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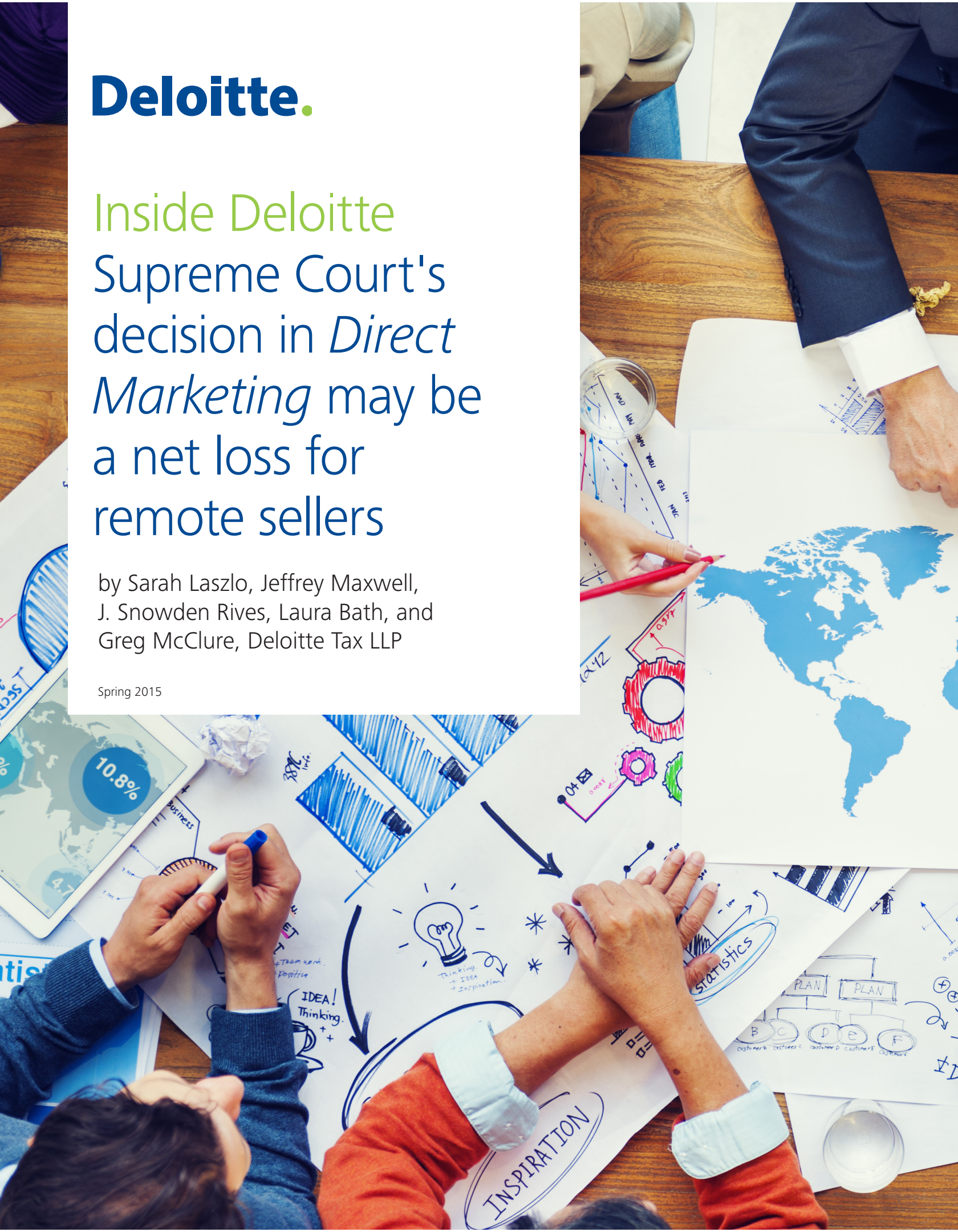

Supreme Court's Decision in *Direct Marketing* May Be a Net Loss for Remote Sellers

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In this edition of Inside Deloitte, the authors use the Supreme Court's decision in *Direct Marketing Association v. Brohl* and Justice Anthony M. Kennedy's concurrence as a platform to discuss how Kennedy may view future questions on commerce clause sales and use tax nexus as applied to remote sellers and the likelihood of federal intervention in this area.

