South Dakota: Amicus briefs accumulate in the "Kill Quill" effort

David M. Kall | Thursday, November 16, 2017

Just last month, we provided an update on South Dakota's effort to get the United States Supreme Court to hear its appeal of the state's Supreme Court decision striking down the law imposing sales tax collection obligations on out-of-state retailers. At issue is the precedent established by the 1992 case *Quill Corp. v. North Dakota*, in which the court established the physical presence test for addressing the permissibility of imposing use tax obligations on an out-of-state mail order catalogue retailer of office equipment and supplies.

There is now a vigorous "Kill *Quill*" movement afoot, as is evident from the collection of amicus briefs that stakeholders have filed since the state submitted its cert petition, on Oct. 2, 2017. In that brief, the petitioners urged the high court to "abrogate *Quill*'s sales-tax-only, physical-presence requirement." The SCOTUSBlog web page for the case contains links to all of the filings, which it updates regularly.

The argument in South Dakota's cert petition is the same that the state has been making all along, as follows: the state should not continue to adhere to the *Quill* precedent, the legal rationale for which has always been weak, because it hamstrings states from collecting sales taxes to which they are entitled. As the petitioners put it:

> "*Quill* 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[ies] to effectively collect sales tax from internet sellers imposes crushing harm on state treasuries and brick-and-mortar retailers alike."

Amicus briefs

There is a lot of agreement with South Dakota's position in it cert petition. Since its Oct. 2, 2017 filing, the following organizations have tendered 14 amicus briefs:

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. Colorado and 34 other States, et al.
14. Law Professors and Economists

And lest one believe that it is only these entities care about the case's outcome, it is worth highlighting the fact that several of these briefs speak for a great many others. For example, the "Four United States Senators" document represents the opinions of six federal lawmakers: Heidi Heitkamp, Senator from North Dakota; Lamar Alexander, Senator from Tennessee; Richard Durbin, Senator from Illinois; Michael Enzi, Senator from Wyoming; Kristi Noem, Representative from South Dakota; and John Conyers, Jr., Representative from Michigan and the Ranking Member of the House Committee on the Judiciary.

As their brief asserts, they "maintain a vital interest in the laws affecting their states' ability[ies] to assess and collect sales and use taxes by state and local governments." They support the state of South Dakota because:

> Not only does *Quill* cause a loss in revenue to their States, but it also places merchants with physical locations in their States at an economic disadvantage because they must, in effect, charge a higher price for a product also sold by an out-of-state retailer that does not have to collect a tax that is imposed on in-state buyers and must be collected by in-state sellers.

These amici calculate that for states that rely heavily on sales tax revenues, the internet retailers in the South Dakota matter "have a price advantage of up to 11 percent in Illinois, 8.5 percent in North Dakota, 9.75 percent in Tennessee, and 6 percent in Wyoming over businesses with a physical presence…"

The lawmakers explain that they "are filing this brief to provide an anticipatory response to the inevitable objection that respondents will make that this Court should stay its hand and allow Congress to address the serious unfairness problems created by *Quill*." …"

Similarly, here are the 37 signatories to the Law Professors and Economists brief:

1. Reuven Avi-Yonah (Michigan)
2. Joseph Bankman (Stanford)
3. Jordan Barry (San Diego)
4. Lily Batchelder (NYU)
5. Jake Brooks (Georgetown)
6. Sam Brunson (Loyola-Chicago)
7. Cliff Fleming (BYU)
8. David Gamage (Indiana)

9. Ari Glogower (Ohio State)
10. Jacob Goldin (Stanford)
11. Andy Haile (Elon)
12. Daniel Hemel (Chicago)
13. David Herzig (Valparaiso)
14. Hayes Holderness (Richmond)
15. Cal Johnson (Texas)
16. Richard Kaplan (Illinois)
17. Michael Knoll (Penn)
18. Zachary Liscow (Yale)
19. Yair Listokin (Yale)
20. Ruth Mason (Virginia)
21. Goldburn Maynard (Louisville)
22. Orly Mazur (SMU)
23. Susan Morse (Texas)
24. Richard Pomp (Connecticut)
25. James Repetti (Boston College)
26. Julie Roin (Chicago)
27. Daniel Schaffa (Richmond)
28. Erin Scharff (Arizona State)
29. Daniel Shaviro (NYU)
30. Jay Soled (Rutgers)
31. Sloan Speck (Colorado)
32. Kirk Stark (UCLA)
33. John Swain (Arizona)
34. Adam Thimmesch (Nebraska)
35. Manoj Viswanathan (Hastings)
36. Ed Zelinsky (Cardozo)
37. Eric Zolt (UCLA)

Speaking for themselves and not their universities, these amici contend that the doctrine of *stare decisis*, the principle calling for adherence to past precedent for factually similar cases, "exerts a weaker pull when [that precedent] is based not on statutory interpretation but on changing competitive circumstances and evolving economic understandings."

