



MULTISTATE INDIRECT TAX

United States Supreme Court denies certiorari petition for North Carolina sales and use tax case

Tax Alert

Overview

On June 20, 2023, the Supreme Court of the United States (“U.S. Supreme Court”) issued an [order](#) denying the taxpayer’s petition for writ of certiorari in *Quad Graphics, Inc. v. N.C. Dept. of Revenue*, allowing the Supreme Court of North Carolina’s (“North Carolina Supreme Court”) [decision](#) to stand. The North Carolina Supreme Court ruled to uphold a sales tax assessment against the taxpayer because the assessment did not violate the Due Process Clause or the Commerce Clause of the United States Constitution (“the Constitution”).

This Tax Alert summarizes the North Carolina Supreme Court’s decision.

North Carolina Supreme Court reverses decision finding that North Carolina lacked sufficient nexus to impose sales tax on out-of-state printer company

Background

The taxpayer is a Wisconsin-based S-corporation that is engaged in the production and sale of printed materials, including books, magazines, catalogs, and other items, for distribution across the United States. During the tax years at issue, the taxpayer processed approximately \$20 million worth of orders for delivery to customers or third-party recipients located in North Carolina. The taxpayer had no facilities located in North Carolina. After production of its materials, the taxpayer would deliver customers’ orders to common carriers located outside of North Carolina for delivery to in-state customers or their third-party representatives. According to its sales contracts, possession, legal title, and risk of loss for any ordered materials passed from taxpayer to its customers when those materials were delivered to carriers outside of North Carolina. The taxpayer also employed a sales representative in North Carolina who solicited sales to customers both inside and outside of the state.

The North Carolina Department of Revenue (“the Department”) audited the taxpayer, and after review, issued a Notice of Final Determination upholding the imposition of uncollected and unremitted sales tax in the amount of \$3,238,022.52. The Department found that the taxpayer was a retailer engaged in business in North Carolina as it maintained a resident employee to solicit sales and service customer accounts within the state. The Department also found that the taxpayer had failed to establish that its customers took possession of purchased materials outside of North Carolina and, as such, concluded that the sales were properly sourced under North Carolina’s sourcing statute. N.C. Gen. Stat. § 105-164.4B provides sourcing principles for the imposition of sales tax on sellers of goods delivered to in-state purchasers or their designees. The statute specifically provides that “[w]hen a purchaser or purchaser’s donee receives an item at a location specified by the purchaser . . . the sale is sourced to the location where the purchaser or the purchaser’s donee receives the item.” Further, North Carolina Sales and Use 4-1 provides that for purposes of sourcing, the terms “receive” and “receipt” mean “taking possession of tangible personal property; making first use of services; or taking possession or making first use of certain digital property, whichever comes first,” but does not include “possession by a shipping company on behalf of the purchaser.”

In an appeal to the Office of Administrative Hearings (“OAH”), the Administrative Law Judge upheld the Department’s determination. The taxpayer petitioned the North Carolina Business Court (“the Business Court”) for judicial review of the OAH’s decision, arguing that it was not a retailer and that the imposition of the sales tax violated the Due Process Clause and Commerce Clause of the Constitution.

The Business Court rejected the taxpayer’s argument that it was not a retailer and concluded that the OAH had correctly held that the taxpayer was a retailer within the meaning of North Carolina’s statute. However, the Business Court agreed with the taxpayer that the imposition of the sales tax violated the Commerce Clause of the Constitution based on the 1944 U.S. Supreme Court decision in *McLeod v. J.E. Dilworth Co.* The Business Court discredited the Department’s assertion that the decisions of the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady* and *South Dakota v. Wayfair, Inc.* overruled *Dilworth* formalism, and therefore concluded that *Dilworth* remains controlling precedent in the case. Accordingly, the Business Court granted summary judgment in favor of the taxpayer on the basis that North Carolina did not have sufficient nexus to impose sales tax on the taxpayer, reversing the OAH’s decision.

North Carolina Supreme Court Decision

The North Carolina Supreme Court reviewed the Business Court’s decision *de novo*. The sole question before the North Carolina Supreme Court was whether the holding of the U.S. Supreme Court in *Dilworth* controlled the outcome of the case. The Court concluded that the formalism doctrine established in *Dilworth* has not survived the subsequent decisions of the U.S. Supreme Court in *Complete Auto* and *Wayfair* so as to render the sales tax regime of North Carolina violative of the Commerce Clause and Due Process Clause of the Constitution. Further, under the relevant test provided by *Complete Auto*, North Carolina’s imposition of sales tax on the transactions at issue in the case were constitutional. Therefore, the North Carolina Supreme Court reversed the Business Court’s order and opinion and held in favor of the Department.

Get in touch

[Kathy Saxton](#)

[Art Tilley](#)

[Inna Volfson](#)
[Michael Spencer](#)
[Ryan Trent](#)



[Deloitte.com](#) | [Unsubscribe](#) | [Manage email preferences](#) | [Legal](#) | [Privacy](#)

30 Rockefeller Plaza
New York, NY 10112-0015
United States

As used in this document, "Deloitte" means Deloitte Tax LLP, a subsidiary of Deloitte LLP. Please see www.deloitte.com/us/about for a detailed description of our legal structure. Certain services may not be available to attest clients under the rules and regulations of public accounting.

This alert contains general information only and Deloitte is not, by means of this alert, rendering accounting, business, financial, investment, legal, tax, or other professional advice or services. This alert is not a substitute for such professional advice or services, nor should it be used as a basis for any decision or action that may affect your business. Before making any decision or taking any action that may affect your business, you should consult a qualified professional advisor. Deloitte shall not be responsible for any loss sustained by any person who relies on this alert.

Copyright © 2023 Deloitte Development LLC. All rights reserved.