

**FILED**

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OF WEST VIRGINIA

Davis, C.J., concurring:

In this case, MBNA, an out-of-state credit card company disputed the imposition of business franchise and corporation net income taxes on its profits<sup>1</sup> generated from West Virginia residents in the years 1998 and 1999. The majority opinion, applying sound legal analysis, determined that the application of the taxes did not violate the Commerce Clause because MBNA's business activity in this State constituted a significant economic presence sufficient to meet the substantial nexus standard. I fully concur in the majority decision and its analysis. I have chosen to write separately to emphasize the correctness of the legal analysis articulated in the majority decision and, further, to respond to several misconceptions contained in the dissenting opinion.

In the lone dissenting opinion, my colleague chastises the majority and states that “[t]here is no precedential support whatsoever for the conclusions reached by the majority decision. None. None at the state level. None at the federal level.” *See* Dissenting opinion, pgs 1-2. The critical point that the dissent fails to acknowledge is that there is no

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<sup>1</sup>In 1998, MBNA had gross profits of \$8,419,431.00 from its West Virginia customers. In 1999, the gross profits were \$10,163,788.00. *See* Majority opinion, p. 2.

established precedent, either way, from the United States Supreme Court. The sole decision on this topic is from the Tennessee Court of Appeals. *See generally J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999). It has long been held that “[i]n considering and deciding the constitutionality of a tax imposed and collected by this state, in the light of a provision of the Constitution of the United States, this Court is bound by applicable decisions of the Supreme Court of the United States[.]” Syl. pt. 2, in part, *State ex rel Battle v. B.D. Bailey & Sons, Inc.*, 150 W. Va. 37, 146 S.E.2d 686 (1965). However, no such requirement exists as to decisions rendered by other state courts. Moreover, it is expressly left to each state to regulate commerce inside its borders, within the confines of constitutional directives.

The majority opinion performed a critical analysis of the United States Supreme Court decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed.2d 91 (1992). The *Quill* opinion considered the Commerce Clause in connection with use and sale taxes, not the types of taxes at issue in the present case. Therefore, while the *Quill* opinion is instructive, it is not exactly on point with the case *sub judice*. The majority opinion succinctly interpreted the *Quill* decision, which determined that a physical presence was needed prior to imposing in-state sales taxes on an out-of-state mail-order house under the Commerce Clause. In its analysis, the majority of this Court correctly observed that physical presence is not a requirement of the substantial nexus standard with regard to the taxes at issue herein. Taking into account the realism of today’s world, the majority astutely

recognized that *Quill's* physical presence requirement for showing a substantial nexus under the Commerce Clause applies only to use and sales taxes and not to business franchise and corporation net income taxes, which are the taxes at issue in the present case. Such an interpretation was invited by the *Quill* Court when it noted that it has not adopted a bright line, physical presence requirement in any area except sales and use taxes. *See* Majority opinion, p. 14. In its interpretation of *Quill*, the majority opinion correctly recognized the legal differences between the Due Process Clause and the Commerce Clause, as well as the even finer distinctions between the application of sales and use taxes as opposed to business franchise and corporation net income taxes. The majority opinion articulates and appreciates these distinctions; the dissenting opinion does not.

Further, the dissenting opinion, in its discussion regarding the physical presence component of the substantial nexus prong, strays from the issue before this Court by discussing at length the minimum contacts required under the Due Process Clause. In so doing, the dissenting opinion accuses the majority of merging Due Process and Commerce Clause nexus requirements. However, the majority opinion correctly addresses this argument, which was first raised by MBNA, by recognizing the contact requirements under both doctrines. The majority opinion concludes that “although a substantial economic presence standard is by nature more elastic than the bright-line physical presence test, we are convinced that when properly applied, a greater nexus is required under the substantial economic presence standard [than] under the minimum contacts analysis.” *See* Majority

opinion, pgs. 21-22.

Moreover, the dissenting opinion's lengthy discussion of the Due Process Clause is unwarranted and prone to create confusion. The application of the Due Process Clause is not the issue presented for resolution in this case nor does it play any role in the decision reached by the majority of the Court. The question that was brought for our review was, solely, "whether application of West Virginia's business franchise and corporation net income taxes to MBNA, a business with no physical presence in this state, violates the Commerce Clause of the United States Constitution." Majority opinion, p. 5 (footnote omitted). Significantly, as recognized by the majority opinion, the requirements for satisfying the Due Process Clause and the Commerce Clause are different. *See* Majority opinion, p. 10 ("In addressing this issue, the Supreme Court first indicated that in determining the propriety of a state use tax on an out-of-state corporation 'the nexus requirements of the Due Process and Commerce Clauses are not identical.'" (internal citation omitted)). The Due Process Clause is concerned with notions of fairness, while the Commerce Clause is aimed at the effects of state regulation on the national economy. Thus, the dissenter's analysis under the Due Process Clause is wholly irrelevant and inapplicable to the issue before the Court in this case.

The final point I wish to address is the dissent's unexplained and rigid adherence to a physical presence requirement for all types of taxes. The dissenting opinion

argues that the taxing scheme at issue impermissibly burdens interstate commerce, yet it fails to explain how such an impermissible scheme occurs. *See* Syl. pt. 3, *Battle*, 150 W. Va. 37, 146 S.E.2d 686 (“A tax imposed pursuant to an act of the legislature of this state will not be held to contravene the commerce clause of Article I, Section 8 of the Constitution of the United States unless the imposition of the tax discriminates against or imposes an undue burden on interstate commerce. Such a tax will not be held to violate the commerce clause merely because it relates to or affects interstate commerce in some indirect, incidental and inconsequential manner.”). When a company, whether out-of-state or in-state, earns millions of dollars<sup>2</sup> directly as a result of its dealings with West Virginia customers, should it not be compelled to pay taxes?<sup>3</sup> If not, then all companies would only deal with out-of-state customers so as to avoid all business franchise and corporation net income taxes. Such a result is perverse, especially when considering the climate of today’s business world where new technology has made it possible for businesses to span the globe. I see no reason why a small “mom and pop” store in the State of West Virginia, with gross receipts in the thousands, should be compelled to pay business franchise and corporation net income taxes due to its physical presence in the State, while a large corporation, like MBNA, who makes millions of dollars from West Virginia’s economy, would be exempt from such taxes simply

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<sup>2</sup>*See* note 1, *supra*.

<sup>3</sup>On its multimillion dollar gross profits, *see* note 1, *supra*, MBNA was required to pay, in 1998, a business franchise tax of \$32,010.00 and a corporation net income tax of \$168,034.00. In 1999, MBNA was required to pay a business franchise tax of \$42,339.00 and a corporation net income tax of \$220,897.00. *See* Majority opinion, p. 2.

because it has no physical presence here. As the majority shrewdly points out, in today's world, a business does not necessarily need a physical presence anywhere. MBNA's significant economic presence in this State meets the substantial nexus standard; thus, it should not be exempt from state taxation.

Because the majority correctly addressed and resolved the issues in this case, I respectfully concur with the opinion of the Court.