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The Supreme Court recently issued a unanimous decision in *Direct Marketing Association v. Brohl*, reversing an earlier decision rendered by the U.S. Court of Appeals for the Tenth Circuit.[1] The Tenth Circuit had held that the Tax Injunction Act (TIA; 28 U.S.C. section 1341) deprived the U.S. district court of jurisdiction to enjoin Colorado from enforcing its remote seller[2] sales and use tax notice and reporting requirements.[3] The Supreme Court held that the TIA did not bar the suit brought by the Direct Marketing Association (DMA)[4] because the injunctive relief sought would not enjoin, suspend, or restrain the assessment, levy, or collection of Colorado's sales and use taxes.[5] In an environment in which states have made continued efforts to capture sales and use tax revenue attributable to remote seller transactions, the Court's holding in *Direct Marketing* may be viewed as a victory for remote sellers insofar as it allows the DMA to pursue its federal suit to enjoin Colorado's remote seller sales and use tax notice and reporting requirements.

As Colorado is one of only a small number of states that have enacted notice and reporting requirements specific to remote sellers, the actual decision in *Direct Marketing* may have a limited direct application in the ongoing state quest to collect sales and use taxes on remote seller transactions. However, the significance of the decision may extend beyond the Court's holding as a result of a somewhat surprising concurring opinion authored by Justice Anthony M. Kennedy. Citing the "far reaching systemic and structural changes in the economy,"[6] Kennedy strongly suggested that

[1] *Direct Marketing Association v. Brohl*, 135 S. Ct. 1124, 1134 (2015), *rev'g* 735 F.3d 904 (10th Cir. 2013).

[2] For purposes of this article, a remote seller is an out-of-state retailer that is not required to collect sales or use tax from purchasers in a particular state because that state does not have sales and use tax collection authority over the retailer because of the retailer's lack of physical presence within the state.

[3] *Direct Marketing Association v. Brohl*, 735 F.3d 904 (10th Cir. 2013); C.R.S. section 39-21-112(3.5).

[4] The DMA is a trade association of businesses and organizations that market products directly to customers via catalogs, print advertisements, broadcast media, and the Internet.

[5] *Direct Marketing Association*, 135 S. Ct. at 1127, 1134.

[6] *Id.* at 1135 (Kennedy, J., concurring).

it was time for "a reconsideration of the Court's holding in *Quill*,"[7] the case that had reaffirmed the physical presence requirement for sales and use tax nexus established in *National Bellas Hess Inc. v. Dep't of Revenue of Illinois*.[8] Kennedy explained that "there is a powerful case to be made that a remote seller doing extensive business within a State has a sufficiently 'substantial nexus' to justify some minor tax-collection duty, even if that business is done through mail or the Internet."[9] In closing, Kennedy called on the legal system to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[10] While Kennedy's concurrence is the view of just one justice and is therefore not necessarily a reflection of the Supreme Court as a whole, his concurrence may have set the stage for a Supreme Court reexamination of *Quill*, thus potentially serving as a catalyst for significant change in state sales and use tax nexus as applied to remote sellers.

In this article, we provide an overview of Colorado's sales and use tax reporting requirements and the resulting federal and state litigation in *Direct Marketing*; analyze Kennedy's call for change; speculate on how Kennedy may view commerce clause nexus in future proceedings; and summarize federal legislative developments regarding the taxation of remote seller transactions.

I. Overview of Colorado's Sales and Use Tax Reporting Requirements and Resulting Litigation

A. Colorado's Notice and Reporting Requirements

On February 24, 2010, Colorado Gov. Bill Ritter signed HB 10-1193, which enacted Colorado's remote seller sales and use tax notice and reporting requirements in order to help promote sales and use tax compliance regarding sales by out-of-state retailers to Colorado customers. The bill was codified in Colo. Rev. Stat. (C.R.S.) section 39-21-112(3.5) and requires, along with its accompanying regulations, a noncollecting retailer with $100,000 or more of sales to customers in Colorado to perform all of the following tasks:

- Notify its Colorado customers that sales or use tax is due on some taxable purchases and that the customer is required to self-report and pay use tax to the Colorado Department of Revenue.[11]
- Provide to its Colorado customers with over $500 in annual purchases an annual report detailing the purchases for the previous calendar year. The report should also notify each customer that sales or use tax is due on certain taxable purchases and that the customer is required to self-report and pay use tax to the DOR.[12]
- Provide to the DOR an annual report listing each of the retailer's Colorado customers. The report should include each customer's name, billing address, shipping address, and total purchases.[13]