The professors and economists point out that *Quill*'s "dormant Commerce Clause analysis was based on structural concerns about the effect of state regulation on the national economy,… but [w]hile the *Quill* Court was focused on the mail-order industry, it could not and did not foresee the meteoric rise of online retail, which has magnified the revenue losses that result from the physical presence rule."

Thus, "[i]n the age of online retail, the physical presence rule has become a drag on economic efficiency and a potential impediment to investment across state lines." Beyond this, automation has only made it easier to comply with tax rules, "so much so that overruling *Quill* would likely *reduce* aggregate compliance costs for individuals and firms seeking to abide by state tax laws."

Not to be outdone, the District of Columbia, Colorado and 34 other states also signed on to an amicus brief.

The 34 states are:

1. Alabama
2. Arkansas
3. California
4. Connecticut
5. Florida
6. Hawaii
7. Idaho
8. Illinois
9. Indiana
10. Iowa
11. Kansas
12. Kentucky
13. Maine

14. Maryland
15. Massachusetts
16. Michigan
17. Minnesota
18. Mississippi
19. Nebraska
20. New Mexico
21. New York
22. North Carolina
23. North Dakota
24. Ohio
25. Oregon
26. Pennsylvania
27. Rhode Island
28. Tennessee
29. Texas
30. Utah
31. Vermont
32. Washington
33. Wisconsin
34. Wyoming

These jurisdictions' "significant interest" is in "seeing that the unprincipled physical-presence rule receives the "complete burial it justly deserves."

These jurisdictions point to the infringement on state sovereignty that the continued application of *Quill* represents, and criticize the suggestion that "the States [should] await a national solution from Congress [which] is no answer to this infringement. As important is the "ever-increasing toll on the States' fiscal health," estimated to be $211 billion over the next five years.

Finally, the Tax Foundation, the non-partisan, non-profit research organization that we frequently refer to, also briefed the issue. They conceded that in the past, they have urged courts to rule *against* states when they tried to tax out-of-state sellers. "But because it is necessary to resolve an almost universal lack of clarity about the proper scope of state sales taxation of out-of-state internet sellers, the group urged the Court to not only take the case, but to "rule in favor of South Dakota's statute."

Tax Foundation counsel highlighted the 1977 case *Complete Auto Transit, Inc. v. Brady,* in which the Court "gave a comprehensive and workable list of [four] criteria for determining whether a state's tax law violates constitutional limitations on state tax power." These were the following:

1. A tax must be applied to an activity with a substantial nexus with the taxing State;
2. A tax must be fairly apportioned;
3. A tax must not discriminate against interstate commerce; and
4. A tax must be fairly related to the services provided by the State.

On this framework, the Tax Foundation opined that "[t]he South Dakota law in question gives this Court the best opportunity to resolve this area of law, upholding state action while defining the limits of state tax power." It provided four reasons in support of the law's constitutionality:

1. South Dakota taxes nearly all other goods and services under its sales tax except internet-based transactions, demonstrating no discriminatory intent or purpose.
2. South Dakota has minimized the costs of sales tax collection to the extent practicable, by adhering to interstate standards of sales tax administration, maximizing statewide sales tax uniformity, and adopting a de minimis threshold likely to exclude interstate activity where state burdens exceed state benefits.
3. South Dakota law bars retroactive collection.
4. South Dakota law limits the scope of its tax liability to taxpayers present in the state (residents who purchase goods and services online), keeping with the spirit of physical presence as the basis of taxation.

Ultimately, "states are ignoring the *Quill* decision, and absent this court's action, this will result in a complex and indefensible patchwork of laws harming interstate commerce."

All of these amici agree with South Dakota that "*Quill* clearly needs to go."

The respondents have until Dec. 7, 2017 to file their response to the cert petition.

David M. Kall
Team member bio