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Justice Kennedy Wants Case to Allow States to Collect Internet Use Tax

One Supreme Court Justice is ready to hear a case on whether online purchasers should pay a use tax regardless of where the seller is located. Currently, states can collect taxes only if the seller has a "presence" in the state—a holding Justice Anthony Kennedy apparently wants reversed.

Justice Kennedy expressed his strong view in a concurring opinion for a case where the issue of taxing internet sales was not an issue. That did not stop him from finding that there is a "serious, continuing injustice" in allowing businesses not to collect use taxes if the businesses do not have a physical presence in the state seeking the tax.

Citing "changes in technology and consumer sophistication," Justice Kennedy said, "[I]t is unwise to delay any longer a reconsideration of the Court's holding in *Quill*. A case questionable even when decided, *Quill* now harms States to a degree far greater than could have been anticipated earlier."

In *Quill Corp. v. North Dakot*a, decided in 1992, the Supreme Court affirmed the requirement that states cannot require a business to collect a use tax for out-of-state purchases if the business does not have a physical presence in the state. This initial position was established in 1967 in *National Bellas Hess, Inc. v. Department of Revenue of Ill.* Use taxes are equivalent to sales taxes for out-of-state purchases. *Quill* involved a mail-order business that sold goods in states where it had no physical presence.

Justice Kennedy noted that in 1992 that the Internet was "in its infancy." But as a result of *Quill*, states have been unable to collect use taxes on all Internet purchases. "The result has been a startling revenue shortfall in many States, with concomitant unfairness to local retailers and their customers who do pay taxes at the register," the Justice wrote. "Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront."

"Today, buyers have almost instant access to most retailers via cell phones, tablets, and laptops," his opinion noted. "As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term."

He admitted that the case before the court, *Direct Marketing Assn. v. Brohl* did not raise the issue. "It does provide, however, the means to note the importance of reconsidering doubtful authority. The legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*.

Direct Marketing Assn. v Brohl, Supreme Court No. 13-1032, issued March 3, 2015.

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