



STATE OF SOUTH CAROLINA
DEPARTMENT OF REVENUE

300A Outlet Pointe Blvd., Columbia, South Carolina 29210
P.O. Box 12265, Columbia, South Carolina 29211

SC REVENUE RULING #18-14

- SUBJECT:** Retailers Without a Physical Presence (“Remote Sellers”) - Economic Nexus
(Sales and Use Tax)
- EFFECTIVE DATE:** For sales made on or after November 1, 2018, unless a later date is otherwise provided in this advisory opinion.
- SUPERSEDES:** SC Revenue Advisory Bulletin #01-7 and all previous documents and oral directives in conflict herewith.
- MODIFIES:** SC Revenue Ruling #14-4 and all previous documents and oral directives in conflict herewith.
- AUTHORITY:** S.C. Code Ann. Section 12-4-320 (2014)
S.C. Code Ann. Section 1-23-10(4) (2005)
SC Revenue Procedure #09-3
- SCOPE:** The purpose of a Revenue Ruling is to provide guidance to the public. It is an advisory opinion issued to apply principles of tax law to a set of facts or general category of taxpayers. It is the Department’s position until superseded or modified by a change in statute, regulation, court decision, or another Departmental advisory opinion.

I. OVERVIEW OF NEXUS AND WAYFAIR DECISION

Nexus is a sufficient connection between a person and a state, and a sufficient connection between an activity, property, or transaction and a state, that allows the state to subject the person, and the activity, property, or transaction to its taxing jurisdiction. The Due Process and Commerce Clauses of the United States Constitution and other federal statutes provide limitations on a state’s powers to tax out-of-state businesses. Over the years, the courts have provided limitations and guidelines in determining whether certain activities create nexus in a taxing state.

On June 21, 2018, the United States Supreme Court in *South Dakota v. Wayfair, Inc.*, 585 U.S. ___, 138 S. Ct. 2080 (2018), ruled that retailers (including online retailers) without physical presence in a state may be subject to sales and use tax. This decision overturned the Court’s longstanding position in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), which allowed states to collect sales and use tax only on retailers with a physical presence.

South Carolina Code Section 12-36-70 defines “retailer” and “seller” to include persons not maintaining a physical presence in South Carolina, and reads in part:

“Retailer” and “seller” include every person:

(1)(a) selling or auctioning tangible personal property whether owned by the person or others;

* * *

(2)(a) maintaining a place of business or qualifying to do business in this State; or
(b) not maintaining an office or location in this State but soliciting business by direct or indirect representatives, manufacturers agents, distribution of catalogs, or other advertising matter or by any other means, and by reason thereof receives orders for tangible personal property or for storage, use, consumption, or distribution in this State (Emphasis added).

South Carolina has not enforced this provision against retailers without a physical presence because of the constitutional nexus restrictions under *National Bellas Hess* and *Quill*.¹ Because the United States Supreme Court has reversed its longstanding position and eliminated the physical presence requirement, South Carolina will require retailers who do not have a physical presence in South Carolina but who establish an economic presence as outlined below to remit the sales and use tax on a prospective basis beginning **November 1, 2018, unless a later date is otherwise provided in this advisory opinion.**

The purpose of this advisory opinion is to provide written guidance for retailers (*i.e.*, persons engaged in the business of selling tangible personal property at retail) without a physical presence in South Carolina regarding sales and use tax registration and remittance in light of *Wayfair*.

For purposes of this advisory opinion, a retailer with no physical presence in South Carolina is referred to as a “remote seller” (*e.g.*, marketplace,² online, catalog, or mail order retailer). In addition, a remote seller includes any related entity assisting the remote seller in sales, storage, distribution, payment collection, or in any other manner with respect to the remote seller.³

¹ See SC Revenue Procedure #92-2, “Filing Requirements Where Nexus Is an Issue;” SC Information Letter #92-19, “Nexus - *Quill Corp. v. North Dakota*,” and SC Information Letter #90-29, “Nexus - Economic Presence.”

² A “marketplace” is a person engaged in the business of facilitating a retail sale of tangible personal property by (1) listing or advertising, or allowing the listing or advertising of, the products of another person in any marketplace where sales at retail occur and (2) collecting or processing payments from the purchaser, either directly or indirectly through an agreement or arrangement with a third party, regardless of whether the marketplace receives compensation or other consideration in exchange for its services. A marketplace includes any related entity assisting the marketplace in sales, storage, distribution, payment collection, or in any other manner with respect to the marketplace.

A marketplace may be physical or electronic and includes, but is not limited to, any space, store, booth, catalog, website, television broadcast, or similar place, medium, or forum.

