Is the Supreme Court Set to Extinguish Bellas Hess' Bright Line Rule Barring Imposition of Sales Tax on Out-of-State Internet Sellers Later This Year?

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Twenty-six years ago in *Quill Corp. v. North Dakota* the U.S. Supreme Court held that the *Bellas Hess* bright line rule that out-of-state sellers cannot be held liable for collecting and remitting sales tax to any state unless the seller had physical presence in that state, was a precedent that still shone brightly. It looks like the Supreme Court may extinguish that holding this year.

When it issued that decision, the Court made the point that if there was to be any erosion in that rule, Congress was the better suited and empowered force to do so. In fact, the Court almost pushed Congress to address this, stating "Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes."

However, in the 26 years since then, Congress has not legislated just what rights states have to regulate sellers lacking physical presence in that state. Several states have taken their own steps to introduce legislation in that vacuum. Several times, challenges to that legislation have failed to be granted *certiorari* in the Supreme Court, so the Supreme Court has not yet revisited the bright line rule. Until now.

This year, the Supreme Court will hear *South Dakota v. Wayfair*, which again places front and center the issue of whether a seller that lacks physical presence in a state may be required by that state to collect and remit sales tax upon sales made to buyers in that state. Here, South Dakota enacted a law which requires that out-of-state sellers of tangible personal property, electronically transferred products, or taxable services which are delivered into South Dakota register, collect, and remit South Dakota sales taxes on those sales ***as if*** the seller has a physical presence in the state. Under this law, South Dakota has attempted to legislate around the *Bellas Hess* bright line rule by simply treating such sellers as if they have presence in the state.

Will it be enough? There are indications from prior writings of two of the justices that they look forward to revisiting the topic. For example, Justice Kennedy's concurrence in *Direct Marketing Association* stated that applying the bright line rule under a theory of *stare decisis* (sticking with your past decisions) was "a serious, continuing injustice faced by … states," and advocated applying the *Complete Auto* test—which is used for other types of taxation imposed by states—to sales taxes as well:

Twenty-five years later, the Court relied on *stare decisis* to reaffirm the physical presence requirement and to reject attempts to require a mail-order business to collect and pay use taxes. This was despite the fact that under the more recent and refined test elaborated in *Complete Auto Transit, Inc. v. Brady,*

"contemporary Commerce Clause jurisprudence might not dictate the same result" as the Court had reached in *Bellas Hess*. **In other words, the *Quill* majority acknowledged the prospect that its conclusion was wrong when the case was decided.** Still, the Court determined vendors who had no physical presence in a State did not have the "substantial nexus with the taxing state" necessary to impose tax-collection duties under the Commerce Clause. Three Justices concurred in the judgment, stating their votes to uphold the rule of *Bellas Hess* were based on *stare decisis* alone. **This further underscores the tenuous nature of that holding—a holding now inflicting extreme harm and unfairness on the States.**

Justice Kennedy continued that "in *Quill*, the Court should have taken the opportunity to reevaluate *Bellas Hess* not only in light of *Complete Auto* but also in view of the dramatic technological and social changes that had taken place in our increasingly interconnected economy. 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."

Similarly, Justice Gorsuch, back when he was on the 10th U.S. Circuit Court of Appeals, opined in *Direct Marketing* that *Bellas Hess* appears poised to fall:

Quill might be said to have attached a sort of expiration date for mail order and internet vendors' reliance interests on *Bellas Hess's* rule by perpetuating its rule for the time being while also encouraging states over time to find ways of achieving comparable results through different means. In this way too *Quill* is perhaps unusual but hardly unprecedented, for while some precedential islands manage to survive indefinitely even when surrounded by a sea of contrary law (*e.g., Federal Baseball*), a good many others disappear when reliance interests never form around them or erode over time. And ***Quill's* very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess's* precedential island would never expand but would, if anything, wash away with the tides of time.**

And so we sit here today, with *South Dakota v. Wayfair* awaiting briefing and argument before the Supreme Court. Justices Kennedy has pointed out the "tenuous nature" of *Bellas Hess'* bright line rule, and Justice Gorsuch that *Quill's* reliance on *Bellas Hess* via *stare decisis* was engineered to eliminate the rule. While it's always hard to predict the Court's action from just the views of two justices over time, we are seeing current justices with very strong views that *Bellas Hess'* bright line rule should be extinguished.