C.R.S. section 39-21-112(3.5) also imposes strict penalties on noncollecting retailers for failing to comply with Colorado's remote seller notice and reporting requirements.[14]

B. Federal and State Litigation in *Direct Marketing*

Shortly after the passage of HB 10-1193, the DMA brought suit against the DOR in the U.S. District Court for the District of Colorado. Among its other arguments, the DMA raised two claims under the commerce clause: that the notice and reporting requirements unconstitutionally discriminate against out-of-state retailers who do not collect Colorado sales tax, and that the notice and reporting requirements impose an undue burden on interstate commerce. On January 26, 2011, the district court granted the DMA's motion for preliminary injunction, enjoining the DOR from enforcing the remote seller reporting requirements in C.R.S. section 39-21-112(3.5). On March 30, 2012, the district court granted partial summary judgment in favor of the DMA and permanently enjoined enforcement of the notice and reporting requirements, holding that the requirements violated the commerce clause.[15]

Subsequently, the DOR appealed the district court's judgment to the Tenth Circuit. The Tenth Circuit held that the TIA deprived the district court of jurisdiction to enjoin Colorado from enforcing its remote seller notice and reporting requirements, and, accordingly, the Tenth Circuit vacated the district court's judgment based solely on the lack of jurisdiction.[16]

The TIA provides that federal district courts do not have jurisdiction to rule on an action to "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be

[7] *Id.*

[8] *Id.*, citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992); *Nat'l Bellas Hess Inc. v. Dep't of Revenue of Ill.*, 386 U.S. 753 (1967).

[9] *Id.* at 1134.

[10] *Id.* at 1135.

[11] C.R.S. section 39-21-112(3.5)(c)(I).

[12] C.R.S. section 39-21-112(3.5)(d)(I)(A); Colo. Reg. 39-21-112.3.5(2)(c)(i).

[13] C.R.S. section 39-21-112(3.5)(d)(II)(A),(B); Colo. Reg. 39-21-112.3.5(1)(a)(iii) and (4)(a).

[14] Retailers failing to provide transactional notices to Colorado customers are subject to a penalty equal to $5 for each transaction for which they fail to send the requisite notice. C.R.S. section 39-21-112(3.5)(c)(II). Retailers failing to provide annual reports to their Colorado customers are subject to a penalty equal to $10 for each report they fail to send. C.R.S. section 39-21-112(3.5)(d)(III)(A). Retailers failing to provide an annual report to the DOR are subject to a penalty equal to $10 for each purchaser that should have been included in the report. C.R.S. section 39-21-112(3.5)(d)(III)(B).

[15] *Direct Marketing Association v. Huber*, No. 10-cv-01546-REB-CBS (D. Colo. Mar. 30, 2012).

[16] *Direct Marketing*, 735 F.3d 904.

had in the courts of such state."[17] The Tenth Circuit found that the DMA's challenge to Colorado's sales tax notice and reporting requirements sought to restrain the collection of sales and use taxes in Colorado, and that the DMA has a plain, speedy, and efficient remedy in Colorado for its claim since Colorado's administrative remedies provide for hearings and appeals to state court, as well as ultimate review in the U.S. Supreme Court.[18] The Tenth Circuit remanded the case to the district court with instructions to dismiss the DMA's commerce clause claims for lack of jurisdiction and dissolve the permanent injunction,[19] which the district court did on December 10, 2013.

Following the Tenth Circuit's ruling, the DMA petitioned the Supreme Court for certiorari. While the petition for certiorari was pending before the Supreme Court, the DMA filed a suit with similar claims in Colorado state court. On February 18, 2014, the state district court preliminarily enjoined the DOR from enforcing the remote seller reporting requirements. On July 1, 2014, the U.S. Supreme Court granted certiorari. In response, the state district court stayed further proceedings, pending the outcome of the federal litigation.

