Justice Kennedy's Tax Legacy: A Lot of *Wayfair* and a Little *Wynne*

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This topic would have been a little difficult to tackle had Justice Anthony M. Kennedy retired 12 months ago. Sure, he was involved in numerous decisions around the dormant commerce clause. These include *C & A Carbone Inc. v. Town of Clarkstown*,[39] in which he wrote for a five-justice majority to invalidate a local law that required solid waste generated within the town's boundaries to be deposited at a designated processing facility, and *Granholm v. Heald*,[40] in which again he wrote for a 5-4 majority striking down state laws that limited the ability of out-of-state wineries to sell directly to consumers. But today any question about Kennedy's legacy will start and end with the *Wayfair* case. And what will that legacy be?

Wayfair could be viewed as a helpful push by the Court to usher in a sales tax collection method that makes more sense in the internet-based economy. The fact that he had to lead the charge to reverse not one but two prior Court decisions to get there (including one where he stood with the majority) will simply be an interesting footnote. Alternatively, *Wayfair* could be cited as another example of judge-based lawmaking that wreaks havoc in industry and forces businesses into predicaments better solved by lawmakers. But one thing is clear: from a tax perspective, without question or debate, I think *Wayfair* is Kennedy's legacy. Indeed, he spurred the debate almost single-handedly through his concurring opinion in *Direct Marketing Association*, in which he essentially egged on states like South Dakota to pick a new case to re-examine *Quill*. And having started the fight, he was appropriately the one to end it with his decision this past summer.

The reverberations from the decision will be felt for years. The decision promises to change not only sales tax nexus for all time, but state tax nexus in general. And maybe it will force Congress to finally step in and solve the problem. If that happens, I suspect Kennedy's tax legacy will be as positive and great as his legacy in other areas of the law. But if that does not happen, and if we continue to find ourselves in the Wild Wild West on sales tax nexus issues, with thousands of localities left free to pick different economic nexus thresholds and impose different kinds of taxes on different kinds of products and services at different tax rates, I expect many practitioners and businesses will not look so kindly on Kennedy, at least when doing their monthly sales tax returns.

Finally, on a personal note, I hope that Kennedy's swing vote in *Wynne*, a 2015 decision that invalidated a Maryland personal income tax scheme on dormant commerce clause grounds, spurs similar victories for other taxpayers fighting to strike down state taxing regimes that impose double taxation on the states' residents. The Court's decision in *Wynne*, which (before *Wayfair*) had been called one of the most important state tax cases in decades,[41] made clear that the dormant commerce clause can apply to personal income taxes, and clarified that the internal consistency test is the test to apply in dormant commerce clause cases to determine whether a taxing scheme unfairly burdens or discriminates against interstate commerce. There are two cases working their way through the New York court system[42] in which taxpayers are seeking to apply this *Wynne* analysis to invalidate a New York scheme that they allege violates the internal consistency test and fails commerce clause scrutiny. If these taxpayers win, they'll have *Wynne* (and Kennedy) to thank for it!

[39] 511 U.S. 383 (1994).

[40] 544 U.S. 460 (2005).

[41] *See* Michael S. Knoll and Ruth Mason, "*Comptroller v. Wynne*: Internal Consistency, a National Marketplace, and Limits on State Sovereignty to Tax," 163 *U. Pa. L. Rev. Online* 267 (2015).

[42] *See Edelman v. New York Department of Taxation and Finance*, 162 A.D.3d 574 (1st Dept 2018) and *Chamberlain v. New York Department of Taxation and Finance*, 2018 NY slip op. 07383 (3d Dept 2018). The author represents the plaintiffs-appellants in both the *Edelman* and the *Chamberlain* cases.