

Report on recent US international tax developments - 22 June 2018

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The United States (US) Supreme Court issued its much anticipated ruling in *South Dakota v. Wayfair* on 21 June, overturning long-standing precedent that precluded the states from imposing sales or use tax collection responsibilities on remote sellers, including internet sellers, with no "physical presence" in the state. This decision, which lies firmly within the state taxation area, will likely have a profound impact on all companies that make any sales to the US, including foreign-based companies. This decision will no doubt be of interest to countries currently evaluating the taxation of the digital economy.

The *Wayfair* case was on appeal from the South Dakota Supreme Court, and involved a challenge to that state's economic presence nexus provision, which was enacted in 2016. That law required remote sellers that sell tangible personal property, electronically transferred products, or taxable services for delivery into South Dakota to register, collect, and remit South Dakota sales taxes on those sales **as if** the seller has a physical presence in the state. Similar provisions have been implemented in at least 11 other states since 2015. In a 5-4 ruling, the Court majority in *Wayfair* held that the physical presence standard articulated in *Quill v. North Dakota* "is unsound and incorrect" and, as a result, overturned the *Quill* and *Bellas Hess* cases upon which the physical nexus standard was established.

US House Ways and Means Committee Chairman Kevin Brady issued a statement on the 6-month anniversary of enactment of the *Tax Cuts and Jobs Act* (TCJA), saying Congress would no longer wait 30 years between major changes to the tax code and would instead work “every year ... to make America more competitive, more innovative, and make sure our tax code is family friendly.” Chairman Brady earlier said he hopes to release a “phase 2” tax reform plan before the August recess, although its fate in the Senate is very uncertain.

The House Budget Committee on 21 June approved a fiscal year 2019 budget resolution that reaffirms Republican intentions to cut spending and make permanent the temporary provisions of the TCJA. The budget resolution contains reconciliation instructions that conceivably could be tapped for tax legislation, but Republican leaders have announced no plans to strive for a bicameral budget agreement that would be required to unlock the reconciliation process.

The Organisation for Economic Co-operation and Development (OECD) on 21 June released two reports containing *Guidance for Tax Administrations on the Application of the Approach to Hard-to-Value Intangibles*, under Base Erosion and Profit Shifting (BEPS) Action 8 and *Revised Guidance on the Application of the Transactional Profit Split Method*, under

BEPS Action 10. The new guidance for tax administrations on hard-to-value intangibles (HTVI) is meant to help reach consensus on understanding and practice relating to HTVI. The guidance on the profit split method has been formally incorporated in the OECD Transfer Pricing Guidelines, replacing the previous text on the transactional profit split method. Although it retains the basic premise for when the profit split method should be applied, it expands the guidance including many examples.

And OECD Secretary-General Angel Gurría told members of the European Parliament this week that his organization is not in competition with the European Union (EU) in regard to digital taxation, but asked that the EU not create short-term measures that will impede long-term digital tax solutions. The OECD earlier announced it would release a digital taxation report in 2020, but Gurría indicated the OECD report could be released in 2019. The European Commission on 21 March released two proposals for new Directives that would provide new ways to tax digitalized forms of business activity. The Commission’s controversial proposals included a two-phased approach: an interim solution, referred to as the Digital Services Tax and a longer term *Council Directive laying down rules relating to the corporate taxation of a significant digital presence*.

For additional information with respect to this Alert, please contact the following:

Ernst & Young LLP, International Tax Services, Washington, DC

- ▶ Arlene Fitzpatrick arlene.fitzpatrick@ey.com
- ▶ Joshua Ruland joshua.ruland@ey.com

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