On March 3, 2015, the Supreme Court issued a unanimous decision in favor of the DMA, reversing the decision of the Tenth Circuit.[20] Writing for the unanimous Court, Justice Clarence Thomas found that Colorado's enforcement of its sales and use tax notice and reporting requirements does not encompass the "assessment, levy or collection" of sales and use taxes in Colorado.[21] As Thomas explained, although enforcement of the notice and reporting requirements may improve Colorado's ability to assess and collect sales and use taxes, the TIA "is not keyed to all activities that may improve a State's ability to assess and collect taxes. . . . [It] is keyed to the acts of assessment, levy and collection themselves, and enforcement of the notice and reporting requirements is none of these."[22] Allowing the TIA to apply to all activities that may improve a state's ability to assess and collect taxes "would be inconsistent not only with the text of the [TIA] statute, but also with our rule favoring clear boundaries in the interpretation of jurisdictional statutes."[23]

Thomas further concluded that the relief sought by the DMA would not restrain Colorado's assessment, levy, and collection of taxes.[24] The Supreme Court specifically rejected the broad definition of the term "restrain" used by the Tenth Circuit, which had concluded that the TIA bars any suit that would "limit, restrict, or hold back" the assessment, levy, or collection of state taxes.[25] In determining that the term "restrain" should not be defined so broadly by the Tenth Circuit, the Supreme Court decided that the term has a more narrow meaning that "captures only those orders that stop (or perhaps compel) acts of 'assessment, levy or collection.'"[26] The Supreme Court set forth several reasons why the term "restrain" should be narrowly defined:

- The statutory context suggests that the TIA uses the word "restrain" narrowly.[27] The words "enjoin" and "suspend" are terms of art in equity referring to "different equitable remedies that restrict or stop official action to varying degrees, strongly suggesting that 'restrain' does the same."[28]
- As used in the TIA, "restrain" acts on a carefully selected list of technical terms, "assessment," "levy," and "collection," instead of acting on an all-encompassing term such as "taxation."[29] To give "restrain" a broader meaning would defeat the precision of that list, as virtually any court action related to any phase of taxation might be said to "hold back" collection.[30]
- The TIA is rooted in equity practice, and courts of equity do not refuse to hear every suit that would have a negative impact on state tax revenues.[31] To interpret the term "restrain" broadly would result in the TIA barring every suit that has a negative impact on state tax revenues, supporting the conclusion that Congress used the term "restrain" in the narrower, equitable sense.[32]
- A narrower definition of the term "restrain" is consistent with the rule that "jurisdictional rules should be clear."[33]

Under the Supreme Court's more narrow definition of the term "restrain," a suit does not "restrain" the assessment, levy, or collection of a state tax if it merely inhibits those activities.[34] Based on the foregoing, the Supreme Court concluded that the TIA does not bar the DMA's suit in federal court and remanded the case to the Tenth Circuit.[35]

On remand, the Tenth Circuit has requested that the parties fully brief the commerce clause issues (thus indicating that the court would like to consider *Quill*) and whether the comity doctrine bars the suit in federal court. The comity doctrine "counsels lower federal courts to resist

[17] 28 U.S.C. section 1341.
[18] *Direct Marketing*, 735 F.3d 904.
[19] *Id.* at 920-921.
[20] *Direct Marketing*, 135 S. Ct. at 1131.
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.* at 1133.
[25] *Direct Marketing*, 735 F. 3d at 913.
[26] *Direct Marketing*, 135 S. Ct. at 1131.
[27] *Id.*
[28] *Id.* at 1132.
[29] *Id.*
[30] *Id.*
[31] *Id.* at 1133.
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*

engagement in certain cases falling within their jurisdiction."[36] Under the doctrine, federal courts are urged to "refrain from interfering with the fiscal operations of state government in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."[37] This is an interesting twist considering that the comity doctrine is not jurisdictional in nature, had not been raised by the DOR in the lower courts, and was waived by the DOR via a motion filed with the Tenth Circuit on April 7. While comity was not raised in the lower courts, the Tenth Circuit, in a footnote to its original opinion, felt compelled to comment on comity, stating that "the doctrine of comity also militates in favor of dismissal."[38] The Supreme Court, however, did not take a position on whether the DMA's suit is barred by the comity doctrine and, in fact, seemed uncertain as to how comity arguments may have been preserved, considering it is non-jurisdictional and was not previously raised by the DOR.[39]

II. Kennedy's Call for Change: 'Reexamine *Quill* and *Bellas Hess*'

In a somewhat surprising concurring opinion, Kennedy strongly suggested that it was time for "a reconsideration of the Court's holding in *Quill*."[40] Kennedy described a state's inability under commerce clause jurisprudence to require a business to collect sales and use taxes when the business does not have physical presence in the state as "what may well be a serious, continuing injustice faced by Colorado and many other States."[41] In closing, Kennedy called on the legal system to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[42]

