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Tax Law

I. COURT EXTENDS BOUNDARIES OF POWER TO TAX INCOME OF FOREIGN CORPORATIONS

In *Geoffrey, Inc. v. South Carolina Tax Commission*¹ the South Carolina Supreme Court explored the limits of modern Due Process Clause² and Commerce Clause³ jurisprudence by holding constitutional the imposition of a tax upon the income earned from a licensee's use of a trademark, even though the licensor is not physically present in the state. This decision suggests that any use of intangible property in South Carolina, whether by the owner of the property or by others, subjects the income from that property to taxation. For example, even though Tom Clancy lives in another state, he might be subject to South Carolina taxation on any income he receives from South Carolina sales of *Red Storm Rising*.⁴ The question *Geoffrey* raises is whether the court's ruling exceeds the boundaries of due process and the Commerce Clause.

Geoffrey, Inc. was organized in Delaware as a trademark management and holding company to manage the trademarks of Toys "R" Us.⁵ It has no physical presence or operations in any other state.⁶ Rather, it licenses the Toys "R" Us name to its corporate parent in consideration for a royalty of one percent of the net sales or services rendered under the agreement.⁷ Toys "R" Us did not begin doing business in South Carolina until October 1985, more than a year after the August 1984 license agreement was made.⁸

Toys "R" Us deducted the royalty payments on its 1986 and 1987 South Carolina income tax returns. After initially denying the deduction, the Tax Commission changed its position and allowed the deduction in favor of

1. ___ S.C. ___, 437 S.E.2d 13, *cert. denied*, ___ U.S. ___, 114 S. Ct. 550 (1993).

2. U.S. CONST. amend. XIV, § 1.

3. U.S. CONST. art. I, § 8, cl. 3.

4. TOM CLANCY, *RED STORM RISING* (Berkley 1986).

5. Gordon W. Stewart, *The Geoffrey Decision's Constitutional Problems*, 5 STATE TAX NOTES 420, 420 (Aug. 23, 1993). Delaware specially exempts such trademark management and holding companies from taxation. DEL. CODE ANN. tit. 30, § 1902(b) (8) (Supp. 1992).

6. Petition for Writ of Cert. at 3. Note that the Petition is entitled *Geoffrey, Inc. v. South Carolina Dep't of Revenue and Taxation* because of the South Carolina Government Restructuring Act. S.C. CODE ANN. § 1-30-95 (Law. Co-op. Supp. 1993). See also *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 15 (noting that Geoffrey has no physical presence in South Carolina).

7. *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 15.

8. Petition for Writ of Cert. at 4-5.

assessing an income tax against Geoffrey itself.⁹ Geoffrey paid the tax assessments and filed an action for refund in the South Carolina Court of Common Pleas, asserting that it did not have a sufficient nexus and that it did not do business in South Carolina. The court found for the Tax Commission, and Geoffrey appealed to the South Carolina Supreme Court.¹⁰

Following the United States Supreme Court's two-part analysis of state taxation issues under the Constitution,¹¹ the court found that jurisdiction to tax Geoffrey was proper under the Due Process and Commerce Clauses.

The court found that the trademark agreement supplied the "minimum connection" required by the Due Process Clause. By licensing its trademark to Toys "R" Us for use in other states and by receiving income under that agreement, Geoffrey purposely availed itself of the economic benefits of those states and established a connection with them.¹²

Additionally, the court found that Geoffrey had intangible property present in South Carolina. The court based its holding upon the creation of accounts receivable for Geoffrey after each South Carolina sale and the trial judge's finding that the license agreement was a franchise located in South Carolina.¹³ The court rejected Geoffrey's assertion that, under the doctrine of *mobilis sequuntur personam*, its intangibles were located not in South Carolina but in Delaware.¹⁴ Rather, the court reasoned that the trademark is located in South Carolina and other states through its use in each state.¹⁵

9. *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 15.

10. *Id.* at ___, 437 S.E.2d at 15.

11. The framework was recently set forth in *Quill Corp. v. North Dakota ex rel. Heitkamp*, ___ U.S. ___, 112 S. Ct. 1904 (1992), *cert. denied*, ___ U.S. ___, 114 S. Ct. 173 (1993). The first part of the test focuses on the Due Process Clause's concern with "the fundamental fairness of governmental activity." *Id.* at ___, 112 S.Ct. at 1913. The test requires (1) "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax," and (2) that the "income attributed to the State for tax purposes must be rationally related to values connected with the taxing State." *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 16 (quoting *Quill*, ___ U.S. at ___, 112 S. Ct. at 1909-10).

