

## Illinois Imposes Economic Nexus Standard Impacting Remote Sellers

September 25, 2018

On June 21, 2018, the United States Supreme Court dramatically altered the state tax world when it issued its decision in *South Dakota v. Wayfair, Inc.*<sup>1</sup> In a 5-4 majority opinion, the Supreme Court overruled a 50-year rule that an out-of-state or “remote” seller cannot be required to collect use tax imposed by a state in which a customer is located unless the seller has a “physical presence” in the customer’s state. The Supreme Court found to be constitutional a South Dakota statute requiring use tax collection by an out-of-state retailer satisfying certain “economic” or “factor” presence nexus standards. Under South Dakota’s now-blessed standard, remote sellers have nexus in South Dakota and, consequently, must collect use tax on sales to South Dakota customers, if the seller delivers more than \$100,000 of goods or services to customers in South Dakota or engages in 200 or more retail transactions with South Dakota customers.

In hopes of the Supreme Court’s pro-state tax decision, Illinois enacted Public Act 100-57 on June 4, 2018, imposing an economic presence nexus standard on out-of-state retailers who sell to Illinois customers, which is similar to the South Dakota standard. On September 21, 2018, the Illinois Department of Revenue issued regulations clarifying the new Illinois law.<sup>2</sup>

Beginning on October 1, 2018, remote sellers without a physical presence in Illinois must register with the Illinois Department of Revenue and collect and remit use tax if either: (i) their cumulative gross receipts from sales of tangible personal property to purchasers in Illinois are \$100,000 or more; or (ii) they enter into 200 or more separate transactions for the sale of tangible personal property to purchasers in Illinois.

Remote sellers must determine whether they satisfy the new economic presence nexus standard on a quarterly basis as of the end of March, June, September, and December. If the remote seller meets the standard for the preceding twelve-month period, then the remote seller must register with the Illinois Department of Revenue and is required to collect and remit use tax and file returns for the following year. At the end of the year, the retailer must redetermine whether it has continued to meet the economic presence nexus standard. If the standard is met at the end of the year, then the retailer must collect and remit use tax and file returns for the subsequent year. If the standard is not met, then the retailer may stop collecting use tax if it notifies the Department of Revenue and reverts to making quarterly nexus determinations.

Illinois arguably should have imposed a higher gross receipts or transactional threshold than the South Dakota standard because it is a more populous and commercial state than South Dakota, but the constitutional question of whether the Illinois nexus statute unduly burdens interstate commerce will have to be resolved in further litigation. In the meantime, other states have already begun enacting factor presence nexus statutes and the *Wayfair* decision appears to resolve the question of whether the income tax factor presence nexus statutes found in many states are constitutional. Retailers should expect state agencies to be more aggressive in asserting that out-of-state taxpayers have nexus for state sales, use, and income tax purposes.

<sup>1</sup> *South Dakota v. Wayfair, Inc.*, 585 U.S. No. 17-494 (June 21, 2018).

<sup>2</sup> S.D. Codified Laws § 10-64-2.

If you might have exposure to state sales tax in Illinois or another state under the *Wayfair* standard, we encourage you to contact one of Neal Gerber Eisenberg's tax professionals.

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