A. *Quill Corp. v. North Dakota*[43]

To further understand Kennedy's concurring opinion in *Direct Marketing*, the Supreme Court's opinion in *Quill* must be examined. In *Quill*, the Court held that a mail-order business could not be required to collect and remit state use tax without having a physical presence in the state.[44] In reaching its decision, the Court determined that Quill did not have the requisite "substantial nexus" required by the commerce clause for North Dakota to require Quill to collect tax given Quill's lack of physical presence in the state.[45] Although the Court held that the commerce clause precluded North Dakota's ability to require Quill to collect tax, the Supreme Court noted that Congress could disagree with its holding and decide "whether, when and to what extent the states may burden interstate mail-order [businesses] with a duty to collect use taxes."[46]

The *Quill* Court examined the distinctions between the nexus requirements for the due process and commerce clauses.[47] Due process is concerned with a taxpayer having "notice" or "fair warning" of a state's ability to impose a tax on the taxpayer.[48] The Court explained that its due process jurisprudence has evolved since *Bellas Hess* was decided[49] and that it has abandoned formalistic tests focusing on physical presence within a state for a more flexible approach that considers whether contacts with the state make it reasonable to subject a person to jurisdiction in that state.[50] As support, the Court cited its holding in *Burger King Corp. v. Rudzewicz*[51]: "If a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State."[52] Given the evolution of its due process jurisprudence, *Quill* overruled the Supreme Court's other decisions, which had held that due process required physical presence in order for a state to impose a duty to collect use tax.[53]

However, while due process is concerned with a taxpayer having "notice" or fair warning of a state's ability to impose a tax on a taxpayer,[54] the commerce clause is concerned with the structure and "effects of state regulation on the national economy."[55] Accordingly, the commerce clause "prohibits discrimination against interstate commerce . . . and bars state regulations that unduly burden interstate commerce."[56] The "substantial nexus" requirement of the commerce clause is therefore "a means for limiting state burdens on interstate commerce."[57] So while the *Quill* Court determined that due process does not require physical presence,[58] the Supreme Court affirmed the *Bellas Hess* physical presence standard for substantial nexus under the commerce clause, stating that "the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law."[59]

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[36] *Id* at 1133-1134.
[37] *Id.* at 1134.
[38] *Direct Marketing*, 735 F.3d at 920 n.11.
[39] *Direct Marketing*, 135 S. Ct. at 1133-1134.
[40] *Id.* at 1135 (Kennedy, J., concurring).
[41] *Id.* at 1134 (Kennedy, J., concurring).
[42] *Id.* at 1135 (Kennedy, J., concurring).
[43] 504 U.S. 298.
[44] *Id.*
[45] *Id.*
[46] *Id.* at 318.
[47] *Id.* at 309 ("The *Commerce Clause* is more than an affirmative grant of power; it has a negative sweep as well. The Clause, in Justice Stone's phrasing, 'by its own force' prohibits certain state actions that interfere with interstate commerce." *South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177 (1938) (emphasis added)).
[48] *Id.* at 312.
[49] *Id.* at 307.
[50] *Id.*
[51] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).
[52] *Quill*, 504 U.S. at 307.
[53] *Id.* at 308.
[54] *Id.* at 312.
[55] *Id.*
[56] *Id.*
[57] *Id.* at 313.
[58] *Id.* at 308.
[59] *Id.* at 317.

In *Quill*, Justice Antonin Scalia, joined by Kennedy and Thomas, concurred that "the Commerce Clause holding of *Bellas Hess* should not be overruled," but based his concurrence solely on *stare decisis*.[60]

Justice Byron R. White dissented in part regarding the Supreme Court's judgment on the commerce clause issue.[61] In his dissent, White questioned the majority's decision to differentiate due process nexus and commerce clause nexus.[62] Further, White concluded that if differentiation is appropriate, a physical presence standard was not supported by precedent.[63] In White's view, the minimum contacts standard should be the only standard for determining nexus, and under this standard, Quill had the necessary minimum contacts with North Dakota for North Dakota to require that Quill collect use tax.[64]

B. Kennedy's Concurrence in *Direct Marketing*

Kennedy first criticized the holding in *Quill*, describing it as "tenuous." He explained that the Court relied on *stare decisis* to reaffirm the physical presence standard and noted that the *Quill* majority acknowledged that "'contemporary commerce clause jurisprudence might not dictate the same result' as the Court rendered in *Bellas Hess*," given the Court's more recent and refined test elaborated in *Complete Auto Transit Inc. v. Brady*.[65] According to Kennedy, "the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided."[66]

Kennedy stated further that the *Quill* Court should have revisited *Bellas Hess* based on changes in the economic climate. According to Kennedy, technological and social changes caused "far-reaching systemic and structural changes in the economy" and, "as a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."[67] While the U.S. economy has experienced revolutionary change, *Quill*'s bright-line physical presence nexus standard has remained unchanged.

