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The Local Disadvantage

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In this installment of Eyes on E-Commerce, Bessey and Szal highlight, from the practitioner's standpoint, disparate post-*Wayfair* approaches among states with complicated local tax systems.

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Four years ago in this column, we put a spotlight on a little-discussed aspect of state and local taxation: evaluating nexus and compliance with local jurisdictions' taxing power.[1] At that time, the U.S. Supreme Court had not yet decided, or even agreed to hear, *Wayfair*.[2] This once-overlooked issue has become increasingly prominent, as we have watched a growing wave of local jurisdictions endeavor to impose sales and use tax obligations on remote sellers without a physical presence in the jurisdictions.

By doing away with the long-standing bright-line rule[3] that states could not impose a tax collection obligation on remote sellers that had no physical presence in the taxing jurisdiction, *Wayfair* ushered in the era of economic nexus,[4] exposing to tax and compliance burdens many remote sellers that, under the Supreme Court's prior precedent, had been shielded from those burdens by the commerce clause of the U.S. Constitution. The *Wayfair* decision did not, however, discuss the power of local jurisdictions to impose such obligations on remote sellers, or when the exercise of that power will impose an unconstitutional burden on interstate commerce. In states with complex local tax systems, the burdens of compliance with local tax obligations can be profound.

Historically, many states with tax systems that provided a great deal of local autonomy also employed origin sourcing. In states like Colorado, Illinois, and Texas, origin sourcing traditionally allowed a state to maintain a highly complex local tax system without requiring overcomplex compliance efforts from sellers, since each seller needed to keep track of only the rates and tax base applicable at the seller's business locations. With economic nexus statutes imposing collection obligations on true remote sellers without any physical presence in-state, origin sourcing no longer provides an easy answer to the question of how to permit businesses with limited administrative resources to comply with complex local tax systems.

[1] Martin I. Eisenstein and Jamie Szal, "The L in SALT: Limits on Local Jurisdiction to Tax," *State Tax Notes*, May 29, 2017, p. 865.

[2] *South Dakota v. Wayfair*, 585 U.S. ___, 138 S. Ct. 2080 (2018).

[3] *Quill v. North Dakota*, 504 U.S. 298 (1992).

[4] Since *Wayfair* was decided, every state that imposes a sales tax has adopted an economic nexus standard for out-of-state sellers. The final state to adopt economic nexus, Missouri, will begin enforcing economic nexus on January 1, 2023.

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In this article we highlight, from the practitioner's standpoint, two disparate post-*Wayfair* approaches among states with complicated local tax systems. In the first camp we have Texas and Alabama, states that appear to have taken seriously the commerce clause prohibition against undue burdens on interstate commerce and that have adopted totally new systems intended to mitigate the complexities (and burdens) of local tax compliance by providing an actual simplified and centralized tax collection and remittance option to remote sellers. Indeed, both states created systems that may provide a slight competitive advantage for some out-of-state retailers compared with in-state competitors. In the other camp stand Colorado and Illinois. In these two states the legislatures and revenue departments not only appear unwilling to tame unruly local tax systems but also wish to protect in-state businesses, to a degree, from the compliance burdens being heaped upon remote sellers. Recent policy changes in these two states highlight the discriminatory burdens that out-of-state retailers still bear.

As the examples discussed later illustrate, entrenched and complex systems of local taxation are often inconsistent with the type of tax simplification the Supreme Court endorsed in *Wayfair*. As a result, states that wish to maintain such systems will frequently find themselves having to have one set of rules for in-state businesses and another for true remote sellers. If these differing rules place an out-of-state company at a disadvantage, they will be vulnerable to challenge as unconstitutional burdens on interstate commerce.

