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**COMMENTARY**

*Arizona's Remote Sales Tax: A Look at How We Got Here*

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We often muse that “nothing is certain but death and taxes.” However, remote sellers were able to evade the latter until 2018 because a series of Supreme Court decisions held that sales taxes levied against out-of-state businesses are unconstitutional unless the seller has a physical presence inside the state.<sup>1</sup> Because of this requirement, Arizona—like many states—requires customers to pay a use tax on any purchase for which the seller doesn’t collect a sales tax.<sup>2</sup> Since it is impractical to enforce this schema, the physical presence requirement effectively gave remote sellers a tax advantage over businesses with in-state employees, stores, or other physical presence.<sup>3</sup>

In 1992, the Court re-affirmed this physical presence requirement under the Commerce Clause in *Quill Corp. v. North Dakota*.<sup>4</sup> The Court acknowledged that “a substantial amount of business is transacted . . . [without] physical presence within a State in which business is conducted,”<sup>5</sup> but reasoned that the rule is necessary to prevent states from burdening interstate commerce by subjecting a corporation to the tax collection duties that “might be imposed by the Nation’s 6,000-plus taxing jurisdictions.”<sup>6</sup> After this decision, states began a number of

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<sup>1</sup>Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill., 386 U.S. 753 (1967); *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

<sup>2</sup>ARIZ. REV. STAT. § 42-5155.

<sup>3</sup>*South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2094 (2018).

<sup>4</sup>504 U.S. at 317–18.

<sup>5</sup>*Id.* at 308.

<sup>6</sup>*Id.* at 313 n.6.

initiatives aimed at reducing the burden of compliance; one of which is the Streamlined Sales and Use Tax Agreement (SSUTA).<sup>7</sup>

In 2016, South Dakota passed a remote sales tax law and filed suit seeking a declaratory judgment against online retailers to determine the law's validity.<sup>8</sup> The Supreme Court granted cert and noted that “[f]orty-one States, two Territories, and the District of Columbia now ask this Court to reject the [physical presence] test formulated in *Quill*.”<sup>9</sup> The Court acquiesced and held that states may show the requisite “substantial nexus” for taxation by economic and virtual contacts, but cautioned that a remote sales tax may still be unconstitutional if it discriminates against or imposes undue burdens upon interstate commerce.<sup>10</sup> To this point, the Court noted that South Dakota adopted SSUTA, which “standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions . . . simplified tax rate structures, and other uniform rules.”<sup>11</sup>

Last year, Arizona passed a remote sales tax law, which took effect on October 1, 2019.<sup>12</sup> Rather than adopting SSUTA, Arizona selectively incorporated burden-reducing features like the safe harbor for remote sellers with limited business in Arizona, prospective tax liability, standardizing the “retail” classification across Arizona jurisdictions, requiring a single registration, and waiving licensing fees.<sup>13</sup> However, Arizona’s new law allows over 100 local governments to continue setting their own rates for taxes levied against remote sellers.<sup>14</sup>

It is true that the Supreme Court specifically noted variations in tax rates throughout the Nation’s 6,000-plus taxing jurisdictions as an undue burden on interstate commerce.<sup>15</sup> Nevertheless, Arizona’s novel approach strikes a between standardization and local-control that—with the aid of modern technology and a streamlined registration and filing system—should not unduly burden interstate commerce. Whether Arizona’s balanced approach is enough to satisfy judicial scrutiny is an open question.

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<sup>7</sup>Nat’l Conf. of State Legislatures, *Streamlined Sales and Use Tax Agreement*, REMOTE SALES TAX COLLECTION (Mar. 13, 2020), <https://www.ncsl.org/research/fiscal-policy/e-fairness-legislation-overview.aspx> (last visited Sept. 25, 2020) (hereafter “NCSL”).

<sup>8</sup>S. 106, 2016 Leg. Assembly, 91st Sess. (S.D. 2016).

<sup>9</sup>Wayfair, 138 S. Ct. at 2095.

<sup>10</sup>*Id.* at 2099.

<sup>11</sup>*Id.* at 2100.

<sup>12</sup>H.B. 2757, 44th Leg., 1st Reg. Sess. (Ariz. 2019).

<sup>13</sup>NCSL, *supra* note 9.

<sup>14</sup>Arizona Dep’t of Revenue, REMOTE SELLER AND MARKETPLACE FACILITATOR TAX RATE TABLES (Oct. 1, 2020), [https://azdor.gov/sites/default/files/media/TPT\\_RATE\\_TABLE\\_RSMP\\_10012020.pdf](https://azdor.gov/sites/default/files/media/TPT_RATE_TABLE_RSMP_10012020.pdf) (last visited Sept. 25, 2020).

<sup>15</sup>*Quill*, 504 U.S. at 313 n.6.