

South Dakota: State Supreme Court sides with sellers in the battle for online tax revenue



David M. Kall | Thursday, September 21, 2017

An eagerly awaited [opinion](#) that the South Dakota Supreme Court filed last week says that the state's hands must remain tied when it comes to taxing the sales of internet retailers.

It was just two weeks ago that we [addressed](#) the positions each side presented to the state Supreme Court during oral arguments. To recap, the defendants, internet sellers Wayfair, Overstock.Com, and Newegg, were fighting the state law, [SB 106](#), that required remote sellers with no physical location in South Dakota to remit sales tax, and follow all procedures of the law, if they meet one of two criteria in the previous calendar year or the current calendar year:

1. The remote seller's gross revenue of sale of tangible property, any products transferred electronically, or services delivered into South Dakota, exceeds \$100,000.
2. The remote seller has 200 or more separate transactions tangible property, any products transferred electronically, or services delivered into South Dakota.

Governor Dennis Daugaard signed SB 106 into law on March 22, 2016, and it went into effect May 1, 2016. But even before that, the South Dakota Department of Revenue (DOR) began notifying sellers of their obligations, including registering with the DOR. The litigation started on April 28, 2016, when one seller failed to comply with its duty to register. That retailer, Systemax Inc., ended up doing so voluntarily and was dismissed from the suit.

By all accounts, South Dakota expected that its law would not pass muster in state court, but with last week's decision, its "plan to get this before the U.S. Supreme Court inched closer to a possibility," wrote

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Consumerist. Indeed, agreed [ecommercebytes.com](#), states that want an audience before the high court out of frustration with their inability to collect tax revenues on certain internet sales “may soon get their wish.”

This opinion did not raise, or solve, any issues that are not already out in the open. The court relied on previous case law “rejecting imposition of ‘the duty of use tax collection and payment upon a seller’ with no physical presence in the taxing state,” and opined that there was no distinction between those unlawful collection obligations and South Dakota’s. To the state’s points “that computer technology and software have advanced, South Dakota has streamlined its revenue laws, and the retail industry has evolved,” the court insisted that controlling precedent required it to limit sales tax collections, “[h]owever persuasive the State’s arguments on the merits of revisiting the issue” are.

On September 14, 2017, the South Dakota Attorney General issued a [press release](#) declaring that the decision “is one step closer to bringing tax fairness to South Dakota retailers which would continue to sustain South Dakota’s status as an income tax-free state.” He reasoned that the Court was “obligated” to rule as it did, thus “highlight[ing] the need for the U.S. Supreme Court to revisit this issue, allowing states to require internet retailers to shoulder the same tax burden as in-state retailers do.”

The trade group NetChoice, a ubiquitous leader in the effort to quash sales tax collection rules on internet retailers, issued a widely published statement that [ecommercebytes.com](#) included in its article about the lawsuit:

If the high court takes this case, we will be ready to show that the perspective of a few large online retail defendants is only a small part of the story. In fact, many thousands of smaller businesses would bear disproportionate burdens and costs if they are forced to become tax collectors for 12,000 jurisdictions across 46 states.

Even so, in a different [statement](#), NetChoice highlighted its stance that “Congress is best suited to weigh the benefits and burdens of empowering state tax auditors to go after every business in America.” Similarly, the [Tax Foundation](#) stressed Congress’ role: “There are more than 10,000 sales tax jurisdictions nationwide that use different rules for determining what’s taxable and what isn’t. We should not lose sight of this or the need for Congress to be the arbiter of a solution to the online sales tax issue that works for everyone.”

Partial solution in Massachusetts?

Massachusetts is one state that has come up with a possible work-around for the problem that South Dakota and others face. We have been following the twists and turns this effort has taken, and [described](#) them most recently earlier this month.

In short, the new rule, among other things, will subject remote retailers to the state’s tax laws when they install in-state software, also referred to as “apps,” and ancillary data, including cookies, on in-state customers’ devices. The regulation has been filed with the Massachusetts Secretary of State’s Office, and is expected to be published in the Massachusetts Register on September 22, 2017.

The Bay State claims that its “cookie tax” satisfies due process requirements, and therefore does not run afoul of the precedent that the South Dakota court was bound by, because it “sets a bright line threshold intended to reflect a level of purposeful availment at which the requirements of due process will be met.” Confronting the fairness argument, the state says that the cookie tax is, because it asserts the same

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jurisdiction, and applies the same standards, over all vendors, internet and non-internet alike.

Ohio recently passed a similar law, by way of budget legislation, with parameters similar to those in Massachusetts.



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