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California Mulls Actions, Guidance in Wake of 'Wayfair'

By Laura Mahoney | July 12, 2018 04:40PM ET | BLW

California tax authorities haven't outlined how they will respond to the U.S. Supreme Court's ruling in *Wayfair*, but a 2012 state law appears to allow the state to begin collecting use taxes on online sales now.

It is unclear when the California Department of Tax and Fee Administration may issue guidance, a department spokesman told Bloomberg Tax. The department hasn't released information beyond a statement issued immediately after the June 21 ruling.

"The State of California joined with 41 other states, two territories and the District of Columbia in asking the court to reject the physical presence test in support of today's result," the CDTFA said. "The department is currently reviewing the court's opinion to determine next steps to support taxpayers."

The June 21 Wayfair ruling—which tossed out *Quill Corp. v. North Dakota*, the Supreme Court's 1992 physical presence threshold for when states could tax remote sales—has many states looking to expand their authority over online sales taxation.

When California enacted its law for online retailers in 2011, the focus was mainly on its click-through nexus provision. Home to eBay Inc., the state was eager to capture sales tax revenue from online sales into the state from out-of-state sellers.

Amazon Deal

Lawmakers reached a deal with Amazon.com Inc. to delay the law from 2011 to 2012 in exchange for Amazon's promise to build warehouses in the state and create jobs, thus creating a physical presence in the state.

Under the law, retailers have been required to collect and remit use tax if they have affiliates who sell at least \$10,000 in merchandise a year through referrals to sales platforms such as Amazon through links or ads, and if they sell at least \$500,000 a year in merchandise to California residents. They also must collect and remit if a member of their corporate group is in the state.

With an eye toward possible action in Congress or the courts, California lawmakers also decided in 2011 that a retailer engaged in business in the state “means any retailer that has substantial nexus with this state for purposes of the commerce clause of the United States Constitution and any retailer upon whom federal law permits this state to impose a use tax collection duty.”

Long Arm of Law

This long-arm provision means California’s policy can mirror the court’s holding in *Wayfair* that suggested strongly that South Dakota’s law—giving nexus to sellers with more than \$100,000 in sales or 200 transactions into the state each year—is constitutional under the commerce clause, Annette Nellen, professor of accounting and taxation at San Jose State University, told Bloomberg Tax.

“It seems the CDTPA is obligated to enforce that,” she said.

The majority in the 5-4 ruling suggested strongly that South Dakota’s law would pass constitutional muster; the statute imposes a tax collection threshold at 200 transactions or \$100,000 in in-state sales.

The court stopped short of formally declaring South Dakota’s law valid in the absence of *Quill*, and the South Dakota Supreme Court still has to bless the state’s economic nexus model before it can become effective. It’s expected to do so in mid-August.

Although the CDTPA is mulling its next steps, it isn’t obvious that they must issue guidance, Nellen and Andrew Silverman, a tax analyst with Bloomberg Intelligence, told Bloomberg Tax.

“I don’t think they have to, but it would be great if they put out something,” Silverman said.

Meaning Has Changed

The department could wait to see how sellers, platforms, and software companies respond, for example if sellers stop selling into some states, or platforms like Amazon start collecting and remitting on a wider basis, Nellen said. State officials also may be calculating what resources and staff they need before announcing which retailers must register.

But out-of-state vendors want to know whether they should be registering in California and when, Nellen said. Companies that sell sales tax software to those vendors are looking for certainty as well.

"The meaning of the law just changed, so I think they need to say something," she said.

Legislation isn't likely unless CDTFA officials believe they need more authority, for example to adopt the South Dakota thresholds, Carley Roberts, an attorney with Pillsbury Winthrop Shaw Pittman LLP in Sacramento, told Bloomberg Tax.

Not Streamlined

California's lack of membership in the Streamlined Sales and Use Tax Agreement may complicate California's path, Nellen and Roberts said. In its ruling, the court said South Dakota's membership in the SSUTA, with its simplified tax structures and access to sales tax administration software for sellers, strengthened the fairness of its law.

It's unclear if states must have the SSUTA's simplified system, or some other system, to pass constitutional muster, Nellen said.

"If a state like California wants to adopt something without belonging to the SSUTA, are they imposing an undue burden?" Roberts said.

The CDTFA could continue under its current regime, which isn't as broad as the South Dakota statute, Roberts said. Or, the department could issue regulations setting thresholds and applying those rules prospectively.

"At a minimum, the CDTFA should give retailers some guidance," she said. "They should say if they are not changing, or if they are making distinctions they should state them up front."

Nellen and Roberts said one thing is fairly certain: California won't be joining the SSUTA as a way to smooth its path.

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