



STATE OF ARKANSAS

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and Administration

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August 14, 2018

Via email to

[REDACTED]  
[REDACTED]  
[REDACTED]

RE: Sales Tax – South Dakota v. Wayfair  
Opinion Number 20180427

Dear [REDACTED],

Your email received on April 6, 2018, by the Arkansas Department of Finance and Administration requesting a legal opinion has been referred to me for response. The specific inquiry and facts that you have provided as follows:

[W]ill the South Dakota v. Wayfair sales tax case being heard by SCOTUS, depending on the ruling, make this sales tax issue a bit clearer (all Internet purchases now can be taxed regardless of nexus) or just churn up already muddy water? We've made the decision to collect/remit sales taxes as a courtesy/convenience for any AR subscribers. But there are ~30 states that don't tax streaming media or have different levels of taxation, as you have with just streamers not having to pay an AR sales tax by streamers with the ability to download for off-line listening being taxed. Confusing. So depending on a SCOTUS decision, good, bad or same old-same old?

To address the potential effects of the *Wayfair* case on Arkansas, I discuss in this letter Congress's power to regulate interstate commerce, the Supreme Court's Dormant Commerce Clause jurisprudence, the *Wayfair* case, and the State of Arkansas law on the sales tax liability of remote sellers.

**RESPONSE**

*South Dakota v. Wayfair* is a recent case with the United States Supreme Court that decided the constitutionality of South Dakota Senate Bill 106 of 2017 and overturned the holding in *Quill Corp. v. North Dakota*. The *Wayfair* case determined whether the South Dakota law is constitutional under what is called the "Dormant Commerce Clause," and while its decision could apply to sellers in all fifty states, its impact on Arkansas is uncertain.

The Commerce Clause grants the United States Congress the authority to regulate commerce “among the several states.” U.S. Const. art. I, § 8. The Dormant Commerce Clause—which is a constitutional doctrine that is inferred from the Commerce Clause’s positive grant to Congress of power to regulate interstate commerce—prohibits states from discriminating against interstate commerce. For example, the Supreme Court held that a local ordinance that required all milk sold in the city of Madison to be pasteurized within five miles of the city unconstitutionally discriminated against interstate commerce. *Dean Milk Co. v. City of Madison Wisconsin*, 340 U.S. 349 (1951).

The United States Supreme Court has stated that a state tax will be upheld under the Dormant Commerce Clause only if it applies to an activity with substantial nexus to the taxing state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In *Quill Corp. v. North Dakota*, the Court held that a seller did not have substantial nexus to a taxing state when the seller lacked a physical presence in the state. 504 U.S. 298 (1992) (citing *Nat’l Bellas Hess v. Dep’t of Rev. of Ill.*, 386 U.S. 753 (1967)). However, in the recent case of *South Dakota v. Wayfair*, the Supreme Court overturned its holding from *Quill* and held that a seller may have substantial nexus to a taxing state even if the seller does not have a physical presence in the state. 585 U.S. \_\_\_\_ (2018).

*Quill* had been the standard rule for more than twenty-five years when in 2017 South Dakota passed Senate Bill 106, which required out-of-state vendors to collect and remit South Dakota sales tax on purchases made by in-state residents. Liability under the law, however, would apply only to sellers that, on an annual basis, deliver more than one hundred thousand dollars of goods or services into South Dakota or engage in two hundred or more separate transactions for the delivery of goods or services into South Dakota. The Supreme Court of South Dakota held that *Quill* prohibited enforcement of the law, and the state of South Dakota asked the Supreme Court of the United States to overturn *Quill*. Then in 2018, the Supreme Court of the United States reversed the decision of the South Dakota Supreme Court and overturned *Quill* and *Nat’l Bellas Hess*). *South Dakota v. Wayfair*, 585 U.S. \_\_\_\_ (2018).

The majority opinion in *Wayfair* did not state what minimum contacts a remote seller must have with a taxing state to meet the substantial nexus standard; it merely stated that a seller that meets South Dakota’s annual minimum of two hundred transactions or one hundred thousand dollars in goods or services delivered into the state has substantial nexus to South Dakota. *Id.*

Further, the majority opinion in *Wayfair* did not state whether sales tax liability may be applied retroactively to a seller; the majority did, however, suggest that retroactively applying liability to a remote seller could make both a buyer and seller legally liable for collecting and remitting the tax on a transaction intended to be taxed only once. *Id.* The dissent specifically characterized possible retroactivity of remote sales tax liability as “troubling.” *Id.* To sidestep this issue, the majority opinion merely observed that retroactivity was not an issue with the South Dakota law because the law explicitly did not apply retroactively. *Id.*

Finally, the majority noted that that South Dakota’s membership—as one of twenty-four full member states—in the Streamlined Sales and Use Tax Agreement standardizes taxes and reduces administrative and compliance costs for sellers. *Id.* Membership in the agreement requires that member states use a single, state-level tax administration, uniform definitions of products and

services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the member states.

Despite the Supreme Court's holding in *Wayfair*, the majority opinion's effect on sellers with no physical presence in Arkansas remains uncertain. In Arkansas, the sales tax liability for all sales of tangible personal property, specified digital products, digital codes, and taxable services is upon the seller. Ark. Code Ann. § 26-52-517(a). The face of that statute does not limit its application to sellers with a physical presence in Arkansas. However, while Arkansas is a full member state under the Streamlined Sales and Use Tax Agreement, the Department is reviewing the exact requirements and actions to be taken regarding the *Wayfair* decision. Furthermore, the Bureau of Legislative Research has indicated their opinion that legislation would be necessary to impose the collection duty on remote sellers. The Arkansas Legislative Tax Reform and Relief Task Force has indicated that it may recommend in its final report introducing such a bill in the 2019 legislative session.

The long-term effects of the *Wayfair* decision could also be complicated by the action (or inaction) of the United States Congress. I cannot fully state how the *Wayfair* decision will affect Arkansas, and I cannot, as you asked in your letter, give my opinion on whether the *Wayfair* decision is good for Arkansas. The Department does not provide policy-based opinions regarding collection topics.

My opinion is based on my understanding of the facts as set out in your inquiry, as those facts are governed by current Arkansas laws, rules, and regulations. This opinion does not address other issues of taxability that may be mentioned in your request. Any change in the facts or law could result in a different opinion. You may rely on this letter opinion for a period of three years from the date of its issuance in accordance with Arkansas Gross Receipts Tax Rule GR-75.

Sincerely,

Chris McNeal  
Revenue Legal Counsel