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SUBJECT

SUPREME COURT OF THE UNITED STATES AGREES TO TAKE *SOUTH DAKOTA V. WAYFAIR* – HAS THE TWILIGHT OF *QUILL* ARRIVED?

SUMMARY

On January 12, 2018, the Supreme Court of the United States agreed to hear *South Dakota v. Wayfair, et al.* South Dakota is challenging and attempting to have overturned the physical presence nexus standard for the collection of sales and use taxes. The physical presence standard was established by the Court in its 1967 decision in *National Bellas Hess, Inc. v. Illinois Dept. of Revenue*, and affirmed 25 years later by the Court in *Quill Corp. v. North Dakota*. It is anticipated that the Court will be asked to decide whether the physical presence standard is outdated, and whether states can constitutionally require out-of-state retailers to charge and collect sales and use taxes from in-state consumers when the retailer has no physical presence with a state.

DETAILS

Background

In addition to affirming the physical presence standard for collection of sales and use taxes under the Commerce Clause to the U.S. Constitution in *Quill*, the Court indicated that the U.S. Congress could enact legislation using its plenary authority under the Commerce Clause to regulate interstate commerce. To date, however, Congress has yet to act. Nonetheless, and perhaps because of congressional inaction, States have been attempting to overturn *Quill* by statutes or regulations with increased frequency in recent years.

For example, Colorado enacted a use tax notification and reporting statute for out-of-state vendors that have no physical presence with Colorado but that make sales to Colorado residents. Colorado's statute requires the seller to notify Colorado consumers of their use tax obligation and to report sales to the Department of Revenue. In its 2016 decision in *Direct Marketing Ass'n v. Brohl* ("*Brohl II*"), the Federal Court of Appeals for the Tenth Circuit upheld Colorado's statute. A number of other states have since enacted similar statutes.

Other states, including South Dakota, have gone one step further by enacting economic nexus statutes (or regulations) that impose a sales and use tax collection obligation on out-of-state sellers that have a minimal threshold of sales or number of sales transactions into the [state](#).

CONTACT

ROCKY CUMMINGS

Tax Partner

415-490-3130 / rcummings@bdo.com

SCOTT SMITH

Tax Managing Director

615-493-5629 / ssmith@bdo.com

STEVE OLDROYD

Tax Managing Director

408-352-1994 / soldroyd@bdo.com

It is South Dakota's economic nexus for sales and use tax collection that is at issue in *South Dakota v. Wayfair, Inc., et al.*

Direct Marketing Ass'n v. Brohl, in addition to *Quill*, is significant with regard to the Court's consideration of *Wayfair*. Notably, in his concurring opinion in the Court's 2015 "*Brohl I*" decision (that addressed whether a challenge to Colorado's use tax notice and reporting statute in federal court was barred by the Tax Injunction Act), Justice Kennedy nonetheless mused that it could be time to reconsider the holding in *Quill*, given changes in the national economy and technology since *Quill* was decided in 1992. Additionally, Justice Gorsuch, when he was still a circuit judge with the Federal Court of Appeals for the Tenth Circuit, also authored a concurring opinion in that court's 2016 *Brohl II* decision. While then judge Gorsuch opined that *Quill* may have reached the end of its useful life, he stated that, under the doctrine of *stare decisis*, the precedent of *Quill* could not be overturned by the Tenth Circuit. Further, it is rumored that Justice Gorsuch is skeptical of the dormant Commerce Clause limitation on state taxes, under which substantial nexus is a part. As a result, there could be some "wild cards" with regard to how the Court will address *Wayfair*, and it is impossible to predict how the Court may ultimately decide the case.

History of South Dakota S.B. 106 (Economic Nexus Law) and Wayfair

South Dakota enacted S.B. 106 on March 22, 2016. The effective date of the legislation is stayed, pending the resolution of the *Wayfair* case. Under S.B. 106, a remote seller is required to collect and remit sales tax if (1) South Dakota sales exceed \$100,000; or (2) the seller has more than 200 separate sales transactions into South Dakota.

In addition to the economic nexus thresholds, S.B. 106 provided for an expedited appeals process. Shortly after enactment, South Dakota filed a declaratory judgment action against remote sellers in South Dakota. The trial court quickly disposed of the case by granting summary judgment in favor of the sellers, citing *Quill* as judicial precedent. The case was then appealed to the South Dakota Supreme Court. The South Dakota Supreme Court also ruled in favor of the sellers, again noting that *Quill* remains controlling precedent, and, as a lower court, it could not overturn the Court's precedent.

On October 2, 2017, South Dakota then filed a Petition for a *writ of certiorari* with the Court. On January 12, 2018, the Court granted South Dakota's petition.

What's Next?

Now that the Court has agreed to accept the *Wayfair* case, the matter will proceed to the briefing stage. Under the Court's rules, South Dakota has 45 days from January 12, 2018, to file its brief on the merits. After South Dakota files its brief, Respondents have 30 days to file their brief on the merits. South Dakota will then have an opportunity to file a reply brief to Respondents' brief on the merits 30 days after the Respondents' briefs are filed. Oral arguments have been scheduled for April 17, 2018.

BDO INSIGHTS

- ▶ Online retailers should closely monitor the case, especially if they sell to consumers in states that have enacted economic nexus statutes with respect to sales and use tax collection.
- ▶ If the Court overturns *Quill*, it is likely that more states will be encouraged to enact similar sales/use tax economic nexus legislation.
- ▶ It is also conceivable that the Court's ultimate decision could take alternative directions. For example, the Court could uphold *Quill* and send the message to the states that *Direct Marketing Ass'n v. Brohl* is their "roadmap" for enforcing sales and use tax compliance. Alternatively, the Court could overturn *Quill*, but remand *Wayfair* back to the South Dakota Supreme Court for proceedings consistent with the Court's decision while leaving it up to state courts to decide which economic nexus thresholds pass constitutional muster.
- ▶ It is uncertain what a decision in *Wayfair*, whether for or against South Dakota, could mean for the prospects of federal legislation that remains pending in the U.S. Congress.

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