

State and Local Taxation: More on the Dormant Commerce Clause and Maryland's "County" Tax.

There are actually three dissents in *Comptroller of the Treasury of Maryland v. Wynne*, No 13-485 (May 18, 2015). Two are fairly predictable: since it's a dormant commerce clause case, Justice Scalia and Justice Thomas are dissenting because they think the dormant commerce clause is judge-made nonsense. While predictable, Justice Scalia's dissent is entertaining, as he delivers his argument with great force.

The third, Justice Ginsburg's, is different. It is thought-provoking; when I got the chance to read it carefully, I understood why the majority spends so much of its time countering her analysis. It certainly suggests that the case was a much closer call than the majority opinion's analysis would lead the reader to believe.

If there is a problem with Justice Ginsburg's analysis it is her focus on due process cases. The question under the due process clause is generally whether the state has a sufficient relationship with the taxpayer or the transaction, known as the "nexus" requirement. Cases under the due process clause tend to focus on the question how much contact with the state is needed to tax a non-resident. See *Quill Corp. v North Dakota*, 504 U.S. 298, 306-07 (1992). With an in-state resident, there is no nexus question to resolve, which makes the cases Justice Ginsburg relies upon less than compelling.

In contrast, the dormant commerce clause has traditionally imposed greater constraints, a point well illustrated by *Quill*: while the Supreme Court held that an actual physical presence in a state was not required under the due process clause, it was nonetheless necessary under the commerce clause, which requires not just nexus, but "substantial nexus." See *Quill Corp.*, 504 U.S. at 311-13. The dormant commerce clause also imposes requirements that a state tax be structured to avoid double taxation, which is known as the internal consistency test. See *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989).

While much of the litigation under the dormant commerce clause has involved out-of-state businesses challenging taxes in states where they do some business but are not based, there is no question that the majority opinion identifies cases in which commerce clause challenges by residents have been sustained, *J.D. Adams Mfg. Co. v. Storen*, 304 U.S. 307 (1938), *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434 (1939), and *Central Greyhound Lines, Inc. v. Mealey*, 334 U.S. 653 (1948). See *Comptroller of the Treasury of Maryland v. Wynne*, No. 13-485, slip op. at 8 (May 18, 2015).

I cannot see a principled reason why corporations would be entitled to greater protection under the commerce clause. As a consequence, I find the majority's opinion more persuasive, but Justice Ginsburg's dissent made me think about the issue harder.

Jim Malone is a tax attorney in Philadelphia; he focuses his practice on federal, state and local tax controversies. This post is intended to provide background on a relevant issue; it is not intended as legal advice. © 2015, MALONE LLC.