

Fair Access to Interstate Remedies

Talking points

Recent technological, legal and economic changes have resulted in a national economy where all businesses engage in interstate commerce across state borders.

- Prior to the 1930s, when Congress enacted the Tax Injunction Act (TIA), Section 1341 of Title 28, there was minimal interstate commerce, no state imposed sales tax and only 17 states had corporate income taxes—much has changed in the last 100 years.
- The landscape changed further with the Supreme Court’s recent decision in *South Dakota v. Wayfair*, putting remote sellers at risk of being subject to multiple taxes in all 50 states.
- As technology enables businesses to expand sales across state and national borders, state court decisions will likely have national as well as international tax policy implications.

Taxpayers are increasingly at risk of not receiving a fair hearing in state court.

- The TIA requires taxpayers to file state tax claims in state courts “as long as a plain, speedy and efficient remedy may be had in state court” (most cases).
- Congress eliminated mandatory Supreme Court review of state tax cases in 1988, and petitions for writ of certiorari will only be granted for compelling reasons—the success rate of petitions granted for a writ of certiorari is less than 2%.
- States have a home-court advantage with the Supreme Court’s recent ruling in *FTB v. Hyatt*, which held that taxpayers may not bring suit in their own state court against another state—without adding some checks and balances to the current landscape, a state will be free to impose taxes that discriminate against out-of-state taxpayers with little fear that such taxpayers’ claims will be heard outside the state’s own court system.
- A lack of either state tax tribunals or tribunals that are independent of the executive branch in 45 states (these tribunals often establish the record) also heightens concern.
- The TIA prevents taxpayers from defending class actions regarding collection of state taxes in federal courts, despite passage of the Class Action Fairness Act.
- *Post-Wayfair*, the possibility that taxpayers engaged in interstate commerce will be subject to unfair and discriminatory taxation has increased dramatically.

With states’ expanded authority to tax interstate commerce, taxpayers should have access to federal courts to prevent discrimination, ensure fairness and increase certainty.

- Congress has provided exceptions to the TIA to address taxes that unreasonably burden and discriminate against interstate commerce, including laws applicable to the railroad industry, the motor carrier industry and the mobile telecom industry (narrow scope).
- Unconstitutional state tax positions and discriminatory state taxation impose undue burdens on interstate commerce and the national economy.
- In recognition of these issues, we have formed a coalition of taxpayers to support federal legislation that would expand the exceptions to the TIA and provide federal court jurisdiction in certain state tax cases. Our current proposal would provide taxpayers with access to judicial remedies in federal courts, notwithstanding the TIA, to (i) contest liability for a state or local tax that violates federal laws regarding taxation of interstate commerce, (ii) allow a small business claiming a violation of federal law to bring

suit in the district court in which it resides, (iii) provide relief regarding local taxes imposed on interstate commerce, in which the controversy exceeds a certain amount and the parties have diverse citizenship, or (iv) seek injunctive or equitable relief, or a declaratory judgment, in order to prevent an imposition of a state or local tax that violates federal laws.

Multistate businesses face an increasing array of discriminatory state taxation.

- Recent legislative developments have placed extra burdens on out-of-state taxpayers, including a surcharge applicable only to out-of-state banks enacted in Washington and a tax on digital advertisers crafted only to target large out-of-state taxpayers passed by the Maryland legislature.
- Remote work arrangements have further increased tensions regarding state and local taxation of nonresident workers and created extra burdens for companies where employees are working from locations other than their primary office location.
- Small businesses are still dealing with the impact of the *Wayfair* decision, as states push the boundaries of the Supreme Court’s decision regarding the Constitutional requirements for establishing nexus.
- Years or decades later, states have enacted retroactive changes to state tax laws to prevent large revenue losses related to refunds of taxes due to out-of-state taxpayers, depriving such taxpayers of due process after they prevailed in state tax cases.
- Recent cases demonstrate discriminatory treatment in interpreting rules related to income apportionment of multistate business activity, such as inconsistent application of sourcing rules to maximize revenue, risking the imposition of multiple layers of tax on such income.
- Recent cases demonstrate that the incidence of unfair state taxation increases when the controversy involves large amounts of money and multistate taxpayers from other states.

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