

Enforceability of Wayfair Decision on Foreign Companies Unclear

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By William Hoke

The treatment of foreign suppliers remains unresolved following the landmark decision in *South Dakota v. Wayfair Inc.* that abolished the physical presence test for the collection of sales tax.

In its [June 21 decision](#), the Supreme Court rejected arguments that physical presence is necessary to establish taxable nexus in a state. The Court's argument paralleled the international debate over whether a "[significant digital presence](#)" is sufficient to establish corporate income taxing rights. Although it is widely accepted that the requirement to collect and remit sales taxes to states with laws similar to South Dakota's apply to both domestic and foreign companies, the ability of those states to enforce that obligation on businesses with no U.S. presence is in doubt.

Christina Edson of True Partners Consulting LLC, which works with clients on state and local tax issues, said states told both Congress and the Supreme Court that the *Wayfair* issue applies globally. "Every seller that makes sales into states could have a sales tax collection duty, regardless of where they are based worldwide and regardless of whether there is a treaty with the U.S. protecting them from the federal income tax," she said. "Many states do not follow federal treaties and still will require a state income tax filing."

Amazon already bills and remits state sales taxes for shipments made from its own inventory. While businesses that sell through the company's Fulfillment by Amazon (FBA) service can decide whether to have Amazon include state and local sales taxes on invoices for sales into those jurisdictions, it's still up to the seller to remit the proper amount of tax to many of those governments. The trend, however, appears to be moving in the direction of Amazon handling sales taxes in-house. At least eight states have [passed laws expanding sales tax collection requirements](#) to online marketplaces. An Amazon spokeswoman said her company remits sales tax on behalf of sellers in the states of Washington and Pennsylvania. And Amazon has notified third-party sellers that it will provide information to revenue departments in at least three other states about their sales into those jurisdictions.

Skip McGrath, who publishes *The eBay & Amazon Seller's News* and sells a wide variety of products from his location in Washington state, told Tax Analysts that foreign sellers will also have to confront the welter of state and local tax requirements validated by the Supreme Court for their U.S. competitors. "Now, I have to set up with 45 separate states (and the District of Columbia) that have sales tax, and some states have separate tax districts," he said. "I think the big sellers like Amazon, eBay, and Walmart will have to set up and collect the tax because if they don't, they're going to lose thousands of sellers like us. Unless they step up and do this, I don't see how it's going to work."

Neither eBay nor Alibaba, an online marketplace based in China, responded to emails asking if it plans to start remitting sales tax to all applicable U.S. states following the *Wayfair* decision. The Amazon spokeswoman said that while she can't comment on the company's future plans, "we're digesting the Court's decision and the impact it will have on our sellers."

Christopher Doyle, who specializes in state and local tax issues for Hodgson Russ LLP in Buffalo, N.Y., said that if a company located in another state doesn't pay New York sales tax and ignores a subsequent tax assessment, the Department of Taxation and Finance has a couple of courses of action it can take. Doyle said New York could issue a warrant creating a lien and have the warrant domesticated in the state where the business is domiciled. But if there is no short-form domestication process available in that jurisdiction, New York might have to file suit in the other state's courts, he said. "Frankly, New York is not great at collecting against folks and businesses outside of New York," Doyle said. "It's more about wrecking your credit rating or having this lien out there unsatisfied. If you want to sell your business, it would likely have to be disclosed."

Doyle said that when a foreign business doesn't pay sales tax, the State of New York is more likely to bring pressure on the company by attacking its credit rating or seizing any assets it might have in the state. "If there's property that's held in the U.S. by somebody that has enough of a connection in New York that is subject to New York's long-arm jurisdiction, New York can claim that property in satisfaction of the warrant," he said. "Many foreign banks have facilities in New York City, so New York can levy on any cash in the bank account of the business by levying on that bank."

Cross-Border Enforcement

Allison Christians, a professor of tax law at McGill University in Montreal, said U.S. states will be expected to impose sales tax on remote sellers in Canada and elsewhere. "The ability to actually do so is in no way assisted by *Wayfair*," she said. "I think *Wayfair* just unleashes the dragon but likely provides no instructions for how to tame it. "

Bobby Solhi, a lawyer with TaxChambers LLP in Toronto, said there is a heavy flow of shipments from Canadian companies to U.S. consumers. "Prior to the *Wayfair* decision, these sales would not attract state sales tax insofar as the vendor did not maintain a permanent establishment or carry on business in the U.S.," he said. "*Wayfair* appears to completely change this."

McGrath said he receives many emails through his newsletter from the United Kingdom and Asian countries about how to sell into the United States. He recommends that sellers avoid having their inventories held by Amazon's FBA. "It's a bad choice to ship large quantities to FBA," because of the fees Amazon charges, he said.