Commerce Clause Limitations on Local Taxing Authority

A tax passes muster under the commerce clause if the "tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State."[5] That is because the commerce clause relates to the congressional power "to regulate Commerce . . . among the several states."[6] The Supreme Court's formulation of the modern dormant commerce clause test in *Complete Auto* was based on a state-level tax. Nevertheless, the dormant commerce clause also restricts a local jurisdiction's power to impose taxes.[7] As Chief Justice John Marshall said long ago in *Gibbons*:

> The commerce of the United States . . . is that of the whole United States. Every district has a right to participate in it. The deep streams which penetrate our country in every direction pass through the interior of almost every State in the Union, and furnish the means of exercising this right.[8]

The Court rejected the approach of "aggregating the burdens on commerce across an entire State to determine the constitutionality of a burden on interstate trade imposed by a particular subdivision of the State," since that approach would frustrate the commerce clause's central objective of securing a national area of free trade among the several states.[9]

The *Wayfair* Court's formal holding was limited to the first prong of the *Complete Auto* test — whether the tax applies to an activity with a substantial nexus with the taxing state. In the absence of the bright-line physical presence nexus rule articulated in *Quill*, which the *Wayfair* Court reversed, the Court was satisfied that the economic presence thresholds established by South Dakota's law created a sufficient nexus between South Dakota and a remote seller making more than $100,000 in annual sales or more than 200 separate transactions for the delivery of goods and services into the state.[10]

[5] *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274, 279 (1977) (emphasis added).

[6] U.S. Const. Art. I, section 8.

[7] *See Comptroller of the Treasury v. Wynne*, 64 A.3d 435 (Md. 2013), *aff'd on other grounds*, 135 S. Ct. 1781 (2015) ("under the dormant Commerce Clause . . . a state may not unreasonably burden interstate commerce through its subdivisions any more than it may at the state level").

[8] *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 195 (1824).

[9] *Id.*

[10] *Wayfair*, 138 S. Ct. at 2099.

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Analysis of the three other *Complete Auto* factors was reserved for remand.[11]

Although the Court did not reach a conclusion under the remaining *Complete Auto* factors, specifically the question whether the South Dakota tax discriminated against interstate commerce, it spoke approvingly of several aspects of South Dakota's system, which appeared "designed to prevent discrimination against or undue burdens upon interstate commerce."[12] The Court noted that (1) South Dakota applied a safe harbor to companies that transact only limited business in the state (for example, the economic nexus thresholds), (2) South Dakota's law did not apply retroactively, and (3) South Dakota had adopted the Streamlined Sales and Use Tax Agreement. Adherence to the SSUTA was significant to the Court because the agreement (a) "standardizes taxes to reduce administrative and compliance costs" and (b) "requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures and other uniform rules."

The *Wayfair* Court's focus on these factors prompts the question: Is a tax system that does not satisfy either or both of these factors inherently and unconstitutionally discriminatory? We believe the answer to that question is yes. For this reason, and as discussed later, we believe that the local tax regimes in Colorado and Illinois are significantly more vulnerable to constitutional challenge than the centralized systems recently created in Texas and Alabama.

Texas: A Single Rate in the Lone Star State

The Texas tax system, like many Midwestern states' systems, features not only state-level sales and use taxes but also local and special district sales and use taxes. Also similar to other states, Texas local and special tax districts are not contiguous with ZIP code boundaries. In other words, one ZIP code could straddle the borders of multiple tax districts. Pitfalls abound for any seller trying to keep track of the myriad boundaries and rules of local jurisdictions and special purpose districts.

As a solution for businesses lacking any physical presence in the state, Texas law provides remote sellers that are subject to a tax collection obligation in the state with the option of either collecting and remitting applicable local and special district taxes based on the rates in effect at the destination of each delivery of taxable goods and services, or of collecting and remitting tax on all Texas sales at a single flat local rate, set annually by the comptroller based on the average of local sales and use taxes imposed in Texas.[13] The total tax rate in some Texas locations, when adding state and local and special tax district sales taxes together, can be as high as 8.25 percent.[14] Remote sellers that elected to collect and remit at the single local use tax rate in the current year, on the other hand, collect at a flat rate of 8 percent.[15] In some circumstances, the ability to elect a single local tax rate could in fact provide a remote seller with a slight advantage compared with a Texas business in a jurisdiction with higher-than-average local tax rates. For example, a remote seller making significant sales into the Houston or Dallas markets (combined rate 8.25 percent), would be responsible for collecting and remitting tax at a rate a quarter percent lower than competitor businesses with locations in those cities.

