A Requiem for *Quill* and the Birth of *Wayfair* World

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Having spent my state and local tax career dealing with *Quill*[28] from both sides of the aisle, the death of the ruling is unsettling. Admittedly, I was one of the few die-hards who thought the Court would not be so quick to bury *Quill* because it would realize the value of having an objective physical presence nexus standard. *Quill*, despite all the negative rhetoric heaped on it by states, served a critical purpose of providing some balance between state sovereignty and protection against state excesses in the tax realm, particularly many states' unfortunate predilection for trying their darnedest to shift as much of their tax burdens onto out-of-state companies as possible.

As *Wayfair*[29] world supplants *Quill,* we have a good idea of the approach many states will take to sales tax collection obligations. Although South Dakota's statute was not blessed as constitutional by the Court (the case was remanded to address the other prongs of *Complete Auto Transit Inc. v. Brady*[30] and, potentially, any due process concerns that *Wayfair* might raise), states are viewing the S.B. 106 thresholds as the new gold standard for "substantial nexus" and are quickly getting their ducks in a row to enforce collection against remote sellers. Things might get a bit heated as states that do not impose a sales tax try to throw in monkey wrenches. New Hampshire created a No Sales Tax Task Force to resist *Wayfair*, as the governor vowed to protect New Hampshire businesses and block other states from imposing collection obligations, promising legislation to "erect every possible and constitutionally permissible legal and procedural hurdle." Delivering on that promise, draft legislation was introduced that would have prohibited New Hampshire remote vendors from disclosing customer information and require states to obtain approval from the New Hampshire attorney general before they can audit, collect information, or impose sales tax collection obligations on New Hampshire remote sellers.[31] Neither the bill, S.B. 1, nor its amendment, S.S.S.B.1-FN, passed but a new bill could be introduced come September. And U.S. Sen. Jon Tester, D-Mont., who introduced the Stop Taxing Our Potential (STOP) Act in Congress, has offered that "Montanans oppose a sales tax and our businesses shouldn't be forced to collect a sales tax to shore up the finances of other states." Interesting times.

Which brings me to income tax nexus in *Wayfair* world. With *Quill's* death, companies no longer need to be physically present to impose *any* tax, including income tax. Rejecting the argument that the commerce clause and *Quill's* interpretation of "substantial nexus" applied to all taxes, many states jumped the gun and adopted economic nexus for income tax some time ago, on the basis that *Quill* only applied to sales tax collection obligations. So what happens now? Despite the elimination of physical presence from the commerce clause's substantial nexus calculus, a company must still have substantial nexus in a state before that state can impose an income tax, although the contours of the substantial nexus test of *Complete Auto* are unclear in *Wayfair* world. Although "substantial" is routinely viewed as something of considerable importance, size, worth, or essentiality, we can expect many states to marginalize "substantial" until it morphs into "de minimis."

However, help to beleaguered taxpayers may fall under the guise of the due process clause, which I predict will come to center stage in *Wayfair* world. Many of the seminal income tax nexus cases were decided long before the Court's recent line of cases explaining the vibrancy of due process protections and elaborating on the distinction between general "all-purpose" and specific "case-linked" personal jurisdiction.

Unlike sales taxes, which are transactional taxes involving a collection obligation that are

[28] 504 U.S. 298 (1992).

[29] No. 17-494 (2018) (slip op.).

[30] 430 U.S. 274 (1977).

[31] Draft Special Session S.B. ___, 2018-2125 (July 18, 2018).

analyzed by using "case-linked" specific jurisdiction concepts, imposition of an income or franchise tax on the purported privilege of doing business in a state arguably should require that a state first establish that it has "all-purpose" general jurisdiction over the entity it seeks to subject to a direct imposition and bottom-line burden. The Court has now confirmed in several cases — *Goodyear Dunlop Tires Operations SA v. Brown*,[32] *Daimler AG v. Bauman*,[33] and more recently in *Bristol-Myers Squibb Co. v. Superior Court of California*[34] — that the entity must be "at home" in the jurisdiction to be able to exercise "all-purpose" jurisdiction over it. That entails "an appraisal of a corporation's activities in their entirety, nationwide and worldwide. A corporation that operates in many places can scarcely be deemed at home in all of them. Otherwise 'at home' would be synonymous with 'doing business' tests framed before specific jurisdiction evolved in the United States" (citation omitted). Nothing in *International Shoe Co. v. State of Washington*[35] and its progeny suggests "a particular quantum of local activity should give a State authority over a 'far greater quantum of . . . activity' having no connection to any in-state activity."[36] The Court offered that an individual's domicile (yes, it can only have one) or a corporation's equivalent (its state of incorporation or principal place of business) would be "home." While a corporation might have several "business centers" and "homes," simply having "significant business operations" and hundreds of in-state employees has been held not to "extend the adjudicatory reach" of a state under general jurisdiction concepts.[37]

Even if income tax jurisdiction can somehow be shoehorned into a "case-linked" due process inquiry, recent specific jurisdiction cases, such as *J. McIntyre Machinery Ltd. v. Nicastro*[38] and *Walden v. Fiore*,[39] signal that the Court will not countenance jurisdictional overreach, and that "minimum contacts" still require a *substantial* connection to the forum state by an act of the defendant (and not a third party or affiliate) purposefully directed to the forum state evidencing a manifest intention "to submit to the power of a sovereign."[40] We can expect many companies to mightily contest states' attempts to assert jurisdiction when all or substantially all their *activities* that generate the income occur out of state and they have not targeted efforts to the jurisdiction.

Welcome to *Wayfair* world. Interesting times indeed.

[32] 564 U.S. 915 (2011).

[33] 571 U.S. 117 (2014).

[34] __ U.S. __, 137 S. Ct. 1773 (2017).

[35] 326 U.S. 310 (1945).

[36] *Daimler AG*, 571 U.S. 139, n. 20.

[37] *Bristol-Meyers Squibb Co. v. Superior Court of California*, 1 Cal.5th 783 (2016), *rev'd on other grounds and remanded*, __ U.S. __, 137 S. Ct. 1773 (2017).

[38] 564 U.S. 873 (2011).

[39] 571 U.S. __, 134 S. Ct. 1115 (2014).

[40] *McIntyre*, 564 U.S. at 882.