

Minnesota Department of Revenue

Revenue Notice # 20-03: Tobacco Products Tax – Out-of-State Retailers – Collection Responsibility

Introduction

On June 21, 2018, the U.S. Supreme Court issued its decision in *South Dakota v. Wayfair, Inc., et al.*, 138 S. Ct. 2080 (2018) (“*Wayfair*”). The U.S. Supreme Court held that when a business has substantial nexus with a state, physical presence in a state is not constitutionally required when determining whether a state can impose tax collection and payment responsibilities.

This revenue notice applies *Wayfair* to Chapter 297F tax. More specifically, the revenue notice applies *Wayfair* to excise tax collection and payment responsibilities of out-of-state retailers that:

- (1) Meet the definition of “out-of-state retailer” found in *Minnesota Statutes* section 297F.01, subdivision 10a; and
- (2) Make “delivery sale[s]” of “tobacco products” to Minnesota consumers as defined in *Minnesota Statutes* section 325F.781, subdivision 1. (The definition of “tobacco products” in *Minnesota Statutes* section 325F.781, subdivision 1, includes only “cigarettes,” “smokeless tobacco,” and “premium cigars.”)

Retailers meeting these two criteria are referred to in this revenue notice as “Out-of-State Tobacco Product Retailers.”

Minnesota Statutes section 325F.781, subdivision 6, states that “[p]rior to shipping any tobacco products to a purchaser in this state, the out-of-state retailer shall comply with all requirements of chapter 297F and shall ensure that all state excise taxes and fees that apply to such tobacco products have been collected and paid to the state...” This provision is referred to in this revenue notice as the “Ensure-Payment Provision.” The Ensure-Payment Provision requires Out-of-State Tobacco Product Retailers to collect and remit all state excise tax that applies to the tobacco products, which currently means collecting and remitting to the Department consumer use tax imposed by Chapter 297F.

Note that the obligation of Out-of-State Tobacco Product Retailers to comply with the Ensure-Payment Provision, which is triggered by meeting *Wayfair* sales thresholds, is separate from the obligation of such retailers to register with the Department. Under *Minnesota Statutes* section 297F.031, Out-of-State Tobacco Product Retailers must register with the Department prior to making any delivery sales of tobacco products to Minnesota consumers, regardless of whether their delivery sales meet *Wayfair* sales thresholds.

Department Position

Applying *Wayfair*, an Out-of-State Tobacco Product Retailer with no physical presence in Minnesota is subject to the Ensure-Payment Provision and has nexus with Minnesota if, during the prior 12-month period, the Out-of-State Tobacco Product Retailer made:

- (1) 200 or more delivery sales of tobacco products from outside Minnesota to destinations in Minnesota by common carrier or otherwise; or
- (2) Delivery sales of tobacco products totaling more than \$100,000 from outside Minnesota to destinations in Minnesota by common carrier or otherwise.

The above two nexus criteria will be collectively referred to as “*Wayfair* thresholds” in this revenue notice.

Under the Ensure-Payment Provision, an Out-of-State Tobacco Product Retailer:

- (1) Must begin collecting and remitting tax on the first day of a calendar month occurring no later than 60 days after such retailer, in a 12-month period, met either of the *Wayfair* thresholds;
- (2) Must continue to collect and remit tax until at least the last day of the 12th calendar month following the calendar month in which such retailer began collecting and remitting tax under paragraph (1);
- (3) May cease such activities after the 12-month period described in paragraph (2), if such retailer no longer meets either of the *Wayfair* thresholds;
- (4) May cease collection and remittance of tax under paragraph (3) only after notifying the Department that such retailer no longer meets either of the *Wayfair* thresholds. If the retailer subsequently requalifies under either of the *Wayfair* thresholds, the retailer shall again comply with the requirements of paragraphs (1) and (2); and
- (5) Must file a return and pay, on or before the 18th day of the following calendar month, any tax it collected under the Ensure-Payment Provision.

Examples

- (1) An Out-of-State Tobacco Product Retailer that does not maintain a place of business in Minnesota solicits sales of premium cigars. In the 12-month period from November 2019 through October 2020, the Out-of-State Tobacco Product Retailer made 210 Delivery Sales of premium cigars to Minnesota consumers, with a total value of \$90,000. Because the number of Delivery Sales to Minnesota consumers in the past 12 months exceeds 200,

the Out-of-State Tobacco Product Retailer must collect and remit the premium cigar use tax imposed by *Minnesota Statutes* section 297F.05, subdivision 4a, to the Department on the first day of the calendar month occurring no later than 60 days after October 31, 2020. This means the retailer must start collecting and remitting tax no later than December 1, 2020. Tax collected in December 2020 is due by January 18, 2021.

- (2) An Out-of-State Tobacco Product Retailer that does not maintain a place of business in Minnesota solicits sales of premium cigars. In the 12-month period from February 2020 through January 2021, the Out-of-State Tobacco Product Retailer made 190 Delivery Sales of premium cigars to Minnesota consumers, with a total value of \$125,000. Because the amount of its Delivery Sales to Minnesota consumers in the past 12 months exceeds \$100,000, the Out-of-State Tobacco Product Retailer must collect and remit the premium cigar use tax imposed by *Minnesota Statutes* section 297F.05, subdivision 4a, to the Department starting on the first day of the calendar month occurring no later than 60 days after January 31, 2021. This means the retailer must start collecting and remitting tax no later than March 1, 2021. Tax collected in March 2021 is due by April 18, 2021.
- (3) An Out-of-State Tobacco Product Retailer that does not maintain a place of business in Minnesota solicits sales of premium cigars. In the 12-month period from July 2020 through June 2021, the Out-of-State Tobacco Product Retailer made 152 Delivery Sales of premium cigars to Minnesota consumers, with a dollar value of \$95,000. Because the Delivery Sales fall below *Wayfair* thresholds, the Department does not require the Out-of-State Tobacco Product Retailer to collect and remit tax for the time period at issue.

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Lee Ho, Deputy Commissioner