



# This Week in State Tax (TWIST)

January 9, 2023



MASSACHUSETTS



to listen to the  
podcast please  
[click here.](#)

## Massachusetts: Cookies Not Sufficient to Establish Physical Presence Nexus

On December 22, 2022, the Massachusetts Supreme Judicial Court affirmed an Appellate Tax Board decision holding that for tax periods prior to *Wayfair*, the Commissioner could not impose a use tax collection and remittance responsibility on an out-of-state online retailer whose presence in Massachusetts was limited to the placement of “cookies” and “apps” on the computers and portable devices of its Massachusetts customers. Recall, under a regulation promulgated by the Commissioner effective October 1, 2017, a taxpayer with more than \$500,000 in Massachusetts sales from 100 or more online transactions with Massachusetts customers, coupled with the placement of cookies on customer devices and the use of content delivery networks, was deemed to have sufficient contacts with the Commonwealth to be required to register, collect and remit Massachusetts use tax.

The court first rejected the Commissioner’s position that the *Wayfair* decision could be applied retroactively — regardless of whether the presence of apps and cookies constituted a physical presence in the Commonwealth. In *Harper v. Virginia*, the U.S. Supreme Court stated that decisions on issues of federal law “must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate [the Court’s] announcement of the rule.” Although the Commissioner asserted this meant that the *Wayfair* holding applied retroactively, the Massachusetts court disagreed on the basis that the Commissioner’s own regulation limited its reach to vendors that satisfied the physical presence test in *Quill*. In other words, regardless of whether Supreme Court decisions applied retroactively, the regulation itself required a physical presence. The court also noted that the Supreme Court in *Wayfair* identified the South Dakota statutory prohibition on applying a favorable decision retroactively as contributing to its determination to abrogate the *Quill* physical presence rule. It further noted that Massachusetts was part of a coalition of states filing an amicus brief in *Wayfair* arguing that “there was no reason to expect” retroactive application of *Wayfair* by states because of regulations and processes that would bar imposition of a new rule on retailers on retailers meeting the terms of the *Quill* rule.

The court then moved on to affirm the Board’s conclusion that the use of cookies, apps, and content delivery network servers did not constitute sufficient physical presence under *Quill*. In the court’s view, it was clear the *Wayfair* Court did not view the “physical aspects” of modern technology (e.g., cookies, apps, and use of in-state servers) as satisfying the physical presence rule under *Quill*. The court concluded that it would defer to the Board’s “reasonable conclusion” that use of apps, cookies and content delivery networks did not create in-state physical presence. Please contact [Ryenne Tannenbaum](#) or [Jon Benson](#) with questions on *U.S. Auto Parts Network, Inc. v. Commissioner of Revenue*.



For more news and insights on tax developments, follow KPMG’s U.S. Tax practice on Twitter – [@KPMGUS\\_Tax](#).

[kpmg.com/socialmedia](https://kpmg.com/socialmedia)

