

5 KEY TAKEAWAYS

U.S. Sales and Use Tax: Where are we after *South Dakota v. Wayfair*?

Jeffrey S. Reed, Chair of Kilpatrick Townsend's State and Local Tax Group, spoke in Washington DC on November 29, 2018 at the International Tax Dispute Resolution & Litigation Summit, on the topic "U.S. Sales and Use Tax: Where are we after *South Dakota v. Wayfair*?"

Key takeaways from the presentation include:

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States are copying the South Dakota scheme.

Not surprisingly, many states enacted legislation that copies the South Dakota economic nexus scheme. In states in which it was difficult to get legislation passed, some revenue departments announced that they would take the position that economic nexus thresholds apply in the state even in the absence of legislation. A few larger states opted for higher thresholds than the South Dakota thresholds (\$100K revenue; 200 transactions) on the basis that they have larger economies than does South Dakota.

Online marketplaces are a growing area of focus for states.

Increasingly, small vendors are selling products through online platforms and marketplaces. In such cases, who is responsible for collecting and remitting sales tax, the platform or the small business selling through the platform? A few states, including Minnesota, New Jersey, Pennsylvania, and Rhode Island have enacted legislation requiring that the platform collect sales tax. There are currently audits and pending controversies in which state revenue departments are asserting that the platform or the small seller should have collected sales tax on sales made through the platform. Expect to see more and more legislation and litigation in this area in the coming year.

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Small manufacturers may be caught in the economic nexus web.

Imagine a specialty manufacturer of widgets that mails the widget directly to customers for \$9.99 (with free shipping). If the manufacturer makes 200 annual sales to South Dakota customers, the manufacturer has a filing obligation under the South Dakota statute, despite having less than \$2,000 in annual gross South Dakota sales. Would it be unduly burdensome within the meaning of *South Dakota v. Wayfair* to require this small manufacturer to register in South Dakota and begin collecting South Dakota sales tax?

Online service providers often exceed the economic nexus thresholds, but what they sell may not be taxable in most states.

Thousands of online service businesses have substantial revenue from customers in all fifty states. Should they register and begin collecting taxes in every state in which they exceed state economic nexus thresholds? If a state does not tax services delivered online, are such online sellers nevertheless required to register and perpetually file zero returns? Would forcing them to file zero returns perpetually be unduly burdensome within the meaning of *South Dakota v. Wayfair*?

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The term "transactions" is problematically ambiguous.

In states like South Dakota that have a 200 transactions (or X transactions) threshold, there is some question about what should count as a transaction. For example, consider a business model in which customers subscribe on an annual basis but are billed and receive product monthly (e.g., a coffee of the month or wine of the month or book of the month club). Is the "transaction" the annual subscription or is each monthly shipment and payment a separate transaction? What if billing occurs annually rather than monthly? What other facts and circumstances are relevant to determining how the term "transaction" should be interpreted in the context of a business with a subscription model?