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TAXATION OF E-COMMERCE: STATES' RESPONSE TO THE CASE OF *WAYFAIR V. SOUTH DAKOTA*

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ABSTRACT

This paper takes a cross-disciplinary approach, between information systems and taxation, by focusing on recent uncertainty of taxation of e-commerce within the United States. On June 21, 2018 the Supreme Court, in *South Dakota v. Wayfair, Inc.*, changed the law with respect to a state's ability to collect sales taxes from remote vendors such as e-commerce retailers (e-tailers). Previously, states were restricted by *Quill v. North Dakota* (1992), which required some form of physical nexus between the out-of-state e-tailer and the state seeking to collect sales taxes. This physical nexus requirement applied regardless of the e-tailer's number or dollar amount of in-state transactions. Economic nexus alone would not be sufficient to sustain a state's power to require an e-tailer to collect and remit sales taxes. Compliance with over 7,600 taxing jurisdictions (now 9,998) was held to constitute an undue burden on interstate commerce in violation of the Constitution's Commerce Clause.

In *Quill*, the Supreme Court made clear that Congress had almost plenary power over interstate commerce. Various legislative remedies were explored, but ultimately nothing was accomplished. During this time period the jurisprudence with respect to jurisdiction over an out of state individual/entity moved from a physical presence test to accepting an economic nexus as satisfying the constitutional requirements for jurisdiction. Eventually, in a concurring opinion in *Direct Mail Marketing v. Brohl* (2015), Justice Kennedy raised the issue of whether *Quill* should be revisited.

Almost immediately, states saw an opportunity to challenge the *Quill* decision by enacting legislation requiring out-of-state e-tailers to collect and remit sales taxes on sales to in-state residents. Based on precedent, these new laws could not be sustained by the lower courts. However, the goal was to get the case before the Supreme Court, and hopefully have *Quill* overturned or modified.

The first of these cases heard by the Supreme Court was *South Dakota v. Wayfair, Inc.* South Dakota has no income tax and relies heavily on consumption taxes. It claimed to be losing \$50 million per year in state and local revenues. The challenged South Dakota legislation, enacted in 2016, required e-tailers with in-state sales of \$100,000 or more, or 200 or more transactions, to remit a 4.5% sales tax. Wayfair had no physical presence in South Dakota and successfully challenged the legislation based on *Quill*. Upon appeal to the Supreme Court, *Quill* was overturned. The majority opinion based its decision on technological advances that made compliance much less burdensome than in 1992, and thus not in violation of the commerce clause.

Immediately, tax hungry states drafted and enacted legislation compelling the collection and remittance of sales taxes by e-tailers. These statutes are not uniform in threshold dollar or transaction amounts, taxed items, tax exempt items, tax rates, and other compliance issues. This has created significant compliance costs and potential liability for e-tailers, especially for small online companies. We offer solutions to this national, even global issue, which requires a federal legislative solution to provide a uniform tax system.

Keywords

E-commerce taxation, Online sales tax, E-tailer sales tax, Internet taxation, Sales and use tax.