

# Taxation News

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## Chair's Message

By Sandra Veliz

The Taxation Section approaches the new 2017-2018 term with enthusiasm.

The new officers started their term in May 2017. Our principle task when we first took over was revising the Tax Section's bylaws. WSBA's Section Bylaw Alignment Project prompted a review of the Tax Section's bylaws. Rich Johnson and I worked to make improvements to the bylaws as well as meet WSBA requests for alignment with WSBA bylaws. The bylaws continue to provide that members of the executive committee have a vote on Tax Section matters. Because of this, the WSBA requires that the executive committee members be elected by the section members. Our next election to be held in May 2018 will, for the first time, include voting on all executive committee members. The executive committee members consist of the officers, the committee chairs, and three members at large. Tax Section members are encouraged to seek a position on the executive committee.

The WSBA held a Fall Open Sections Night in Tacoma on November 1, 2017. This was an opportunity to encourage new attorneys to become section members. I had the pleasure of meeting several new attorneys.

The Tax Section newsletter is generally published three times per year: a fall, winter and spring edition, depending on article availability. We always welcome our members to provide an article for publication. Note: our newsletters are sent in an email with a link rather than the hardcopies we used to mail.

The Tax Section has numerous events over the year. So far, there have been two Tax Section events in Spokane. On August 29, 2017, the Tax Section collaborated with the Gonzaga Federal Tax Clinic to hold an event celebrating the tax clinic's Ninth Circuit Court of Appeals win. On October 2, 2017, the Tax Section and Gonzaga Federal Tax Clinic honored Judge Joel Gerber at a Tax Court Judge Reception.

The Tax Section also has a tradition of hosting various events through its committees. This year we look forward to providing members with opportunities that foster relationships. We will have our annual luncheon meeting in May and will begin planning for this event soon. As always, we are interested in hearing from our

section members on how the Tax Section can benefit your practice. I welcome your ideas and input. I can be reached at [sveliz@lesourd.com](mailto:sveliz@lesourd.com).

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## The Tax Section Presents the New Department of Revenue Liaison

By Dan Jensen



My name is Dan Jensen and, in August of this year, I replaced Jeff Mahan as the Department of Revenue's Liaison to the Tax Council. I am also the Administrative Review Manager for the Department's Administrative Review and Hearings Division (ARHD). During my career, I have worked in various capacities for Departments of Revenue.

I started with the Arizona Department of Revenue, writing rules and working on proposed tax legislation. I then moved to Washington over 10 years ago to work for the Washington State Department of Revenue. During my time here, I have worked as an Administrative Law Judge and Policy and Operations Manager for ARHD. I also did a one-year rotation as a Special Assistant Attorney General for the Revenue Division of the Attorney General's Office. In my free time, I enjoy jogging, hiking, and spending time with my family. My wife and I have four very active children that keep us busy.

In other news at the Department, we have had other personnel changes due to recent retirements. As some of you already know, Janetta Taylor (Senior Assistant Director of Operations) and Alan Lynn (Assistant Director of Interpretations and Technical Advice) will retire by the end of 2017. We will miss both of them. John Ryser from the Audit Division is set to replace Janetta Taylor and Tim Jennrich from the Legislation & Policy Division will replace Alan Lynn. Mark Mullin, the current Program Manager for Legislation & Policy, replaces Tim Jennrich and will now be the Assistant Director of Legislation & Policy.

## Economic Nexus Requirements & Challenges to *Quill*

By Lauren M. Visoria, LL.M.

The way in which we conduct business has rapidly changed within the last decade. Today, it is common to make purchases from all over the country with the click of a mouse and to have those purchases delivered to your home. Individuals and businesses are no longer limited to shopping within their state, but can easily - and often times more easily - find the products or services they need or desire online.

This change has presented a growing challenge for states that rely on sales and use tax to support their state budgets. Many of these online retailers do not meet the physical presence requirement that would trigger nexus and allow the state to impose sales and use tax. In an attempt to recapture the sales and use tax from these out-of-state sellers, states have begun to create economic nexus regulations. Several of these cases have presented a direct challenge to the decision made by the U.S. Supreme Court in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

### **Quill Corp. v. North Dakota**

*Quill Corp. v. North Dakota* (“*Quill*”), set the precedent that some form of physical presence was required for a state jurisdiction to require that sales and use tax be collected and remitted from an out-of-state seller.

