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In this issue:

- “Kill-Quill” Legislation to Get U.S. Supreme Court Review
- Federal Court Upholds U.S. Small Business Administration Decision to Remove Business from List of Service Disabled Veteran Owned Small Business but Says that Decision Leads to “Draconian and Perverse Results”

“Kill-Quill” Legislation to Get U.S. Supreme Court Review

In 1992 the Supreme Court decided, in *Quill Corp. v. North Dakota* [504 U.S. 298 (1992)] that a state cannot collect sales tax from a retailer which has no “physical presence” in the state. This case confirmed the Court’s earlier decision in *National Bellas Hess v. Illinois* [386 U.S. 753 (1967)]. The issue of collection from remote sellers has, in recent years, acquired greater emphasis as states seek to collect sales taxes for sales made over the Internet.

The case now under review *South Dakota v. Wayfair* (U.S., No. 17-494) involves legislation passed in South Dakota imposing a sales tax obligation on an out-of-state seller which:

- has \$100,000 or more in gross revenue from sales of tangible personal property or services in South Dakota; or
- completes 200 or more separate transactions involving delivery to South Dakota.

South Dakota sought judicial declaration that the legislation’s collection requirements were constitutionally valid and applicable to four out-of-state retailers. The four retailers sought summary judgment arguing that there was no issue of material fact since the sales collection scheme of the legislation was in contradiction to the physical presence rule articulated in *Bellas Hess* and *Quill*.

The actual question at issue in the case as it is now before the Supreme Court is whether the motion of summary judgment was properly granted by state courts in South Dakota. Whether the Court will see the case as an opportunity to look again at the physical presence rule is unclear but supporters of such a review note that such a review was suggested by Justice Kennedy in his opinion in the 2015 case of *Direct Marketing Association v. Brohl* which dealt with state efforts to distinguish other state activity from the prohibition on tax collection of *Quill*.

Such efforts to distinguish have taken the form of reporting requirements under which a remote seller must report the identity of sales made in a state; or so-called “cookie nexus” regulation holding that vendors can have an in-state presence through the use of software located on customers’ computers; or (as in Minnesota) requiring companies that

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facilitate sales of out-of-state vendors by providing an online market place to collect sales taxes or comply with reporting schedules.

It remains to be seen in the Court's decision whether it will provide clarity to the current physical presence rule or will enact some other, new rule. Either way, the effect on taxpayers, state revenue collections, and sellers will be substantial.

Federal Court Upholds U.S. Small Business Administration Decision to Remove Business from List of Service Disabled Veteran Owned Small Business but Says that Decision Leads to “Draconian and Perverse Results”

In a case involving “separate but overlapping regulatory frameworks” for contracting set-aside programs of the U.S. Department of Veterans Affairs and the U.S. Small Business Administration the United States Court of Federal Claims, on December 20, 2017, upheld a decision of the Small Business Administration's Office of Hearings and Appeals that a small business was not a Service Disabled Veteran Owned Small Business (SDVOSB) eligible for contract award and should be removed from the Department of Veterans Affairs data base of SDVOSB firms. [*Veterans Contracting Group v. United States and Williams Building Co, Inc.* No. 17-1188C]

The trigger to the case was bid protest from a contract bidder on a Corps of Engineers project that the awardee was not eligible as a SDVOSB.

The regulations of the Department of veterans Affairs required that a service disabled veteran must have “unconditional ownership” which the regulations define as ownership not subject to any conditions that could cause or potentially cause ownership to go to another (e.g., assignment of voting rights, establishment of voting trusts). The veteran must have “day-to-day management and long term decision making authority,” noting that “Control is not the same as ownership, although both may reside in the same person.”

In contrast, the Small Business Administration has no such definition of unconditional ownership in its regulations. In the case here the disabled veterans owner of the business first awarded the contract (the subject of the bid protest) had a shareholder agreement with another party that restricted his heirs ability to convey or transfer his stock in the company and so, in SBA's judgment, did not have unconditional ownership. The court upheld SBA's ruling.

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In its discussion the court noted that Congress had addressed this issue of divergent regulations in legislation that was part of the National Defense Authorization Act for 2017 and which provided uniform, consolidated definitions for businesses owned and controlled by service disable veterans. That legislation, however, delayed implementation of the new definitions until such time as the Administrator of SBA and Secretary of the Veterans Administration “jointly issue regulations implementing” the new consolidated definitions. As of the date of the decision in this case, no such regulations had been promulgated; but see the last paragraph below.

Noting that the SBA could have acted to conform its interpretation to those in other SBA programs which did have an unconditional ownership definition (e.g., the 8(a) program and Women Owned Small Business Program), the court indicated it would not “pursue the theory of the dog that did not bark” and that “...it would not be appropriate for this court to draw any inferences from the silence of regulatory history of the SBA’s SDVOSB program.”

The court concluded “SBA’s omission of a definition of unconditional ownership in the SDVOB program produces draconian and perverse results in a case such as this one. Nevertheless, without at least some indicia of SBA’s intent or inadvertence regarding that omission, the court cannot remake the regulations in reliance on SBA’s action in closely related contexts of the 8(a) and WOSB programs.

On January 10, 2018 the Veterans Administration published proposed rules to place jurisdiction for eligibility determinations under the SDVOSB and to amend the Veterans Administration’s existing regulations to adopt the SBA rules.

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