

South Dakota enacts S.B. 106: Physical presence no longer required for sales tax collection

Overview

On March 22, 2016, Governor Dennis Daugaard signed Senate Bill 106 (S.B. 106)¹ amending S.D. Codified Laws § 10-45 and 10-52, effective May 1, 2016, to require the collection of South Dakota sales tax on sales into South Dakota if, in the previous or current calendar year, the seller's sales into South Dakota exceed \$100,000 or the seller had two hundred or more separate transactions into South Dakota.

S.B. 106 is a direct challenge to the current physical presence requirement of *Quill*,² the 1992 decision of the U.S. Supreme Court which affirmed the existence of a bright-line physical presence standard for substantial nexus under the Commerce Clause before a state or locality may impose a duty to collect use tax on a remote vendor. Noting that “the inability to effectively collect the sales or use tax from remote sellers . . . is seriously eroding the sales tax base of [South Dakota], causing revenue losses and imminent harm to [South Dakota] through the loss of critical funding for state and local services,”³ S.B. 106 also authorizes the state to initiate a declaratory judgment action in order to provide the “most expeditious possible review of the constitutionality of this law.”⁴

In this Tax Alert we summarize S.B. 106 and provide some taxpayer considerations.

South Dakota sales tax nexus—physical presence no longer required

Currently, only sellers who have a physical presence in South Dakota are required to collect and remit sales tax on their sales into South Dakota.⁵ S.B. 106 expands sales and use tax nexus beyond physical presence and requires the collection of sales taxes on sales of tangible personal property, products transferred electronically, or services for delivery into South Dakota if the seller meets either of the following criteria in the previous calendar year or current calendar year:

1. The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or
2. The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.⁶

The provisions of S.B. 106 become effective on and after May 1, 2016⁷, and may not be applied retroactively.⁸

Enforcement of S.B. 106 enjoined during pendency of litigation challenging its constitutionality

S.B. 106 provides that South Dakota “may bring a declaratory judgment action . . . to establish that the obligation to remit sales tax is applicable and valid under state and federal law.”⁹ Further, the filing of a declaratory action by South Dakota operates as an injunction during the pendency of the action, prohibiting any state entity from “enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis” for the period during which the constitutionality of S.B. 106 is being challenged.¹⁰ If the constitutionality of the nexus provisions are ultimately upheld and any injunction against the enforcement of this law is lifted, S.B. 106 then provides that “the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.”¹¹

¹ Senate Bill 106, 2016 Legislative Assemb., Reg. Sess. (S.D. 2016). Available [here](#).

² *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

³ S.B. 106 § 8(1).

⁴ S.B. 106 § 8(8).

⁵ S.D. Codified Laws § 10-45.

⁶ S.B. 106 § 1.

⁷ S.B. 106 § 9.

⁸ S.B. 106 § 5.

⁹ S.B. 106 § 2.

¹⁰ S.B. 106 § 3.

¹¹ S.B. 106 § 6.

Considerations

Remote sellers who transact sales into South Dakota should consider whether their activity meets the criteria requiring them to collect and remit sales tax and whether litigation and/or injunctive action seeking to enjoin the state from enforcing the nexus provisions of S.B. 106 is an appropriate course of action.

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