*Quill* was a Delaware corporation that sold office equipment and supplies. It maintained all of its offices, buildings, and warehouses outside of North Dakota. Additionally, *Quill* did not have any employees working or living in North Dakota, and the company’s ownership of tangible personal property within the state was *de minimis*. *Quill* sold its office supplies through catalogs, flyers, advertisements in national periodicals, and through telephone calls. Its national sales, at the time of the case, exceeded \$200 million with around \$1 million attributed to approximately 3,000 customers residing in North Dakota. All products were delivered via mail or common carrier from out-of-state locations.

North Dakota imposed a sales and use

tax on every “retailer maintaining a place of business” within the state. North Dakota defined “retailer” to include “every person who engages in regular or systematic solicitation of a consumer market in the state.” And “regular and systematic solicitation” meant three or more advertisements within a 12-month period. Thus, *Quill* would be subject to the tax even though it had no physical presence or personnel in North Dakota.

*Quill* argued that North Dakota did not have the power to compel it to collect a sales and use tax since it had no physical presence in the state. North Dakota, through its Tax Commissioner, filed this action to require *Quill* to pay the taxes as well as interest and penalties. The trial court found in favor of *Quill*, the North Dakota Supreme Court reversed, and the U.S. Supreme Court affirmed. Therefore, since 1992 *Quill* affirmed the physical presence requirement for state nexus.

### **Current Challenges to *Quill***

In the last few years, as online purchasing has become more prevalent, several states have started to challenge the physical presence requirements of *Quill*. Some states have done so through promulgating legislation that directly challenges *Quill*, while others have tried to capture certain online retailers by expanding definitions such as “physical presence” to include affiliate sellers in the state or by expanding the definition of what it means to “do business in the state.”

For example, Colorado enacted a law that gave out-of-state sellers, who met certain gross receipts requirements, two options: (1) collect and remit sales and use tax on sales into the state, or (2) notify customers of their use tax liability and report sales information back to the state. Regulations like this, with built-in reporting requirements, have been nicknamed “tattletale” laws.

In 2016, the U.S. Supreme Court decided *Direct Marketing Ass’n v. Brohl*, 137 S. Ct. 593. This case involved Colorado’s reporting requirement for out-of-state retailers to notify and report customers making

purchases from out-of-state vendors. The case is especially noteworthy because of Justice Kennedy’s concurrence where he questioned whether or not we should continue to follow *Quill* in light of “the dramatic technological and social changes that had taken place in our increasingly interconnected economy.” Justice Kennedy went on to say, “[t]here is a powerful case to be made that a retailer doing extensive business within a State has a sufficiently ‘substantial nexus’ to justify imposing some minor tax-collection duty, even if that business is done through mail or the Internet.” Those words are even more true now than they were in 1992.

In mid-September of [year], a case in South Dakota became ripe as a test case and an opportunity for the U.S. Supreme Court to overturn *Quill*. South Dakota, through S.B. 106, became one of several states to enact legislation that directly violated *Quill*. The legislation provided that a seller of tangible personal property into South Dakota, without physical presence, was still responsible for collecting and remitting sales tax if their gross revenue from sales into South Dakota exceeded \$100,000 per calendar year or if the retailer had 200 or more separate transactions in the state. This legislation was ultimately challenged in *State of South Dakota v. Wayfair* 901 N.W. 2d 754 (S.D. 2017), where the South Dakota Supreme Court ruled that the requirements for out-of-state sellers were unconstitutional. The case would be the perfect opportunity for the U.S. Supreme Court to overturn *Quill*.\*

The following is a list of states and their current positions with regard to economic nexus. Many states have adopted legislation similar to South Dakota, while several others have taken an approach more similar to Colorado.

\*Note: petition for cert. filed 10/2/17.

