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South Dakota v. Wayfair

Background

- 2016 South Dakota law required out-of-state sellers with no physical presence in the state to collect and remit sales and use tax if:
 - The seller's gross revenue from sales in the state exceeds \$100,000; or
 - The seller has at least 200 separate transactions in the state
- South Dakota law was NOT retroactive
- Sole question for the Supreme Court was the scope and validity of the physical presence rule under *Quill* and *Bellas Hess*



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U.S. Supreme Court's Decision

Overview

- ▶ Voted 5-4 to overrule *Quill*: “[T]he Court concludes that the physical presence rule of *Quill* is unsound and incorrect. The Court’s decisions in [*Quill* and *Bellas Hess*] should be, and now are, overruled.”
- ▶ In relation to Congress:
 - “[T]his Court has observed that ‘in general Congress has left it to the courts to formulate the rules’ to preserve ‘the free flow of interstate commerce.’”
 - “It is inconsistent with the Court’s proper role to ask Congress to address a false constitutional premise of this Court’s own creation.”
- ▶ Power to regulate commerce is held by the states and Congress concurrently in some circumstances
- ▶ BUT states cannot discriminate against or place undue burdens on interstate commerce

Framework for State Taxation

(Complete AutoTransit, Inc. v. Brady)

- Tax does not burden interstate commerce if it:
 - Applies to an activity with a substantial nexus with the taxing state;
 - Is fairly apportioned;
 - Does not discriminate against interstate commerce; and
 - Is fairly related to the services the state provides.

Quill's Physical Presence Rule

- Tied to the “substantial nexus” requirement
- Court's view: *Quill* is flawed
 - Physical presence rule is increasingly removed from economic reality and creates significant revenue losses for states
 - Not a necessary for “substantial nexus”
 - Creates rather than resolves market distortions
 - Uses an arbitrary, formalistic distinction not supported by modern precedent
 - A business may be present in a meaningful way without being physically present
- “[T]he physical presence rule as defined by *Quill* must give way to the ‘far-reaching systemic and structural changes in the economy’ and ‘many other societal dimensions’ caused by the Cyber Age.”

Considerations of the Court

- ▶ *Quill* puts local businesses and interstate businesses at a competitive disadvantage through a “judicially created tax shelter”
- ▶ Costs of compliance are unrelated to a company's physical presence
- ▶ Not unfair to require companies that use state benefits to bear their share of the burden of paying for the benefits through tax collection
- ▶ The internet has changed the dynamics of the national economy

Considerations of the Court

- Physical presence rule is unworkable
- Reliance on *Quill* is misplaced
- “Substantial nexus” of *Complete Auto* is satisfied if a company meets the requirements of the SD law
- Could potentially be another legal principle that invalidates SD law

SD Provisions Noted by the Court

- Safe harbor
- Not retroactive
- Streamlined Sales and Use Tax Agreement
 - Centralized administration
 - Simplified tax rate structure
 - Uniformity
 - State-provided software with immunity for companies that use it

Implications for Arkansas

Arkansas Law

- ▶ Party to Streamlined Sales and Use Tax Agreement
- ▶ Legislation required
- ▶ Consider the Supreme Court's comments in *Wayfair*
- ▶ One possibility: SB140 of 2017
 - Modeled on South Dakota law
 - ▶ Same safe harbor
 - ▶ Not retroactive
 - ▶ Immunity
 - Adds a notice option (as amended)
 - Contains provisions made obsolete by *Wayfair*

Things to Watch

- Arkansas tax triggers
- Congress
- Any developments in the *Wayfair* case on remand
- New Hampshire



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Questions?