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South Dakota: State's high court upholds "Quill" physical presence standard

The South Dakota Supreme Court held that the state is bound to follow established U.S. Supreme Court precedent, and therefore, a law imposing economic nexus standards on remote retailers was not valid in light of the physical presence standard most recently articulated in *Quill v. North Dakota*.

In reaching this conclusion, the state high court rejected the state's arguments that the *Quill* physical presence standard is outdated in light of advances in software and technology. The case is: *South Dakota v. Wayfair, Inc.*, 28160-a-GAS (S.D. September 13, 2017). Read the [decision](#) [DPF 417 KB]

Summary

In 2016, South Dakota became the first state to enact economic nexus provisions for sales and use tax purposes. Specifically, effective May 1, 2016, all entities with annual sales in South Dakota exceeding \$100,000 or with more than 200 separate transactions in the state were required to collect and remit South Dakota sales and use tax. To expedite anticipated litigation, the state was authorized to bring an action in any circuit court in the state against sellers it believed met the requirements—even if there was no ongoing or completed audit and no pending administrative action.

Before the law took effect, South Dakota filed a declaratory judgment action against certain online retailers under the terms of the economic nexus law. The state asked the court to issue a determination that it may constitutionally require remote sellers without a physical presence in the state to collect sales tax. After the retailers had the case removed to federal court, it was subsequently remanded back to state circuit court. On March 6, 2017, a state circuit court found in favor of the online retailers, with the presiding judge noting that he was bound to follow the U.S. Supreme Court precedent in *Quill*.

South Dakota appealed. The South Dakota Supreme Court affirmed.

However persuasive the State's arguments on the merits of revisiting the issue, Quill has not been overruled. Quill remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes. We are mindful of the Supreme Court's directive to follow its precedent when it "has direct application in a case" and to leave to that Court "the prerogative of overruling its own decisions."

KPMG observation

It is fully expected that the state will petition the U.S. Supreme Court for review of the case. Whether the U.S. Supreme Court will decide to revisit the issue is unknown. Much has been made of the fact that U.S. Supreme Court Justice Anthony Kennedy, in a concurring opinion in *Direct Marketing Association v. Brohl*, suggested that the *Quill* decision needs to be re-examined and stated that the decision was "questionable even when decided." However, one Justice's thoughts do not necessarily mean that the Court will agree to hear the case.

Read a [September 2017 report](#) [PDF 104 KB] prepared by KPMG LLP

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