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Insights: Perspectives

5 Key Takeaways: South Dakota v. Wayfair: The United States Supreme Court Reconsiders Sales/Use Tax Nexus

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South Dakota v. Wayfair:

The United States Supreme Court Reconsiders Sales/Use Tax Nexus

Jeffrey S. Reed, Chair of Kilpatrick Townsend's State and Local Tax Group, spoke at Tax Executives Institute's Tax School in Dallas, Texas, on April 25th. He discussed the South Dakota v. Wayfair oral argument, which occurred the prior week, on April 17th.

Key takeaways from the presentation included:

1

The Justices Focused on Nexus Broadly and Not on the South Dakota Statute

The justices did not ask many questions about the South Dakota statute at issue, which imposes use tax collection responsibilities on any seller with over 200 annual South Dakota separate sales transactions or over $100,000 in annual South Dakota sales. Rather, they focused more broadly on what would be the nationwide impact of changing (or not changing) the current physical presence nexus rule.

Congressional Inaction Could Cut Different Ways

The justices agreed that the Court in Quill (1992) called on Congress to enact federal legislation addressing sales/use tax jurisdiction. The justices seemed to draw different things from Congress not enacting federal legislation over the prior 26 years. Several justices thought that this left the Court with no choice but to step in and address the issue. Justice Kagan on the other hand seemed to suggest that perhaps the Court should defer to Congress's lack of action in this area, interpreting it as a sign that maybe Congress thinks that the status quo is acceptable, or perhaps even preferable to proposed legislative solutions.

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Who is Most Hurt By Physical Presence and the Current System?

The justices seemed to disagree about what type of business is most injured by the present laws. Justices Ginsburg and Gorsuch seemed to view brick and mortar retailers as the victims, because they have to collect sales tax, whereas out-of-state internet retailers often do not collect use tax, leaving brick and mortar retailers at a competitive disadvantage. Other justices seemed to view small internet retailers as the victims, because they must comply with a welter of different state sales/use tax systems, entailing considerable compliance costs, which could become worse if the physical presence rule is abrogated.

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In their briefs, the parties relied on different studies calculating the amount of nationwide sales/use tax revenue lost due to the physical presence rule. They also made different claims about the ease by which software can be purchased to eliminate sales/use tax compliance burdens (or at least make them manageable). Several Justices, and especially Justice Breyer, expressed difficulty in evaluating the contrasting factual and empirical claims made by the parties.

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Overall, the Oral Argument Went Well for Wayfair

When the Court agreed to hear the case, the bulk of commentators speculated that this was done with the object of reversing Quill. However, many of the justices, and especially Justices Alito, Kagan, Roberts, and Sotomayor, seemed concern with reversing Quill, and especially with the retroactive impact in other states, plus the administrative and compliance burdens that reversing Quill could place on small sellers. Accordingly, it sounded like the Court was at the very least divided on reversing Quill. We will know for sure in June, when the Court issues its opinion.

For more information, please contact Jeffrey S. Reed at jsreed@kilpatricktownsend.com

www.kilpatricktownsend.com