

Leveling the Playing Field for Local Retailers – Taxing Online Sales

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Prior to June 2018, states and municipalities were only permitted to impose sales taxes on sellers of goods and services when the sellers had a physical presence in the state or municipality. Many brick-and-mortar businesses and local businesses believed this gave an advantage to the burgeoning online retailers, as people could buy save money by foregoing purchases from local stores and instead buying the same goods from an online retailer such as Amazon without paying sales tax.

On June 21, 2018, the United States Supreme Court overruled the two prior cases setting forth the physical presence rule, opening the door for the state and local governments to tax online sales from out-of-state sellers in its holding in *South Dakota v. Wayfair*, 585 U.S. ___, 138 S.Ct. 2080 (2018). Local retailers in Texas believe that this will ultimately help them keep a level playing field against the online retail giants. However, online retailers can continue to sell goods without adding local sales taxes in Texas until the state legislature enacts how and when the taxes are implemented.

The State of Texas currently imposes a 6.25% sales and use tax, but local taxing jurisdictions (including cities, counties, special purpose districts, and transit authorities) may also impose sales taxes up to an additional 2%, for a total maximum rate of 8.25%. The problem facing online retailers is that there are over 1,500 local taxing jurisdictions, so determining the correct sales tax can be complicated. While a company like Amazon may be able to keep track of the sales taxes for all jurisdictions, a mom-and-pop business in Florida that has just started selling its goods online and out-of-state is unlikely to have the resources to do so.

To combat this issue, the Texas comptroller is seeking to remove the sales and use taxes for the local taxing jurisdictions, and instead replace it with a uniform fee paid to the comptroller based on a weighted average of local sales tax rates. The comptroller would deposit all of the fees into the state treasury and distribute the funds to each individual taxing entity accordingly. In fact, Section 151.059 of the Texas Tax Code already contemplates and permits this procedure. However, that particular statute currently only applies if there was a change in collection responsibilities based on the passage of federal legislation, not changes affecting federal law stemming from a court case such as *Wayfair*. The Texas comptroller has recently made recommendations to the Texas Legislature on how to implement this existing law following the Supreme Court's decision.

The Supreme Court's ruling in *Wayfair* will ultimately increase the amount online shoppers have to pay for goods purchased, but will likely help local retailers compete against e-commerce sites by removing one of their competitive advantages.

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