NEBRASKA ASSOCIATION OF COUNTY OFFICIALS

Supreme Court to Decide Billon Dollar Sales Tax Case

In November 2017 a Government Accountability Office report estimated that states and local governments could "gain from about $8 billion to about $13 billion in 2017 if states were given authority to require sales tax collection from all remote sellers."

In January 2018 the Supreme Court agreed to decide *South Dakota v. Wayfair*. In this case South Dakota is asking the Supreme Court to rule that states and local governments may require retailers with no in-state physical presence to collect sales tax.

This case is huge news for states and local governments. This article describes how we got here and why it is likely South Dakota will win.

In 1967 in *National Bellas Hess v. Department of Revenue of Illinois*, the Supreme Court held that per its Commerce Clause jurisprudence, states and local governments cannot require businesses to collect sales tax unless the business has a physical presence in the state.

Twenty-five years later in *Quill v. North Dakota* (1992), the Supreme Court reaffirmed the physical presence requirement but admitted that "contemporary Commerce Clause jurisprudence might not dictate the same result" as the Court had reached in *Bellas Hess*.

Customers buying from remote sellers still owe sale tax but they rarely pay it when the remote seller does not collect it. Congress has the authority to overrule *Bellas Hess* and *Quill* but has thus far not done so.

To improve sales tax collection, in 2010 Colorado began requiring remote sellers to inform Colorado purchasers annually of their purchases and send the same information to the Colorado Department of Revenue. The Direct Marketing Association sued Colorado in federal court claiming that the notice and reporting requirements were unconstitutional under *Quill*. The issue the Supreme Court decided in *Direct Marketing Association v. Brohl* (2014), was whether the Tax Injunction Act barred a federal court from deciding this case. The Supreme Court held it did not.

The State and Local Legal Center (SLLC) filed an *amicus* brief in *Direct Marketing Association v. Brohl* describing the devastating economic impact of *Quill* on states and local governments. Justice Kennedy wrote a concurring opinion stating that the "legal system should find an appropriate case for this Court to reexamine *Quill*." Justice Kennedy criticized *Quill* for many of the same reasons the SLLC stated in its *amicus* brief. Specifically, internet sales have risen astronomically since 1992 and states and local governments have been unable to collect most taxes due on sales from out-of-state vendors.

Following the Kennedy opinion a number of state legislatures passed laws requiring remote vendors to collect sales tax in clear violation of *Quill*. South Dakota's law was the first ready for Supreme Court review.

In September 2017 South Dakota's highest state court ruled that the South Dakota law is unconstitutional because it clearly violates *Quill* and it is up to the U.S. Supreme Court to overrule *Quill*. In October 2017 South Dakota filed a *certiorari* petition asking the Supreme Court to hear its case and overrule *Quill*. The SLLC filed an *amicus* brief supporting South Dakota's petition. The Supreme Court ultimately agreed to decide the case.

It seems likely the Supreme Court will rule in favor of South Dakota and overturn *Quill* for a number of reasons. It is unlikely the Supreme Court accepted this case to congratulate the South Dakota Supreme Court on correctly ruling that South Dakota's law is unconstitutional. Said another way, if the Supreme Court wanted to leave the *Quill* rule in place it probably would have simply refused to hear *South Dakota v. Wayfair*.

It is easy to count at least three votes in favor of South Dakota in this case. First, Justice Kennedy of course. Second, Justice Thomas. While he voted against North Dakota in *Quill* he has since entirely rejected the concept of the dormant Commerce Clause, on which the *Quill* decisions rests. Third, Justice Gorsuch. The Tenth Circuit ultimately decided *Direct Marketing Association v. Brohl* ruling that Colorado's notice and reporting law didn't violate *Quill*. Then-judge Gorsuch wrote a concurring opinion strongly implying that given the opportunity the Supreme Court should overrule *Quill*.

That said, the Supreme Court, and the Roberts Court in particular, is generally reticent about overturning precedent. The *Quill* decision illustrates as much. The Supreme Court looks at five factors in determining whether to overrule a case. One factors is whether a rule has proven "unworkable" and/or "outdated . . . after being 'tested by experience.'" This factor weighs strongly in favor of overturning *Quill*. As Justice Kennedy pointed out in *Direct Marketing Association v. Brohl*: "When the Court decided *Quill*, mail order sales in the United States totaled $180 billion. But in 1992, the Internet was in its infancy. By 2008, e-commerce sales alone totaled $3.16 trillion per year in the United States."

It is possible (though not yet certain) the Court will hear this case this term meaning it will issue an opinion by the end of June 2018.

NOTE: The Nebraska Association of County Officials (NACO) is a member of the International Municipal Lawyers Association (IMLA). As a benefit of its membership, we receive valuable and timely resources about issues affecting political subdivisions, including counties. On occasion, we also receive articles on topics that may be of interest to NACO members. The article above was written by contributing author Lisa Soronen, Executive Director of the State & Local Legal Center.

Follow up information on the status of *South Dakota v. Wayfair* follows: (1) oral arguments are expected to be heard April 23, 24 or 25, 2018 and the schedule of the Court is at http://www.scotusblog.com/events/2018-04/ (2) the transcript is available the day of the argument and the recording will be available the Friday after the argument, both can be downloaded at . http://www.scotusblog.com/case-files/cases/south-dakota-v-wayfair-inc/.

Editor's Note: Legal Line is a feature that will periodically appear in NACO E-Line. Legal Line is not intended to serve as legal advice. Rather, it is published to alert readers to court decisions and legal or advisory matters important to county government. For a specific opinion on how the information contained in this article or that which will be discussed in future issues relates to your county, consult your county attorney or personal counsel.