Beyond *Quill* and Congress

The Future of Consumption Tax Enforcement on Tangible and Digital Products

DMA v. Huber (later *DMA v. Brohl*)

- 2010 Colo. Rev. Stat. § 39-21-112(3.5), 1 Colo. Code Regs. § 201-1:39-21-112.3.5:
  - Imposed 3 obligations on remote sellers:
    - Send transactional notice to purchasers informing them they might owe use tax
    - Send CO purchasers who bought goods from the retailer totaling more than $500 an annual purchase summary with dates, categories, and amounts, reminding them of use tax due
    - Send Department annual customer information report listing customers' names, addresses, and total amounts spent

DMA v. Huber (later *DMA v. Brohl*)

- Direct Marketing Association (DMA) filed facial challenge in district court, which granted summary judgment and permanent injunction
- 10th Circuit held district court lacked jurisdiction under Tax Injunction Act (TIA)
- DMA sued in state court and petitioned for cert to SCOTUS on issue of district court's jurisdiction

DMA v. Huber (later *DMA v. Brohl*)

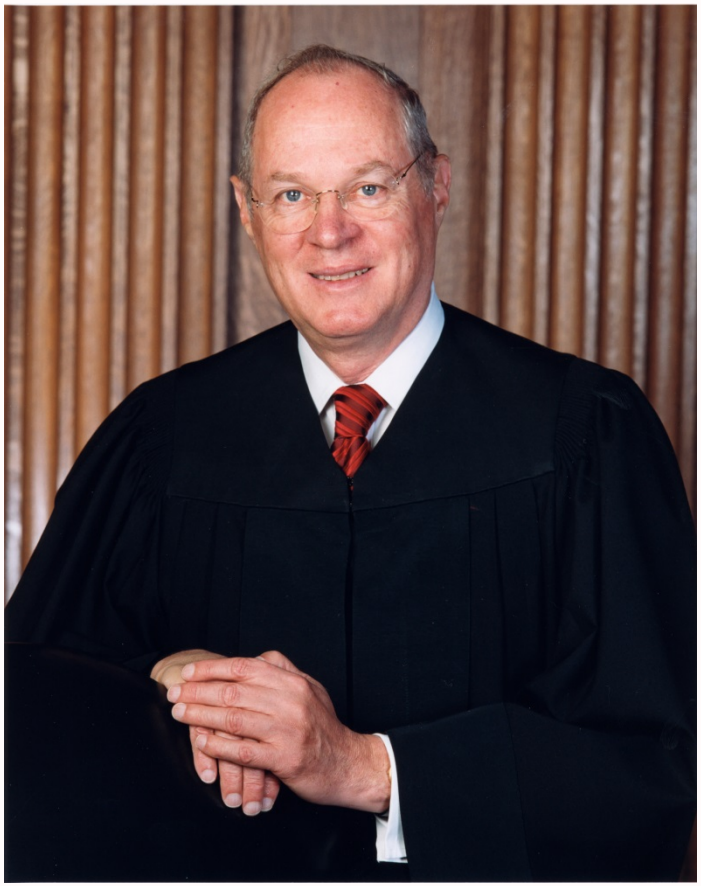
- SCOTUS granted cert., found:
  - *Quill* established that a state "may not require retailers who lack a physical presence in the State to *collect* these taxes on behalf of the Department"
  - Colorado's notice and reporting requirements do not constitute a form of tax collection
    - notice and reporting requirements precede the steps of 'assessment' and 'collection

DMA v. Huber (later *DMA v. Brohl*)

- SCOTUS ruling:
  - TIA did not apply because TIA determination precisely because the relief sought in this litigation-invalidating the Colorado Law-would not "enjoin, suspend or restrain the assessment, levy or collection of any tax under State law"

Kennedy's Concurrence

- "Given these changes in technology and consumer sophistication, it is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. … The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."
- "The instant case does not raise this issue in a manner appropriate for the Court to address it. It does provide, however, the means to note the importance of reconsidering doubtful authority."
- No other judges joined concurrence



DMA, 10th Cir., Released 2/22/16

- SCOTUS's holding cannot be squared with the district court's determination that the Colorado Law functionally compels the collection of taxes
- "we cannot identify any good reason to *sua sponte* extend the bright-line rule of *Quill* to the notice and reporting requirements of the Colorado Law"

DMA, 10th Cir., Released 2/22/16

- Gorsuch, J., [former clerk for Kennedy] concurring:
  - Indeed, if my colleagues are I are correct that states may impose notice and reporting burdens on mail order and internet retailers comparable to the sales and use tax collection obligations they impose on brick-and-mortar firms, many (all?) states can be expected to follow Colorado's lead and enact statutes like the one now before us.

