

MEMO# 3837

June 5, 1992

SUPREME COURT HOLDS THAT REQUIRING USE TAX COLLECTION BY MAIL-ORDER COMPANIES VIOLATES THE U.S. CONSTITUTION'S COMMERCE CLAUSE

June 5, 1992 TO: TAX COMMITTEE NO. 20-92 RE: SUPREME COURT HOLDS THAT REQUIRING USE TAX COLLECTION BY MAIL-ORDER COMPANIES VIOLATES THE U.S. CONSTITUTION'S COMMERCE CLAUSE _____ The U.S. Supreme Court, in the attached case, *Quill Corp. v. North Dakota*, No. 91-194, has held that states may not require a mail-order sales company with no physical presence in a state to collect use tax on the merchandise shipped to state residents. The case upheld, on Commerce Clause grounds only, *National Bellas Hess v. Commissioner of Revenue*, 386 U.S. 753 (1967). In *Bellas Hess*, the Court had held that requiring an out-of-state mail-order company to collect use tax was a violation of both the Due Process and Commerce Clauses of the United States Constitution. The Court's majority in *Quill* stated that, as a result of changes in the Court's Due Process jurisprudence since *Bellas Hess*, Due Process no longer required physical presence in a state before jurisdiction would exist. However, the Court found, imposition on the tax would be an undue burden upon interstate commerce. Justice White dissented from the majority opinion and would have overruled *Bellas Hess* in its entirety. Justice Scalia, joined by Justices Kennedy and Thomas, while concurring with the result, would have upheld *Bellas Hess* only because of *stare decisis*. The concurring opinion also states: I agree with the Court that the Due Process Clause holding of *Bellas Hess* should be overruled. Even before *Bellas Hess*, we had held, correctly I think, that state regulatory jurisdiction could be asserted on the basis of contacts with the State through the United States mail. See *Travelers Health Assn. v. Virginia ex rel. State Corp. Comm'n*, 339 U.S. 643, 646-650 (1950) (Blue Sky laws). It is difficult to discern any principled basis for distinguishing between jurisdiction to regulate and jurisdiction to tax. As an original matter, it might have been possible to distinguish between jurisdiction to tax and jurisdiction to compel collection of taxes as agent for the State, but we have rejected that. [Emphasis added.] - 1 - Under the reasoning of the various Justices, it is unclear to what extent states might have jurisdiction to require mutual funds to report tax information on state residents to each state. In addition, it is unclear to what extent the Commerce Clause would prohibit state taxation of the funds themselves or of the fund's advisor if such taxation were apportioned on the basis of the number of shareholders in a state. We will keep you informed of further developments. David J. Mangefrida Jr. Assistant Counsel - Tax

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