When *Bellas Hess* was decided in 1967, the mail-order business in the U.S. generated $2.4 billion in revenue.[68] In 1992, when *Quill* was decided, estimates of mail-order business varied widely from $35 billion to $180 billion a year.[69]

With the advent of the Internet, sales by remote sellers have grown tremendously in the U.S. since the time of *Quill*. In 1990 about 98 million Americans purchased products via mail order.[70] In 2013 an estimated 191.1 million Americans shopped online, and that number is expected to surpass 200 million in 2015.[71] By 1998, U.S. e-commerce sales surpassed $5 billion, equal to about 0.19 percent of total U.S. retail sales.[72] By 2013, U.S. retailers reported e-commerce sales of $260 billion,[73] comprising approximately 5.7 percent of total retail sales in the U.S.[74]

E-commerce is expected to continue to grow at a fast pace. Forecasts suggest e-commerce sales will continue to increase at a double-digit percentage annually, with sales growing to almost $500 billion by 2018.[75] These changes to the retail economy have had an effect on states' revenue and budgets, since sales and gross receipts taxes accounted for $271.3 billion, or 31.3 percent, of tax revenue for state governments in fiscal 2014, second only to income tax collection.[76] The increase in e-commerce and states' potential inability to collect tax revenues associated with these sales are at the heart of Kennedy's concurring opinion.

III. Kennedy's Suggested Standard

Unfortunately, Kennedy did not elaborate on how the Supreme Court should view commerce clause nexus if the merits of this issue were to return for the Court's review. While Kennedy clearly believes that too much emphasis was placed on *stare decisis* in *Quill*, and that the Court should have reevaluated *Bellas Hess* in light of the economic changes that had taken place since its holding, we are left to speculate on how he might view commerce clause nexus in future proceedings.

Perhaps Kennedy is suggesting, similar to White's dissent in *Quill*, that precedent does not support different standards for nexus under the due process and commerce clauses. White stated, "The Court freely acknowledges that . . . we have never found, as we do in this case, sufficient contacts for due process but an insufficient nexus under the *Commerce Clause*." White continued, "For the Court now to assert that our *Commerce Clause* jurisprudence supports a

[60] *Id.* at 319-321 (Scalia, J., concurring).
[61] *Id.* at 321 (White, J., dissenting).
[62] *Id.* at 325 (White, J., dissenting).
[63] *Id.* at 325-333.
[64] *Id.* (White, J., dissenting).
[65] *Direct Marketing*, 135 S. Ct. at 1134 (Kennedy, J., concurring).
[66] *Id.* (Kennedy, J., concurring).
[67] *Id.* at 1135 (Kennedy, J., concurring).
[68] *Nat'l Bellas Hess Inc.*, 386 U.S. at 763.
[69] *See, e.g.*, *Quill*, 504 U.S. at 329; U.S. Census Bureau, Census of Retail Trade: Miscellaneous Subjects, at Table 1 (1992); Paul J. Hartman, "Collection of the Use Tax on Out-of-State Mail-Order Sales," 39 *Vand. L. Rev.* (1986) 993, 1003. White's dissent in *Quill* cited figures that the industry had grown to $180 billion a year. In 1992 the

(Footnote continued in next column.)

U.S. Census Bureau reported that retail sales from catalog and mail-order houses were approximately $35 billion.
[70] *Heitkamp v. Quill Corp.*, 470 N.W.2d 203, 209 (N.D. 1991).
[71] Statista, Number of Digital Shoppers in the U.S. From 2010 to 2018.
[72] U.S. Census Bureau, Annual Retail Trade Survey, U.S. Retail Trade Sales — Total and E-Commerce: 2013-1998 (2013).
[73] *Id.*
[74] *Id.*
[75] Statista, U.S. Retail E-Commerce Sales From 2010 to 2018.
[76] Sheila O'Sullivan et al., *State Government Tax Collections Summary Report: 2014* (2015) (income tax collection resulted in $310.8 billion, or 35.9 percent of tax revenue).

separate notion of nexus is without precedent or explanation."[77] Thus, it is conceivable that Kennedy has reversed his position since *Quill* and now supports White's view that the nexus standard for the due process clause and the commerce clause should be aligned.

