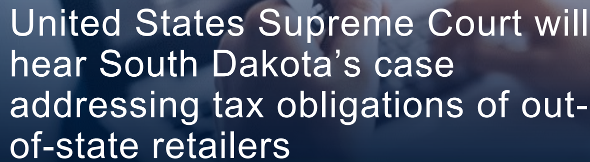

United States Supreme Court will hear South Dakota’s case addressing tax obligations of out-of-state retailers

TAX AND BENEFITS CHALLENGES | JAN 18, 2018

To the delight of the state of South Dakota, the United States Supreme Court accepted its case, *South Dakota v. Wayfair*, on Jan. 12, 2017. The crux of this lawsuit is the legal permissibility of South Dakota’s spring 2016 law, SB 106, which has a purpose to “provide for the collection of sales taxes from certain remote sellers.” Ultimately, SB-106’s objective is to challenge the U.S. Supreme Court’s 1992 decision in *Quill Corp. v. North Dakota*. *Quill* banned states from requiring out-of-state retailers to collect sales taxes on products they ship into those jurisdictions, absent some minimal contact or physical presence.

SB 106, which the South Dakota Supreme Court found to be unconstitutional under *Quill*, requires remote sellers in South Dakota to remit sales tax and follow all procedures of the law, regardless of whether they have a physical presence in the state, 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.

Companies that meet one or both of requirements that do not have a business tax license with South Dakota are required to apply for one.

As we explained in May 2016, South Dakota used SB 106 to sue four internet retailers, Newegg Inc., Overstock.com Inc., Systemax Inc. and Wayfair LLC, who had failed to register for a business tax license as the new law required.

AT THE SUPREME COURT

With respect to sales and use taxes, there is a nationwide tension between bricks and mortar retailers and internet retailers. At one time, Amazon, the “behemoth valued at more than $600 billion,” according to the *New York Times*, was at the forefront of this battle. When it originally put down stakes in Seattle in 1994, a key advantage it had, thanks to *Quill*, was that it would not have to collect sales taxes in states where it did not have a physical presence. This was especially helpful to the start up in high population states, like California and New York.

Over time, however, state lawmakers began “hounding” Amazon to pay its fair share of sales taxes, and, according to the *Times* piece, founder Jeff Bezos complied “after it became clear that Amazon’s image could be tarnished.” In 2011, he signed the first agreement to collect sales taxes, with California. As of April 1, 2017, Amazon was “collecting state sales taxes everywhere,” noted *CNNTech.*

Following the Supreme Court’s decision to take the South Dakota case, the National Conference of State Legislators (NCSL) issued a statement expressing its approval: “We are pleased that the court has taken the next step in leveling the playing field for Main Street businesses across America. NCSL has long supported marketplace fairness as states are losing tens of billions of dollars per year in uncollected sales taxes. These taxes fund education, public safety, and the innumerable services that state governments provide. We are pleased the process is moving forward quickly and anticipate the U.S. Supreme Court will ultimately restore fairness to Main Street businesses and states.”

In total, 35 states supported South Dakota’s cert petition:

1. Alabama
2. Arkansas
3. California
4. Colorado
5. Connecticut
6. Florida
7. Hawaii
8. Idaho
9. Illinois
10. Indiana
11. Iowa
12. Kansas
13. Kentucky
14. Maine
15. Maryland
16. Massachusetts
17. Michigan
18. Minnesota
19. Mississippi
20. Nebraska
21. New Mexico
22. New York

23. North Carolina
24. North Dakota
25. Ohio
26. Oregon
27. Pennsylvania
28. Rhode Island
29. Tennessee
30. Texas
31. Utah
32. Vermont
33. Washington
34. Wisconsin
35. Wyoming

But not everyone is so jubilant. The American Catalog Mailers Association's (ACMA) amicus brief argued that the court should stay out of the fight. They argue that the court should not reverse *Quill* because the absence of a "meaningful alternative to the physical presence standard for regulating interstate sales supports rejection of [South Dakota's cert] petition at this time."

In addition, the ACMA, highlighting federal proposals to "address the complexity of compliance for sellers in the interstate markets," contended that the court "should not intervene in a case instituted by a state when that litigation is being substituted for continuing efforts to achieve real solutions to the continuing burdens on interstate commerce."

The ACMA does not acknowledge the possibility that the court could set forth a meaningful alternative, or Congressional gridlock in general with respect to passing legislation. But if the court does overturn *Quill* without specifying a test or standard for taxing out-of-state sales, the ACMA's contention that states would have "carte blanche authority for whatever varying requirements that each state or municipality separately chooses…" could indeed come true.

Predictions are risky, but a December NCSL piece featured comments by the executive director of the State and Local Legal Center, who cited conventional wisdom for her assertion that "if the court takes the case, it will probably overturn *Quill." She argued that before he joined the Supreme Court, the newest justice, Neil Gorsuch, wrote a concurring opinion that many commentators read to suggest that Quill should be overturned.*

NCSL's director of budget and tax policy concurred that it is likely that the court will overturn *Quill*. Even so, he foresaw some danger: "If South Dakota loses, it's pretty horrible for every state that has a sales tax."

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