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Electronic Commerce

State of Wayfair: Philly Uses Case to Grab Business Income

The U.S. Supreme Court's *Wayfair* decision is impacting revenue programs beyond the sales tax arena—just ask Philadelphia.

The Philadelphia Department of Revenue published an update to the city's Business Income and Receipts Tax (BIRT) [regulation](#) Jan. 29, finalizing amendments first proposed in November 2018.

The amendments reflect the Supreme Court's June 2018 ruling in *South Dakota v. Wayfair*, the city said on its website. The department specified that Philadelphia is updating its standard to reflect the court's view, "that businesses' economic and virtual connections to the taxing jurisdiction are sufficient to create constitutional nexus."

In making the changes, Philadelphia may be one of the first taxing jurisdictions in the nation to apply principles from the *Wayfair* decision to business income, said Jennifer Weidler Karpchuk, a senior counsel at Chamberlain Hrdlicka in West Conshohocken, Pa.

"As far as I am aware, Philadelphia is the first city to take action in regard to its income tax," Karpchuk told Bloomberg Tax Jan. 30.

"It definitely does rope in people that it didn't before. Some businesses may have to take a closer look at sales in Philadelphia," she said.

The *Wayfair* decision overturned the court's 1992 physical presence standard in *Quill Corp. v. North Dakota*, which had limited states' ability to tax sales from out-of-state sellers with no physical presence in the state. The majority in the 5-4 ruling suggested that South Dakota's law, which required remote sellers to collect sales tax if they passed a threshold of \$100,000 in sales or 200 transactions in South Dakota, was constitutional.

Philadelphia's new regulations for business income taxes apply the \$100,000 *Wayfair* threshold to economic nexus, although they don't specify a number of transactions. Under the changes, as of Jan. 1, 2019, a taxpayer with no physical presence in Philadelphia that has at least \$100,000 in gross receipts in the city during a 12-month period is subject to the BIRT.

Grabbing New Dollars Philadelphia has long maintained that businesses with an "active presence" in the city could be subject to the BIRT, even if they had no actual place of business inside the city limits. Yet written rules alluded to facts and circumstances rather than

a clear dollar threshold, said James R. Malone, Jr., a principal in the tax controversy practice at Post & Schell, P.C. in Philadelphia.

"I think it's going to affect a lot of people, because there are people who may not have focused on BIRT before," Malone told Bloomberg Tax Jan. 30. "My suspicion is that the city will generate some additional revenue."

Alan Goldenberg, a principal in the state and local tax and tax controversy groups at Friedman LLP in New York, said he hasn't seen any other jurisdiction apply *Wayfair* to a gross receipts tax. It's possible that the regulation could be challenged on those grounds because *Wayfair* was strictly a sales tax case, he said.

"If every local jurisdiction is going to be mandating all these economic nexus rules, this is going to be a very difficult burden for taxpayers to comply with," Goldenberg said.

Arkansas: Marketplace Language Added Arkansas' pursuit of a *Wayfair* payday now includes legislation targeting online marketplace providers for tax collection on in-state transactions.

Once solely a South Dakota-style threshold bill, a Jan. 29 amendment to [H.B. 1002](#) would require marketplaces such as Amazon.com Inc., eBay Inc., and Etsy Inc. that host sellers on their sales platforms to collect and remit sales tax on behalf of third-party vendors.

"That's significant," Matthew C. Boch, a member of Dover Dixon Horne PLLC in Little Rock, told Bloomberg Tax. "Even if it doesn't move on its own, I wouldn't be surprised if this is the working model for *Wayfair*," he said in a Jan. 30 email.

The amendment follows a state request asking for additional guidance on the "emerging" issue of marketplace facilitators.

The threshold aspect of the legislation would bring in [\\$23.6 million for FY 2020 and \\$35.4 million for FY 2021](#). The bill is currently sitting in House committee.

No Beef in Minnesota Minnesota has no beef with e-commerce companies responding to its first-in-the-nation marketplace provider law despite rumors to the contrary. In fact, a state revenue official told Bloomberg Tax that collections have proceeded smoothly for three months.

"Compliance in this area has gone as expected," Ryan Brown, a spokesman for the Minnesota Department of Revenue, said Jan. 29. "We provided remote sellers and marketplace providers over 60 days' notice that they must register and begin collecting and remitting Minnesota sales tax no later than October 1, 2018."

In May 2017, Minnesota became the first state to enact a marketplace provider [law](#). The law requires online

marketplaces to [collect](#) Minnesota's sales tax on behalf of thousands of retailers selling goods and services on their platforms.

Brown declined to address rumors that some e-commerce companies are having problems meeting the collection expectations of the marketplace states. Instead, he said marketplaces and sellers are expressing satisfaction with the guidance and tools provided by the department.

"We'll continue to work with our customers to make sure they're meeting their obligations under Minnesota

law, and we take seriously our responsibility to ensure that all taxpayers are treated fairly under Minnesota's tax laws," Brown said.

—With assistance from Leslie A. Pappas in Philadelphia and Paul Stinson in Austin, Texas

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