Legal Matters®

Business Law
fall 2018

Sales tax to hit online retailers

In late June, the U.S. Supreme Court ruled that online retailers can be required to collect sales taxes in states where they have no physical presence. The decision came in the case of *South Dakota v. Wayfair, Inc.* and represents a victory for brick-and-mortar stores as well as states that claimed they were losing billions of dollars in revenue.

©pulsar011

The ruling effectively overturned a 1992 judgment in which the court ruled that states couldn't require businesses to collect sales tax unless they had a physical presence in the state.

But as internet retailing grew, states began to feel the loss. Writing for the majority, Justice Anthony M. Kennedy said, "The Internet's prevalence and power have changed the dynamics of the national economy." Estimates suggest that states were losing out on sales tax revenues of $8 billion to $33 billion per year.

In 2016, South Dakota passed a law requiring all merchants to collect a 4.5 percent sales tax if they exceeded $100,000 in annual sales or had more than 200 transactions in the state. That law allowed them to test the Supreme Court's readiness to review their position on state sales tax.

Thirty-one states already have online sales tax laws of some sort, but those with lower thresholds than South Dakota's could still see their laws challenged in court.

continued on page 3

ALLRED, BACON, HALFHILL & YOUNG, PC

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

Glitch in new tax law discouraging business investment

In June, a group of restaurants, retailers, and industry associations sent a letter to lawmakers asking them to correct a mistake in the Tax Cuts and Jobs Act (TCJA). The law inadvertently increased the tax burden on a category of business investment called Qualified Improvement Property (QIP).

The new tax law included a provision known as "100 percent bonus depreciation," which allows businesses to write off immediately the cost of short-lived investments. Due to an error, the language excludes QIP investments.

QIP investments include remodeling and other improvement projects to nonresidential buildings. Now, as currently written, businesses must depreciate those deductions over 39 years. This provision is less favorable than rules that existed before the law went into effect.

According to the Tax Foundation, an independent tax policy nonprofit, before the TCJA, if a business made a $100 QIP investment that had a 15-year cost recovery period, it would have been able to recover $84.38 of that investment over the life of the asset. But now, if a business makes a QIP investment, it can generally only recover $42.12 of that initial investment cost.

Essentially, businesses can write off only 2.5 percent of an improvement cost in the year the expenditures are made, a dramatically different amount from what the immediate full deductibility provision intended.

In the letter to the Senate Finance Committee and the House Ways and Means Committee, the organizations claimed that the significant discrepancy was causing stores and restaurants to delay remodeling projects. They added that businesses were declining to purchase or lease new locations that would require substantial improvements.

The impact, they wrote, was to "deny communities the jobs associated with substantial construction projects, but also deny … opportunity to bring new, permanent jobs to an otherwise abandoned store or to revitalize a declining mall."

Signatories to the letter include the Petroleum Marketers Association and the National Retail Federation. Though the QIP omission is considered a technical error, some pundits suggest that partisan battles could threaten a swift correction.

Can a business refuse service to same-sex couples?

After ruling in favor of a baker who refused to create a wedding cake for a same-sex couple, the U.S. Supreme Court declined to hear a case involving a florist who made a similar denial. The court sent the florist's case back to a lower court, directing it to revisit the decision in light of the ruling involving the cake, the *Masterpiece Cakeshop* case.

©belchonock

In ruling for the baker, Jack Phillips, the court held that Colorado commissioners showed hostility toward Phillips' religious beliefs because the state civil rights commission ruled against him while allowing other bakers to turn away a customer seeking cakes with anti-gay messages.

The court avoided a larger constitutional question regarding whether a business can decline to provide products or services due to religious objections to same-sex marriage.

In sending the florist case back to the lower court, the Supreme Court wiped away the lower court opinion that found against the florist for denying services. That case must now be reheard. The result may be ongoing conflict in the lower courts over when a business can refuse to serve a same-sex couple.

Twelve states have policies that permit the denial of services to LGBT individuals based on religion, in a patchwork variety of situations. Twenty-two states have anti-discrimination laws that, if upheld, could require businesses to serve same-sex couples, regardless of their religious beliefs.

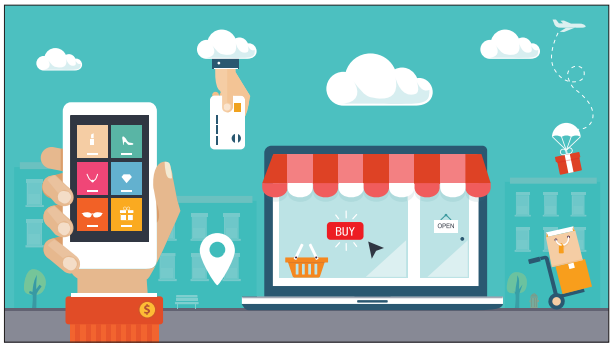
Sales tax to hit online retailers

continued from page 1

Impact on consumers, businesses

For consumers, the shift means they'll pay more for the things they buy online. Internet retailers will need to update their systems to accommodate an upcoming patchwork of state and local taxing districts. That likely won't be a significant problem for large retailers and smaller sellers using well-established platforms such as Amazon and Etsy. But internet startups could suffer.

