

Impact of South Dakota v. Wayfair on the Auction Industry

Background

In March 2016, South Dakota passed a law to collect sales tax on any taxable item purchased outside the state, if the buyer takes possession of the item within South Dakota (for example, if the item is shipped to the buyer in South Dakota). This law applies to items purchased from traditional retailers, or at auctions, or from marketplaces both in person and online.

South Dakota brought suit against major online retailers (Wayfair, Overstock.com and Newegg) to enforce the law. The law was struck down by the South Dakota courts because of the longstanding Supreme Court decisions (the *Bellas Hess* decision in 1967 and most recently the *Quill* decision in 1992) permitting sales taxation on interstate sales only if the seller maintains a physical presence in the purchaser's location. South Dakota appealed to the U.S. Supreme Court this past spring. NAA, on behalf of the auction industry and 38 state associations, filed an amicus brief that outlined concerns of auction companies and other smaller remote sellers that were not addressed by the major online retailers. However, in June, the Supreme Court found in favor of South Dakota and effectively overturned the longstanding *Bellas Hess* and *Quill* decisions that required a physical presence in a state before sales tax could be collected. The Supreme Court remanded the case to the South Dakota Supreme Court, which has since returned it to the lower courts for further proceedings.

In the opinion of many, the imposition of sales taxes on remote sellers, especially smaller remote sellers such as auctioneers, creates a significant and impermissible burden on interstate commerce. Many smaller retailers are working to resolve those issues through a combination of simplification of numerous and wildly different state tax procedures, clarification of issues relating to minimum sales volume thresholds before the imposition of sales taxes and avoiding retroactivity in the application of sales taxes, following the Supreme Court's decision. These issues have garnered the attention of both state and federal legislators. At the federal level, the U.S. House of Representatives Judiciary Committee has held a hearing outlining the issues related in this decision, and a group of four U.S. Senators – Jon Tester (D-Mont.), Jeanne Shaheen (D-N.H.), Jeff Merkley (D-Ore.), and Maggie Hassan (D-N.H.) – have drafted the **Stop Taxing Our Potential (STOP) Act** to prevent forcing businesses to collect online sales taxes for sales to buyers in states where they do not have a physical presence.

The NAA is monitoring and participating in these efforts with an eye toward protecting the interests of its members and the auction profession generally. As explained in the following synopsis of the auction industry, the imposition of state sales taxes is a particularly acute problem for many smaller auction companies and imposes significant burdens on interstate commerce conducted by auction companies.

About the Auction Industry

Although a majority of auction companies are small, often family-owned businesses, auction professionals collectively facilitate commerce in America on a massive scale, selling a diverse variety of goods via live, online and simulcast auctions. Auction professionals sell billions of dollars of idle assets each year, putting those assets back to work, and providing a valuable service to businesses, governments, individuals, communities and the larger community.

Auction companies do not typically own the goods they sell at auctions, serving instead as agents of the sellers by overseeing the marketing and logistics of the auction. As agents, auction professionals collect and remit sales taxes on the sale of goods sold and delivered in the jurisdiction of the auction.

Auction professionals have relied on the physical-presence rule of *Bellas Hess* and *Quill* to determine when to collect and remit sales tax. The certainty afforded by these Supreme Court decisions has allowed the auction profession to evolve and embrace online and other forms of interstate sales. With the *South Dakota v. Wayfair* decision, however, auction companies now face an overwhelming tax environment charged with financial burden and legal uncertainty.

Issues within the Auction Industry

- **Threat to Industry Survival:** States that support the *South Dakota v. Wayfair* decision see it as a way to require out-of-state retailers to pay their “fair share” of state sales tax while purportedly imposing a “negligible burden” on interstate commerce. However, the burden is not negligible for thousands of small auction businesses that have relied on *Quill* to conduct interstate sales. In fact, the elimination of the physical-presence requirement is an existential threat to their very survival.
- **Lack of Standardization:** Auction companies will face a complex web of state and local sales tax collection obligations and may even become subject to retroactive sales tax liability for prior sales. With customers across the country, these new tax laws mean that auction professionals will face the overwhelming and daunting task of determining the correct taxing authority and tax rate for each customer as well as the proper classification of each item sold in nearly 10,000 different taxing jurisdictions in the United States.
- **Limited Resources:** Auction professionals sell billions of dollars of assets every year; yet, 70% of NAA member companies have four or fewer employees. Members will soon be required to determine the applicable sales tax, collect, and then remit the tax to the buyer’s local taxing jurisdiction. Businesses this size cannot afford to hire tax compliance professionals or spend hours of staff time on compliance. Furthermore, while basic versions of tax software may be available for low monthly fees, substantial fees apply for premium services including support for additional jurisdictions, ready-to-file return preparation and actual remittance of sales taxes to each taxing authority. Auction companies must also consider the cost and staff time of integrating software into existing accounting and payment systems, which can be particularly challenging as the items and prices vary greatly for each auction with very little overlap.
- **Short Adoption Periods:** Thirty-three states now have similar pending or recently passed legislation, giving auction companies little to no time to understand and implement processes in an efficient, affordable and accurate manner. Additionally, states are currently able to impose retroactive tax liability on businesses for prior sales. This only compounds the burdens on small businesses like those in the auction industry.

For more information about this issue, please visit www.auctiontax.com or www.auctioneers.org/auction-tax.