Impact of the Wayfair decision

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1/16/19

Vermont's sales tax

- 6% of the sales price on the retail sale of tangible personal property
- Collected by vendors on behalf of the State at the point of sale – a "trust tax"
- When a state relies on someone else to collect and remit a tax, it has to be able to exercise jurisdiction over that person to enforce the obligation.
- How far can a state reach beyond its borders to enforce its laws?

Commerce Clause

- Congress has the power to regulate commerce among the States.
- Drafted to avoid the economic balkanization that plagued relations among the colonies.
- State regulation may not:
  - Discriminate against interstate commerce
  - Impose an undue burden on interstate commerce

Quill v. North Dakota (1992)

- Quill office supply company solicited and sold goods in South Dakota via US mail
- Under Commerce Clause, US Supreme Court ruled that a state cannot force seller to collect and remit sales tax unless the seller has a physical presence in the state – undue burden case
- In the internet age, this means that online retailers who lacked a physical presence in Vermont are not obligated to collect and remit the sales tax

Use tax compliance

- If, under Quill, a seller is not going to collect and remit, then the purchaser owes use tax
- But use tax compliance is low
  - Nationally in the range of 1-3%
  - Vermont has taken steps to improve its use tax compliance, but it is still only about 20%
- Since most people do not pay use tax, result is that most out of state purchases are not taxed

Two equity problems

- As online sales increase as a proportion of all sales, sales and use tax revenue in Vermont goes down
  - Online sales have increased nearly tenfold since 2000
  - Currently about 10% of all sales
- If online retailers do not collect and remit, they gain a competitive edge over brick and mortar retailers

State responses to Quill

- There were a number of state responses to Quill over the years, but in light of subsequent legal developments, there are only two that bear mention now:
  - Streamline Sales and Use Tax Agreement
  - Direct legal challenges

Streamline Sale and Use Tax Agreement

- Interstate agreement with 23 states, including Vermont – adopting a common set of definitions and administrative provisions
- Designed to simplify sales tax compliance and administration
- Was created to counter the concern that subjecting businesses to multiple sales tax regimes would burden interstate commerce – a response to Quill's "undue burden" analysis
- Vermont realizes about $1 million each year from participating in the agreement

Direct Legal Challenges

- A number of states began passing laws or adopting regulations which extended jurisdiction to vendors who had an "economic presence" in the state, but no physical presence
- Direct challenge to Quill's requirement
- Hoped that the U.S. Supreme Court would overturn Quill

Wayfair

- South Dakota passed a law that required any vendor to collect and remit the sales tax if:
  - $100,000 in sales or
  - 200 individual transactions
  - Physical presence not required
- US Supreme Court ruled that in light of subsequent developments, the physical presence requirement of Quill is “incorrect and unsound”

Wayfair

- Physical presence rule not a necessary interpretation of prior nexus cases
- Quill created, rather than resolved, market distortions
- The physical presence test was overly formalistic and inconsistent with the Supreme Courts overall approach to the Commerce Clause, which tends to be more of a case-by-case analysis

Wayfair

- Court concluded that South Dakota's economic presence test did not create an undue burden
- Specifically mentioned how the law excluded smaller vendors ($100,000/200 transactions)
- Specifically mentioned that South Dakota was a streamline state, reducing the burden on compliance
- The result is a sense that there is a clear "safe harbor" – if a state comes with the South Dakota economic presence requirement, it should be able to reach out of state vendors who lack a physical presence

Vermont anticipated

- In 2017, Vermont adopted South Dakota type requirements:
  - $100,000/200 sales
  - Plus Vermont is also a SSUTA Agreement state
- Made effective on the first day of the first quarter after Quill was overturned
- After Quill, these provisions became effective July 1, 2018
- Happy ending! …. Right?

How internet sales work

- In the old days:
  - Website
  - Direct sales and fulfillment by the vendor
- Nowadays, vendors also sell through other businesses that provide a marketplace for online sales:
  - Promote products
  - Facilitate payments
  - May or may not handle fulfillment
  - Other services, such as accounting, inventory tracking

Marketplace Facilitators versus Marketplace Sellers

- Marketplace facilitator:
  - A business that that contracts with third party sellers to promote their sale of physical property, digital goods, and services through an online marketplace.
  - Think Amazon or Ebay
- Marketplace seller:
  - A business that contracts with a marketplace facilitator for services to assist in the sale of their products.
  - Think a producer of widgets

Vermont is only part way there

- Wayfair + Vermont's current statutory system means that Vermont can collect and remit on direct sales into Vermont by a vendor who is not located here.
- However, marketplace facilitators, such as Amazon, are not required to collect and remit for indirect, or facilitated third party sales.

Why is this a problem?

- Compliance issues to collect and remit from every far flung individual vendor
  - MFs aggregate a huge number of sellers
    - 55% of Amazon's total sales were third party sales in 2017
    - 25% of Amazon's third party sales in 2017 were from non-US global sellers
  - As Amazon has begun collecting sales tax on direct sales, its third party seller services have boomed
- Threshold problems – some small vendors could split sales to avoid the tax

Marketplace legislation beginning

- As of 11/18, ten states had some form of marketplace facilitator language. More coming.
- Multistate Tax Commission organized a working group in 2018 to outline marketplace facilitator issues moving forward.