³ See the definition of the term “person” in Code Section 12-36-30, which includes “any group or combination acting as a unit.”

The prospective treatment outlined in this advisory opinion is limited to remote sellers and does not apply to retailers who have a physical presence in South Carolina or retailers currently licensed with the Department for sales and use tax purposes.

Note: This advisory opinion reflects the Department’s official position at this time. Since developments in this area are taking place, any guidance is subject to change due to a future statute, regulation, court decision, or advisory opinion. Any change in South Carolina’s position as set forth in this document that is not the result of a court case or change in statute or regulation will be prospective. Any change that is the result of a court case will apply to all periods open under the statute unless the court states otherwise and any change in statute or regulation will be applicable as of the effective date established by the General Assembly.

II. SUBSTANTIAL NEXUS STANDARDS FOR REMOTE SELLERS

In accordance with Code Section 12-36-70 and the principles of *Wayfair*, a remote seller whose gross revenue from sales of tangible personal property,⁴ products transferred electronically, and services delivered into South Carolina exceeds \$100,000 in the previous calendar year or the current calendar year has economic nexus (*i.e.*, substantial nexus) with South Carolina and is responsible for obtaining a retail license and remitting South Carolina sales and use tax.

III. CALCULATION OF THE \$100,000 ECONOMIC NEXUS STANDARD

The \$100,000 economic nexus standard for a remote seller includes:

- ◆ the total gross revenue from all sales of tangible personal property delivered into South Carolina, including all taxable retail sales, exempt retail sales, and wholesale sales of tangible personal property;
- ◆ the total gross revenue from all sales of products transferred electronically into South Carolina, whether or not the transfer of such product is subject to the South Carolina sales and use tax; and,
- ◆ the total gross revenue from all services delivered into South Carolina, whether or not the service is subject to the South Carolina sales and use tax.

Example 1 – Sales on Own Website: Assume a remote seller makes sales into South Carolina via his own website. His annual South Carolina sales total \$100,001. These sales consist of \$75,000 in taxable retail sales and \$25,001 in exempt retail sales and wholesale sales. Since the remote seller’s total gross revenue from all sales into South Carolina exceeds \$100,000, the remote seller

⁴ Code Section 12-36-60 defines “tangible personal property,” in part, as “personal property which may be seen, weighed, measured, felt, touched, or which is in any other manner perceptible to the senses. It also includes services and intangibles, including communications, laundry and related services, furnishing of accommodations and sales of electricity, the sale or use of which is subject to tax under [the South Carolina sales and use tax law].” For services that are specifically subject to the sales and use tax, and therefore by definition are “tangible personal property,” see Code Sections 12-36-910(B), 12-36-1310(B), 12-36-920, and 12-36-2645.

meets South Carolina's economic nexus standard and he is required to obtain a retail license and remit the sales and use tax to the Department.

Example 2 – Sales on Own Website and Via a Marketplace: Assume a remote seller makes sales on his own website. He also lists his products for sale on a marketplace that has economic nexus with South Carolina. The remote seller sells \$75,000 of items into South Carolina via his own website. A marketplace makes sales of \$50,000 of products owned by the remote seller into South Carolina, and the marketplace collects or processes customer payments from these marketplace sales.

The calculation of the remote seller's economic nexus standard includes the gross revenue from property owned by the remote seller but sold via the marketplace. Since the remote seller's total gross revenue from South Carolina exceeds \$100,000 (\$75,000 + \$50,000), the remote seller meets South Carolina's economic nexus standard. He is required to obtain a retail license and remit the sales and use tax to the Department on his "gross proceeds of sales"⁵ of \$75,000.

Since South Carolina's economic nexus standard is based on "gross revenue," revenue from the sales made via the marketplace in this example (Example 2) is included in the calculation for determining if the remote seller has established economic nexus with South Carolina. However, under South Carolina sales and use tax law, the sales made via the marketplace are sales by the marketplace, and the marketplace is required to obtain a retail license and collect and remit the sales and use tax on the marketplace's "gross proceeds of sales," which includes the \$50,000 in sales of products owned by the remote seller but sold by the marketplace.

IV. REGISTRATION AND TAX REMITTANCE BY REMOTE SELLERS WITH ECONOMIC NEXUS

In accordance with Code Section 12-36-70, Code Section 12-4-320, and the principles of *Wayfair*, remote sellers with economic nexus must remit the sales and use tax for all taxable sales made into South Carolina on and after **November 1, 2018**, as provided below. Remote sellers who are not currently licensed for sales and use tax purposes with the Department should follow the guidelines below.

