Florida: Florist seeks US Supreme Court review on taxation of out-of-state sales

David M. Kall | Saturday, November 12, 2016

The issue of nexus – whether a company has sufficient contacts with a state to justify taxing sales activity in that state – is one with which taxpayers, tax administrators, and the courts are constantly grappling. The seminal case is the 1992 U.S. Supreme Court case *Quill Corp. v. North Dakota*, which banned states from requiring out-of-state retailers to collect use tax on products they ship into those jurisdictions, absent some minimal contact or physical presence with or in the taxing state. We have addressed this question in numerous contexts. For example, in August, we explained the information releases that Ohio and Michigan issued to clarify what kinds of activities constitute nexus. Before that, in April, we acknowledged that states are struggling to find ways to capture foregone tax revenue while remaining within the bounds of legal precedent. In the wake of one noteworthy case out of Colorado, *Direct Marketing Association v. Brohl* (Brohl), which went all the way to the U.S. Supreme Court and then back to the circuit court, some suggested that there would be a "showdown between the states and remote sellers, either before the Supreme Court or in Congress."

A new case could trigger that showdown. In May, in *Florida Department of Revenue v. American Business USA Corp.*, the Florida Supreme Court declared constitutional a statute rendering a florist liable for sales tax on sales to retail customers, no matter where the customers were located. At the end of October, the original plaintiff, American Business USA Corp. (American Business), sought review in the U.S. Supreme Court. What is different about this case relative to others addressing nexus issues is that it involves the taxation of products shipping *outside of* a state, not into it.

Background

The plaintiff that brought the case, American Business, is a for-profit company incorporated under the laws of the state of Florida, and does business as 1Vende.com in Wellington, Florida. While its physical location and principal address are in Florida, its sales of flowers, gift baskets, and the like, are initiated online.

American Business keeps no inventory in Florida, instead using florists located where the items are to be delivered. The company charged its customers sales tax on the items that local florists delivered in Florida, but did not do so for those items delivered outside of the Sunshine State. Thus, the Florida Department of Revenue (DOR) issued a proposed tax assessment for taxes and interest on the company's internet sales transactions that occurred between April 1, 2008, and March 31, 2011.

The DOR justified its assessment by way of a Florida statute that provided, in pertinent part:

> "Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items are to be delivered. Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state."

The DOR also relied on the state's Administrative Code, under which a florist is one who is engaged in the sale of flowers, wreaths, bouquets, potted plants and other items of tangible personal property, which are taxable.

On this authority, the DOR concluded that the sales tax is one on the privilege of engaging in business in Florida, not a tax on the property sold, rendering American Business liable. The DOR rejected American Business' argument that based on the way it fills orders, it should not be classified, legally, as a florist.

In its appeal, American Business contended that the DOR had violated the Dormant Commerce Clause doctrine, which limits state taxation in light of commerce among the several states, and the Due Process Clause of the Fourteenth Amendment, when it imposed tax for the company's sales of flowers and the like to be delivered outside of Florida. The appellate court held that the tax violated the Dormant Commerce Clause, reasoning that there was not sufficient nexus to justify taxing the company.

However, the appellate court did not find that there was a Due Process violation. Citing *Quill*, the court noted that the firm had minimum contacts with the State of Florida, such that "traditional notions of fair play and substantial justice were not offended [by the imposition of sales tax] because the taxpayer's company was registered in Florida and had a mailing address in Florida."

Recognizing the peculiar situation it had created in which a taxation scheme could violate the Dormant Commerce Clause without violating the Due Process Clause, the court, again referring to *Quill*, distinguished claims under the two clauses: "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy."

The Florida Supreme Court's conclusion and rationale

The Florida Supreme Court observed that the Dormant Commerce Clause protects against burdensome laws that would harm the flow of commerce across state borders, and determined that the tax on American Business did not violate it, for several reasons. First, the company had "more than a slight presence in Florida" by virtue of its headquarters located in the state, and the internet activities conducted there.

Also, the court found the statute to operate in an even-handed, non-discriminatory manner, even though it might have some incidental affect on interstate commerce.

Thirdly, the statute does not give an advantage to local businesses to the detriment of interstate commerce. And lastly, the court pointed out that the company enjoys the state's public amenities and safety agencies, and infrastructure, thus benefiting from the "orderly, civilized society," such that there is a "reasonable relationship between the company's presence and activities in Florida and the tax at issue." Accordingly, the court concluded that the challenged statute does not violate the Dormant Commerce Clause.

As for American Business' claim that the tax also violated the Due Process Clause, the court affirmed the lower court's judgment. "Due process requires only that there be some minimal connection between the State and the transaction it seeks to tax." Because the company has both a physical presence in Florida, and conducts business there, the minimum connection necessary to satisfy Due Process exists.

At the end of October, American Business asked the U.S. Supreme Court to review its case.

Implications

In considering the florist's petition, *Bloomberg* wondered whether the case would force the U.S. Supreme Court to reconsider *Quill*. While recognizing that the Court has turned down every sales tax case for the last several years, at least one expert suggested that this one might be different because "Florida's policy 'opens Pandora's box' to tax any transaction with a remote connection to the state." This gives it a "higher chance" of being accepted, but with a "still fairly low" likelihood.

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