BETTER LATE THAN NEVER: THE WAYFAIR IMPACT & MISSOURI'S NEW SALES TAX LEGISLATION

Posted on August 6, 2021 by Michelle F. Schwerin

Tag: Michelle Schwerin

Over the past decade, online retail has exploded – for many sellers, it is now almost non-optional to offer products via online sales. Until recently, however, a state could not impose sales tax obligations on retailers who lacked a physical presence within that state's borders. Thus, online retailers with a national customer base avoided collecting and remitting sales tax on a significant portion of their sales.

On June 21, 2018, in *South Dakota v. Wayfair*, the United States Supreme Court issued a landmark decision concerning the taxability of online sales. In a 5-4 decision, the Court reversed its prior determination and recognized the reality of today's marketplace -- that an entity can transact business in a meaningful and real way without physically being in the state. The Court concluded that a state may impose tax obligations on businesses who have a "virtual presence" within the state.

Not surprisingly, before the ink on the Court's Wayfair opinion had even dried, states raced to see how fast they could cash in on the decision by implementing some *Wayfair*-based legislation. This was, after all, an additional source of revenue. In fact, some states, anticipating the Court's decision in *Wayfair*, enacted legislation even before the Court issued the decision.

Missouri was the very last state (with a state sales tax) to implement a *Wayfair* bill (SB 153), which Governor Parsons signed on June 30, 2021. The measure takes effect on January 1, 2023. Let's take a close look at how states and retailers have responded to *Wayfair* and the issues Missouri faced when passing its own legislation.

What are states doing about *Wayfair*?

Each state enacts its own set of laws defining "nexus"- the minimum level of connection between a business and the state that allows the state to tax the business' activity (in this case, sales tax). After *Wayfair*, states may define nexus without requiring a seller to have a physical presence within the state. Each state determines when a business' operations constitute a nexus, bringing the business within the reach of the state's taxing authority. For example, a state may determine that a certain number of sales or a certain dollar value of total sales to residents of the state establishes nexus with that state.

Wayfair Checklist

In *Wayfair*, Justice Kennedy set forth a list, now informally called the "Wayfair Checklist", of the elements which a constitutionally acceptable definition of nexus must include:

1. **A Safe harbor** to exclude "those who transact only limited business" in the state
   (For example, South Dakota's safe harbor exempts businesses with either (a) less than $100,000 in sales or (b) fewer than 200 transactions and Alabama's safe harbor exempts businesses with less than $250,000 in sales)
2. **No retroactive collection of tax on sales predating the sales tax statute**
3. **A single, state-level administration** addressing all sales tax reporting and collection within the state
4. **Uniform definitions** of products and services
5. **A Simplified tax rate structure**
   (For example, South Dakota requires the same tax base between state and local sales tax, has only three sales tax rates, and limited exemptions from the tax.)
6. **Sales Tax Administration Software** provided by the state to facilitate reporting and compliance

The Economic Impact of *Wayfair* on States

The National Conference of State Legislatures' State Tax Actions 2018 report estimates that the economic impact resulting from remote sales tax collections ranges between $7 million to $190 million *per state* for fiscal year 2019.

State Tax Actions Database:

To illustrate what tax actions states are taking, NCSL put together a database detailing the states' tax changes. The database includes all actions enacted from 2015 through 2020.

What are online retailers doing about *Wayfair*?

Between states, counties, cities, and specialized taxing districts, over 10,000 sales tax jurisdictions exist throughout the United States. Now, in addition to complying with the tax laws of the states in which they are physically located, online retailers must also track and manage the collecting, reporting and remitting requirements of the states and various taxing jurisdictions into which they sell. This has become a significant administrative burden.

Because each jurisdiction has **a different threshold** ($100,000 in sales or 200 transactions, $250,000 in sales or 200 transactions, $500,000 in sales, etc.) and **tax different goods** (some exclude all clothing or clothing under a certain dollar value, some exclude groceries completely or apply a lower rate on groceries, etc.), and many have **different reporting and remission dates**, the analysis might trigger an anxiety attack in a retailer's compliance officer. At a minimum, it is overwhelming.

A business must register for a permit or license in each state in which it has an obligation to collect and remit sales and use tax. In addition, most sellers use software programs to track sales by state, invest in accounting and tax return preparation services to assure compliance, and keep up to date on changes in the tax law. The costs of compliance are not insignificant – many businesses have and will continue to revise their IT structures, business models, data collection, and processes for calculating, reporting and paying their tax obligations.

Missouri's *Wayfair* Legislative Issues

Missouri, the last "sales-tax state" to implement the *Wayfair* bill, missed out on revenue from out-of-state retailers by failing to enact legislation for close to three years. For almost a year, the legislators agreed that Missouri needed a *Wayfair* sales tax regime. However, they couldn't get their act together to reach a consensus on how to use the revenue generated from such tax.

Missouri Wayfair Nexus

- Starting in 2023, under the new law, **out-of-state retailers** with cumulative gross receipts of $100,000 from the sale of *tangible* personal property into Missouri in the twelve months preceding the current quarter (i.e., economic nexus) must register with the Department of Revenue.
- In addition, **marketplace facilitators** (i.e., an eBay or Amazon) will be liable for sales tax on direct sales into Missouri and sales made on behalf of a third-party.

Missouri has over 2,000 tax jurisdictions that sometimes overlap, each with its own standards and tax rates. The newly enacted law requires the Department of Revenue to generate and maintain a tax mapping tool to aid potential taxpayers with compliance.

Financial Impacts of Missouri's *Wayfair* Bill

Missouri Senator Andrew Koenig characterized the bill as a "$380 million income tax cut". Missouri legislators built actual and potential reductions in state income taxes into the new statute. Starting in 2024, income tax rates will drop by one-tenth of a percentage. If the state's general revenues grow by $150M in subsequent years, the income tax rate might be reduced twice, in additional tenth of a percentage increments.

In addition, the bill establishes a nonrefundable **Missouri Working Family Tax Credit Act**, calculated based on a percentage of the taxpayer's federal earned income tax credit, which will go into effect *if* the state meets certain net general revenue growth thresholds.

It is unfortunate that Missouri missed out (and will continue to miss out) on the revenue generated from remote sales until 2023. The reality is that Missouri businesses have been tracking, collecting and remitting sales tax on out-of-state sales for the past three years. Out of state retailers have been making money off of Missouri residents without having to engage in the same exercise. Nonetheless, Missouri is now on board, and the Department of Revenue will work over the next 17 months to build the infrastructure to administer and manage this new sales tax source.