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## *Supreme Court*

### **Kennedy Leaves State Tax Legacy, Administrative Law Imprint**

It isn't clear what U.S. Supreme Court Justice Anthony Kennedy's decision to retire will mean for federal tax policy.

The justice made a notable impact on state tax policy when he recently wrote the landmark ruling in *South Dakota v. Wayfair, Inc.*—a decision that removed a major obstacle to states' ability to tax online sales. But his replacement could follow recent court actions on administrative law, an issue closely watched by tax attorneys for a potential impact on IRS rulemaking, one practitioner told Bloomberg Tax.

Kennedy's opinion in *Wayfair* tossed its divisive 1992 ruling in *Quill Corp. v. North Dakota*, which had limited states' authority to require out-of-state sellers to collect sales tax.

The 81-year-old Ronald Reagan appointee has been the court's pivotal vote for the last decade, joining liberal justices to recognize same-sex marriage and voting with conservatives to throw out campaign finance restrictions. The court said June 27 he will retire effective July 31.

President Donald Trump will nominate a successor who, if cut from the same strict interpretation mold as Justice Neil Gorsuch, could lay the foundation to restrict the actions of the Internal Revenue Service and Treasury Department.

"If Trump nominates someone close to Gorsuch on administrative law, it will be a good move to limit the power of the IRS and Treasury to depart from statutory authority," said Patrick Smith, a partner at Ivins, Phillips & Barker, Chartered in Washington. "Kennedy hasn't been a strong voice for administrative law," he said.

**Warning Shot on 'Chevron'** Smith commended Kennedy's concurrence in the June 21 decision in *Pereira v. Sessions*, an immigration case that rejected an agency's statutory interpretation.

That concurrence addressed *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, which courts have followed to allow administrative agencies great deference in interpreting statutes they are charged with enforcing.

The IRS and Treasury have been challenged for their broad interpretation of the tax code. Opponents have argued that the IRS and Treasury are subject to the

same administrative law restrictions as other federal agencies.

In 2015, Kennedy issued a concurring opinion to the Supreme Court's decision in *Direct Marketing Association v. Brohl*, calling for a re-evaluation of *Quill*.

Kennedy's concurrence in *Pereira* echoed *Brohl*, when he said, "it seems necessary and appropriate to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision. The proper rules for interpreting statutes and determining agency jurisdiction and substantive agency powers should accord with constitutional separation-of-powers principles and the function and province of the Judiciary."

**Impact on State Tax** While Kennedy has been the swing vote on an ideologically divided court, tax cases—especially those that the Supreme Court decides to take—often don't lend themselves to an obvious ideological interpretation.

"I'm not sure that Kennedy's retirement will have any predictable effect on tax cases," said Andy Grewal, a professor at the University of Iowa College of Law.

"Tax cases often aren't decided on ideological lines, and even in headline cases like *Wayfair*, you don't get the standard liberal-conservative split. I suspect that the next nominee will be somewhat more text-focused than Kennedy, and that might help with taxpayers who challenge judicially-created tax doctrines, but probably not by all that much," Grewal said.

But Kennedy left a mark on state tax policy. In 2015, he joined with the majority in *Comptroller of Treasury of Maryland v. Wynne*, a decision that found unconstitutional Maryland's practice of allowing a credit against the state income tax but not against the local tax to residents who paid income tax to another state.

The *Wayfair* decision will have a long-reaching impact.

"Justice Kennedy's view of the appropriate jurisdictional standard to be applied to a state's reaching outside its border on tax matters has fundamentally revolutionized the world" of state and local taxes, Stephen P. Kranz, a partner at McDermott Will & Emery LLP in Washington, told Bloomberg Tax.

"While ultimately he was not alone, it was his invitation that brought the states to action and led to the *Wayfair* decision. Borders between states have much less significance today as a result of his jurisprudential views," he said.

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