

Remote Sellers Information Bulletin

No. 18-001

August 10, 2018

Sales Tax

**Impact of *Wayfair* Decision on Remote Sellers
Selling to Louisiana Purchasers**

On June 21, 2018, the United States Supreme Court issued its decision in *South Dakota v. Wayfair, Inc., et al.*¹ and overturned the longstanding physical presence requirement established in the 1992 *Quill Corp. v. North Dakota*² case. In light of the *Wayfair* decision, this Revenue Information Bulletin is intended to provide guidance from the Louisiana Sales and Use Tax Commission for Remote Sellers.

Supreme Court Decision in *South Dakota v. Wayfair*

As established by United States Supreme Court jurisprudence in *Bellas Hess*³ and *Quill*, a state could not require a business to collect and remit the state's sales tax if the business lacked a physical presence in the state. The physical presence test provided that a business must have retail outlets, salespersons, or property within a state in order for a state to impose a collection and remittance requirement on the business. When a business was not required to collect and remit sales tax because of lack of physical presence, the purchaser was required to remit use tax directly to the state.

In 2016, South Dakota enacted Senate Bill 106 (the "SD Act") to provide for the collection of sales tax from certain remote sellers. The SD Act requires remote sellers to collect and remit sales tax *as if* the seller had a physical presence in South Dakota. The SD Act provided a small seller exception and limited collection and remittance requirements to those businesses which deliver more than \$100,000 of goods or services into the state or engage in 200 or more separate transactions for the delivery of good or services in the state. Further, the SD Act provides for prospective application only.

South Dakota filed a declaratory judgment action against three online retailers (Wayfair, Overstock.com, and Newegg) seeking a judicial declaration that the requirements of the SD Act were valid and applicable to those retailers. The South Dakota Supreme Court granted summary judgment in favor of the retailers and the court's finding of unconstitutionality hinged on the *Quill* physical presence standard, "*Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitation on interstate collection

¹ 585 U. S. ____ (2018)

² 504 U. S. 298 (1992)

³ *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 385 U. S. 753 (1967)

Remote Sellers Information Bulletin 18-001

August 10, 2018

Page 2 of 5

of sales and use taxes.”⁴ South Dakota sought a writ of certiorari to the United States Supreme Court which was granted.

The United States Supreme Court held the physical presence rule of *Quill* is unsound and incorrect and overruled the Court’s prior decisions in *Bellas Hess* and *Quill*.⁵ Recognizing the substantial nexus requirement of *Complete Auto*⁶ was satisfied by the sellers availing themselves of the substantial privilege of carrying on business in South Dakota, the Court acknowledged there was still a question of whether some other principle of Commerce Clause jurisprudence might invalidate the SD Act.⁷ With this acknowledgment, the Court also pointed to several features of South Dakota’s tax system that “appear designed to prevent discrimination against or undue burdens upon interstate commerce.”⁸ Those features include:

1. A safe harbor under the SD Act for business who transact limited in-state business
2. No obligation to remit the tax retroactively under the SD Act
3. South Dakota’s adoption of the Streamlined Sales and Use Tax Agreement

The Court further explained the benefits of South Dakota’s adoption of the Streamlined Sales and Use Tax Agreement in reducing administrative and compliance costs. The Streamlined Sales and Use Tax Agreement requires a single, state-level tax administrator, uniform definitions of products and services, simplified tax rate structures, other uniform rules, access to sales tax administration software is provided to sellers by the state with immunity for those who rely on it.⁹

After invalidating the *Quill* physical presence requirement, the Court vacated the decision of the South Dakota Supreme Court affirming the unconstitutionality of the SD Act. The case was remanded back to the state courts for further proceedings on Commerce Clause claims in the absence of *Quill* and *Bellas Hess*. The full text of the *Wayfair* decision may be found on the United States Supreme Court’s website.

Act 5 of 2018 Second Extraordinary Session

LA R.S. 47:301(4)(l) defines a “dealer” as “[e]very person who engages in regular or systematic solicitation of a consumer market in the taxing jurisdiction by the distribution of catalogs, periodicals, advertising fliers, or other advertising, or by means of print, radio or television media, by mail, telegraphy, telephone, computer data base, cable, optic, microwave, or other communication system.” Act 5 of the 2018 Second Extraordinary

⁴ 585 U. S. _____ (2018), slip op. at 4

⁵ 585 U. S. _____ (2018), slip op. at 22

⁶ *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)

⁷ 585 U. S. _____ (2018), slip op. at 23

⁸ *Id.*

⁹ *Id.*

Remote Sellers Information Bulletin 18-001

August 10, 2018

Page 3 of 5

Session of the Louisiana Legislature amended LA R.S. 47:301(4) to further refine the definition of a “dealer” and substantially align the Louisiana definition with the definition of South Dakota’s Senate Bill 106. LA R.S. 47:301(4)(m) defines “dealer” as:

“(i) Any person who sells for delivery into Louisiana tangible personal property, products transferred electronically, or services, and who does not have a physical presence in Louisiana, if during the previous or current calendar year either of the following criteria are met:

(aa) The person’s gross revenue for sales delivered into Louisiana has exceeded one hundred thousand dollars from sales of tangible personal property, products transferred electronically, or services.

(bb) The person sold for delivery into Louisiana tangible personal property, products transferred electronically, or services in two hundred or more separate transactions.”

