Part Six

If the Court Overturns Quill, Will it Apply Retroactively? Were the Wayfair Court to apply the decision to overturn Quill retroactively, remote sellers, including Wayfair, could argue that this amounts to a discriminatory tax on interstate commerce ...

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As noted in Part Three of this article, one of the reasons the *Quill* Court upheld the "physical presence" standard set forth in *National Bellas Hess,* hoping that Congress would take action with prospective focused legislation. Should the *Wayfair* Court decide to overturn Quill, one of the issues it will have to consider will be whether the decision applies retroactively or prospectively. One theory is that the *Wayfair* Court may consider the discriminatory nature of any application that is not prospective only. In *Complete Auto Transit, Inc. v. Brady*, the U.S. Supreme Court established the following four-part test to determine the constitutionality of a tax on multistate transactions:

(1) the tax is applied to an activity having substantial nexus with the taxing state,

(2) the tax is fairly apportioned,

(3) the tax does not discriminate against interstate commerce, and

(4) the tax is fairly related to services provided by the taxing state.

[430 US 274 (1977)] The purpose of the four-part test established by the U.S. Supreme Court in *Complete Auto Transit, Inc. v. Brady* is to determine when *non-resident* businesses conducting interstate commerce in a state may be asked to contribute their "'just share'" to collecting that State's taxes. State use taxes

complement the sales tax by imposing consumer self-reporting requirements on

interstate commerce, in direct violation of the Commerce Clause and the standard set forth in *Complete Auto Transit, Inc. v. Brady.* Remote sellers can assert that when they sold their goods, for example to a Virginia customer in 2017, they lacked physical presence and did not collect sales tax. However, the Virginia customer was liable for use tax and the Virginia Tax Commissioner had a use tax mechanism for enforcement of the use tax liability of the customer. Arguably, the customer may have even remitted the use tax to the state on its income tax return. Now, post-*Wayfair* decision, if applied retroactively, Virginia could assert that the remote seller is liable for sales tax that may – or may not – have been collected already from the customer as use tax. This amounts to double taxation, which is discriminatory against interstate commerce.

Whether the customer did or did not remit the use tax does not eradicate the discriminatory impact of retroactive application of a Quill reversal. There would be no plausible means for assessing, or for states to assert whether each and every customer did or did not remit use tax. Furthermore, the Court's anti-discrimination test in *Complete Auto Transit* does not provide an exception when it is merely doubtful that the other party to the transaction actually paid the tax. As such, the *Wayfair* Court can rely on *Complete Auto Transit* for the position that it prohibits retroactive application, given that states have already imposed use tax on consumers with respect to remote transactions, and can't force the remote seller to remit sales taxes on the same transaction.

In addition, the *Wayfair* Court will be guided by it's 1971 decision in *Chevron Oil Co. v. Huson,* in which it considered retroactive vs. prospective application of a decision. [404 U.S. 97 (1971)] In *Chevron Oil,* the Court established a three-factor test for determining when a new rule should be applied on a prospective-only basis:

1. "the decision to be applied nonretroactively must establish a new principle of law,

hardship by a holding of nonretroactivity."

[404 U.S. at 106–07 (citations and internal quotation marks omitted)] While several Supreme Court decisions since *Chevron Oil* have applied retroactively to all affected parties (*See, e.g.*, *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)), it is still agreed among most justices and legal scholars that prospective only application of a decision is permissible and is guided by the Court's test put forth in *Chevron Oil*.

If ever there were a case begging for prospective only application, it's the *Wayfair* case should the Court decide to overturn *Quill*.

- **First**, this decision would overrule a "clear past precedent on which litigants may have relied."
- **Second**, consider the historical mail order context in which *Quill* was decided, the explosive global growth of e-commerce, and the perverse and arbitrary application of *Quill's* physical presence boundaries that govern state's ability to impose sales tax collection obligations on a remote seller, when such boundaries do not govern other tax or legal obligations.
- Furthermore, as addressed above, given the concerns about double taxation surrounding retroactive application of sales tax on transactions already subjected to use tax, retroactive application will not further operation of the law, but only harm it.
- **Third**, as addressed above, there would be substantial inequitable and discriminatory results if remote sellers were required to remit sales taxes on transactions already subjected to use tax. For all these reasons, *Chevron Oil* establishes a pathway for the *Wayfair* Court to apply a prospective only decision to overrule *Quill*.

- **Lastly**, as noted above, if the Court were to overturn *Quill* within the confines of

registered taxpayers who are interested in compliance without the pressure of looking over their shoulder for historical exposure.

Conclusion

Whatever the outcome of the *Wayfair* case, we can rest assured that in state taxation, nothing is clear, and nothing is certain. Should the Court uphold Quill, or decide to overrule Quill, there will be questions. Regardless of the manner in which the *Wayfair* Court overrules *Quill*, there will be questions. Regardless of whether Congress enacts Federal legislation addressing state authority to impose sales tax compliance obligations on remote sellers, there will be questions.

As long as there are question and uncertainty, there will there remain countless arguments about nexus and state's authority to impose sales tax compliance obligations on remote sellers. None of this may bring about much clarity for remote sellers, but we can all believe if *Quill* is overruled, the states will ultimately exercise more authority to tax remote sellers.

Fasten your seatbelts! It's gonna be a bumpy ride!

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