



This Week in State Tax (TWIST)

October 17, 2022



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Multistate: Nexus Litigation Updates

There are several cases pending currently in courts across the country that address sales and use tax nexus for years both before and after the *Wayfair* decision. Here are a few status updates. First, the Pennsylvania Department of Revenue announced that it will not appeal the Commonwealth Court's recent decision in *Online Merchants Guild v. Hassell*. In that case, the court held that the merchants that sold through Amazon's "Fulfillment by Amazon" program did not place their merchandise in the stream of commerce with the expectation that the goods would be purchased by a consumer in Pennsylvania (even though some inventory may have ended up in Pennsylvania). Further, the merchants had not availed themselves of Pennsylvania's protections, opportunities, and services. As such, they lacked the requisite due process clause contacts to establish nexus with the Commonwealth.

In another case addressing pre-*Wayfair* sales, the litigation in South Carolina over whether Amazon was required to collect and remit sales tax on its facilitated sales will remain pending at the Court of Appeals. Recall, in 2019, the state Administrative Law Court concluded that Amazon was a "retailer" required to collect sales and use tax during pre-*Wayfair* tax years. The appeals court had requested that the South Carolina Supreme Court certify the case for review before the state highest court. Finally, the oral arguments in *U.S. Auto Parts*, which addresses "cookie nexus" and whether the holding in *Wayfair* applied retroactively, will be held before the Massachusetts Supreme Judicial Court on November 4, 2022.

In other news, an Arizona-based online bead seller appealed the dismissal of its lawsuit challenging the constitutionality of Louisiana's locally administered sales tax regime to the Fifth Circuit Court of Appeals. The bead seller had avoided doing business in Louisiana because of its burdensome and costly parish tax system. The federal district court had determined that it lacked jurisdiction over the case under the Tax Injunction Act (TIA). Under the TIA, a court cannot "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law." That bar, however, applies only if "a plain, speedy and efficient remedy may be had in the courts of such State." The bead company argued that it was not challenging the levy or assessment of a tax; it was challenging the state's overall local tax regime. Further, the company argued that because it had not been assessed tax and was therefore not seeking a refund, it did not have a remedy in state court.



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