



This Week in State Tax (TWIST)

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South Carolina: State supreme court holds marketplace liable for collection in pre-Wayfair years

The South Carolina Supreme Court recently held that an online marketplace facilitator was liable for sales and use tax on third-party marketplace sales made to South Carolina customers during the first quarter of 2016. The decision analyzes statutory language in existence prior to the U.S. Supreme Court decision in *South Dakota v. Wayfair* and the subsequent enactment of South Carolina's law requiring marketplace operators to collect tax on sales they facilitate. The Department of Revenue had previously assessed the taxpayer additional tax, penalties, and interest for uncollected tax on sales made by third-party merchants through its platform. A state administrative law court and the court of appeals had earlier affirmed the assessment.

Under South Carolina law, sales tax is imposed on persons "engaged in the business of selling" tangible personal property at retail. The taxpayer argued on appeal that it was not a "seller" with respect to third-party transactions made on the marketplace and therefore had no obligation to collect tax on those sales. The supreme court focused instead on whether the taxpayer was "engaged in the business of selling." It concluded it was, finding that the taxpayer had an integral role in facilitating every third-party sale conducted on the marketplace. The court cited the taxpayer's control over marketplace activities such as the regulation of listings, pricing parameters, customer communications, payment processing, returns, and disbursements of funds to third-party merchants. The court distinguished the taxpayer's level of control in the marketplace sales from those of service providers such as payment processors or delivery companies, which the court characterized as incidental services and not required for a particular sale to occur. The court also rejected the taxpayer's argument that the statute required the taxpayer to receive consideration "for" the sale itself and found no due process violation in applying the statute to the periods at issue.

Because the court found the tax imposition statute to be unambiguous, it affirmed the decision of the court of appeals and held that the taxpayer was liable for collecting and remitting tax on all taxable third-party marketplace sales made during the audit period. Two justices dissented stating that both the state and the taxpayer had provided reasonable interpretations of the statutes involved and that South Carolina precedent required such ambiguity to be resolved in favor of the taxpayer. For questions regarding the South Carolina Supreme Court decision in [Amazon Service, LLC v. South Carolina Department of Revenue](#), please reach out to [Nicole Umpleby](#) and [Scott Jackson](#).

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