By implementing a centralized filing option, with a single rate, Texas has at least taken seriously the *Wayfair* factors and sought to create for remote sellers a tax system that

[11] *Id.* ("The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here."). The *Wayfair* litigants reached a settlement before any decision on remand.

[12] *Id.*

[13] Tex. Tax Code section 151.0595.

[14] Texas law limits the aggregate rate to the state rate of 6.25 percent plus an additional 2 percent. *See* Tex. Tax Code Ann. sections 151.051 (6.25 percent state sales tax rate); 151.101(b) (state use tax assessed at the sales tax rate); and 451.405(a) (combined local taxes may not exceed 2 percent). Many communities, particularly in major metropolitan areas, impose the maximum 2 percent local tax. For example, both the Dallas and Houston areas impose a 1 percent sales and use tax on sales sourced within their transit districts, in addition to a local sales and use tax of 1 percent imposed by the relevant locality. Applicable sales tax rates may be searched on the comptroller's website.

[15] The state rate of 6.25 percent plus the published single local use tax rate of 1.75 percent. *See* Texas Comptroller of Public Accounts, "Taxes — Remote Sellers."

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standardizes taxes and rates and provides for a single, state-level administration of the tax.

Alabama: Simplified Tax Compliance for Remote Sellers

Alabama imposes a state sales and use tax rate of 4 percent, but authorizes local jurisdictions to impose their own sales and use taxes. A taxable sale in Alabama's largest city, Birmingham, for example, is subject to sales tax at a combined rate of 10 percent. Taxable sales in Alabama are sourced to the local jurisdiction where title is transferred by the seller or seller's agent to the purchaser or purchaser's agent, which generally occurs at the time of delivery, unless explicitly agreed otherwise.[16] Thus, Alabama retailers are required to collect and remit the local sales and use tax applicable in the destination jurisdiction, if nexus exists with the municipality.

Nexus with a local jurisdiction is determined at the level of the municipality.[17] Under Alabama regulations, a seller with a physical location in one Alabama municipality will have nexus with another Alabama municipality (and a corresponding obligation to collect and remit that municipality's tax) only if the seller has some physical presence in the other municipality.[18]

Remote retailers with no physical presence are obligated to collect and remit taxes on sales into Alabama if they have total annual retail sales (taxable and nontaxable) over $250,000.[19] Remote retailers may satisfy this obligation either by collecting and remitting tax in the same manner as sellers with an Alabama presence, or by participating in the simplified sellers use tax (SSUT) remittance program. Under the voluntary SSUT program, remote sellers may collect from Alabama purchasers and remit to the Department of Revenue seller's use tax at a single combined state and local rate (currently 8 percent) for all taxable Alabama sales, regardless of where in the state the goods were delivered.[20] Participants in the SSUT program are relieved of the obligation to collect any additional sales or use tax, even if the applicable combined rate in the destination jurisdiction is higher than the flat SSUT rate. As a practical matter, this means that in many cases a remote seller may be obliged to collect and remit tax at a lower rate (and thus enjoy a competitive advantage over) Alabama businesses with nexus in the municipality. On the other hand, participants in the SSUT program are required to collect the SSUT at the flat rate on *all* taxable Alabama sales, even those to jurisdictions with applicable rates lower than the flat SSUT rate, or to municipalities in which the retailer would not otherwise have nexus.

On balance, by providing remote sellers with economic nexus in Alabama the option of complying with its sales and use tax as applicable to in-state businesses *or* participating in the SSUT program, Alabama appears to have taken seriously the constitutional requirement that its sales and use tax system not discriminate against interstate commerce.

