

Wayfair and the New Hampshire Advantage

BLOG, TAXATION



Recently retired U.S. Supreme Court Justice Anthony Kennedy, a dedicated follower of passions, enthusiastically fell for the fiction that the South Dakota vs. Wayfair

[https://www.supremecourt.gov/opinions/17pdf/17-494_j4e1.pdf]. Case was actually about “leveling the playing field” between online and traditional retailers through expanded sales tax collections. It wasn’t.

Under the “physical presence standard” that existed before June’s Wayfair decision, states could collect 75-80 percent of the sales taxes that were possibly collectible from online transactions, a 2017 GAO report [found](https://www.gao.gov/products/GAO-18-114) [<https://www.gao.gov/products/GAO-18-114>]. It isn’t clear how much of the remainder could be collected given the safe harbor and other limitations endorsed in the Wayfair ruling.

Though the Supreme Court didn’t rule South Dakota’s law constitutional, it strongly suggested that any law set up in a similar way would be. Among the provisions the court seemed to endorse were safe harbors, simplified tax rates, and collection software provided by the state.

South Dakota’s safe harbor provision states that taxes will be collected only when an out-of-state business has \$100,000 or more in sales or 200 or more transactions. The tax simplification standard means that states would have to ease their definitions of taxable goods and minimize rate differences among localities.

These provisions, along with the fact that most large retailers were already collecting state sales taxes, suggest that states

would collect some new sales tax revenue but not nearly as much as previous estimates of available revenue had predicted.

If the argument was that Amazon kills downtowns and shopping malls because people avoid sales taxes, well, Wayfair wasn't a very good remedy. Amazon was already collecting state sales taxes prior to Wayfair. And, obviously, states could just cut their sales tax rates to make their local retailers more competitive.

But the point of this court case was not to make brick-and-mortar stores competitive. It was to expand state tax collections across state borders. And not just for sales taxes, but most critically for income taxes.

We can feel your eyes rolling. Income taxes? Really?

We call your eye roll and raise you one emergency rule [<https://docs.legis.wisconsin.gov/code/register/2018/753A2/register/er>] issued by Wisconsin on October 1. The Wisconsin Department of Revenue issued the rule to clarify its tax policies post-Wayfair. Buried in the rule is this sentence:

“Retailers with sales and use tax nexus in Wisconsin may also have nexus in Wisconsin for franchise or income tax purposes.”

And there it is. This is the game. Wayfair opens the door to cross-border collection of multiple state taxes — personal and corporate income, franchise, gross receipts, etc.

By eliminating the physical presence standard, Wayfair gives new meaning to the term “the long arm of the law.” Any “nexus” that can arguably connect a business or individual to another state can create a tax liability in that state.

States are already pursuing this, which has the potential of eroding, if not destroying, the New Hampshire Advantage. People move here to avoid income taxes and shop here to avoid sales taxes. If Wayfair creates a de facto national income and sales tax, New Hampshire loses a major competitive advantage over other New England states.

As Americans for Tax Reform President Grover Norquist put it at the Wayfair tax panel you should have attended in Concord on Wednesday, the ultimate goal of the high-tax states that spout the “level playing field” line is the destruction of interstate tax competition.

This is why it’s so important for New Hampshire to pass what legislation it can to protect its businesses and residents from cross-border tax collections. Without a state law that blocks such collections, it likely would be too risky for an individual or small business to sue a foreign state. Paying the tax would be much cheaper.

But with a law to stymie such collections, a business or individual would have firmer ground on which to stand. And the

law might discourage many states from even trying to collect in the first place, as New Hampshire's 2009 Town Fair Tire law did.

The Wayfair decision really does threaten New Hampshire's unique tax structure and the competitive advantage that structure gives us over our neighboring states. Legislators cannot let it stand unchallenged.

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