AiA Art News-service

# The US Supreme Court Wayfair decision's impact on the art market

The US Supreme Court has overruled the longstanding rule that interstate sellers do not need to collect and remit state sales tax unless they have a physical presence in a state.

On June 21, 2018, the Supreme Court of the United States ("SCOTUS") ruled in the long-awaited *South Dakota v. Wayfair et al.*decision, which determined whether the South Dakota law, requiring certain out-of-state retailers to collect sales tax, was constitutional. In light of this decision, art businesses must re-evaluate whether they have a sales tax collection responsibility to any state in which they deliver art, and art collectors should also follow any subsequent changes in state legislation that may affect individual sellers.

## Prior Physical Presence Rule.

Before this decision, many businesses did not worry about collecting and withholding sales tax for states in which they did not have a physical space or employees. However, simply focusing on physical presence is now not sufficient. SCOTUS' opinion stated that this prior physical presence rule was flawed for the following reasons:

**Prior rule created market distortions.** SCOTUSnoted that the prior rule provided a judicially-created tax shelter for businesses who chose to limit their physical presence in a state, and it therefore produced an incentive for businesses to avoid physical presence in multiple states.

**Prior rule created arbitrary, formalistic distinctions.** SCOTUS noted that each year the physical presence rule had become further removed from economic and market reality.

**Prior rule resulted in significant revenue losses for the states.** SCOTUS noted that the estimated revenue losses are US$8 to US$33 billion annually because purchasers are not remitting use tax.

## The Ruling.

SCOTUS upheld South Dakota's statute,[1] which mandates that any seller who makes sales of tangible personal property for delivery in South Dakota must collect and remit sales tax to South Dakota if either:

**the seller's gross sales from items delivered in South Dakota exceed US$100,000**; or

the seller sells items for delivery into South Dakota in 200 or more separate transactions.

Addressing administrative burden concerns of sellers, SCOTUSnoted that the South Dakota statute includes the following features designed to prevent undue burdens upon interstate commerce:

There is no obligation to remit sales tax retroactively.

South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement, which requires a single state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to state sales tax administration software for by the State. Sellers who choose to use such software are immune from audit liability.

## Impact on the Art Market.

This ruling has paved the way for other states to enact similar legislation based on South Dakota's statute. As 41 states, 2 territories, and the District of Columbia asked SCOTUS to reject the prior physical presence rule, in support of South Dakota, it is likely that other states will enact legislation modelled on South Dakota's law to increase their state sales tax revenues. This would be particularly problematic for art businesses, as many individual sales of art exceed US$100,000. For example, in 2017, North Dakota enacted legislation matching South Dakota's statute which became effective immediately upon this decision.

This new development may negatively affect New York art merchants, who often arrange shipments of out-of-state deliveries using fine art carriers. As a result, when New York merchants control the shipment of artwork outside of New York, they now must consider whether they are inadvertently exposing themselves to the sales tax withholding requirements of other states.