- Idea of *Quill* as an easing-out of *Bellas Hess*?
  - …*Quill* might be said to have attached a sort of expiration date for mail order and internet vendors' reliance interests on *Bellas Hess'* rule by perpetuating its rule for the time being while also encouraging states over time to find ways of achieving comparable results through different means…*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time.

Narrowing of *Quill*?

- Affected DMA's claims for discrimination and for undue burden

DMA, 10th Cir., Released 2/22/16

- DMA has 90 days from final judgment to appeal, likely will (~May 23)
- Will SCOTUS take another look? Will this be the *Quill* challenger?
  - Would the court grant cert with federal legislation pending?
  - Note even if SCOTUS grants cert, can skirt the *Quill* issue

SCOTUS

- *Quill*
  - Scalia, joined by Kennedy and Thomas, concurred in part and concurred w/judgment
    - I also agree that the Commerce Clause holding of *Bellas Hess* should not be overruled. Unlike the Court, however, I would not revisit the merits of that holding, but would adhere to it on the basis of *stare decisis*. Quill Corp. v. N. Dakota By & Through Heitkamp, 504 U.S. 298, 320 (1992)
    - Referred to Congress for final say
  - Kennedy and Thomas are only judges remaining on court who participated in *Quill*

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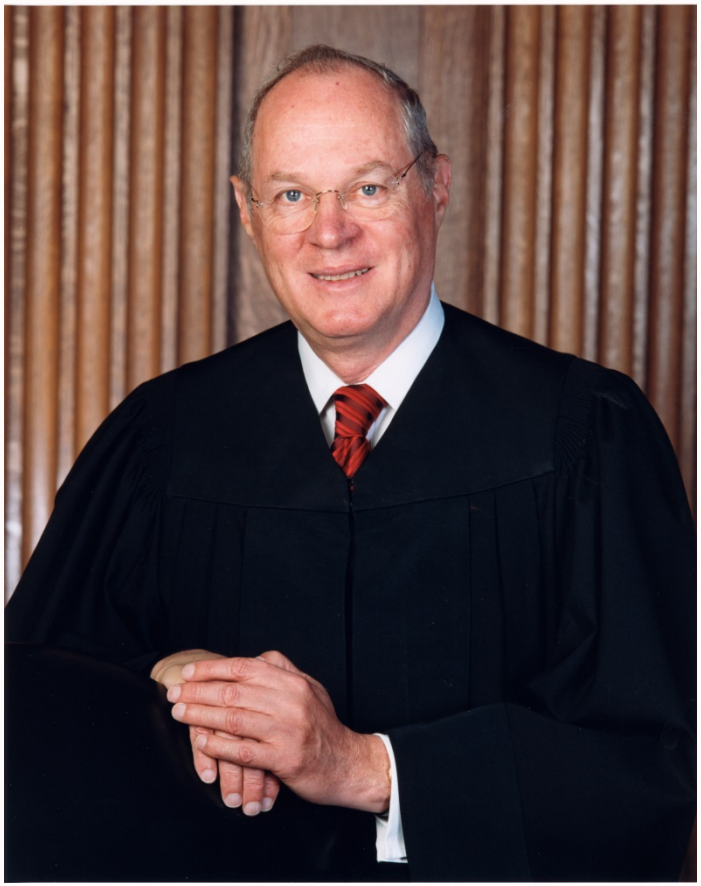
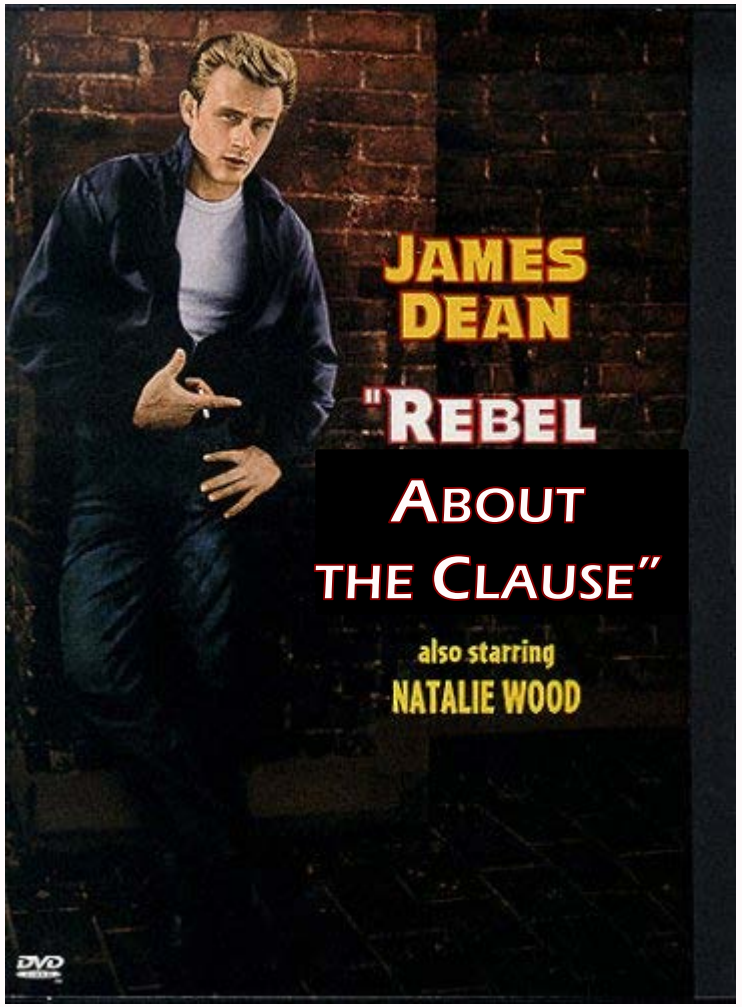


