Gen. Assemb. (2019).
[22] Mo. S.B. 189, 100th Gen. Assemb. (2019).