Remote Sellers Between a Rock and Hard Place In the Centennial State

Colorado is home to spectacular mountains and one of the most Byzantine sales tax systems in the country. To begin with, Colorado effectively runs two parallel tax systems. The state itself administers a multitier system, collecting state sales and use taxes, city sales taxes, county sales taxes, and the sales and use taxes of roughly a dozen special taxing districts. To put it in perspective, a single state-level tax return for one month in Colorado could be up to 150 pages long to account for all those layers of state-administered tax jurisdictions. Separate and apart from those taxes are the sales taxes

[16] Ala. Code section 40-23-2(1). *See also* Alabama attorney general's Op. No. 2017-001 (Oct. 5, 2016).

[17] Rule 810-6-5-.04.02 ("The threshold applicable for determining whether a seller is obligated to collect and remit the state sales or use tax associated with interstate transactions shall also be applied by sellers to determine whether the seller is obligated to collect and remit local sales or use tax by examining the contacts the seller has within each local jurisdiction where local sales or use tax is due.").

[18] *Id.* ("A seller may only avoid the responsibility for collecting and remitting a local jurisdiction's sales or use tax when the seller lacks *physical presence* within the local jurisdiction that would be sufficient to create an obligation to collect and remit state sales or use tax if the sales transaction or use in question was an interstate transaction.") (Emphasis added.).

[19] Rule 810-6-2-90.03.

[20] Ala. Code section 40-23-192.

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administered by Colorado's more than 70 home rule cities. These mini-fiefdoms decide their own tax bases, adopt their own exemptions, set their own rates, collect their own taxes, and conduct their own audits.

Rather than endeavor to simplify that system, Colorado thumbed its nose at the *Wayfair* factors, which specifically endorsed a streamlined system that "standardizes taxes to reduce administrative and compliance costs" and includes "a single, state level tax administration." It did so in two ways. First, Colorado acknowledged just how heavy a burden its complex state and local system was for even its own businesses to comply with and provided specific smaller Colorado businesses with a lengthy grace period to come into compliance. Second, many of Colorado's home rule cities have enacted an economic nexus standard that on its face treats remote sellers differently — and worse — than it treats businesses with a location in Colorado. We examine each of these in turn.

Local Businesses Receive Special Treatment

Colorado has historically enforced origin sourcing for all Colorado-based businesses. When it adopted economic nexus, Colorado initially required that all businesses (in- and out-of-state) switch to destination sourcing. The new rule was intended to require *all* businesses to implement the same sourcing standard and calculate tax liability based on the place in Colorado at which the item or service is delivered.[21] The burden of compliance with destination sourcing rules in a state with as many different taxing jurisdictions, rates, and tax bases as exist in Colorado is daunting, to be sure, but this approach at least has the virtue of treating out-of-state sellers no less favorably than in-state sellers.[22]

Colorado's sourcing switch caused uproar among the Colorado business community, which did not take the change lying down. When enacting legislation that would formally codify the state's economic nexus standard (as opposed to the Department of Revenue's effort to enforce by regulation alone), Colorado's legislature capitulated and created a safe harbor from the destination sourcing rules for eligible Colorado-based businesses to ease their compliance burden.[23] The safe harbor has since been extended and Colorado businesses with less than $100,000 in sales have been permitted to continue using origin sourcing through at least February 1, 2022.[24] In enacting the safe harbor, the legislature sought to protect some local businesses from increased compliance burdens associated with switching from a simple system (in this case origin sourcing) to a notably complex system by providing a grace period of nearly two years. No similar consideration of the costs of compliance was extended to remote sellers, nor was additional time provided to remote sellers that had to stand up complex multistate tax compliance systems in the wake of *Wayfair*. It is true that the relief provided by the safe harbor to Colorado

[21] Colorado H.B. 19-2140, section 3 (codified at new Colo. Rev. Stat. section 39-26-104(3)(a)).

[22] Another notoriously complex state challenging retailers is Louisiana. As highlighted in a recent lawsuit challenging the state's enforcement efforts, Louisiana has a decentralized sales tax system under which the state levies and administers its sales taxes; there are special taxing districts; and, separately, 64 parishes levy and administer their own taxes. *See Halstead Bead Inc. v. Lewis*, Dkt. No. 2:21-cv-02106 (E.D. La.). The system is further complicated because parishes are not required to enforce the same exemptions as the state, and the state itself periodically suspends all exemptions when in financial straits. *See* Louisiana Department of Revenue, Frequently Asked Questions — Sales Tax.