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*Economic Nexus Requirements & Challenges to Quill* continued from previous page

State	Economic Nexus?	Explanation
Alabama	Yes	Administrative Rule 810-6-2-.90.03 created an economic nexus threshold requiring out-of-state sellers with gross receipts greater than \$250,000 to collect and remit sales and use tax. The rule is currently being challenged in <i>Newegg v. Dep't of Alabama</i> .
Alaska	No	Alaska does not impose a sales and use tax.
Arizona	No	
Arkansas	No	Arkansas's economic nexus bill, S.B. 140, failed in the House of Revenue & Taxation in February of 2017. The bill was modeled after South Dakota's economic nexus bill.
California	No	
Colorado	Yes	Any out-of-state retailer that has gross revenue in excess of \$100,000 in the state, and does not collect the sales tax on taxable purchase must: <ul style="list-style-type: none"> <li>• Send a transactional notice to the customer that they may be subject to the state's use tax</li> <li>• Send a detailed annual purchase summary to customers that purchase more than \$500 of goods during the year, reminding them of potential use tax obligations</li> <li>• File the annual customer information report with the Colorado Department of Revenue.</li> </ul> Any penalties for failure to follow Colorado's remote seller notice and reporting requirements will be waived with respect to transactions occurring prior to July 1, 2017.
Connecticut	No	
DC	No	
Delaware	No	Delaware does not impose a sales and use tax.
Florida	No	
Georgia	No	H.B. 329 proposed a law similar to Colorado's law that gives retailers the option to collect and remit or report and notify customers of the use tax obligation. The bill did not pass.
Hawaii	No	S.B. 620 proposed an economic nexus threshold for sales over \$100,000.
Idaho	No	
Iowa	No	
Illinois	No	
Indiana	Yes	H.B. 1129, signed April 28, 2017. Requires remote sellers with no physical presence in Indiana to collect, remit, and comply with all applicable provisions of the Indiana gross retail tax (sales tax) code when remote sales are made to Indiana customers. Effective July 1, 2017. If: <ol style="list-style-type: none"> <li>Gross revenue from the sale of tangible personal property, products transferred electronically, or services into Indiana exceeds \$100,000</li> <li>The retail merchant sells tangible personal property, products transferred electronically, or services into Indiana in 200 or more separate transactions</li> </ol>
Kansas	No	H.B. 2400 & H.B. 2235 (introduced).
Kentucky	No	Kentucky does require out-of-state retailers to notify their Kentucky customers of their potential use tax liability. Rev. Stat. Ann. Section 139.450.
Louisiana		H.B. 1121 was signed June 17, 2016, effective July 1, 2017. A remote seller is a retailer who is not required to collect sales and use tax and who makes more than \$50,000 of taxable sales or services into Louisiana in a calendar year. A remote seller must send an annual purchase summary to each customer who made Louisiana purchases and send an annual customer information report to the Louisiana Department of Revenue.

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*Economic Nexus Requirements & Challenges to Quill* continued from previous page

State	Economic Nexus?	Explanation
Maine	Yes	Maine legislature overrode the Governor's veto to enact an economic sales and use tax nexus law effective October 1, 2017.
Maryland	No	
Massachusetts	Yes	The Massachusetts Department of Revenue issued a policy directive that required qualifying internet vendors to collect sales and use tax beginning July 1, 2017.
Michigan	No	
Minnesota	Yes	Law requiring e-commerce market facilitators, such as Amazon, to collect and remit sales tax. The new law is expected to be challenged. The definition of "retailer maintaining a business in the state" was expanded to include sellers that makes sales over a marketplace provider operating in Minnesota. The law requires marketplace facilitators to collect and remit tax on any retailer's sales over their platform, unless the retailer registers with the State to perform such duties. Effective the earlier of July 1, 2019 or if the Supreme Court of the United States overturns <i>Quill</i> .
Mississippi	No	Proposed Rule (\$250,000 economic nexus threshold) died in Committee.
Missouri	No	
Montana	No	Montana does not impose a sales and use tax.
Nebraska	No	LB 44 would have created economic nexus for sellers with gross receipts from taxable sales in Nebraska exceeding \$100,000 or if more than 200 separate sales transactions were made in Nebraska for a calendar year. However, the bill failed to pass.
Nevada	No	
New Hampshire	No	New Hampshire does not impose a sales and use tax.
New Jersey	No	
New Mexico	No	H.B. 202 vetoed. The bill proposed that the place of business of a person without physical presence in the state is where the property or service being sold is delivered. The bill also established a threshold of \$100,000 in gross receipts.
New York	No	
North Carolina	No	Proposed S.B. 81. The law would require an out-of-state seller with sales of more than \$100,000 sourced to North Carolina or who made 200 or more separate transactions sourced to North Carolina to collect and remit sales and use tax. The Bill states that it is a direct violation of <i>Quill</i> . In addition, it would expand the definition of remote sale to include sales facilitated by a marketplace provider or a person who facilitates sales at retail in the state.
North Dakota	Yes	North Dakota enacted an economic sales and use tax nexus law similar to South Dakota. The law requires an out-of-state seller to collect and remit sales tax if it has gross receipts exceeding \$100,000 or more than 200 separate transactions into the state in a calendar year. The North Dakota provision will only become effective if the U.S. Supreme Court overturns <i>Quill</i> .
Ohio	Yes	H.B. 49 signed June 30, 2017, effective January 1, 2018. Economic nexus threshold of \$500,000.
Oklahoma	Yes	H.B. 2531 signed May 17, 2016, effective November 11, 2016. Requires retailer making sales of tangible personal property into Oklahoma to send an annual purchase summary to each Oklahoma purchaser notifying them of their potential use tax liability.

