

tax fails the test — that is, if the commerce burdens are unequal — the tax is unconstitutional.

In *Chamberlain v. Department of Taxation and Finance* and *Edelman v. Department of Taxation and Finance*, the taxpayers are challenging the state's denial of credits for taxes paid to Connecticut on income from investments and intangibles because the income was not earned in Connecticut. Though the taxpayers are domiciled in Connecticut, they are considered residents of New York because they have a permanent place of abode and spent more than 183 days per year in the state. Both Connecticut and New York taxed 100 percent of their income, but New York allows a credit for taxes paid to states only on income earned in that state.

Noonan said the 1998 decision held that the disallowance of the credit for investment and intangible income was constitutional, ruling that the commerce clause wasn't implicated by a tax on the basis of residency and that there was no need to apply the internal consistency test. But he argued that the question isn't whether interstate commerce is being taxed, but whether the tax affects interstate commerce. If it does, the court must apply the internal consistency test under *Wynne*, Noonan continued.

Noonan added that the problem with the state's tax scheme isn't the low threshold that New York has enacted for residency, but the failure to provide credits for taxes paid to other states to remedy the multiple taxation. ■

## Wayfair Is a Policy Dispute For Congress, Isaacson Says

by Jad Chamseddine

*South Dakota v. Wayfair Inc.* is less about the law and more about perceptions and policy, Wayfair's counsel said during a May 11 panel at the 2018 American Bar Association Section of Taxation meeting in Washington.

"I think one of the major misconceptions of the *Wayfair* case is that it is really less a case about the law — about the dormant commerce clause — than it is a case about the perceptions," said George Isaacson of Brann & Isaacson.

The situation according to the states is that they are hemorrhaging revenue because remote online sellers, a growing industry, are not required to collect and remit sales taxes to them, Isaacson said. That runs counter to the sellers' assertion that online retailers would be burdened by additional regulations requiring them to collect sales taxes from every jurisdiction they sell into, he explained.

**'People have made investment decisions — especially smaller and medium-sized businesses — based on what their tax obligations may be,' Isaacson said.**

Isaacson, who also appeared before the U.S. Supreme Court representing remote sellers in *Direct Marketing Association v. Brohl*, used similar talking points in the brief he submitted on behalf of Wayfair, which argues that states are complaining about a diminishing problem. "Nineteen out of the 20 largest retailers are collecting in every state with sales tax requirements," he told attendees, criticizing the states' assertions that they are losing too much revenue from the precedent set in *Quill*. "They overstated their losses by four times," Isaacson said, citing a December 2017 report by the Government Accountability Office. "They did not cite that report in their brief . . . for obvious reasons," he added.

Isaacson said he expected more and harder questioning from the justices during oral arguments, quipping that he received more

complex questions from his law firm colleague Matthew Schaefer while preparing for the case.

While Isaacson stressed that the issue is a policy matter rather than a legal one, he said *stare decisis* plays a defining role in this case. “It is understood that *stare decisis* is not a rule of law but instead is a judicial discipline,” Isaacson said. “The doctrine of *stare decisis* stands for the principle that the stability of the law — the fact that individuals organize their affairs around the declarations of the Supreme Court — should stand for the proposition that the Court will follow precedent.”

Companies across the nation are relying on the fact that a lack of physical presence will protect them from having to collect and remit sales taxes, Isaacson said. “People have made investment decisions — especially smaller and medium-sized businesses — based on what their tax obligations may be,” he added.

The effect of overturning the precedent is also something the Court will consider, Isaacson said, adding that some argue killing *Quill* would be catastrophic for businesses. “That element of *stare decisis* is very present here,” he said.

Isaacson told members of the audience that Congress would be better equipped to handle the complexities of sales tax regulation and argued that if the Court had not granted certiorari in the matter, a solution from Congress would have been probable.

### Congressional Solution

That point was backed by Daniel Huff, counsel to House Judiciary Committee Chair Bob Goodlatte, R-Va. “It is the pendency of this case that has been preventing us from finding a resolution,” Huff said at a later panel discussing *Wayfair*. Several Supreme Court justices, in their questioning, also suggested that the issue would be better resolved by Congress because it would not lead to a binary solution.

While many practitioners felt the Court would overturn *Quill* when it first granted certiorari in *Wayfair*, the mood changed following oral arguments. Most of the practitioners who attended the ABA panel raised their hands when asked whether they thought the Court would instead affirm *Quill*.

Huff said work has been underway to find a solution, but progress has stalled. “At Congress, we’ve been hard at work on this issue, contrary to popular belief,” he said. With the case up in the air, neither side is willing to concede. “Let’s say you have a compromise that gets you 95 percent of the way there,” Huff explained. “Why would you take a deal that gives you 95 percent if the Supreme Court can give you 100 percent of what you want?”

A legislative solution, however, appears more likely if *Quill* is affirmed, according to Isaacson. Citing statements made by Max Behlke, director of budget and tax at the National Conference of State Legislatures, Isaacson said states will have no incentive to bargain with the other side if they win the case.

While states blame Goodlatte for the lack of activity in Congress, his tenure is coming to an end this year. Huff told attendees that if Republicans retain control of the House, two legislators have been promoted as possible successors: Rep. Doug Collins of Georgia, and Rep. Steve Chabot of Ohio. “They’re both well respected,” he said. ■