The More Things Change

by Matthew P. Hedstrom, Andrew W. Yates, and Clark R. Calhoun

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In a recent letter to the editor of State Tax Notes, Alabama Revenue Commissioner Julie Magee added her voice to a conversation between George Isaacson and professor John Swain. Magee's letter essentially distills the Isaacson-Swain conversation into a disagreement about whether the U.S. Supreme Court would "legislate from the bench" if it overruled Quill, arguing that the Court never had the constitutional authority to decide Quill in the manner it did.

We recognize that Alabama, South Dakota, and Tennessee have enacted sales and use tax provisions that directly conflict with Quill — and that numerous other states are considering similar provisions, having grown weary of waiting on Congress to enact a law that provides a replacement for the physical presence standard. However, in taking an action contrary to binding Supreme Court precedent, state legislatures and revenue departments discount the Court's specific conclusion in Quill: stare decisis demands the continued application of a physical presence standard for regulating interstate use tax collection because Congress has the ultimate authority to decide a different rule. State action in violation of Supreme Court precedent — if applied by other state actors in contexts more politically charged than tax collection — could create a dangerous precedent for state officials who disagree with federal decisions.

Quill: Judicial Restraint and Respect for the Separation of Powers

Magee looks at Quill as though it were nothing more than a mistake, a wrong turn of judicial activism. Viewed through that lens, her solution makes some sense: the Court should just fix its mistake and remove its shortsighted physical presence limit. But that analysis sells Quill short, because the Court's affirmation of the physical presence standard says less about the Court's thinking on use tax collection and more about the Court's understanding of stare decisis.

The advocates for killing Quill argue that changes in the interstate marketplace since 1992 make the case an antiquated relic. But in the ways that matter to the Supreme Court's analysis, the landscape today is identical. In fact, every argument made by states for overturning Quill today was made by the states when the Court decided the case in 1992:

- that the rise of remote selling made the physical presence rule obsolete (at the time of Quill, there was evidence that up to 25 percent of all retail sales were made by remote sellers);
- that new computer technologies made compliance with state and local sales and use tax laws less expensive and less burdensome;
- that remote sellers were increasingly enjoying a competitive advantage over local bricks-and-mortar businesses because of the physical presence standard;
- that auditing in-state purchasers who are liable for use tax was virtually impossible; and
- that the taxing states facilitated remote transactions by providing telephone lines and roads.

The Court heard and rejected those arguments, and there is no reason to believe that the technological advances that have occurred since 1992 would materially change the
with Congress’s failure to change the physical presence rule in the years since Quill, but the states’ desire for change doesn’t make Quill bad law. Instead, in our view the process is working exactly as the Court intended, with Congress considering numerous bills in recent years as political pressure mounts. Congress’s deliberative process is a feature — not a failure — that the Court anticipated when it upheld the physical presence standard in 1992.

Attempts to Nullify Quill Set a Troubling Precedent for State Action

Because Quill is binding Supreme Court precedent, the states’ aggressive approach to have it reversed is troubling. Of course, asking the courts to clarify areas of unsettled law — even if doing so would require a court to overrule itself — is a perfectly acceptable role for state officials. It may be the only way some legal questions ever get resolved.

But Quill provided a definitive answer to the issue presented in the case, and to pass a law in direct conflict with Quill chips away at the authority of the Supreme Court and the relationship between the states and our federal institutions. In other words, the law is not unsettled in this space. What if a state governor disagreed with a federal court’s decision regarding rights to water along an interstate boundary and refused to permit the other state to use the disputed water until the courts reheard the case? Or assume that a state passed a law restricting the possession of firearms in some places, and a federal court deemed it unconstitutional, granting an injunction against the law’s enforcement? What if a state official, believing the decision to be wrong and certain to be overruled on appeal, insisted that the law be enforced anyway?

Public acts by state officials ignoring the authority of binding court precedent are challenges to the rule of law itself, and such acts could yield dangerous consequences in areas of public policy that are more politically charged than tax collection. Further, such acts outsource the costs of pursuing policy changes from interested parties who choose to participate in the legislative process onto specific taxpayers who are compelled by administrative fiat to engage in the state’s chosen battle.

Conclusion

What appears to be lost in some of the discussion surrounding the future of Quill is the Court’s actual reasoning. The Court did not reaffirm the physical presence standard because it was necessarily mandated by the dormant commerce clause, and it decided this despite some reservations about whether the rule is even a good one. Rather, the Court reaffirmed the existing physical presence standard on stare decisis grounds because it recognized that Congress is the appropriate body to determine a new standard — if any — under which states may impose a use tax collection obligation on remote sellers. The Court made a firm decision in 1992 that the balance of powers between the judiciary and the legislature dictates the maintenance of the physical presence standard. Technology may have changed since then, but stare decisis remains the same.