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## Economic Nexus Requirements & Challenges to Quill *continued from previous page*

State	Economic Nexus?	Explanation
Oregon	No	Oregon does not impose a sales and use tax.
Pennsylvania	No	
Rhode Island	Yes	H.B. 5175 was signed on August 3, 2017, effective August 17, 2017. Any non-collecting retailer that had sales of \$100,000 or more within Rhode Island or 200 or more transactions with Rhode Island customers must register for a sales tax permit and collect and remit sales tax on all taxable sales. In the alternative, the retailer must comply with notice and reporting requirements similar to those in Colorado.
South Carolina	No	
South Dakota	Yes	First state to take statutory action against <i>Quill</i> . Out-of-state sellers with no physical presence are subject to sales tax collection obligations when South Dakota sales exceed \$100,000 in either the current calendar year or the previous calendar year or the seller sells taxable property or services into South Dakota in 200 or more transactions.
Tennessee	Yes	Administrative Rule 1320-05-01-.129 requires remote sellers without physical presence to register by March 1, 2017 and begin collection by July 1, 2017. The regulation was challenged and enforcement of the provision is currently suspended pending the outcome of the litigation.
Texas	No	
Utah	No	Both S.B. 110 and S.B. 83 failed to pass.
Vermont	Yes	H.B. 873 was signed into law on May 25, 2016. Economic nexus threshold of \$100,000 or if the vendor has sales of 200 or more separate transactions into Vermont. The law only becomes effective if the U.S. Supreme Court overturns the <i>Quill</i> requirements.
Virginia	No	
West Virginia	No	
Wisconsin	No	
Wyoming	Yes	H.B. 19 was signed on March 1, 2017, effective July 1, 2017. The law requires remote sellers to collect and remit sales tax on sales to Wyoming customers if, within the current or preceding calendar year, the sellers' gross revenue from the sale of tangible personal property, admissions, or services delivered into the state exceed \$100,000 or the seller had more than 200 separate transactions into Wyoming.

### Washington

Washington adopted economic nexus standards this past legislative session, as well. Effective July 1, 2017, the new regulations state that an out-of-state retailer making sales into Washington will be subject to B&O tax if they (1) have sales of more than \$267,000 of gross receipts sourced or attributed to Washington or (2) have at least 25 percent of total yearly gross receipts sourced or attributed to Washington.

Washington has also expanded the economic nexus thresholds to market fa-

cilitators and referrers. Effective January 1, 2018, market facilitators with gross receipts from retail sales sourced to Washington of at least \$10,000 will be required to collect and remit sales and use tax or comply with reporting and notification requirements. Additionally, referrers will be subject to the same rules when their gross receipts break the threshold of \$267,000 of gross income.

#### What's next?

While we wait for the U.S. Supreme Court to tackle the question of whether or

not we should continue to follow the physical presence requirement of *Quill*, it is important to stay up to date as states continue to work their way around *Quill*. In fact, some states are imposing penalties for failure to follow their new economic nexus and reporting requirements. In this light, many online retailers will be looking for guidance from tax advisors and attorneys on how to best navigate this spider web of ever-changing regulations.



## Estate and Gift Tax Committee Report

By Sandy Cairns

The Estate and Gift Tax Committee meets for a brown bag lunch at noon at the office of K&L Gates in Seattle, who generously provide delicious cookies and refreshments. If you are unable to attend in person, you may call in:

Dial In Info: Long distance and Int'l (855)-886-4157

Access Code is 1018119

For assistance please call 206-623-7580 (1-800-551-4613 toll free) and ask for Reception (x 2677) or Denise Ruthford (x 5850).