Another possibility is that Kennedy believes that different standards under the due process and commerce clauses should continue, but that the standard under the commerce clause should be lessened. Perhaps Kennedy believes that substantial nexus under the commerce clause requires something less than the physical presence standard established in *Quill* and *Bellas Hess*, but more significant than a company "purposely" availing itself to the "benefits of an economic market" in a state, which constitutes the minimum contacts necessary under due process for a state to impose a tax. A similar theory was also described in White's dissenting opinion in *Quill*, in which he further stated:

> Even were there to be such an independent requirement under the *Commerce Clause*, there is no relationship between the physical-presence/nexus rule the Court retains and *Commerce Clause* considerations that allegedly justify it . . . Perhaps long ago a seller's "physical presence" was a sufficient part of a trade to condition imposition of a tax on such presence. But in today's economy, physical presence frequently has very little to do with a transaction a State might seek to tax. Wire transfers of money involving billions of dollars occur every day; purchasers place orders with sellers by fax, phone, and computer linkup; sellers ship goods by air, road, and sea through sundry delivery services without leaving their place of business.[78]

Kennedy's adoption of this belief may be supported by his specific mention in *Direct Marketing* that "there is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently 'substantial nexus' to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet."[79] In what would appear to support this view, Kennedy stated, "Although online business may not have a physical presence in some States, the Web has . . . brought the average American closer to most major retailers . . . regardless of how close or far the nearest storefront."[80]

Finally, Kennedy does not rule out a continuation of *Quill* and *Bellas Hess*. While clearly frustrated by the holdings in *Quill* and *Bellas Hess*, Kennedy curiously stopped short of unequivocally dismissing the holding in *Quill*, stating, "It should be left in place only if a powerful showing can be made that its rationale is still correct."[81]

[77] *Quill Corp.*, 504 U.S. at 327 (White, J., dissenting).
[78] *Id.* at 327-328 (White, J., dissenting).
[79] *Direct Marketing Association*, 135 S. Ct. at 1135 (Kennedy, J., concurring).
[80] *Id.*
[81] *Id.*

IV. Possible Federal Intervention

Congress has been wrestling with the issue of the states' ability to collect sales and use taxes on remote sales for the last several years, but has yet to pass through both branches of Congress any legislation on the issue.[82] However, several bills and discussion drafts that seek to require out-of-state retailers to collect sales tax have been recently introduced or otherwise contemplated in Congress, and thus merit further discussion. While the likelihood of their passage is unknown, Congress maintains the power to regulate interstate commerce, and any bill enacted that may alter the sales and use tax collection responsibilities of a remote seller could bring to a close the *Quill* and *Bellas Hess* debate.

A. Marketplace Fairness Act of 2015

On March 10, one week after the Supreme Court issued its decision in *Direct Marketing*, the Marketplace Fairness Act of 2015 (S. 698; MFA 2015)[83] was introduced in the U.S. Senate. Several versions of the MFA have been introduced in Congress over the past few years. If adopted, MFA 2015 would allow states to require out-of-state retailers without an in-state physical presence to collect sales and use taxes on remote sales, such as Internet and catalog sales.

MFA 2015 would authorize Streamlined Sales and Use Tax Agreement[84] member and nonmember states to enact laws requiring remote sellers to collect and remit sales and use taxes on remote sales. Nonmember states would be required to adopt some minimum simplification requirements for the administration of the tax before they could require out-of-state retailers without physical presence to collect sales and use tax on remote sales. The minimum simplification requirements would include uniformity of the state sales and use tax base, a single sales and use taxes return, and a single audit for state and local taxing jurisdictions. A nonmember state would also be required to provide remote sellers with free software for calculating sales and use taxes due on each transaction (at the time the transaction is completed) and for filing state sales and use tax returns.

