

How Wayfair Decision Benefits New Jersey

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On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair Inc. et al.*,^[1] which required the court to consider the extent to which South Dakota could obligate an out-of-state seller to collect a sales tax for goods delivered into the state, where the seller had no “physical presence” in South Dakota. The court’s 1992 ruling in *Quill Corp. v. North Dakota*^[2] held that a state could not require an out-of-state seller, with no physical presence in the state, to collect a sales tax for that state, thus giving online retailers a significant advantage over traditional brick and mortar businesses.

In overruling *Quill*, the Supreme Court, by a 5-4 decision, stated that the physical presence rule was “unsound and incorrect.” The court determined that in the online world of commerce that we currently live in, and “when the day-to-day functions of marketing and distribution in the modern economy are

considered, it is all the more evident that the physical presence rule is artificial in its entirety.”[3]

The Wayfair decision will have a significant impact on commerce in many ways — especially in New Jersey. Prior to the Wayfair decision, online retailers without a physical presence in the state were not required to collect sales tax on goods shipped into New Jersey, resulting in an unfair advantage over traditional brick and mortar stores in the state. Local retailers have found it hard to compete with online retailers who could sell their products to a customer without the imposition of a sales tax that the local retailer was required to collect. While the consumer still had an obligation to remit to New Jersey a “use tax” equal to the sales tax that would have been collected by the local retailer, the vast majority of consumers did not pay this tax and it had proven to be economically prohibitive for states like New Jersey to attempt to police this. So, in effect, the consumer could get the product online at a discount equal to the sales tax that would otherwise be due. After Wayfair, the playing field between the online retailer and the local shopkeeper will be more level.

The removal of this competitive advantage to online retailers is also likely to result in increased traffic to local retail stores, which could have a positive effect on employment numbers and a reduction in commercial vacancy rates. Online retailers who were avoiding the establishment of a physical presence in New Jersey may now choose to do so as they will be required to collect New Jersey sales tax regardless of whether or not they have a physical presence in the state. For New Jersey, with our significant transportation hubs, system of highways, educated workforce, and proximity to major population centers, this could increase the number of online retailers willing to consider locating warehouses, showrooms or office operations in the state.

Interestingly, many large online retailers, like Amazon.com Inc., already collect the sales tax in all states. In fact, Wayfair now collects taxes on about 80 percent of its online orders, as it has warehouses throughout the country. The Wayfair decision could actually be beneficial to those large online retailers, as middle market and specialty retail operations will have a more difficult time competing.

This decision could, however, hurt many small online retail operations as they will now be required to collect sales tax for all states into which they deliver goods. What specifically comes to mind are those

very unique online retailers who ship all over the country. For example, the Jersey Shore is famous for its delicious Fralinger's saltwater taffy. If a visitor from Sioux Falls, South Dakota, returns home after an enjoyable vacation in New Jersey and he finds that he wants more of that delicious taste of summer, he might go online to order a box of taffy. Fralinger's currently is not required to collect a South Dakota sales tax on that sale. However, if the company makes more than 200 sales into South Dakota, they are likely going to need to start doing so.

Currently, 31 states impose a tax on internet sales without a physical presence. As a result of this decision, New Jersey businesses are going to need to immediately consider their obligations to collect these taxes as they conduct business across state lines. Non-New Jersey businesses are also going to have to rethink many business decisions which they've made purely to avoid collecting New Jersey sales taxes. Nevertheless, the result of the Wayfair decision is expected to bring in additional tax revenue to New Jersey measured in the hundreds of millions of dollars.

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[1] 585 U.S. ____ (2018).

[2] 504 U.S. 298.

[3] Wayfair at 14.

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