The second part of the test addresses the Commerce Clause's concern "about the effects of state regulation on the national economy." *Quill*, ___ U.S. at ___, 112 S.C. at 1913. A tax will be sustained so long as: (1) the tax is applied to an activity with a substantial nexus with the taxing state, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax is fairly related to the services provided by the state. *Id.* at ___, 112 S. Ct. at 1912 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)).

12. *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 16.

13. *Id.* at ___, 437 S.E.2d at 16.

14. *Id.* at ___, 437 S.E.2d at 17. *Mobilis sequuntur personam* means literally "[m]ovables follow the [law of the] person." BLACK'S LAW DICTIONARY 1003 (6th ed. 1990).

15. *See Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 17.

The court also upheld the tax as rationally related to the benefits Geoffrey derived from the state.¹⁶ Because Geoffrey received income from customers in South Carolina, Geoffrey received benefits from the orderly society provided by South Carolina. The tax is rationally related to those benefits because South Carolina only taxes the amounts earned within its borders¹⁷ as determined by the statutory apportionment formula.

Finally, the court upheld the tax under the Commerce Clause. Geoffrey asserted that the state could not assess any taxes because physical presence is required for substantial nexus.¹⁸ The court rejected Geoffrey's argument, finding it well settled that the "presence of intangible property alone is sufficient to establish nexus."¹⁹ The court thought that Geoffrey established a substantial nexus with the state by entering into and receiving money from the license agreement.²⁰

Under the first part of the due process test, South Carolina can assert jurisdiction over Geoffrey only if the corporation has some minimum connection with South Carolina. Recent Supreme Court decisions evaluate minimum connection in terms of "whether a commercial actor's efforts are 'purposefully directed' toward residents of another State."²¹ In *Asahi Metal Industry Co. v. Superior Court*,²² the Supreme Court stated that "[t]he placement of a product into the stream of commerce, without more, is not an act of the defendant purposefully directed toward the forum State."²³

If the reasoning from *Asahi* applies, Geoffrey does not have a minimum connection with South Carolina. Geoffrey merely introduced the trademark into the stream of commerce when it entered the license agreement with Toys "R" Us.²⁴ Toys "R" Us, a separate legal entity, created the minimum connection with South Carolina. Even if Geoffrey was aware that Toys "R" Us would use the trademark in other states, simple awareness that the product might end up in a particular state is not an act purposefully directed toward

16. *Id.* at ___, 437 S.E.2d at 17.

17. *Id.* at ___, 437 S.E.2d at 18.

18. The court considered only the question of substantial nexus. "Our Due Process analysis of the benefits conferred upon Geoffrey applies with equal force [under the Commerce Clause] and need not be repeated. Moreover, Geoffrey raised no constitutional claim that the challenged tax is not fairly apportioned or discriminates against interstate commerce." *Id.* at ___, 437 S.E.2d at 18 n.5.

19. *Id.* at ___, 437 S.E.2d at 18 (citing *American Dairy Queen Corp. v. Taxation & Revenue Dep't*, 605 P.2d 251, 255 (N.M. 1979)).

20. *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 18.

21. *E.g.*, *Quill Corp. v. North Dakota ex rel Heitkamp*, ___ U.S. ___, 112 S. Ct. 1904, 1910 (1992), *cert. denied*, 114 S. Ct. 173 (1993) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985)).

22. 480 U.S. 102 (1987).

23. *Id.* at 112.

24. For an analysis of this corporate structure, see *infra* notes 28-34 and accompanying text.

those states.²⁵ Finally, Toys “R” Us was not doing business in South Carolina when the license agreement was executed.

As noted above, the *Asahi* standard requires some act purposefully directed toward the forum state. Justice O’Connor cited several examples of a purposeful act, such as “advertising in the forum State, establishing channels for providing regular advice to customers in the forum State, or marketing the product through a distributor who has agreed to serve as the sales agent in the forum State.”²⁶ In each example, the corporation actively seeks to enjoy the benefits of a particular state’s market. By design, Geoffrey is a passive corporation. The extent of its purposeful act was licensing its trademark to Toys “R” Us, which controlled the later use of the trademark.

