



This Week in State Tax (TWIST)

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Multistate: Courts in South Carolina and Washington address pre-*Wayfair* marketplace collection

The South Carolina Court of Appeals has affirmed an Administrative Law Court (ALC) decision, which had held that an online marketplace facilitating sales for third-party merchants was required to collect sales and use tax on sales to South Carolina customers. The tax period at issue was January 1, 2016 through March 31, 2016, which pre-dated the *Wayfair* decision. The tax period at issue also coincided with the expiration of a sales tax exemption for businesses that built distribution centers in South Carolina. After the exemption expired, the marketplace collected and remitted tax on its own sales. However, the agreements the marketplace had with merchants at the time generally required the merchants to be responsible for the collection, reporting and payment of taxes on their sales. Upon audit, the South Carolina Department of Revenue argued that the marketplace was a “retailer” with respect to sales it facilitated for third-party merchants and was therefore required to collect and remit sales and use taxes on such sales to South Carolina customers. After the South Carolina Administrative Law Court concluded that the marketplace was in the “business of selling” tangible personal property at retail because a customer’s interaction was almost entirely with the marketplace and the marketplace accepted money in exchange for products, this appeal followed.

The court rejected the taxpayer’s position that the state sales tax law was ambiguous as to the requirements imposed on marketplace facilitators for tax collection. By finding the law was unambiguous, the court was not required to resolve any doubt in this matter in the marketplace’s favor. The court next affirmed the ALC’s holding that the marketplace was a person engaged in the business of selling tangible personal property at retail and was therefore required to collect and remit sales tax on such sales. The court further held that the marketplace was a seller under South Carolina law. In fact, the marketplace was the only party a buyer encountered and interacted with during a sale transaction. Although the goods sold were owned by a third party, the law did not require that a “seller” own the goods that it sold. The court also rejected the constitutional arguments made by the marketplace. Notably, the marketplace asserted that the Department’s attempt to collect sales taxes on third-party sales was an attempt to retroactively apply the 2019 marketplace facilitator amendments without fair notice. The court disagreed, noting that the Department applied the sales tax law that was in place at the time. As such, after the taxpayer built a distribution center in the state and established a physical presence, the Department required it to collect as a “retailer” after the exemption expired.

In Washington State, an appeals court addressed a slightly different issue that involved the same marketplace. The issue was whether two merchants that utilized the marketplace were required to collect sales and use tax and pay retailing B&O tax on sales facilitated by the marketplace for tax years before the state’s marketplace law became effective. The marketplace stored the sellers’ goods in Washington State

during the audit period, which the Department argued created nexus for the sellers. In response, the sellers argued that they did not know that they had a tax-collection responsibility to Washington state once they had goods in the state. The sellers also alleged that the marketplace should have collected and remitted taxes on their behalf as a consignee. The court rejected the consignment argument, noting that the marketplace's website did not list the marketplace as the seller, and there was no evidence a consignment agreement was in place. Further, the court observed that the merchants could not rely on ignorance or a lack of understanding. "Ignorance of the law excuses no one." In addition, the court called out certain provisions of the contract between the marketplace and sellers that placed full responsibility for all taxes related to the transactions on the seller. Finally, the court noted that it must presume that the legislature does not engage in vain and useless acts. If the marketplace was required to collect taxes during the reporting periods at issue, the legislature would not have needed to enact a new law specifically requiring such entities to collect. Please stay tuned to TWIST for future marketplace-related developments.

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