South Dakota v. Wayfair Inc. — *Quill* Death Knell?

Amy F. Nogid

Amy F. Nogid is counsel in Mayer Brown LLP's New York office.

Review of the issue of economic nexus has taken a long time to make its way to the U.S. Supreme Court. In the income tax context, at least one state — Tennessee — tried before (*J.C. Penney National Bank v. Johnson*[27]). Attempts have been made by taxpayers in the sales tax context and they too had their hopes dashed (*Direct Marketing Association v. Brohl*[28] is an example). Since Justices Anthony M. Kennedy and Neil Gorsuch signaled their dissatisfaction with *Quill Corp. v. North Dakota*,[29] and many believe Justice Clarence Thomas would likely side with Kennedy and Gorsuch, the impetus for accepting *South Dakota v. Wayfair Inc.*[30] may be to overturn *Quill*. But I wouldn't be so quick to bury *Quill* just yet.

After all, the doctrine of *stare decisis* is alive and well, and the same concerns that motivated the *Quill* Court to uphold *National Bellas Hess v. Department of Revenue of Illinois*[31] exist today. Notwithstanding states' protestations to the contrary, compliance with state and local sales tax filing requirements is no easy (or inexpensive) lift. Wayfair's brief in opposition notes that the number of sales taxing jurisdictions has mushroomed from over 6,000 in 1992 to over 16,000 today. And compliance does not merely encompass the collection of data and the preparation of returns. Vendors must keep apprised of changes to myriad laws, regulations, and interpretations, and are subject to audits, assessments, and legal challenges. As any seasoned tax practitioner can attest, the states' suggestion that technology is a cure-all is simply a false narrative.

There are other reasons to support the continuation of a physical presence requirement for *all* taxes. The Court has several times in recent years stifled states' attempts to overreach in personal jurisdictional cases decided under the due process clause (*Goodyear Dunlop Tires Operations SA v. Brown*;[32] *J. McIntyre Machinery Ltd. v. Nicastro*;[33] and *Daimler AG v. Bauman*[34]), casting doubt on economic nexus as a basis to sustain jurisdiction.

Furthermore, the fourth prong of *Complete Auto Transit v. Brady*[35] requires that a tax imposition bear a fair relationship to the services provided by the state to the purported taxpayer. States' timeworn justifications based on the purported plethora of generic benefits states provide to those physically absent from their jurisdictions (for example, a civilized society and educated workforce) should get no headway. During oral argument before the Court in *Quill*, North Dakota's attorney general was asked, "Why does North Dakota deserve to collect the tax? That's the real sort of question I would think. What do you want for nothing?"

One of the biggest questions is whether the Court will restrict its analysis to sales tax. South Dakota's question, "Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?" does try to do that, but it has always puzzled me how, under the single commerce clause, there could be different nexus standards depending on the tax type. Nonetheless, states' first line of anti-*Quill* fire was to focus on the following language in *Quill*: "We have not, in our review of other types of taxes, articulated the same physical-presence requirement that *Bellas Hess* established for sales and use taxes." The Court's language gave states an excuse to adopt a broader economic nexus standard for income tax imposition, notwithstanding that there is a *direct* burden imposed under the income tax and generally only a collection responsibility imposed on vendors under the sales and use tax. It is counterintuitive

[27] 19 S.W.3d 831 (1999).

[28] 814 F.3d 1129 (10th Cir. 2016).

[29] 504 U.S. 298 (1992).

[30] 901 N.W.2d 754 (S.D. 2017).

[31] 386 U.S. 753 (1967).

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

[33] 564 U.S. 873 (2011).

[34] 134 S. Ct. 746 (2014).

[35] 430 U.S. 274 (1977).

that a *higher* nexus threshold applies to sales tax. However, if the Court in *Wayfair* reverses course and rejects the physical presence requirement for sales and use taxes, targets of states' economic nexus assertions in the income tax context will have a difficult time to argue that a physical presence is a prerequisite for income tax impositions.

The states' "times have changed" assertion is a red herring. Times always change. That's what times do. In fact, in *Quill*, North Dakota's major premise was that things have changed, and the North Dakota Supreme Court predicated its decision to reject the physical presence requirement on the "'tremendous social, economic, commercial and legal innovations' of the past quarter-century," but the Court rejected that conclusion. So, while times always change, the commerce clause has not.

Despite the signals sent by Justices Kennedy and Gorsuch of their willingness to revisit *Quill*, when squarely faced with myriad issues that could be unleashed if *Quill* were killed (for example, whether the new standard is to be applied retroactively, what the appropriate nexus threshold should be — aka, what is de minimis, and how the new standard would impact international transactions), the Court may yet opt to retain the physical presence standard and urge Congress (again) to take action, and encourage states to adopt alternatives (for example, notification provisions) to collect tax.