This refined definition of “dealer” satisfies the substantial nexus requirement under the Commerce Clause and provides the same safe harbor protections recognized in *Wayfair* for businesses who only transact limited business in the state. Act 5 further provides that “[a] person without a physical presence in Louisiana may voluntarily register for and collect state and local sales and use taxes as a dealer, even if they do not meet the criteria...” mentioned above.

Louisiana Sales and Use Tax Commission for Remote Sellers

Act 274 of the 2017 Regular Session of the Louisiana Legislature created the Louisiana Sales and Use Tax Commission for Remote Sellers (the “Commission”) within the Department of Revenue for the administration and collection of the sales and use tax imposed by the state and political subdivisions with respect to remote sales. The Commission’s purposes include (1) promoting uniformity and simplicity in sales and use tax compliance in Louisiana, (2) serving as the single entity in Louisiana to require remote sellers to collect from customers and remit to the Commission sales and use tax on remote sales sourced to Louisiana, and (3) providing the minimum tax administration, collection, and payment requirements required by federal law with respect to the collection and remittance of sales and use tax imposed on remote sales.

The Commission is prohibited from authorizing or requiring any expenditure unless and until a “federal law” authorizing states to require remote sellers to collect state and local sales and use tax on their sales in each state has been enacted and becomes effective. Act 5 of the 2018 Second Extraordinary Session expanded the definition of “federal law” for purposes of the Commission to include a final ruling by the United States Supreme Court authorizing states to require remote sellers to collect and remit sales and use taxes on

Remote Sellers Information Bulletin 18-001

August 10, 2018

Page 4 of 5

remote sales sourced to Louisiana. The previous definition of “federal law” only referred to a federal law enacted by the United States Congress. With this expansion by Act 5 and the *Wayfair* decision eliminating the physical presence requirement on states requiring sales tax collection by remote sellers, the Commission can begin serving as the single entity for the administration and collection of the sales and use tax with respect to remote sales.

Louisiana has not adopted the Streamlined Sales and Use Tax Agreement. More importantly, there is no requirement in the *Wayfair* decision that states adopt the Streamlined Sales and Use Tax Agreement in order to meet Commerce Clause standards. The Court’s recognition of South Dakota’s status as a Streamlined Member State was in the context of discussing how other features of South Dakota’s tax system serve to prevent discrimination against or undue burdens upon interstate commerce. The Commission is statutorily created to serve as the single, state-level tax administrator for remote sales. The Commission is also tasked with promoting uniformity and simplicity in sales and use tax compliance. The Commission held an organizational meeting on June 29, 2018, and is meeting regularly to develop and implement procedures to administer sales and use tax collection for remote sellers. These procedures will focus on ensuring Louisiana’s tax system for remote sellers meets Commerce Clause standards and places no undue burdens on interstate commerce.

Finally, the Commission will not seek to enforce any sales or use tax collection obligation on remote sellers based on the United States Supreme Court’s decision in *South Dakota v. Wayfair* or the provisions of Act 5 as it relates to the expanded definition of dealer for any taxable period beginning prior to January 1, 2019.

Other Considerations

Future Guidance and Developments

The Commission will issue additional guidance relative to further action on the *Wayfair* case and collection of sales and use tax as appropriate.

The Louisiana Uniform Local Sales Tax Board, also created pursuant to Act 274 of the 2017 Regular Legislative Session of the Louisiana Legislature, is issuing guidance to local sales and use tax collectors to not seek retroactive application of the *South Dakota v. Wayfair* decision.

Remote sellers who have voluntarily registered with the Department of Revenue and currently collect and remit sales and use tax in accordance with LA R.S. 47:302(K) and file and remit using Form R-1031, *Direct Marketer Sales Tax Return*, should continue collecting and remitting in that manner until further guidance is issued.

Any remote seller who is not currently registered with the Department of Revenue or a local sales and use tax collector can voluntarily register with the Department of Revenue to begin collecting and remitting sales and use tax in accordance with LA R.S. 47:302(K) using the

Remote Sellers Information Bulletin 18-001

August 10, 2018

Page 5 of 5

Form R-1031A, *Application to File Direct Marketer Sales Tax Return*. As provided in Revenue Information Bulletin 18-019, the remote seller voluntarily registering and collecting under LA R.S. 47:302(K) would collect and remit sales and use tax at a total combined rate of 8.45 percent for state and local taxes. The form for filing and remitting the sales and use tax is Form R-1031, *Direct Marketer Sales Tax Return*.

Act 569 of 2016 Regular Session

Act 569 of the 2016 Regular Session requires remote retailers to provide notification to purchasers that online purchases of tangible personal property and taxable services are subject to Louisiana use tax unless specifically exempt. Act 569 remains controlling law for those remote retailers who do not voluntarily collect and remit Louisiana sales and use tax under LA R.S. 47:302(K) with respect to their retail sales in Louisiana.

Remote sellers who do not meet the minimum economic nexus thresholds under the Act 5 expanded definition of “dealer” or who do not voluntarily register with the Commission after January 1, 2019, will remain subject to the notification requirements of Act 569. For those remote sellers who do voluntarily register after the *Wayfair* decision, the remote seller must remain compliant with Act 569 for the period prior to the voluntary registration. Refer to Revenue Information Bulletin 18-006 for more information.

Questions concerning this publication may be directed to sales.inquiries@la.gov.

Kimberly Lewis Robinson

Chairman

Louisiana Sales and Use Tax Commission for Remote Sellers