

MARKETPLACE FAIRNESS ACT: OVERVIEW OF THE SALES AND USE TAX REFORM



Roger Royse
Royse Law Firm, PC
Palo Alto, San Francisco
rroyse@rroyse.com
www.rogerroyse.com
www.rroyse.com
Skype: roger.royse
Twitter @rroyse00

Overview

- *Quill v. N.D.* and the physical presence standard for sales and use tax nexus
- Marketplace Fairness Act (MFA)
 - Constitutional issues and motivation for overriding *Quill*
 - Primary legal mechanisms
 - MFA's simplification requirements
 - Legislative status

Quill v. North Dakota: Main Holding

- Nexus: The minimum connection a state must have with something to have certain legal jurisdiction over it
- Holding: SCOTUS holds that sales-and-use-tax nexus requires in-state physical presence beyond a *de minimis* amount
- Effect: Remote sellers are not responsible for collecting use tax; states must instead collect use tax from in-state purchasers (difficult!)
 - Remote sellers: e.g., online and mail-order retailers

Quill v. North Dakota: Reasoning

- Reliance Interests: Businesses relied on physical presence standard for sales-and-use-tax nexus from *National Bellas Hess*
 - No such reliance interests for other taxes, which is why *Quill* does not seem to apply beyond sales-and-use-tax
- Complexity concerns: *National Bellas Hess* required physical presence for sales-and-use tax nexus, because of complexity:
 - “the many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle . . . interstate business in a virtual welter of complicated obligations to local jurisdictions[.]”

MFA: Overriding Quill

- How is Congress Overriding SCOTUS?:
 - *Quill* said there is Commerce Clause and Due Process nexus (a then-new concept)
 - Due Process nexus didn't need physical presence, but Commerce nexus did
 - Congress cannot override Due Process decisions, but can override Commerce Clause-based decisions
- Why Override *Quill*?:
 - Parity for in-state and remote sellers.
 - Per marketplacefairness.org, complexity no longer an issue, because “keeping track of a few thousand local tax rates is no longer an insurmountable technical, administrative, or financial burden—certainly no more difficult than calculating real-time-shipping, a common feature on most web sites and online sales marketplaces.”

MFA: Core Legal Mechanisms

- Doctrinal rules for nexus unchanged from *Quill*
- Instead, after a phase-in period:
 - States given authority to collect sales-and-use-tax from remote sellers,
 - if they implement certain sales-and-use-tax simplifications
- States can choose to exempt small remote sellers from their tax net (i.e., remote sellers w/ U.S. annual gross receipts \leq \$1M)

MFA: Simplification Requirements

- State must either be full member of Streamlined Sales and Use Tax Agreement (SSUTA), or fulfill alternative minimum requirements
- Minimum requirements for a state:
 - Tax base and rate information and software for sellers to use
 - Single tax administrator per state, with standardized return and audit procedures for remote sellers
 - Shared tax base for state and local taxes
 - Nationwide sourcing standard
 - Minimum notice to interested parties for change-in-rate
- SSUTA subscribes to those changes, and also standardizes definitions, simplifies rate calculations

MFA: Legislative Status

- Has been introduced this and prior years
 - A divisive bill: remote sellers hate it
- Supporters currently trying to attach it to a bill that is likely to pass (e.g., Internet access tax ban bill)
- “Competing” bill in House exists, is essentially the same
 - Called Remote Transactions Parity Act (RTPA)