



HB 487 / Wayfair

**Interim Joint Committee on
Appropriations and Revenue**

AUGUST 30, 2018

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Introduction

- On June 21, 2018, the U.S. Supreme Court fundamentally changed the landscape for sales tax collection requirements for online retailers.
- The decision was in South Dakota vs Wayfair which overturned a 1992 U.S. Supreme Court ruling in Quill.

1967 - National Bellas Hess



- In *National Bellas Hess v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), the Supreme Court ruled that a mail order seller was not required to collect sales and use tax on sales into Illinois unless it had some physical presence in the state.
- National Bellas Hess was a mail order company whose only connection with customers in the State was by common carrier or by U.S. mail.
- The Court based its decision on both the Due Process and Commerce Clauses of the U.S. Constitution. It ruled that Illinois' attempt to require National Bellas Hess to collect its tax was an unconstitutional burden on interstate commerce.

1992 - Quill Corporation



- In **Quill Corp. v. North Dakota**, 504 U.S. 298 (1992), The Supreme Court further clarified the constitutional standards that limit state authority to impose sales and use tax upon nonresident retailers.
- North Dakota argued that Quill's marketing of office furniture and supplies used modern technology to engage in an extensive, continuous and intentional solicitation and exploitation of the state's consumer market which established presence there as the 6th largest office supply vendor in North Dakota.
- The Court agreed that because Quill had purposefully availed itself of the North Dakota economic market there was no violation of the Due Process Clause. However, the Court upheld its earlier ruling in *Bellas Hess* that under the Commerce Clause forcing Quill (with minimal to no physical presence in the state) to collect North Dakota sales and use tax would be an undue burden upon interstate commerce.
- Since the Quill decision hinged upon the Commerce Clause, the Court also deferred to Congress as the body to provide further clarity on what constituted undue burden upon interstate commerce.

2018 – Wayfair Decision



- “...The Court concludes that the physical presence rule of Quill is unsound and incorrect. The Court’s decisions in Quill Corp. v. North Dakota, 504 U. S. 298 (1992), and National Bellas Hess, Inc. v. Department of Revenue of Ill., 386 U. S. 753 (1967), should be, and now are, overruled.”
- The case is now back at the South Dakota Circuit Court for final disposition.
- “Physical presence” is no longer required but still creates nexus.
- According to the Supreme Court, “Modern precedents rest upon two primary principles that mark the boundaries of a State’s authority to regulate interstate commerce. **First, state regulations may not discriminate against interstate commerce; and second, States may not impose undue burdens on interstate Commerce...**”
- The Court cited three features of the South Dakota law that seem designed to prevent discrimination or undue burdens on interstate commerce:
 - Safe harbor for those with limited business (threshold)
 - No retroactivity
 - Membership within the Streamlined Sales Tax Governing Board

Remote Retailer Economic Nexus in Kentucky

HB 487 amended KRS 139.340 to parallel the nexus standard adopted by South Dakota as follows:

Any remote retailer selling tangible personal property or digital property delivered or transferred electronically to a purchaser in this state if:

1. The remote retailer sold tangible personal property or digital property that was delivered or transferred electronically to a purchaser in this state in two hundred (200) or more separate transactions in the previous calendar year or the current calendar year; or
2. The remote retailer's gross receipts derived from the sale of tangible personal property or digital property delivered or transferred electronically to a purchaser in this state in the previous calendar year or current calendar year exceeds one hundred thousand dollars (\$100,000).

Kentucky has all three features as articulated by the Supreme Court to prevent “undue burdens” on interstate commerce:

- Safe harbor for those with limited business – noted above
- No retroactivity

KY is a member of the Streamlined Sales Tax Governing Board

Department Guidance for Remote Retailers

- Remote retailers that meet the transaction or receipt thresholds must begin the registration process for collection of Kentucky sales and use tax on a prospective basis.
- Remote retailers required to register for sales and use tax collections in Kentucky may go through the Governing Board's central registration system to register in all twenty-four Streamlined member states in one process or use our own registration process through KY Business One Stop.
- There are also Certified Service Providers (CSPs) available to assist with the tax collection and filing process when using the Governing Board's central registration system.
- Registrations should be completed with sales and use tax collections beginning by October 1, 2018. If there are concerns about complying with this timeframe, contact the Department of Revenue for further assistance.

KY Economic Nexus Implementation Efforts

- The enactment of HB487 in conjunction with the Supreme Court decision positions KY to move forward with collection requirements for remote retailers.
- Notifications of economic nexus standards are prominently posted on Department websites.
- The Department has reviewed its databases and mailed letters to the top 1,000 Etailers not already registered to collect KY tax.
- Kentucky is actively participating in national implementation efforts coordinated by the Streamlined Sales Tax Governing Board.

SST Economic Nexus Implementation Efforts

- The Governing Board is working with other national, multistate tax and business groups to ensure an orderly and generally uniform approach forward.
- Contacting all non-members states to encourage and facilitate additional membership.
- Updating central registration system to accommodate higher registration volumes and potential use by non-member states.
- Reviewing contracts with CSPs to reflect broader nexus standards and higher numbers of remote retailers utilizing the automated tax program and collection services. The compensation model will be adjusted accordingly.
- Monitoring potential congressional action in response to the Wayfair decision.

Marketplace Definitions

New KRS 139.010 Definitions

(21) "Marketplace" means any physical or electronic means through which one (1) or more retailers may advertise and sell or lease tangible personal property or digital property, such as a catalog, Internet Web site, or television or radio broadcast, regardless of whether the tangible personal property, digital property, or retailer is physically present in this state;

(22) "Marketplace facilitator" means a person that facilitates the retail sale of tangible personal property or digital property by listing or advertising the tangible personal property for sale at retail and either directly or indirectly through agreements or arrangements with third parties, collects the payment from the purchaser, and transmits the payment to the person selling the property;

(23) "Marketplace retailer" means a person that has an agreement with a marketplace facilitator and makes retail sales of tangible personal property or digital property through a marketplace;

Marketplace Definitions

New KRS 139.010 Definitions

(33) "Referrer" means a person that:

- (a) Contracts with a retailer or retailer's representative to advertise or list tangible personal property or digital property for sale or lease;
- (b) Makes referrals by connecting a person to the retailer or the retailer's representative, but not acting as a marketplace facilitator; and
- (c) Received in the prior calendar year or the current calendar year, in the aggregate, at least ten thousand dollars (\$10,000) in consideration from remote retailers, marketplace retailers, or representatives of remote retailers or marketplace retailers for referrals on retail sales to purchasers in this state;

(34) (a) "Remote retailer" means a retailer with no physical presence in this state;

(34) (b) "Remote retailer" does not include a marketplace facilitator or a referrer;

Marketplace Next Steps for KY

- Although KY has adopted definitions related to Marketplace sales platforms, there were no collection or remittance requirements included within HB 487.
- Several states have adopted requirements for Marketplace facilitators to collect and remit sales and use tax for the Marketplace sellers using their platforms.
 - Rhode Island, 8/17/17; Washington, 1/1/18; Pennsylvania, 3/1/18; Oklahoma, 7/1/18; Minnesota, 7/1/19
- The expectation is that many additional states will introduce similar legislation in the next legislative cycle.
- Typically, this legislation would require Marketplace facilitators to collect and remit sales tax for all of their Marketplace sellers regardless of size. Enforcement would also be at the facilitator level and not with the seller.

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