[23] Colorado H.B. 19-1240. By enacting this bill, Colorado codified the DOR's destination sourcing rule for state collection of sales and use taxes imposed by any statutorily incorporated town, city, or county and for special districts. H.B. 19-1240 allowed small retailers to source their sales to the business's location regardless of where the purchaser receives the tangible personal property or services. This exception was to be in effect until 90 days after a geographic information system provided by the state was online and available for retailers to access. This system would provide retailers with the ability to determine the taxing jurisdiction for an address. On April 1, 2021, the DOR provided notice that the system was online and available. Therefore, under the language of H.B. 19-1240 the small retailer exception to the sales tax destination sourcing rules was to be repealed June 30, 2021.S.B. 19-131, cosponsored by Sen. Rob Woodward (R), introduced this small business safe harbor language, which was incorporated into H.B. 19-1240.

[24] Colorado S.B. 21-282.

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businesses is temporary, and limited to small sellers, but it nevertheless illustrates an important, and constitutionally concerning, fact: Colorado's continued commitment to complexity imposes real burdens on commerce, and the state appears concerned with lessening those burdens only if they fall on in-state businesses.

Home Rule Cities Overreach

As noted, state-administered taxes are only a piece of the local tax picture in Colorado. Recent efforts by home rule jurisdictions to impose sales and excise taxes on businesses operating in interstate commerce are also stirring substantial interest. Colorado's home rule cities and towns exercise the exclusive authority to administer taxes separately from the state and can determine their own tax rates, taxable items, and exemptions from tax.[25]

Against this backdrop, the Colorado Supreme Court has long mandated a municipality-specific nexus analysis. Called on to determine whether a use tax imposed by Denver in accordance with its home rule authority satisfied the commerce clause substantial nexus standard, the supreme court required that the substantial nexus be with Denver, not just the state.[26] Likewise, in determining whether the city of Arvada constitutionally could impose a use tax collection obligation, in *Associated Dry Goods* the supreme court held that the standard for determining nexus in Colorado home rule jurisdictions "is that the taxpayer must be engaged in a business having a fixed or transitory situs in the taxing jurisdiction."[27]

While the city-specific nexus analysis has traditionally been concerned with physical presence in the taxing jurisdiction, it is not surprising that since the *Wayfair* decision, home rule cities have begun to adopt economic nexus rules. In the middle of the 2020 pandemic summer, the Colorado Municipal League published a model ordinance establishing economic nexus, which it encouraged home rule cities to adopt.[28] By failing to apply a city-specific nexus analysis, and by exempting in-state businesses altogether from the economic nexus provision, the model ordinance violates two separate prongs of the *Complete Auto* test for constitutionality under the commerce clause: It purports to authorize taxes that are not fairly related to activities in the taxing jurisdiction, and it discriminates against interstate commerce by treating remote sellers less favorably than in-state sellers.

First, the model ordinance purports to establish economic nexus for purposes of imposing a city tax collection obligation based on statewide sales, rather than sales in the particular home rule city.[29] The expansive definition creates a default that nexus with Colorado automatically triggers nexus with a home rule city that has adopted the model ordinance. The absurdity of using a statewide sales measure to determine nexus on a city-by-city basis can be illustrated with a hypothetical using two cities that have both adopted the model ordinance:

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[25] All county, municipal, and local jurisdictions are political subdivisions of a state that are created by the state and obtain their source of power, including powers to tax, from a state constitutional or statutory provision. *Hunter v. City of Pittsburgh*, 207 U.S. 161, 178-79 (1907).

[26] *General Motors Corp. v. City and County of Denver*, 990 P.2d 59, 68 (Colo. 1999).

