A Brief History of West Virginia Sales and Use Tax Nexus

Apr 08, 2019

Categories:

Blogs
Tax Law Defined™ Blog

Authors:

Craig A. Griffith

This article was originally published in Tax Notes.

Since the U.S. Supreme Court's *Quill*[1] decision, West Virginia has taken a winding, and sometimes puzzling, stance on nexus for sales and use tax purposes. This article explores the state's various nexus positions and includes a discussion of developments since *South Dakota v. Wayfair Inc.*,[2] which overruled *Quill* and ushered in a new era of sales and use tax nexus. *Quill*, of course, held that an out-of-state seller's responsibility to collect and remit sales and use tax for sales into a state was contingent on the seller having a physical presence in that state. *Wayfair* held that substantial nexus, for commerce clause purposes, does not require that an out-of-state seller have physical presence for a state to require it to collect and remit the tax. The *Wayfair* Court provided a nexus framework for states to follow for out-of-state sellers, writing that nexus was "clearly sufficient based on both the economic and virtual contacts" the sellers had with the state.

Streamlined Sales Tax

The Streamlined Sales and Use Tax Project was created by the National Governors Association and the National Conference of State Legislatures in the fall of 1999 "to simplify sales tax collection."[3] The project represented a response of states to the *Quill* physical presence nexus requirement, with states attempting to simplify sales and use tax collection complexity by establishing uniform definitions and other uniformity provisions to entice out-of-state sellers to voluntarily collect and remit sales and use taxes. West Virginia enacted the Streamlined Sales and Use Tax Administration Act (the act) in 2002,[4] and became a member state in full compliance with the Streamlined Sales and Use Tax Agreement on October 1, 2005.[5] West Virginia has remained a full SSUTA member state since.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons

While the act provides a general framework for simplified sales and use tax administration, including definitions[6] and sourcing rules,[7] nexus guidance is minimal. The act states that SSUTA "must provide that registration with the central registration system and the collection of sales and use taxes in the signatory states will not be used as a factor in determining whether the seller has nexus with a state for any tax."[8] The act states that a seller that registers to collect sales and use taxes using the online registration system established under the SSUTA is not required to also register for a West Virginia business registration certificate unless it has "the minimum contacts necessary for a constitutionally sufficient nexus for this state to require registration and payment of the [business] registration tax."[9] Finally, the act states that if the state leaves or is expelled from the SSUTA, "the tax commissioner may not use registration with the central registration system and the collection of sales and use taxes in the member states as a factor in determining whether the seller has a nexus with the state for any tax at any time.[10] These provisions reflect *Quill*'s strict physical presence nexus standards.

Affiliate Nexus Guidance

In 1999 and 2005, the West Virginia State Tax Department issued two interesting affiliate nexus technical assistance advisories (TAAs) to an internet retailer that had a subsidiary in West Virginia.[11] The 1999 TAA states that although the wholly owned subsidiary was in West Virginia and acted as the retailer's agent, the subsidiary structured "its operations in such a way as to have de minimis or no contact with" the retailer's West Virginia customers. The retailer "structured its business activities so as to not have any business location, property, or employees in West Virginia" and thus did not qualify as a vendor. As a result, the retailer was "not required to collect Sales Tax on sales to West Virginia customers."

For sales and use tax collection requirements, the tax department decided that the retailer was a "retailer" under section 11-15A-1(b)(7), but not a "retailer engaging in business in this state" under the 1999 version of section 11-15A-1(b)(8). The tax department noted that while the retailer would have a wholly owned subsidiary

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

in West Virginia, it would "not be selling any tangible personal property or providing any services to West Virginia customers." The tax department reasoned that "this is a distinction of substance because the retailer engaging in business in this State must be selling its products or providing its services in this State." Because the subsidiary was not performing those activities, the retailer "may not be classified as a retailer engaging in business in this State."

The 2005 TAA was requested based on additional facts presented by the retailer. Namely, instead of merely providing presale and post-sale assistance to the retailer's customers, the subsidiary began taking customer orders for the retailer's goods as well. Essentially, the tax department extended its conclusions from TAA 99-002 to incorporate that the subsidiary would now take customer orders. Per the retailer's representation, those orders would be only for non-West Virginia customers.

In 2013 the tax department issued a new TAA[12] modifying the determinations of the prior two TAAs, finding that "such retailers and merchants are required to collect and remit use tax on sales to West Virginia customers beginning on and after October 1, 2013 where a wholly owned subsidiary engages in business in this state in connection with the business of the retailer." The modification essentially repudiated the 1999 and 2005 TAAs.

Pre-*Wayfair* Statutory Changes

During the 2013 legislative session, West Virginia amended its definition of the term "retailer engaging in business in this state," for purposes of the sales and use tax, with a focus on strengthening the affiliate nexus provisions. The new term was defined as:

(A) Any retailer having or maintaining, occupying or using, within this state, directly or by a subsidiary, an office, distribution house, sales house, warehouse, or other place of business, or any agent (by whatever name called) operating within this state under the authority of the retailer or its subsidiary, irrespective of whether the place of business or agent is located here permanently or temporarily, or whether retailer or subsidiary is admitted to do business within this state pursuant to article fifteen, chapter thirty-one-d of this code or article fourteen, chapter thirty-one-e of this

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

code; or

(B) On and after January 1, 2014, any retailer that is related to, or part of a unitary business with, a person, entity or business that, without regard to whether the retailer is admitted to do business in this state pursuant to article fifteen, chapter thirty-one-d of this code or article fourteen, chapter thirty-one-e of this code, is a subsidiary of the retailer, or is related to, or unitary with, the retailer as a related entity, a related member or part of a unitary business, all as defined in article twenty four, section three-a of this chapter;

(i) That, pursuant to an agreement with or in cooperation with the related retailer, maintains an office, distribution house, sales house, warehouse or other place of business in this state;

(ii) That performs services in this state in connection with tangible personal property or services sold by the retailer, or any related entity, related member or part of the unitary business;

(iii) That, by any agent, or representative (by whatever name called), or employee, performs services in this state in connection with tangible personal property or services sold by the retailer, or any related entity, related member or part of the unitary business; or

(iv) That directly, or through or by an agent, representative or employee located in, or present in, this state, solicits business in this state for or on behalf of the retailer, or any related entity, related member or part of the unitary business.[13]

The term "service" is defined broadly for purposes of the statute to include customer service, help desk, call center, repair, engineering, installation, assembly, delivery, and customer complaint resolution services. It also includes "Internet or other remote order business from facilities located within this state, the service of operating a website or Internet-based business from a location within the state, or any other service."

