2018 decision in South Dakota v. Wayfair, Inc., which allowed states to tax businesses with no physical presence in the state. However, physical presence in a state ...

Gail Cole • Feb. 05, 2021

There's been a lot of emphasis in recent years on the United States Supreme Court's 2018 decision in South Dakota v. Wayfair, Inc., which allowed states to tax businesses with no physical presence in the state. However, physical presence in a state continues to be a primary trigger for nexus, the connection between a business and a state that allows the state to tax the business. In many states, an out-of-state business can establish nexus through participation in a trade show — even just one trade show per year.

According to Washington Department of Revenue Determination No. 15-0036, made

competition of its game.

Back in 2014, the Washington Department of Revenue found the company liable for retail sales tax and retailing business and occupation (B&O) tax for the periods in question. The company appealed, arguing its trade show participation didn't create substantial nexus and it didn't engage in retail sales activity at the shows. The game is free to play; the company generates revenue through in-game sales of a virtual currency players use to purchase skins and other enhancements.

After further deliberation, the department concluded the company *did* establish substantial nexus during the periods in question by:

- Displaying its products (i.e., hosting game demonstrations and competitions)
- Showcasing new game features to public attendees
- Maintaining significant floor space at the trade show
- Establishing contact with potential buyers (e.g., giving away free skins and encouraging attendees to participate in events and meet with representatives)
- Discussing its service model with potential buyers

According to Determination No. 15-0036, these activities were conducted "to increase familiarity with" the company's games and "promote the sales" of their virtual currency. The department noted that between 60,000 and 70,000 people attended the trade show each year, so the company's participation certainly increased its exposure — especially to Washington residents.

Thus, the department concluded the company's trade show participation was "significantly associated" with its ability "to establish or maintain a market for its products" in Washington. It disagreed that the company's "small quantity of visits" to Washington was insufficient to create substantial nexus: "As RCW

82.04.067(6) makes clear, the physical presence in Washington 'need only be

trade conventions by preventing the Department of Revenue from basing physical presence nexus on attendance or participation at a single trade convention per year in the state (Chapter 137, Laws of 2016). However, the exception doesn't apply to anyone who makes or takes orders for retail sales at a trade convention in the state, or if the trade show is marketed to the general public. These are important distinctions, as the most recent ruling reveals.

The Washington rulings underscore the complexity of state nexus laws and the need for businesses to pay attention to them: Failure to collect and remit tax as required can lead to back tax liability, plus penalties and interest.

Washington isn't the only state where trade show attendance can trigger physical presence nexus. For example, if an out-of-state retailer attends a two-day trade show in Arizona and sells inventory at the show, that retailer is required to obtain a seasonal transaction privilege tax (TPT) license and to pay TPT on all sales. The Arizona Department of Revenue mentions this two-day threshold several times on its FAQ – Remote Sellers and Marketplace Facilitators page — but it's not clear whether participating in a one-day trade show would have a similar result.

Although many conferences and trade shows have moved online due to the COVID-19 pandemic, state tax authorities can still hold businesses liable for past activity in the state.

Learn more about how attending trade shows can lead to an obligation to collect and remit sales tax. If you're worried you have nexus in one or more states where you're not registered, you may be interested in our sales tax risk assessment.

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