[27] *Associated Dry Goods Corp. v. City of Arvada*, 197 Colo. 491 (citing *Englewood v. Wright*, 147 Colo. 537 (1961), in turn citing *Jackson v. City of Glenwood Springs*, 122 Colo. 323 (1950) (decided in part on commerce clause grounds)). We note that while the court in *Associated Dry Goods* stated that its ruling that the lack of nexus with Arvada was based on the due process clause, the court grounded its conclusion of lack of nexus on commerce clause cases. 197 Colo. at 494-95 (citing *National Geographic Society v. California*, 430 U.S. 551 (1977); and *Scripto v. Carson*, 362 U.S. 207 (1960)). These Supreme Court decisions applied the same standard for nexus under both the commerce clause and due process clause. It was only later, after *Associated Dry Goods* was decided, that the U.S. Supreme Court in *Quill* determined that these constitutional clauses have different requirements. Therefore, the *Associated Dry Goods* court's determination that nexus for a tax imposed by a home rule authority is based on physical presence within the limits of the jurisdiction remains good law, and continues to be cited at the state level. *See* Colorado Letter Ruling dated Apr. 28, 2014, note 4 ("Nevertheless, the Department continues to believe that a retailer must have something more than a de minimis contact with a local jurisdiction before a local jurisdiction can require the retailer to collect that jurisdiction's tax.").

[28] Colorado Municipal League, "CML Model Ordinance — Economic Nexus & Marketplace Facilitators."

[29] Colorado Municipal League model ordinance, section 3, at "Economic Nexus."

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Denver (population 715,522 as of the 2020 census) and Carbondale (population 6,434). If a remote seller made $100,001 of sales (exceeding Colorado's statewide economic nexus threshold) to customers in Denver, and made a single $10 sale to a single customer in Carbondale, the seller would, per the terms of the model ordinance, be required to collect and remit sales tax not just on sales in Denver, where it made significant sales, but also those in Carbondale, where its sales are plainly de minimis.[30]

The model ordinance also discriminates quite blatantly against interstate commerce, because it creates separate rules and additional burdens for out-of-state businesses that do not apply to in-state businesses. Buried in the definition of economic nexus in the model ordinance, now adopted by more than 40 cities, is a critical nugget: "This definition *does not apply* to any person who is doing business in this state but otherwise applies to any other person."[31] In short, this sentence means that businesses having a physical presence somewhere in the state of Colorado establish nexus in an adopting home rule city *only* through physical presence: by opening an office or storefront, using their own vehicles to deliver sales, employing personnel, or other similarly traditional nexus triggers. If they do not have physical presence nexus, they have no obligation to register, collect, and remit home rule city taxes. It does not matter if they made substantial sales to purchasers in such a city — because, again, they are excluded from the definition of economic nexus. Remote sellers, on the other hand, are purportedly subject to nexus based on sales alone, made to customers anywhere in the state, not simply to residents of the taxing city.

Extra Burden for Remote Sellers in the Land of Lincoln

Illinois is another example in which a state's adoption of economic nexus resulted in differing — in our view unconstitutionally discriminatory — treatment of remote sellers engaged in interstate commerce, when compared with in-state taxpayers.

The Illinois sales and use tax system consists of a constellation of separately named taxes. Retailer's occupation tax[32] (ROT) is imposed on sellers of tangible personal property, while the service occupation tax[33] is imposed on transfers of property in connection with the performance of a service. Purchasers of tangible personal property are subject to the use tax,[34] while purchasers of services who receive property in connection with that service are subject to the seller's use tax.[35]

After adopting economic nexus for remote retailers and marketplaces, Illinois created a complex system of rules governing the tax collection obligations of in-state and out-of-state businesses under the Leveling the Playing Field for Illinois Retail Act and related regulations.[36] The title is ironic because the regulations create an unequal playing field of competition between different categories of sellers, to the distinct disadvantage of pure remote retailers with no physical presence in Illinois.