MFA 2015 would also exempt small businesses, having annual gross receipts from remote U.S. sales of $1 million or less, from being required to collect out-of-state sales tax. Other significant provisions of the proposed MFA 2015 include the following:

[82] On May 6, 2013, the Senate approved the Marketplace Fairness Act of 2013, S. 743. However, the bill was not passed by the House of Representatives before the 113th Congress concluded on January 3, 2015.
[83] S. 698, 114th Cong. (2015).
[84] SSUTA attempts to simplify and modernize sales and use tax administration in order to substantially reduce the burden of tax compliance. There are 23 full-member states and one associate member. SSUTA states have agreed to a number of simplifying measures, including tax base uniformity and various tax base definitions. SSUTA also provides uniform sourcing rules, simplified administration of exemptions, simplified tax returns, and protection of consumer privacy. S. 698 at section 2(a).

- a statement that MFA 2015 shall not be interpreted to create any nexus or alter the standards for determining nexus;[85]
- an acknowledgement that remote sellers may deploy or use a certified software provider of their choice;[86] and
- adoption of a cascading sourcing rule to determine the location where a product or service is sold, which is based on where the item sold is received by the customer.[87]

Some states, such as Colorado, have already begun to pass legislation that aligns with various versions of the MFA so that they will be ready to act quickly should some form of federal enactment transpire.

B. Proposed Online Sales Simplification Act of 2015

Another recent congressional effort to reform states' ability to collect sales and use taxes can be seen in the proposed Online Sales Simplification Act of 2015, a discussion draft of which was released January 13.[88] This contemplated law change would require a remote seller to collect sales tax from the purchaser and remit that tax to the origin state.[89] The tax would then be processed through a clearinghouse and ultimately remitted to the purchaser's state.[90] The discussion draft further provides that states have the option to participate in this method of collecting sales tax on remote sales by entering into a tax distribution agreement. But if a state chooses not to participate, it is prohibited from imposing and collecting sales tax on remote sales.[91]

C. Remote Transaction Parity Act

The so-called Remote Transaction Parity Act has not yet been introduced in Congress, but Rep. Jason Chaffetz, R-Utah, has indicated that he will do so.[92] The Remote Transaction Parity Tax Act is expected to be similar to MFA 2015 in many ways, including using destination-based sourcing, requiring non-SSUTA states to meet specific simplification requirements, and providing for single audits. The Remote Transaction Parity Act is expected to be different than MFA 2015 in that it will have a phased-in exemption amount for retailers with annual remote sales of $10 million or less in the first year, $5 million or less in the second year, and $1 million or less in subsequent years.

V. Conclusion

In the wake of *Direct Marketing* and in the light of Kennedy's concurring opinion, one can only speculate as to what Congress and the states will do. While congressional action would likely end the *Quill* and *Bellas Hess* debate, it seems unlikely given its history to date. On the state front, Kennedy's concurring opinion may embolden state legislatures to enact more broad sales and use tax nexus statutes in an attempt to "find an appropriate case for th[e] Court to reexamine *Quill* and *Bellas Hess*," as Kennedy suggested. In fact, one state has taken the initial steps in this regard. Washington state's proposed budget, HB 2224, would expand nexus beyond physical presence. As stated in the proposal:

> The legislature intends by this act to address the significant harm and unfairness brought about by the physical presence rule by testing the boundaries of the rule. This act also sets up a legal challenge to the physical presence nexus rule that could potentially lead to the United States [S]upreme [C]ourt [sic] reevaluating *Bellas Hess* and *Quill* or congress enacting legislation authorizing and establishing the requirements for states to impose a sales tax collection duty on remote sellers.

A. Practical Considerations

While uncertainty abounds, prudent remote sellers (and states) should remember that although thought-provoking, Kennedy's concurring opinion is just the opinion of one Supreme Court justice and may not reflect the views of the entire Court. However, his strongly worded concurring opinion has certainly turned what appeared to be an initial remote seller victory into a potential catalyst for significant change in rules surrounding state sales and use tax nexus as applied to remote sellers. ☆

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[85] *Id.* at section 3(b).
[86] *Id.* at section 3(c).
[87] *Id.* at section 4(7).
[88] Online Sales Simplification Act of 2015.
[89] *Id.*
[90] *Id.* at section 2(b) and section 3(a)(3).
[91] *Id.* at section 3(a)(4).
[92] Jennifer DePaul, "Chaffetz Promises New Bill to Replace Marketplace Fairness Act," *State Tax Notes*, Dec. 15, 2014, p. 610.