Lucas Carvalho, a tax lawyer with TozziniFreire Advogados in Brazil, said that from an administrative standpoint, U.S. states could follow in the footsteps of Korea and the state of Sao Paulo, which have established a "deemed presence" rule requiring foreign companies to register locally as in-state taxpayers. (He said the Sao Paulo requirement applies only to software sellers.)

Carvalho said the enforceability of those kinds of cross-border requirements remains an open issue. “With the increase in exchange of information and the technological improvement of tax administrations throughout the world, these tax assessments for unpaid taxes of out-of-state traders will only increase in number,” he said. “And cross-border cooperation between tax authorities will be used more often to force compliance [by] multinationals, regardless of whether they are e-retailers or not.”

Edson said the enforcement of sales tax laws in the wake of *Wayfair* has been a hot issue. “I can’t envision auditors traveling overseas, but I do see them using every tool possible to make the company’s U.S. business very difficult,” she said.

Karl Littler, vice president of public affairs for the Retail Council of Canada, agreed that states could require foreign merchants shipping into the United States to register for tax purposes. “Then, to the extent they fail to do so, there is a reciprocal enforcement of judgment regime that would allow the government to go after entities that didn’t do it,” he said. “The problem is, short of having access to their records of who they shipped to — and I don’t think you’d get a lot of voluntary [compliance] on the recipient end — to some extent you have to go after the delivery channel. Some Canadian retailers might say, ‘What are you going to do to me?’”

Littler said any fines for failing to register would be only a corrective measure. “The challenge with that is that you’re talking about 45 states with sales taxes,” he said. To register with all of the states with which they might have customers would be pretty cumbersome.”

Possible Congressional Action

Doyle said it’s possible, but unlikely, that U.S. states will ask Congress to enforce the collection of sales tax when foreign goods pass through U.S. Customs. “If Congress steps in, then I think that the citizenry would feel that Congress would then be compelled to look at the overall issue of what the rules should be for nexus; who should be collecting and who should not be collecting,” he said. “Congress has been very hesitant to step into that arena.”

Compelling a foreign vendor to remit state sales tax at the border is less likely than Congress asking U.S. Customs to make the U.S. purchaser pay, Doyle said. “Why go after a Chinese or Philippine vendor when you can go after a U.S. purchaser? It’s easier to establish jurisdiction. For the same reason that it’s harder for a U.S. state to go after a vendor outside of the U.S., it’s not that much easier for the U.S. to go after that vendor.”

Doyle said there would be little benefit for Congress to require payment of state sales taxes at the border. “You can see why the U.S. might be less than motivated, because there’s not any revenue for the U.S. government,” he said. “It all would go to the states.”

Littler said it’s possible the administration of President Trump — who has [complained in the past about Amazon’s tax history](#) and its delivery contract with the U.S. Postal Service — might be willing to help states collect tax at the border. “In principle, if Donald Trump has some antagonistic views towards Amazon . . . and is defending local merchants from what he sees as the depredations of Amazon and perhaps others, then you would think that,” Littler said. “And given his rhetoric about foreign exploitation of U.S. markets, you would think he would want to

provide the states [something] in terms of their revenue generation, and also the local merchants with a positive outcome. And that would include some kind of mechanism to make sure *Wayfair* is enforced against foreign shippers.”

Competitive Edge

Some observers say the combination of the sales taxes U.S. businesses will now have to pay following *Wayfair* and the difficulty states will face in enforcing sales tax laws on their foreign competitors could give an edge to companies without a physical presence in the United States.

Littler said Alibaba might have an advantage over Amazon and eBay because of *Wayfair*, especially because many consumer products are already being shipped from Asia. “If Alibaba can set up something where it ships from China or Mexico and is able to do so on a tax-free basis, given the scale on which they are able to purchase and given their relatively low labor and other input costs, I would think the challenge for U.S. merchants is much more likely to come from China,” he said. “They already have a price advantage and now they’ve got a tax advantage.”

Alibaba is different from Amazon in that it doesn’t own any goods and acts solely as a marketplace, bringing sellers and buyers together. The vast majority of its sales apparently do not involve U.S. customers.

Carvalho said he doubts foreign businesses will see the *Wayfair* decision as a competitive advantage. “The advice given by many firms to e-retailers nowadays is [that] you have to be on top of local taxes on foreign sellers in the destination jurisdiction,” he said. “And that advice is prior to the publication of the *Wayfair* decision. Also, other concerns might prevent even the less conservative taxpayers . . . from selling more goods into the United States, such as increased tariffs on trade, as proposed under the current government.”