



## Enjoying those tax-free online purchases? Supreme Court could change that

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Minnesotans who've avoided paying state sales taxes on online and other kinds of remote purchases could soon see those taxes added to their bills, depending on how the U.S. Supreme Court rules in a widely watched case that will be argued this week.

On Tuesday, the justices will hear *South Dakota v. Wayfair Inc.*, a dispute over a law that expands states' ability to compel sellers without a physical presence to collect and forward taxes on purchases made by state residents.

Hundreds of millions of dollars in Minnesota sales tax payments hang in the balance as the nation's highest court wades into the digital economy and state tax collections for the first time in 26 years.

While the case will have national implications, Minnesota's interest is heightened because the state is home to two of America's biggest retailers: Target and Best Buy.

Both companies have long complained that online and other remote sellers enjoy an unfair pricing advantage because they often do not charge customers sales tax. Target and Best Buy have growing online stores, but they must pay state taxes on those sales because they have stores across the country.

Minnesota's public sector is also invested in the case. A November 2017 report by the Government Accountability Office (GAO) said the current taxing system collects roughly 80 percent of what is owed. But the 20 percent that is not collected collectively costs states an estimated \$8.5 billion to \$13.4 billion a year in taxes. GAO placed Minnesota's loss between \$132 million and \$206 million annually.

"What's at stake is the ability of states to require more vendors to collect sales tax," said University of Nebraska law Prof. Adam Thimmesch, whose research focuses on state taxes and collection issues. . "The court's doctrine has not kept pace with technology."

### **Target, Best Buy watch case**

The prevailing precedent dates to 1992 and says companies must have some sort of physical presence in a state before they are obliged to collect and forward sales taxes from customers who

are residents of that state. The court implemented the standard before internet commerce exploded, Thimmesch noted, and has not updated it since.

The result for brick-and-mortar companies like Target and Best Buy, he added, “has been a loss of sales and market share.”

Best Buy CEO Hubert Joly said his company welcomes the Supreme Court’s review and “eagerly awaits its ruling” in light of the changing business landscape.

“We have worked for years as part of a broad coalition of large and small retailers to close the loopholes that [give] online-only retailers up to a 10 percent price advantage over retailers operating stores, by choosing not to collect sales tax,” Joly said in a statement to the Star Tribune. “This situation is a result of a Supreme Court decision made before online shopping even existed. As a result, we have a situation where the government is picking winners and losers and where states are prevented from collecting revenue that is owed to them. This negatively impacts communities across the country and puts American jobs at risk.”

Free market advocates such as the Cato Institute counter that South Dakota’s attempt to make Wayfair and other remote sellers collect and forward sales taxes is unconstitutional.

“To allow South Dakota to compel Wayfair’s collection of its state taxes raises serious concerns of taxation without representation,” a lawyer from Cato wrote in a friend of the court brief. “If states can directly compel people who live outside their boundaries to adhere to their standards — standards Wayfair had no chance to influence — the concept of statehood itself is undermined.”

Minnesota is among the nation’s leaders in trying to expand sales tax collections from remote purchases. Last year, the state passed a law that will in some cases make operators of virtual marketplaces such as Amazon, Etsy and eBay collect and forward sales taxes from sellers who use their internet platforms. The law takes effect in 2019, but collections could begin sooner based on what the Supreme Court decides in the South Dakota-Wayfair case.

### **Bipartisan support**

In Minnesota, supporters of online sales tax collection extend across party lines. State Sen. Roger Chamberlain and state Rep. Greg Davids, Republicans who chair the money committees in St. Paul, backed the new internet sales tax collection law.

Both men stress their anti-tax credentials, but both say the Minnesota law and the upcoming Supreme Court case are not about new taxes. Instead, Chamberlain and Davids say, it is about money already owed but not being paid. They want to establish equity between Minnesota Main Street businesses and internet sellers who are not charging buyers taxes they are legally obliged to collect.

For much the same reason, Minnesota Attorney General Lori Swanson, a Democrat, joined two friend of the court briefs in support of South Dakota.

Minnesota Commissioner of Revenue Cynthia Bauerly, a Democrat, said her department “supports efforts to ensure that businesses pay the sales tax owed under current law, regardless of whether that purchase is made online or in a brick and mortar store.”

Having technology compromise current law is not unheard of. But trying to change judicial precedent, especially at the level of the Supreme Court, presents special challenges, said University of Minnesota law Prof. Kristin Hickman.

“It is not unusual for people to ask courts to overturn prior decisions,” she noted. “It’s rare for courts to do it. Up to now the assumption was that Congress would need to step in.”

In fact, language in the 1992 Supreme Court decision specifically invited a legislative solution. But more than a quarter-century later Congress has been unable to agree on one. In recent years several so-called marketplace fairness bills have been introduced. None passed.

This left Minnesota and 44 other states passing separate laws that can make compliance an expensive nightmare, said Mark Faggiano, founder and CEO of TaxJar, a software service that helps e-commerce businesses with tax issues.

“The fact that the system is not federally run makes it complicated,” he said. “Imagine having to comply with sales tax laws that are different from state to state.”

The confusion raises the other big issue in online sales tax collection: enforcement.

Whatever the Supreme Court decides about state taxing power, making businesses pay is a different set of roadblocks.

“The difficulty is always going to be finding these people and making them pay,” said Thimmesch.

Legal actions against people who do not reside in your state are tricky and not particularly cost-effective, he said.

Laws like Minnesota’s that shift sales tax collection to internet platforms that host sellers doing a certain amount of business in the state consolidate the process. But foreign companies operating independently online may be unreachable. And as the digital economy evolves, the situation could get more complicated, not less.

“The global aspect of this,” said Thimmesch, “is going to continue to be a problem.”