A. Guidelines for Timely Registration and Remittance of Tax

1. Economic Nexus in Calendar Year 2017, or from January 1, 2018 through September 30, 2018

Remote sellers having economic nexus with South Carolina in calendar year 2017, or from January 1, 2018 through September 30, 2018, are responsible for remitting the sales and use tax for all taxable sales made into South Carolina on and after **November 1, 2018**.

⁵ "Gross proceeds of sales" is defined in Code Section 12-36-90. Generally, "gross proceeds of sales" is the value proceeding or accruing from the sale, lease, or rental of tangible personal property and, therefore, is the total amount charged in conjunction with the sale or rental of tangible personal property. However, see Code Section 12-36-90(2) for charges that are not included in "gross proceeds of sales." For purposes of this advisory opinion, "gross proceeds of sales" applies to sales tax transactions and use tax transactions.

These remote sellers must obtain a retail license from the Department by November 1, 2018. Sales and use tax, penalties, and interest will not be assessed against these remote sellers for taxable sales by these remote sellers before November 1, 2018.

2. Economic Nexus Established on or after October 1, 2018

Remote sellers who establish economic nexus with South Carolina on or after October 1, 2018, are responsible for remitting the sales and use tax for all taxable sales made into South Carolina beginning the **first day of the second calendar month after economic nexus is established**.⁶ These remote sellers must obtain a retail license from the Department by the first day of the second calendar month after economic nexus is established. Sales and use tax, penalties, and interest will not be assessed against these remote sellers for taxable sales made into South Carolina before the first day of the second calendar month after economic nexus is established.

Example: Assume a remote seller establishes economic nexus in South Carolina on December 10, 2018 (*i.e.*, it exceeds \$100,000 in gross revenue from South Carolina). The remote seller must: (1) obtain a retail license by February 1, 2019 (the first day of the second calendar month after economic nexus is established) and (2) collect and remit the sales and use tax for all taxable sales made into South Carolina on and after February 1, 2019.

B. Failure to Timely Register and Remit Tax

Remote sellers who establish economic nexus with South Carolina as noted above, but who do not timely obtain a retail license from the Department are subject to sales and use tax assessment, penalties, and interest for all taxable sales made into South Carolina beginning with the date the remote seller was required to obtain a retail license.

V. VOLUNTARY REGISTRATION AND TAX REMITTANCE BY REMOTE SELLERS WITHOUT ECONOMIC NEXUS

Remote sellers who are not required to collect and remit the South Carolina sales and use tax may voluntarily obtain a retail license from the Department at any time and remit the sales and use tax for all taxable sales made into South Carolina. The collection and remittance of the sales and use tax by the remote seller applies to all taxable sales made in South Carolina on and after the effective date of the retail license. The voluntary filer must continue to collect and remit the tax for all tax periods until the remote seller notifies the Department that the retail license is being closed.

VI. SUBMITTING AN APPLICATION FOR A RETAIL LICENSE

Remote sellers who have established economic nexus with South Carolina, or who wish to voluntarily collect and remit the South Carolina sales and use tax, must obtain a retail license.

⁶ This is approximately 30 days from the end of the month in which economic nexus is established.

The Department's online portal for obtaining a retail license can be found at MyDORWAY.dor.sc.gov. Remote sellers using the online portal may submit the electronic application, along with the \$50 fee, **beginning September 28, 2018**.

The Department's paper application for a remote seller's retail license is South Carolina Form DOR-111RS, "Remote Seller Sales and Use Tax Registration." This form is on the Department's website (dor.sc.gov). Remote sellers using this form may submit the paper application, along with the \$50 fee, at any time.

A remote seller who has obtained a retail license from the Department must file a sales and use tax return (paper or electronic) and report its total gross proceeds of sales for each month it is licensed beginning with the effective date of the retail license.

VII. ADDITIONAL INFORMATION

1. Filing Requirements

Remote sellers licensed with the Department must file a monthly sales and use tax return. Each monthly return is due by the 20th day of the following month. Returns must be filed for all months, even in those months the taxpayer has no sales into South Carolina or has no tax due. Exception: If a remote seller's total state and local sales and use tax due does not exceed \$100 for any month, then the remote seller may file quarterly upon approval by the Department.

2. Information for Remote Sellers

Remote sellers may obtain additional information on the Department's website (dor.sc.gov). The website provides information on the sales and use tax base, local sales and use taxes, exemptions and exclusions, obtaining a retail license, forms, and frequently asked questions.

SOUTH CAROLINA DEPARTMENT OF REVENUE

s/W. Hartley Powell

W. Hartley Powell, Director

September 18, 2018
Columbia, South Carolina