Illinois created three categories of out-of-state retailers, each with differing tax obligations, effective January 1, 2021[37]: (1) An out-of-state retailer that has a physical presence in Illinois *and* engages in "selling activities" in Illinois must register for ROT, and must collect the state and local tax on its Illinois sales due at the origin rate; (2) an out-of-state retailer that has a physical presence in Illinois but *does not* engage in selling activities in Illinois (for example, its selling activities occur outside the state) must collect state use tax of 6.25 percent, and no local taxes apply;[38] and finally (3) an out-of-state retailer that does not have a physical presence in Illinois at all, but has sales over the

[30]Every home rule jurisdiction that has adopted the model ordinance has also agreed to participate in Colorado's sales and use tax system, a one-stop portal.

[31]Colorado Municipal League model ordinance, section 3, at "Economic Nexus" (emphasis added).

[32]35 Ill. Comp. Stat. Ann. 120/1 to 120/14.

[33]35 Ill. Comp. Stat. Ann. 115/1 to 115/21.

[34]35 Ill. Comp. Stat. Ann. 105/1 to 105/22.

[35]35 Ill. Comp. Stat. Ann. 110/1 to 110/21.

[36]Public Acts 101-0031 and 101-0604; Ill. Admin. Code tit. 86, section 131.101 to 131.180.

[37]The Illinois DOR has published flow charts illustrating the different rules applicable to different types of in-state and out-of-state sellers.

[38]35 Ill Comp. Stat. Ann. 105/3-45.

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economic nexus thresholds of $100,000 in annual sales or 200 separate retail transactions, is required to collect and remit both state and local ROT at the destination rate.[39] To put it in perspective, an e-commerce company based in Maryland that happens to have a remote IT employee working from home in Springfield, Illinois, will collect and pay less tax than if the same exact company had no such employee.

The disparate collection obligations plainly discriminate against interstate commerce by imposing more burdensome obligations (both in terms of compliance costs and by requiring collection of tax at a relatively higher rate) on an out-of-state retailer with no physical presence at all in Illinois than are imposed on retailers with an Illinois presence.[40] If and when this system is challenged, we expect it to be struck down, under the long-established rule that state laws discriminating against interstate commerce face "a virtually *per se* rule of invalidity."[41]

Conclusion

Wayfair did away with a bright-line physical presence rule for the imposition of a sales tax collection obligation on out-of-state companies, and it has paved the way for a significant expansion of the compliance obligations on remote sellers engaged in interstate commerce. *Wayfair* did not, however, remove the protections for interstate commerce provided by the commerce clause, as articulated in the *Complete Auto* test. As municipalities seek to compel remote sellers to collect and remit local sales and use taxes, they would do well to bear in mind the *Wayfair* factors and make available to remote sellers simplified and centralized compliance options, as Alabama and Texas have done. Similarly, they should avoid disparate rules for in-state and out-of-state businesses that place interstate commerce on a less favorable footing than intrastate commerce, as Illinois and many Colorado home rule cities appear to have done. ■

[39] 35 Ill. Comp. Stat. Ann. 120/2.

[40] The Illinois rule, which permits an out-of-state retailer with a physical presence in Illinois but no selling activity in the state to collect only the state use tax, and no local tax, is the inverse of the rule adopted by Pennsylvania. There, remote sellers with no physical presence in Pennsylvania are required to collect and remit use tax at the state rate on all sales to customers in the commonwealth, but do not have an obligation to collect any local tax on the transaction. Only sellers with jurisdiction-specific nexus in a local jurisdiction that imposes additional tax have an obligation to collect and remit the local tax. 72 Pa. Stat. section 7202(a); 53 Pa. Stat. section 12720.504; Pennsylvania DOR, Sales Tax Bulletin 2019-01; Pennsylvania DOR, Sales Tax Answer ID 209. The Pennsylvania rule, which limits the imposition of a local tax collection obligation to businesses that have a connection with the local jurisdiction, is certainly more sensible, and more consistent with the commerce clause, than the Illinois rule, which imposes the greatest local tax collection obligation on the sellers that have the least connection to the local jurisdiction.

[41] *Granholm v. Heald*, 544 U.S. 460, 476 (2005) (emphasis in original).

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