Although the principles applied in *Asahi* should apply in all situations, the Court was addressing due process principles regarding the sale of tangible property in a non-tax situation. Due process principles applying to the sale of intangible property may be different. However, Justice O’Connor noted that *Asahi* “did not create, control, or employ the distribution system that brought its valves to California.”²⁷ Although the Court is still focusing on purposeful acts related to the sale of tangible property, this statement of the rule seems easily transferred to selling intangible property. By its corporate nature, Geoffrey did not “create, control, or employ” the system that used the trademark in South Carolina. Geoffrey merely acquiesced in its parent’s use of the trademark.

Yet, Geoffrey’s corporate nature is somewhat troubling.²⁸ Although Geoffrey and Toys “R” Us are separate corporate entities, asserting that Geoffrey is truly independent of its parent defies reality. *Asahi* considered only an independent distributor in a non-tax situation;²⁹ the Court did not

25. *Asahi*, 480 U.S. at 112; see also JACK H. FRIEDENTHAL ET AL., CIVIL PROCEDURE § 3.11 (1985) (noting that “mere acquiescence in the event that . . . invok[es] the protection of the forum’s law” is insufficient for minimum contacts) (discussing *Kulko v. Superior Court*, 436 U.S. 84 (1978)).

26. *Asahi*, 480 U.S. at 112.

27. *Id.*

28. The Tax Commission originally disallowed a deduction to Toys “R” Us for the license fee paid to Geoffrey, challenging Geoffrey as “a paper corporation.” Petition for Writ of Cert. at 6 (citing Record at 219). After Geoffrey challenged this ruling, the Tax Commission accepted Geoffrey’s separate corporate status and instead assessed the tax directly against Geoffrey based upon the income earned under the license agreement. *Id.*

Subsequently, the South Carolina Supreme Court commented on the use of the corporate structure to produce “nowhere” income that escapes all state income taxation. *Geoffrey, Inc.*, ___ S.C. at ___ n.1, 437 S.E.2d at 15 n.1. This observation suggests that the Tax Commission and the supreme court were concerned with finding a way around Geoffrey’s corporate structure.

29. A lower court has opined that corporations can indeed “organize their operations to avoid selected jurisdictions.” *Bond v. Octagon Process, Inc.*, 745 F. Supp. 710, 714 n.2 (M.D. Ga. 1990) (citing JOHN J. COUND ET AL., CIVIL PROCEDURE 137 (5th ed. 1989)), *aff’d*, 926 F.2d

consider whether a related corporation could establish jurisdiction. While it is true, in a sense, that Toys “R” Us is the distributor of Geoffrey’s “product,” Geoffrey is not independent of Toys “R” Us.

Due process should consider not only the legal but also the economic realities of the parent-subsidiary relationship. Because asserting jurisdiction to tax the income of a wholly owned subsidiary through the acts of its parent is an exercise of “legislative (or prescriptive) jurisdiction,”³⁰ exercising jurisdiction over a subsidiary based on the parent’s purposeful acts probably is within the spirit of due process. Of course, this approach contemplates some form of piercing Geoffrey’s corporate veil, even though Geoffrey is a separate, legal entity under Delaware law.³¹ The Supreme Court has approved taxing the income of out-of-state subsidiaries forming part of a unitary business operating within the state, even though such taxation is a lesser form of veil-piercing.³²

Analyzing whether the multi-state operations of Geoffrey and Toys “R” Us constitute a unitary business seems appropriate. The court did not address the issue, possibly because the South Carolina General Assembly apparently has not addressed the issue by statute. Further, the Tax Commission has enacted regulations treating every corporation as a separate entity and applying unitary taxation only to divisions under the corporate veil of a single entity.³³ The question that arises is whether, because of the Due Process Clause’s concern with notice and fair play, South Carolina must have statutory or regulatory authority to exercise unitary taxation over out-of-state subsidiar-

1573 (11th Cir.), *cert. denied*, 111 S. Ct. 2855 (1991). However, the court made its observation while evaluating the propriety of exercising adjudicative jurisdiction over a corporation based on the actions of an independent distributor.