While these changes did not address the physical presence nexus standard that continued to restrict states, it was a more aggressive approach to sales and use tax nexus and was the justification for the tax department reversing course on its affiliate nexus position in

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

the 2013 TAA.

Post-*Wayfair*

Following *Wayfair*, Gov. Jim Justice (R) issued a release[14] stating that the opinion "allows states to pass laws requiring out-of-state retailers to collect state sales taxes from customers and send it back to the state." Justice was later quoted as saying:

When I took office and our state was struggling financially, at that desperate time, I might have considered supporting legislation to enforce West Virginia sales tax on out-of-state transactions. However, now I do not support adding additional taxes on our people in this manner. This is an issue for the Legislature, and legislation would have to be passed to authorize the state to enforce the collection of out-of-state sales taxes. With our state's growing economy, I don't want to reach into West Virginians' pockets when we don't need to.[15]

However, an administrative notice[16] issued by the tax department on October 1, 2018, reversed course on this issue. The department noted that out-of-state vendors with a physical presence in West Virginia have been collecting and remitting state and municipal sales and use taxes, and some out-of-state vendors without a physical presence in the state have been voluntarily collecting a remitting such taxes. Considering *Wayfair*, the tax department suggested that "other out-of-state vendors without a physical presence in West Virginia may wish to voluntarily begin collecting and remitting West Virginia state and municipal sales and use taxes and we encourage them to do so." The administrative notice stated that beginning January 1, 2019, an out-of-state vendor that as of July 1, 2018, was not required to collect and remit state and municipal sales and use taxes because it lacked physical presence or had not voluntary agreed to do so, and that delivered more than $100,000 of goods or services or engaged in 200 or more separate transactions for the delivery of goods and services into the state during 2018, would be required to collect and remit such taxes for sales into West Virginia. Responsibility for collection and remittance of these taxes "will be determined annually each year thereafter" and "will be imposed for a given calendar year based on the

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

vendor's attainment of either of the stated thresholds in the immediately preceding calendar year." These thresholds mirror those established by South Dakota, and which were deemed reasonable in *Wayfair*.

Interestingly, the administrative notice's thresholds to require collection and remittance of sales and use tax were not established through amendments to statutes or legislative rules. Perhaps the remote seller language was released by the tax department in anticipation of having a bill passed during the 2019 regular legislative session. Mirroring the notice's remote seller thresholds, H.B. 2813, which was introduced in February, states that a "marketplace facilitator, referrer, or retailer, who does not have a physical presence" in the state must collect sales and use tax if "the seller has gross revenue from West Virginia sales equal to or exceeding $100,000 for an immediately preceding calendar year or a current calendar year" or "makes West Virginia sales in 200 or more separate transactions for an immediately preceding calendar year or a current calendar year."[17] However, it is possible that the tax department, in establishing the thresholds, relied on broader statutory language that states, in part, that a "retailer engaging in business in this state" must have "physical presence in this state in the form of employees, offices, agents or sales outlets in this state or any other presence that provides the necessary minimum contacts for a constitutionally sufficient nexus for a state to require such a retailer to collect and remit use taxes."[18]

The bill was passed by the Legislature March 9 and Justice signed it into law on March 27. The effective date for the economic nexus provisions in the bill is July 1, 2019.

For more information, please contact any member of the Frost Brown Todd Tax practice group.

---

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

[2] 138 S. Ct. 2080 (2018).

[3] Streamlined Sales Tax Governing Board Inc., "Frequently asked questions."

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

[4] W. Va. Code section 11-15B-1.

[5] Streamlined Governing Board, supra note 3, "State Information."

[6] W. Va. Code section 11-15B-2.

[7] W. Va. Code section 11-15B-14a, 15, 17, 19.

[8] W. Va. Code section 11-15B-7(4).

[9] W. Va. Code section 11-15B-11(a).

[10] W. Va. Code section 11-15B-12(b).

[11] West Virginia State Tax Department, TAA 99-002 (Nov. 15, 1999); and West Virginia State Tax Department, TAA 2005-02 (Aug. 24, 2005).

[12] West Virginia State Tax Department, TAA 2013-002 (Aug. 30, 2013).

[13] W. Va. Code section 11-15A-1(b)(8)(A)-(C).

[14] Release, "Gov. Justice Issues Statement in Response to U.S. Supreme Court Sales Tax Decision" (June 21, 2018).

[15] *Id.*

[16] West Virginia State Tax Department, Administrative Notice 2018-18, "Re: Collection of State and Municipal Sales and Use Taxes by Certain Out-of-State Retailers" (Oct. 1, 2018).

[17] New W. Va. Code section 11-15A-6b(e).

[18] W. Va. Code section 11-15A-6a(a)(1)-(2).

© 2026 FBT Gibbons LLP. May be considered attorney advertising in some jurisdictions.

2026 FBT Gibbons LLP. All rights reserved. ADVERTISING MATERIAL.

FBT Gibbons