Date set for oral argument in South Dakota v. Wayfair

David M. Kall | Thursday, March 1, 2018

The United States Supreme Court is set to hear oral arguments on April 17, 2018, in *South Dakota v. Wayfair*, which pits the state's authority to impose tax collection obligations against out-of-state retailers' rights to be free of such duties.

Background

We last addressed this case in January, when the court decided to take it on. At issue in the case is the constitutionality of South Dakota's spring 2016 law, SB 106, which requires online retailers, even those with no physical presence inside the state's boundaries, to collect and remit sales taxes if they have gross revenues of at least $100,000 on services or goods shipped into South Dakota, and 200 or more separate transactions that result in the delivery of services or goods into the state.

But there is more at stake than South Dakota's SB 106. Ultimately, as the Supreme Court asserted when it accepted South Dakota's cert petition, the question is whether the court should abrogate a precedent reaching as far back as 1967. In that Illinois-originated case, *Nat'l Bellas Hess v. Dep't of Rev. of Ill.*, the court held that the due process clause prohibits a state from requiring catalog retailers to collect sales taxes on sales into that state unless the retailer is "physically present" there.

The court stated in its acceptance that "[t]hat rule, questionable even then, became an isolated outlier when [the 1977 case] *Complete Auto Transit, Inc. v. Brady*…held that only a 'substantial nexus' was needed for other state taxes affecting interstate commerce."

Fifteen years after that, as the court conceded in its acceptance, "[i]n [the 1992 case] *Quill Corp. v. North Dakota*…this Court was asked to correct that aberration. But despite a vigorous dissent-and the lack of a similar, 'physical presence' rule for any other type of tax…this Court tentatively retained the requirement on *stare decisis* grounds."

The court further confronted this history with a reference to the 2015 case *Direct Mktg. Ass'n v. Brohl*: "The legal and practical developments of the past 25 years strongly recommend revisiting [*Quill*, which] has grown only more doctrinally aberrant, and has been roundly criticized by members of this Court…But while its legal rationales have imploded with experience, its practical impacts have exploded with the rapid growth of online commerce. Today, States' inability to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike. 'Given these changes ... , it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*.'"

Bloomberg is not understating interest in the "Kill *Quill*" movement when it reports that this "case has captivated professionals in the state and local tax (SALT) community for months."

Indeed, as we have observed, 35 states and the following organizations supported South Dakota's cert petition:

1. Retail Litigation Center, Inc.
2. National Retail Federation
3. South Dakota Retailers Association
4. The Tax Foundation
5. Streamlined Sales Tax Governing Board, Inc.
6. American Booksellers Association
7. National Governors Association, et al.
8. International Council of Shopping Centers, et al.
9. American Farm Bureau Federation, et al.
10. American Lighting Association, et al.
11. Four United States Senators, et al.
12. Multistate Tax Commission
13. Law Professors and Economists

In addition, a number of entities filed amicus briefs in support of the e-retailers, Wayfair Inc., Newegg Inc., and Overstock.com Inc.:

1. National Taxpayers Union Foundation
2. Netchoice
3. American Catalog Mailers Association
4. U.S. Rep. Robert W. Goodlatte, Chair Of The House Committee On The Judiciary, Senator Ron Wyden, Representative F. James Sensenbrenner, Jr., Representative Anna G. Eshoo, Senator Michael S. Lee, And Representative Steven J. Chabot In Opposition To The Petition
5. Former U.S. Rep. Chris Cox (R-Calif.), co-author of the Internet Tax Freedom Act
6. Americans for Tax Reform

Ongoing efforts to capture lost sales tax revenues

A different Bloomberg piece pointed out that in 2017, 34 states introduced 81 pieces of legislation to recover revenue from digital commerce. This includes these "significant developments":

- Nearly 20 states pursued economic nexus models through administrative rule or statute, seeking sales tax collection from retailers satisfying a specified threshold of sales. Several enacted laws, including Indiana, Maine, Wyoming, and North Dakota—although the latter two states currently aren't enforcing their laws. And many states are engaged in litigation over their regimes.
- Minnesota adopted a first-of-its-kind law requiring Amazon-type marketplace providers to collect sales tax on third-party marketplace transactions. Washington, Rhode Island and Pennsylvania soon followed.
- Massachusetts released its "cookie nexus" regulation, which requires online vendors to collect state

sales tax if they have property interests in or use in-state apps and "cookies." Ohio followed with its cookie-type regime that mandates sales tax collection from remote retailers placing in-state software on residents' computers and other devices. We have described both of these in recent articles.

So far in 2018, Bloomberg recounts, there have been at least 14 measures in six states, though already in New Mexico, "a few bills have died." In Georgia, on the other hand, sponsors introduced H.B. 61 in January, which remains very much alive. According to the news group, one of HB 61's sponsors "want[s] the state to be ready to collect sales taxes from e-commerce if the U.S. Supreme Court upholds the similar South Dakota law." Presumably, lawmakers in New York, Hawaii, Washington and Nebraska, all putting forth their own efforts in 2018, are likewise preparing for a change in the Supreme Court's direction.

What's next?

South Dakota's merit brief, filed on Feb. 26, 2018, argues a few theories:

1. The physical presence rule, which leads to "arbitrary distinctions that are increasingly unclear, harmful to the States and the economy, and often directly contrary to the dormant commerce clause's own ends," needs to be corrected.
2. "The concerns that animated *Quill*'s decision to retain *Bellas Hess's* rule are no longer present." The brief raises several points under this heading, including one declaring that "[p]ut simply, the size and reach of a seller's economic connections are better measures than physical presence of *everything* the dormant commerce clause might care about. Similarly, an economic-presence standard now makes for a much brighter and straighter line than physical presence."
3. Adherence to past precedent under *stare decisis* "does not justify retaining the physical-presence rule." This is so in large part because the circumstances that lead the Court to its previous conclusions have changed. For instance, the burden of compliance with tax reporting and collection rules is now merely "marginal."

The e-retailers have until March 28, 2018, to file their response, and the court is expected to hear oral argument on April 17 and issue its decision by the end of June.

David M. Kall
Team member bio