30. *Quill Corp.*, ___ U.S. at ___, 112 S. Ct. at 1923 (Scalia, J., joined by Kennedy and Thomas, J.J., concurring in part and concurring in the judgment). Legislative jurisdiction is in contrast to adjudicative jurisdiction, such as tort liability, which was the issue in *Asahi*. *See id.*

At least three Justices believe that due process standards for adjudicative and legislative jurisdiction may differ at the margin.

31. *See* DEL. CODE ANN. tit. 30, § 1902(b) (8) (Supp. 1992).

32. *See* 1 JEROME R. HELLERSTEIN & WALTER HELLERSTEIN, *STATE TAXATION* ¶ 8.12 (2d ed. 1993). The Supreme Court has applied unitary taxation in a recent tax apportionment case. *See Allied-Signal, Inc. v. Director, Div. of Taxation*, ___ U.S. ___, 112 S. Ct. 2251 (1992). Unitary taxation appears to be the starting point for all apportionment cases. *See* 1 HELLERSTEIN & HELLERSTEIN, ¶ 8.13[1].

Unitary taxation allows the tax authority to include the income from out-of-state entities in the apportionable income if the in-state and out-of-state entities are related functionally. The Court has set forth three factors for determining a unitary business: (1) functional integration, (2) centralization of management, and (3) economies of scale. *Allied-Signal*, ___ U.S. at ___, 112 S. Ct. at 2260 (citing *Container Corp. of America v. Franchise Tax Bd.*, 463 U.S. 159, 179 (1983)). A flow of goods between the entities is not required; a flow of value is sufficient. *Id.* at ___, 112 S.Ct. at 2261 (citing *Container Corp.*, 463 U.S. at 178).

33. S.C. CODE REGS. 117-77, 117-87.17 (1976).

ies³⁴ In the absence of legislative authorization for unitary taxation, exercising jurisdiction over an out-of-state subsidiary with no direct nexus with the state may violate the requirement of notice and the spirit of fair play.

To support jurisdiction over Geoffrey, the South Carolina Supreme Court, in a novel and far-reaching approach, used accounts receivable³⁵ and an undisputed franchise to support South Carolina's jurisdiction over Geoffrey.³⁶ The court found that Geoffrey's intangible property was present in South Carolina through the acts of Toys "R" Us.³⁷ Citing *Virginia v. Imperial Coal Sales Co.*,³⁸ the court found that Toys "R" Us's use of these intangible assets gave Geoffrey the required minimum connection with the state. Thus, through the acts of a separate, although related entity, Geoffrey has property present within South Carolina. The property is then apportioned to the state, giving the state jurisdiction.

The problem with this analysis is that *Imperial Coal* addressed the Commerce Clause implications of a property tax imposed on a company having a Virginia domicile, but no tangible property within the state.³⁹ *Imperial Coal* represents that taxes may be levied on accounts receivable. However, the tax was levied on a corporation already domiciled in Virginia; the location of the company's accounts receivable followed the corporate domicile.⁴⁰

Geoffrey itself is not domiciled or operating in South Carolina; only Toys "R" Us is. Even without analyzing the unitary business, the court apparently used a triangular analysis to support jurisdiction over Geoffrey. Because Geoffrey licensed its intangibles to Toys "R" Us, which then used the

34. See 1 HELLERSTEIN & HELLERSTEIN, *supra* note 32, ¶ 8.12[1] (noting that courts have disagreed on the requirement for explicitly permitting unitary taxation; also noting that, when Maine and Massachusetts held that unitary taxation must be explicitly allowed, the respective state legislatures overruled the holdings).

It seems sensible that the presence or absence of a unitary taxing statute may be comparable to the authority given and the notice provided by a state long-arm statute for adjudicative purposes. That is, without such a statute, jurisdiction fails. See FRIEDENTHAL ET AL., *supra* note 25, § 3.12.

35. See William J. Quirk, *Supreme Court Rules in Geoffrey That Delaware Company is Taxable*, in 5 STATE TAX NOTES 145, 146 (July 19, 1993).

36. See *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 16. The characterization of the license agreement as a franchise agreement was seemingly made without much ado. *Id.* at ___ n.2, 437 S.E.2d at 16 n.2 (noting that Geoffrey did not challenge the trial judge's finding of a franchise). This might be important because a franchisor takes a more active role in the franchisee's business. See Stewart, *supra* note 5, at 422 (noting that the term "franchise" was not in the briefs and that Geoffrey argued against the substance of that characterization).

