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Annie Get Your Gun: *Wayfair* and the Unresolved Ambiguities of Sales Tax Nexus

April 10, 2019

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In the late nineteenth century, Annie Oakley was arguably the most famous woman in the country. She was renowned for her skill as a sharpshooter and traveled the country in Buffalo Bill's Wild West Show performing mind-blowing feats. She is credited with shooting the ashes off a lit cigarette hanging out of someone's mouth and hitting objects by looking at them in a mirror. With rare exception, if Annie Oakley targeting something, she hit it.

When the U.S. Supreme Court issued its decision in *Wayfair*, many viewed the case as resolving all of the outstanding questions of sales tax nexus. To this point, the Court determined that an online retailer could be liable for sales taxes whether or not it was physically present in a state. State and local tax authorities viewed the *Wayfair* case as granting *carte blanche* to economic nexus laws that triggered liability based solely on thresholds tied to sales revenue and the number of sales made by the retailer. Despite this unbridled effort by states to expand the scope of their sales tax laws, there remains a certain level of ambiguity regarding sales tax nexus post-*Wayfair*.

The Court in *Wayfair* concluded that the online retailers had nexus with South Dakota based in part on their "extensive virtual presence" in the state.

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According to the Court, sales tax nexus was supported by the fact that the online retailers used “targeted advertising” that provided “instant access to most customers via any internet-enabled device.” These statements by the Court raise a critical point. Is the determination of sales tax nexus controlled by how skilled an online retailer is at “targeting” its customers? Prior decisions of the Court lend support to this notion.

The Court has long-held that a nonresident must “purposefully direct” its activities towards a state in order to be subject to its laws. The critical question is what is meant by “purposeful direction” in the e-commerce world we live in. The *Wayfair* decision provides a clue. The author of the Court’s opinion in *Wayfair* was Justice Kennedy. This fact is relevant because in recent years Justice Kennedy made clear on at least two occasions that purposeful “targeting” is an important constitutional consideration. If the nature and aggressiveness of the online retail advertising impacts the nexus issue, the question to be addressed post-*Wayfair* is what level of advertising causes an online retailer to have sales tax nexus.

The facts of *Wayfair* outline one end of the spectrum on what it means to “target” retail customers in a state. The online retailers involved were multibillion dollar companies that saturated the e-commerce market place. Consistent with these advertising efforts, they used “cookies” to reach customers on their smart phones, tablets, and laptops. Arguably, on the other end of the spectrum is an online retailer operating a “passive” website to accept customer orders without any effort to actively seek new or repeat customers. Is the operation of this “passive” online presence sufficient “targeting” merely because the residents of a state have access to the internet through their smart devices? Between these extremes lie myriad factual situations ripe for dispute between online retailers and state and local taxing authorities.

In the current technological environment there are many sophisticated marketing techniques. For example, retailers now use GPS tracking in smart devices to “geo-fence” and “geo-target” potential customers. When and how online retailers have sales tax nexus in the post-*Wayfair* world may be dictated at how skilled they are at using these advertising tools to “target” customers.

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