Quill Should Apply Only to Mail-Order Retailers, Panelists Agree

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By Andrea Muse

The U.S. solicitor general is correct that *Quill* should be applied only to traditional mail-order retailers, panelists said March 20.

At a panel during the American Bar Association/Institute for Professionals in Taxation Advanced Income Tax Seminar in New Orleans, University of Connecticut law professor Richard Pomp applauded the solicitor general’s amicus brief in *South Dakota v. Wayfair Inc.*, in which the solicitor argued that the U.S. Supreme Court’s holding in *Quill Corp. v. North Dakota* has no ongoing relevance. He said the argument should have been made by states in prior litigation.

Helen Hecht of the Multistate Tax Commission agreed, saying that the *Quill* Court was looking at the particular burdens on the mail-order industry at that particular time and therefore the physical presence test articulated by the Court in the case could have been limited to that fact pattern.

States don’t know when it is acceptable to assert nexus after *Quill* and 25 years of the physical presence test, Pomp said. That’s why the *Wayfair* case is so important, he added.

The U.S. solicitor general has asked the Court to allow the government to participate in oral arguments in *Wayfair*, which are scheduled for April 17.

Calling the opinion in *Quill* “intellectually dishonest,” Pomp said the Court was trying to protect the mail-order industry while at the same time clearing the way for Congress to act. Echoing this point at an Advanced Sales and Use Tax Seminar panel the same day, he said the physical presence test in *Quill* was built out of *Complete Auto Transit v. Brady*, which wasn’t a nexus case.

However, Jordan Goodman of Horwood Marcus & Berk Chtd. cautioned that the Supreme Court could determine that making a decision in *Wayfair* would create chaos and remand the case, once again telling Congress to act.

Pomp said one possible reason for the Court to remand the case would be to try to get a better developed record, noting that evidence of several facts — including that technology has advanced enough since *Quill* that collecting remote sales taxes is not a burden anymore — are not in the record because of the way the case was litigated.

Stating that she was not taking a position on either side, Hecht said that South Dakota could argue that those findings of facts were made by the Legislature when it enacted the economic presence legislation, which it is now testing in court instead of having to potentially litigate every
Goodman said that *Quill* paved the way for Congress to act and Congress has acted: There have been a lot of bills in front of Congress and in every case it has decided not to do anything, which should be taken as affirmative action that Congress agrees with the analysis in *Quill*, he said.

According to Pomp, the Court in *Quill* was bothered about retroactivity. He said the Court in *Wayfair* could decide to make its decision prospective, determine that collecting and remitting sales taxes are no longer a burden as of a particular date, or require notice to taxpayers. But he said that any of those would not be typical for the Court, because most of its decisions are treated as retroactive.

Goodman added that there should not be any retribution from states if *Wayfair* goes their way. He said that even if the Court does not overturn *Wayfair*, the decision in *Direct Marketing Association v. Brohl* upholding Colorado’s reporting requirement law is still out there. Goodman argued that reporting requirement laws are generally put in place to make it more burdensome for out-of-state sellers to not collect sales taxes and comply with the reporting and customer notification provisions.

According to Louisiana Secretary of Revenue Kimberly Robinson, the state enacted reporting requirements that became effective in 2017, with the first reports due to the DOR by March 1. The penalties for noncompliance with the reporting requirements remain to be seen, but she added that she doesn’t expect there would be penalties for the first year. Robinson said her state is excited by the first-year compliance thus far.