



You may not have heard of Justice Anthony M. Kennedy. He is the Senior Associate Justice of the Supreme Court of the United States and at the age of 81 has announced his retirement. One of his final decisions on 21 June 2018 in the case of *South Dakota v Wayfair* is likely however to have a significant impact on interstate transactions involving works of art for years to come.

Technical background

When a buyer is established in a separate US state to that of a seller, it is normal for the seller not to charge sales tax on the transaction. It is down to the buyer to report “out-of-state” purchases and then pay his or her home state the tax that would have been paid if bought locally. This is known as “use tax”. This affects all US citizens, regardless of income levels, who have to declare the purchases on their annual state

Tax Returns.

Whether innocent or intentional, it seems some buyers of art work do not report such purchases on their home state Tax Return. It is estimated that there is a loss of billions of dollars in tax revenue as a result of such use tax omissions or failure by sellers to properly register and account for sales tax.

The Wayfair Case

This case, brought by South Dakota against Wayfair (an e-commerce site selling home décor and lighting) seems to have the potential for far reaching affect.

Under historical rulings, an e-commerce site could operate cross-border in the United States without charging local sales taxes unless the site had some form of nexus in the destination state.

The South Dakota state government considered this resulted in a potential loss of tax revenue. There is also arguably an unfair competitive advantage over “in-state” sellers of similar goods.

Supreme Court Justice Anthony M. Kennedy’s ruling would seem to have the potential to impose the burden on out-of-state sellers to collect sales taxes on any individual sale in excess of \$100,000 or where sales are of lesser amounts but very frequent. This would apply whether or not the seller has a presence in the buyer’s

state.

Commentators suggest that other US states will adopt the precedent set in the South Dakota v Wayfair case which could have an enormous impact on galleries, dealers and auction houses selling into or within the United States. Art Law expert Thomas C. Danziger is reported as saying “The Wayfair decision looks like a sales tax game-changer for many New York galleries. Until now, most New York dealers who delivered works of art to out-of-state buyers did not even have to think about sales tax, much less go through the exercise of computing and collecting tax from the buyer based on the delivery location”.

An art gallery based, say, in London selling and delivering to a collector in South Dakota would therefore seem to be caught by this case and would conceivably need to charge and account for South Dakota sales taxes (4.5%). This would be irrespective of the fact that the gallery will not have a physical presence of its own in South Dakota. Assuming other state legislatures adopt these principles, it can be easily seen that this would have wider ramifications for any art businesses selling into the US or from one US state to another.

What now?

With undoubtedly e-commerce in mind, 41 states are already pushing for changes in line with the way that the Wayfair decision has gone. The onus therefore for the collection of sales taxes would fall more squarely on the selling party even though that party may not have a physical presence in that state.

The case is now to be considered by the South Dakota Supreme Court to issue its opinion and interpretation of the ruling, which is likely to be known in the coming weeks.

This case highlights the need for art dealers to seriously consider their tax responsibilities in the US and how they deal with shipment and delivery of works to collectors based in the US.

How can we help?

We have at our disposal a wide professional network of art specialist legal and tax advisors based in the US. If you consider that you may have some future exposure in this space, please let us know and we would be happy to make appropriate introductions.

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