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Supreme Court's Internet Sales Tax Judgement:

Considerations for Mississippi's lawmakers stemming from *South Dakota v. Wayfair, Inc. ET AL. 2018* beyond the potential for additional revenue.

Introduction

As many are aware given the ample news coverage, the Supreme Court ruled last week that the nexus decision, as stated in *Quill Corp. v. North Dakota*, 504 U.S. 298 which had previously required physical presence of a business in a state for sales tax liability was over-ruled allowing states the jurisdiction to require remittance of sales taxes on goods and services delivered to the state. While many view this action as an over-reach and extension of taxation on citizens, the power of the courts are to interpret constitutional law. As written by Justice Kennedy "If it becomes apparent that the Court's Commerce Clause decisions prohibit the States from exercising their lawful sovereign powers, the Court should be vigilant in correcting the error. It is inconsistent with this Court's proper role to ask Congress to address a false constitutional premise of this Court's own creation. The Internet revolution has made *Quill's* original error all the more egregious and harmful" (pg. 4).

The power of the states and of congress to address the issue of internet sales taxation is reserved duly within their powers and as Justice Kennedy later mentions, the harm from setting up de-facto tax shelters with the *Quill* decision "creates rather than resolves market distortions." As such, this correction to a previously erroneous ruling leaves squarely within the States' and Federal purview the issue of how to mechanize this new taxing authority. Some lessons for Mississippi (and other states) might be found in the context of the Supreme Court's decision, as often there are issues which are not addressed in ruling, but made mention of throughout the ruling which guides potential future rulings and intention of the court.



Considerations for Policy Makers

I. Protections for Small Businesses

As stated on pages 20 and 21 of the decision, while “the physical presence rule has permitted start-up and small businesses to use the Internet as a means to grow their companies and access a national market, without exposing them to the daunting complexity and business-development obstacles of nation-wide sales tax collection”... “In this case, however, South Dakota affords small merchants a reasonable degree of protection.” South Dakota in the passage of SB 106, made remote sellers liable for the remission of sales tax if they should exceed \$100,000 in sales or be party to 200 or more separate transactions of tangible property, products transferred electronically, or services delivered during a previous or current calendar year. While no definitive descriptions for small businesses were offered and the reasoning by which nexus is now established is re-aligned with the original “substantial nexus with the taxing State” (pg. 11) one must assume at some point the minimum for nexus will be tested.

II. Limits of Retroactive Taxation

On multiple occasions during the discussion of the case, the Supreme Court’s issued decision raises the question of retroactive liability. “The law at issue requires a merchant to collect the tax only if it does a considerable amount of business in the State; *the law is not retroactive*” (emphasis added) (pg. 21). The decision claims that tax collection should be analyzed under a balancing framework as discussed in *Pike v. Bruce Church, Inc.* 397 U.S. 137 whereby the burden of such regulation/taxation cannot be in excess to the local benefits. Additionally, sellers which have already made past filings would be at risk of a double tax burden due to many states required use tax filings by the buyers (regardless of the ability to enforce such reports) (pg. 21). The aforementioned retroactive taxation and small business protections are all part of another issue with which the court addressed: The voluntary compliance between states to be a party to The Streamlined Sales and Use Tax Agreement (SSUTA).



III. Compliance Costs and Complex State Tax Systems

As stated on page 23 and elsewhere; “South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.” Mississippi isn’t currently a member of this agreement, but given the emphasis the court has made on the agreement and the current lack of an overarching federal policy, one might find it beneficial to join such an agreement as to provide clear direction to sellers and merchants within and without the state.

Conclusion

While it remains to be seen what the federal government will do with regard to the regulation of interstate commerce with respect to sales taxation by the states, the Supreme Court has made clear that those engaged in repeated business within a state are subject to that state’s sales tax remission. Issues such as retroactive taxation and small business burden will come forward to be tested in the future, but state authorities, whether it be through rule-making under the revenue-collection agency purview or statute passed by legislative bodies, must be aware of these considerations offered through the Supreme Court’s thought process on the issue as well as the foresight many states have already offered through SSUTA. While many will no-doubt see this as just another tax increase, the legitimate branch of government to determine taxation rests with those duly elected to service in our legislatures. “The physical presence rule [...] is not just a technical legal problem—it is an extraordinary imposition by the Judiciary on States’ authority to collect taxes and perform critical public functions” (pg.16).

ABOUT THE AUTHOR

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