**SOUTH DAKOTA V. WAYFAIR: WHAT CONSTITUTES SUBSTANTIAL NEXUS?**

Historically, online retailers needed to be physically present in a state in order to be compelled by a state to collect state sales tax. The physical presence requirement resulted in an inefficient “online sales tax loophole.” In a 5/4 split the Court determined that the “anachronistic” Quill physical presence standard was impractical and effectively discriminated against in-state sellers. Requiring physical presence gave out-of-state retailers an advantage – consumers would purchase goods from them at an overall discount, because the retailer could not be compelled to collect the sales tax. Now, with a more fair economic nexus rule, the Court has leveled the playing field as physical presence is no longer necessary to meet the nexus standard or full-test established in Complete Auto Transit v. Brady.

Now, states can require remote sellers to collect state sales tax, as long as the Complete Auto Transit test is met. The test requires that: (1) the tax applies to an activity with a substantial nexus with the taxing state; (2) whether the tax is fairly apportioned; (3) whether the tax discriminates against interstate commerce; or (4) whether the tax is fairly related to services provided by the state.[[1]](#footnote-1)

The Court did not clearly set out a standard for taxing an “activity” with “substantial nexus.” They did, however, uphold South Dakota’s economic nexus legislation (S.B. 106); leaving states with a roadmap to help in determining what may qualify as substantial nexus in the future. Remote retailers lacking physical presence can still be subject to collecting sales tax when the remote retailer makes in-state sales exceeding $100K *or* makes 200 or more separate sales transactions in the previous or calendar year.[[2]](#footnote-2) The Court found in this case that because Wayfair “engaged in a significant quantity of business” within the state and maintained an “extensive virtual presence” allowing the Court to find “substantial nexus”.[[3]](#footnote-3)

According to Chrease Dickerson, a tax law editor for Bloomberg Tax, “16 states [have] indicated that their state sales tax policy was based on economic nexus”. Other states like Georgia and Illinois have been passing legislation in the wake of Wayfair. Georgia’s new legislation requires online retailers who make $250K *or* 200 sales a year in GA to either: (1) collect and remit the state sales tax; or, (2) send “tax due” notices each year to customers spending $500 or more on their websites.[[4]](#footnote-4) Illinois requires online retailers to charge sales tax to Illinois customers if the business has more than $100K in sales or if more than 200 separate transactions take place, per year.[[5]](#footnote-5)

The case was remanded to determine whether the law satisfies the remaining three prongs of the Complete Auto Transit test above.

1. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). [↑](#footnote-ref-1)
2. South Dakota (S.B. 106). [↑](#footnote-ref-2)
3. South Dakota v. Wayfair. [↑](#footnote-ref-3)
4. https://www.accountingtoday.com/news/states-plan-for-a-post-wayfair-world. [↑](#footnote-ref-4)
5. https://qctimes.com/news/local/illinois-lawmakers-ponder-online-sales-tax/article\_e58b1697-7245-5d93-9811-8227ec9fa0ec.html. [↑](#footnote-ref-5)