

Blog Post

In the Wake of *Wayfair*, New York Will Enforce Sales Tax Economic Nexus

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On June 21, 2018, in its *South Dakota v. Wayfair*, 138 S. Ct. 2080 (2018), decision, the U.S. Supreme Court reversed its “physical presence” nexus test established over a quarter century earlier in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). In *Wayfair*, the Court held that “economic nexus” arising from “economic and virtual contacts” with a state could trigger a sales tax collection obligation. Thus, an out-of-state seller without physical connection to a state can now be required charge, collect, report, and remit sales tax to such state. As expected, most states (over 35 to date) updated their nexus policies to take advantage of the revenue-collection opportunity created by the *Wayfair* economic nexus decision.

As compared to many states now first enacting their economic nexus policies, New York established in 1990 its bright-line, two-prong economic nexus test that required certain out-of-state sellers to register as sales tax vendors, and collect and remit sales tax. Specifically, New York created a sales tax collection obligation on sellers with (i) more than \$300,000 of sales of tangible personal property delivered into New York, and (ii) more than 100 sales of tangible personal property delivered into New York, in the immediately preceding four sales tax quarters, *N.Y. Tax Law § 1101(b)(8)(iv)*. Because of its conflict with *Quill*’s physical presence nexus test, New York’s economic nexus statute lay dormant and unenforced

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for almost thirty years. The need for such dormancy ended with *Wayfair*.

On January 15, 2019, citing *Wayfair*, the New York State Department of Taxation and Finance issued Notice N-19-1 regarding “Sales Tax Registration Requirement for Business with No Physical Presence in New York State.” In this Notice, New York recited the two-prong economic nexus test, declared the test immediately effective, and encouraged each business meeting this threshold to register immediately as a sales tax vendor. The Notice does not expressly set an effective date for enforcement; rather, the Notice states that the law “immediately became effective” with the *Wayfair* ruling. The economic nexus rule does not impact the sales tax collection obligations of any seller that already has physical connection in New York.

While *Wayfair* effectively greenlighted New York’s ability to enforce its long-standing economic nexus rule, certain administration ambiguity remains. The activity threshold established in New York’s two-prong test is sufficiently high and excludes from taxation sellers that transact only limited business in the state; thus, the policy meets one anti-discrimination feature enumerated in *Wayfair*. Whether or not, however, New York meets another enumerated anti-discrimination feature is less clear. Specifically, the Supreme Court wrote that prospective (as opposed to retroactive) application of the sales tax remittance obligation is a feature “designed to prevent discrimination against or undue burdens upon interstate commerce.” Accordingly, the effective date of New York’s economic nexus rule may affect its enforcement. Attempts to tax sales occurring between June 21, 2018 and January 14, 2019 based solely on economic nexus may be challenged by sellers arguing that the policy is being retroactively applied. Additional uncertainty related to the timing and calculation of receipts and sales (e.g., subscriptions, prepayments, deliveries) remains. Administrative ambiguity related to complying with New York economic nexus

policy might be addressed in forthcoming notices from the Department.

It appears that the New York State Department of Taxation and Finance is preparing to aggressively examine and audit out-of-state sellers. A seller of tangible personal property into New York can no longer rely upon the physical presence rule to avoid New York sales tax collection obligations. An out-of-state seller with sales tax exposure may qualify to participate in Department's voluntary disclosure program, which can limit the look-back period and eliminate penalties.

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