BURR ALERT 2018

Supreme Court Unleashes the Tax Kraken

By Joshua A. Ehrenfeld, J. Allen Sullivan, Jr. and Christian Borek June 22, 2018

For the last 26 years, *Quill v. North Dakota* acted as a default tax protector for out-of-state sellers and web-based businesses that had no physical presence in the jurisdictions where they sold and shipped products. As such, *Quill* provided that no state could compel a business to collect and remit sales tax for sales in that state unless the seller had a physical presence in the taxing jurisdiction. Thus, sellers without that presence who merely shipped goods into a consumer's state – often ordered from a website or catalog – generally did not collect and remit sales taxes in that state. No more.

Yesterday, the Supreme Court in *South Dakota v. Wayfair* ripped up *Quill's* physical presence protections when it held that mere economic or virtual contacts with a consuming state are sufficient for the state to require out-of-state sellers to collect and remit sales taxes. These sellers are now potentially at the mercy of each state (and district and territory) where their customers reside; early estimates point to retailers needing to accommodate between 10,000-12,000 unique taxing jurisdictions.

Absent a federal statute, we now expect state legislatures and revenue departments to decide how and whether an out-of-state seller has sufficient contacts (i.e., "nexus") to justify an obligation to collect and remit sales tax. While it's still difficult to predict where the virtual and economic nexus lines will be drawn, the Supreme Court arguably created a temporary safe harbor for states by explicitly approving South Dakota's *de minimis* rule, which exempts an out-of-state seller from collecting and remitting sales tax if it delivers less than $100,000 of goods or services to South Dakota or engages in less than 200 separate transactions for the delivery of goods or services into South Dakota.

Concerned sellers should expect a quick "race to the bottom" wherein most states adopt the South Dakota *de minimis* rule, at least in the short-term. Indeed, many already have laws providing that they can force sellers to collect and remit sales taxes "to the fullest extent allowed by the Constitution" or something similar, and will presumably immediately adopt *Wayfair* and South Dakota's rule as their standard. States like Georgia and Alabama are likely poised to lower their $250,000 thresholds to reflect South Dakota's $100,000 watermark. And Tennessee's $500,000 threshold may now be viewed as "taxpayer friendly."

A few states – California, perhaps? – may be more aggressive in setting their own *de minimis* standard and eventually supplant South Dakota as the standard bearer. The *Wayfair* court arguably left open that opportunity.

While *Wayfair* may indeed end the days of "sales-tax-free" internet sales, the bigger cost impact for web-based sellers' likely lies in the compliance and reporting realm. That is, the Court has potentially exposed web-based out-of-state sellers to 50-plus different sales and use tax regimes, because every business that conducts e-commerce must ensure compliance with the sales tax laws

wherever its customers reside. Thus, every time a transaction occurs with a customer from a different state, the out-of-state seller must examine that particular state's sales tax laws to determine if they must collect and remit tax before the collection and remittance procedure even occurs. That's no small task, and small businesses will likely bear much of the relative compliance and reporting burden. As small and medium size businesses feel the pain of this burden, calls for a national standard may soon follow.

Thus, while many questions remain unanswered, it is certainly clear that Thursday's decision increased the compliance costs for most e-commerce businesses when it removed *Quill's* protections.

For further questions, or to discuss the impact on your business, please feel free to contact any of the following members of Burr's tax team directly.

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