Overstock and Wayfair have both said the ruling would have little impact on their business. Amazon already collects state sales tax on direct purchases from its site, but the internet behemoth does not collect tax for items sold by third-party vendors, which account for about half the site's total sales.



©pulsar011

Advocates say the ruling is a win for states as well as brick-and-mortar retailers, who can now compete on a more level playing field. Critics suggest that the complexities of compliance could hinder entrepreneurism.

Internet contracts must be apparent to be enforceable

If you do business using the internet, you want to ensure your internet contracts are enforceable. To do that, terms need to be presented in such a way that users have reasonable knowledge of them.

Your internet agreements may cover a range of terms including: allowable use of the site, privacy policies, subscriber agreements, terms of sale, and credit card agreements. These agreements can impact where a lawsuit is adjudicated and whether arbitration is mandatory, among other things.

How you present those contracts to your customers and users has an impact on whether the courts deem them enforceable. For example, in a case against Amazon, the company's arbitration agreement was ruled unenforceable because it was buried in an obscure section of the website.

Uber dealt with a similar situation this year when a Brooklyn judge ruled its arbitration clause was buried so deep in legal language that app users could not be expected to find it. "A registrant may complete the process without seeing or even being aware that there are other clickable buttons leading to a screenshot containing Uber's terms and conditions," the judge said.

In internet terminology, a "clickwrap" agreement involves the use of a click-box, requiring the user to acknowledge terms and conditions before proceeding. A "browsewrap" agreement is a term statement, typically linked from the homepage, which the user does not have to visit to use the site. Courts have generally declined to enforce browsewrap agreements, indicating they do not provide users sufficient notice of contract terms.

When evaluating whether your terms and conditions would likely be upheld in court, determine whether those conditions are readily apparent to who anyone who engages in an online transaction with you. The information should be as prominent as other information on your site and clearly presented to customers before purchase. A click-box acknowledgment is ideal. Even if someone doesn't bother to actually read your terms, they will likely be bound by them.

We welcome your referrals.

We value all of our clients. While we are a busy firm, we welcome your referrals. We promise to provide first-class service to anyone that you refer to our firm. If you have already referred clients to our firm, thank you!

Tax write-offs for government settlements restricted

Included in the Tax Cuts and Jobs Act was a provision that disallowed tax deductions for settlements between federal agencies and companies accused of wrongdoing. While previous tax law already barred deductions for criminal fines and penalties owed to the government, businesses could still deduct payments made to compensate victims or correct damages. The effect, critics said, is that taxpayers ended up subsidizing corporate misconduct.

Now, under the new law, all payments linked to a government enforcement action are no longer deductible unless they are classified as remedial (e.g., back wages, remediation of property, costs to bring the company into compliance).

The rule applies to a wide variety of government enforcement actions, such as those regarding employment, environmental impact, health care, government contracts, and other regulatory matters.

ALLRED, BACON,
HALFHILL & YOUNG, PC

11350 Random Hills Road, Suite 700 | Fairfax, VA 22030
(703) 352-1300 | admin@abhylaw.com | www.abhylaw.com

California's new data privacy law and your business

In June, California passed a consumer privacy law that could affect many organizations conducting business in the state.

The law, which has been likened to the European Union's GDPR regulations, gives California consumers the right to know what personal information a business has collected about them, including where it was sourced from and how that information is being used.

©maxkabakov

Consumers also have the right to opt out of having their information sold, the right to delete their information, and the right to receive equal service and pricing even if they exercise their privacy rights.

To comply, businesses will need to provide a specifically worded opt-out link on their home page and provide at least two ways for consumers to submit disclosure requests, including a toll-free phone number. Businesses will have 45 days to disclose their data sharing practices following a consumer request.

The act is slated to go into effect in 2020 and will apply to for-profit businesses that collect and control California residents' personal information and meet any one of the following criteria:

1. have annual gross revenues greater than $25 million;
2. buy, receive, sell or share personal information of 50,000 or more California consumers annually; or
3. derive 50 percent or more of their annual revenues from selling consumers' personal information.

Though this means that most small businesses will not have to comply, the International Association of Privacy Professionals (IAPP) estimates that more than 500,000 U.S. businesses will be affected by the privacy law.