This is an open committee and all members of the Tax Section are both welcome and eligible to join. Please email the committee chair, Sandy Cairns at [scairns@hansonbaker.com](mailto:scairns@hansonbaker.com), to add to the agenda.

The primary focus of the committee is to improve and clarify the estate tax law in Washington, but it also builds collegiality. A representative from the DOR, Melinda J. Mandell, is usually in attendance with the goal of improving communication. The schedule follows. Please mark your calendars and plan to join us.

January 26, 2018

March 9, 2018

April 20, 2018

June 1, 2018

## International Tax Committee Report

By Megan M. Tahl

The International Tax Committee held its last meeting on June 6, 2017 at K&L Gates in Seattle. This meeting centered around developments in international tax with a focus on the treatment of crypto currency within various contexts. The International Tax Committee is open to all members of the taxation section and any individuals with an interest in international tax are encouraged to join. Currently we are planning two future meetings to be held at K&L Gates in Seattle. These meetings are scheduled for January 24, 2018, from noon to 1:00, and April 24, 2018, from noon to 1:00. More details regarding these meetings will be sent out via email prior to each meeting. Additionally, the committee would like to provide as much useful content as possible so please feel free to reach out to Megan Tahl ([megan.tahl@brightonjones.com](mailto:megan.tahl@brightonjones.com)) or Elizabeth Crouse ([elizabeth.crouse@klgates.com](mailto:elizabeth.crouse@klgates.com)) with suggested speaker or meeting ideas.

## IRS Liaison Committee Report

By Nick Nilan

The IRS Liaison Committee works to promote communication between members of the WSBA Tax Section and the Internal Revenue Service, to provide information regarding IRS procedures, and to update WSBA Tax Section members with developments at the IRS. The IRS Liaison Committee presents lunchtime brown bag CLE events on current topics of interest relating to the IRS and hosts receptions for United States Tax Court judges during the Tax Court's trial sessions in Seattle. If you have any suggestions for topics you would like to see covered at a future brown bag CLE or any IRS-related questions, please contact the IRS Liaisons Claire Taylor ([ctaylor@colvinhallettlaw.com](mailto:ctaylor@colvinhallettlaw.com) or 206.223.0800) or Nick Nilan ([nick.g.nilan@irscounsel.treas.gov](mailto:nick.g.nilan@irscounsel.treas.gov) or 206.946.3599).

## Pro Bono Committee Report

By Emily J. Yamada

The Pro Bono Committee publicizes and facilitates pro bono opportunities for WSBA Taxation Section members, primarily with the Federal Tax Clinics at the University of Washington School of Law and Gonzaga University School of Law. These clinics represent low-income taxpayers in disputes with the IRS. Volunteer attorneys can take clinic cases, with help and guidance available from the supervising attorneys of the clinics. If you are interested in working with a clinic, are looking for other pro bono opportunities, or would like to present opportunities to other members, please contact Emily J. Yamada at [emily@amicuslawgroup.com](mailto:emily@amicuslawgroup.com).

## State and Local Tax Committee Report

By Miriam Korngold

The State and Local Tax (SALT) Committee provides a forum for attorneys to address concerns specific to state and local taxation in Washington, review current developments in this area, and communicate with the Washington State Department of Revenue and other government officials and entities as needed. We hold quarterly meetings in Seattle and welcome participation by phone. Any member of the Taxation Section is welcome to join.

Our last meeting covered Seattle's ongoing income tax litigation with a panel of speakers that included attorneys from both sides of the dispute. At our next meeting, we will discuss Washington's Marketplace Fairness Act (EHB 2163), parts of which will go into effect on January 1, 2018. The date and time of this meeting are still TBD, but please contact Committee Chair Miriam Korngold, at [mkorngold@gsblaw.com](mailto:mkorngold@gsblaw.com), if you would like a personal invitation once those details are finalized.

Taxation Section Executive Committee 2017-2018

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**Kyle Richard\***

\*Non-voting member

## Taxation Section Membership Form

Section membership dues cover January 1, 2018 to December 31, 2018.

Voting Membership: I am an active WSBA member. Please enroll me as an voting member of the section. My \$30 annual dues are enclosed.

Non-voting membership: I am not an active WSBA member. Please enroll me as a subscriber member so I can participate and receive your informational newsletter. My \$30 is enclosed.

Name \_\_\_\_\_

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