SCOTUS

- Opinion in *DMA*
  - Mandates specific conclusion?
  - 10th Circuit indicates "yes"
    - DMA's success in *Brohl II* led to "the demise of its undue burden argument"

Litigation of the Future

- States now can:
  - Implement reporting requirement (with caveat that SCOTUS may grant cert in *DMA*)
  - Implement collections requirements amounting to a full *Quill* challenge



Collection Requirement/ Notice Requirement

- Alabama: requires remote sellers with over $250,000 of sales into the state per year to collect and remit sales tax

- Oklahoma, South Carolina, South Dakota
  - Implemented notice requirement, but only to purchaser
  - Okla. Admin. Code § 710:65-21-8; S.C. Code Ann. § 12-36-2691(E)(1); South Dakota Sales Tax Public Notice for Non-Collecting Retailers

What do you want?

Limit *Quill*?	• Just actual sales and use tax collection? • Just mail-order sales (not online)?

Overturn *Quill*?	• Limited overturn
	  • Remove physical presence requirement for "substantial nexus" – what's left?
	  • Due Process "definite link or minimum connection"
	  • Commerce Clause "substantial nexus" requirement, to be defined
	• Total overturn
	  • Cease delineation b/w Due Process and Commerce Clause
	  • Return to *Complete Auto* 4-factor test

What do you want?

Limit *Quill*	Unlikely – too much effort/too many challenges to *Quill* already, would just lay ground for more challenges
Limited overturn of *Quill*	Most likely – *Quill* Court declined to overturn *Bellas Hess* due to *stare decisis* and concerns re: reliance. This would do more to protect reliance, eliminate most contentious portion of the decision Problem: would still leave CC gap
Total overturn of *Quill*	Very unlikely – too many cases rely on *Quill* DP/CC analysis, too disruptive

Strong Litigation Tactics

- Not just legal argument re: *Quill*'s obsolescence
- Determine, outline, and argue *exactly the conclusion you want* – this will matter for a long time
  - What should "substantial nexus" be?

First ClipArt result for "substantial"

Ohio CAT cases

- MTC recently filed amicus brief in Ohio's Newegg/Crutchfield/ Mason cases
- Standard for substantial nexus?
  - *Better to err on the side of definite standard*
- Issue: extent to which a bright-line presence test may be used to determine nexus for purposes of Ohio's corporate activities tax in lieu of physical presence.

Amicus theory:

- "substantial nexus," much like it sounds, requires a greater connection than "minimum contacts."
- Presumably, that greater connection is of the same type—that is, if an action creates minimum contacts, more of that action would create substantial nexus.
- Nor is it necessary that the substantial nexus test not be arbitrary or artificial in nature, since the Court in *Quill* admitted this was the nature of a physical presence standard also.