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Alabama Enacts Economic Nexus Rules for Sales Tax

STATE AND LOCAL TAX, TAX

BY SCHNEIDER DOWNS PROFESSIONAL

Twenty-three years ago the United States Supreme Court in *Quill v. North Dakota* established the current standard under which a state can impose its sales and use tax collection and remittance requirements on remote sellers, also known as substantial nexus. In order to be compliant with the commerce clause of the United States Constitution, a remote seller must have a physical presence in the state that exceeds the slight physical presence of conducting business through the U.S. Mail and common carrier before that state can impose its registration and collection requirements.

Since 1992, the physical presence requirement established by the Court has been the standard that states have followed regarding their sales and use tax nexus rules and regulations. Recently, Alabama formally adopted Regulation 810-6-2.90.03 establishing an economic nexus standard for remote sellers. Under the new rules, it is possible for a remote seller to have substantial nexus for sales and use tax and not have any physical presence in the state.

Effective January 1, 2016, the new regulation indicates that a remote seller will be considered to have substantial nexus for sales and use tax if it has retail sales into the state of \$250,000 or more per year, based upon the previous calendar year's sales; and the seller conducts one or more of the activities described in Section 40-23-68, Code of Alabama 1975.

SECTION 40-23-68, CODE OF ALABAMA 1975 ACTIVITIES

- Soliciting and receiving orders through broadcasters or publishers located in Alabama that are disseminating advertising primarily to Alabama customers.
- Soliciting, pursuant to a contract with a cable television operator located in the state, orders for tangible personal property by means of advertising that is transmitted or distributed over a cable television system in the state.
- Soliciting orders for tangible personal property by means of a telecommunication or television shopping system that is intended to be broadcast to Alabama consumers by cable television or other means of broadcasting.
- Distributing catalogs or other advertising matter and thereby receiving and accepting orders from residents of the state.

It is believed by many in the state and local tax community that Alabama's new regulation is in direct response to Justice Kennedy's concurring comments in *Direct Marketing Association v. Brohl*, which was decided earlier this year by the United States Supreme Court. Although the issue in the case was about the proper application of

the Tax Injunction Act, Justice Kennedy felt compelled to comment on the Court's previous decision in *Quill v. North Dakota*. Justice Kennedy said in part:

"Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could be anticipated earlier. See *Pearson v. Callahan*, 555 U.S. 223, 233 (2009) (stare decisis weakened where "experience has pointed up the precedent's shortcomings.") It should be left in place only if a powerful showing can be made that its rationale is still correct."

The instant case does not raise the issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.

Many found Justice Kennedy's comments rather surprising given that the Court in *Quill* said that Congress had the ultimate authority to overturn *Quill*, and over the past few years we have seen more activity in Congress to draft legislation that would require remote sellers to charge and collect sales tax. Still others are even more perplexed by Justice Kennedy's comments, considering that the Court had denied the petition for certiorari, filed by Amazon.com and Overstock.com regarding the New York Court of Appeals' decision about New York State's click-through nexus provisions in December of 2013.

While Justice Kennedy's comments offer hope to state and local governments as well as large brick and mortar retailers that find the current system unfair, *Quill* is still the law of the land, and a remote seller must have some type physical presence in a state before that state can impose its sales and use tax registration and collection responsibilities. However, states like Alabama, emboldened by Justice Kennedy's comments, may pass sales and use tax nexus provisions challenging the physical presence nexus standard that was first established in *Bellas Hess* and upheld in *Quill*.

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