37. *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 16.

38. 293 U.S. 15 (1934).

39. *Id.* at 17.

40. *Id.* at 19.

intangibles in South Carolina, the state can apportion the intangibles back to Geoffrey and obtain jurisdiction over the company.

After citing *Imperial Coal* as authority for the proposition that accounts receivable sustain jurisdiction, the *Geoffrey* court rejected *Imperial Coal*'s support of the older rule that intangibles are located at the owner's domicile. Rather, the court followed the modern rule that intangibles may be taxed by apportionment.⁴¹ By doing so, the court encountered the same problem as that presented by its use of *Imperial Coal*: Rules used for constitutionally taxing entities over which the state has otherwise acquired jurisdiction do not necessarily create constitutional jurisdiction. By apportioning intangibles to support jurisdiction rather than focusing on jurisdiction itself, the court skirts the issue of upon what basis South Carolina asserts its jurisdiction.

An example of the jurisdiction problem is demonstrated by the court's use of *Mobil Oil Corp. v. Commissioner of Taxes*⁴² as authority for jurisdiction by apportionment. *Mobil Oil* addressed the apportionment of intangibles as part of Mobil's wholesale and retail marketing of petroleum in Vermont; that is, Mobil otherwise purposefully availed itself of Vermont's benefits.⁴³ *Mobil Oil* did not decide whether the apportionment of intangibles to Vermont gives that state jurisdiction to tax out-of-state dividends paid to Mobil. Rather, *Mobil Oil* decided that Vermont can include out-of-state intangibles as part of Mobil's unitary tax base. *Mobil Oil* never addressed the first issue.

The second part of the Court's due process analysis, that there must be a rational relationship to values connected with the taxing state, might be similar to the adjudicative due process requirement of "traditional notions of fair play and substantial justice."⁴⁴ Although Geoffrey might have sufficient minimum contacts to justify the exercise of jurisdiction, the benefits received might not support a tax based on the value.⁴⁵ Assuming Geoffrey has some minimal contact, it seemingly receives some benefit from South Carolina through the income it receives from South Carolina customers. Through apportionment, South Carolina taxes only those benefits Geoffrey receives

41. *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 17. Previously the court ruled that a copyright was allocated to the taxpayer's domicile. *Pendarvis v. South Carolina Tax Comm'n*, 285 S.C. 381, 329 S.E.2d 766 (1985); see also Dean A. Eichelberger, Note, *Situs of Copyrights Determined*, 38 S.C. L. REV. 207 (1986). Seemingly, a copyright is similar to Geoffrey's trademark. However, *Geoffrey* did not discuss *Pendarvis*; *Pendarvis*' continuing validity seems questionable.

42. 445 U.S. 425 (1980).

43. *Id.* at 428. It may be noteworthy that *Mobil Oil* addressed the issue of including dividends from out-of-state subsidiaries in the apportionment factor.

44. See, e.g., *Asahi*, 480 U.S. at 113 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945) (quoting *Milliken v. Meyer*, 311 U.S. 457, 463 (1940))).

45. See Petition for Writ of Cert. at 18-19.

from the state.⁴⁶ The question is how substantial the benefit must be to support the tax.

Although due process does not require physical presence, the Commerce Clause requirement of physical presence is unclear. In *Quill*, while holding that physical presence is required to assess a use tax under the substantial nexus requirement, the Supreme Court also noted that such a requirement never was applied to other taxes. The Supreme Court required it for use taxes because the physical presence rule created substantial reliance in the mail-order industry.⁴⁷

The Court's approach in *Quill* and *Allied-Signal* suggests that in the absence of any congressional action, the focus is on settled expectations and reliance interests. This focus is consistent with the Commerce Clause's concern with the burden of state acts on the national economy.⁴⁸ However, the Court's focus on reliance interests under the Commerce Clause seems somewhat narrow, focusing on an industry rather than all commerce.

It is not clear whether Geoffrey has any legitimate reliance interests affected by South Carolina's ruling. Conceivably, while physical presence has never been articulated for income taxes, taxpayers may have relied on a physical presence requirement because the taxpayers apparently had physical presence in all of the Court's previous tax decisions.⁴⁹ Additionally, given its apparent desire to have Congress exercise its powers under the Commerce Clause to settle this matter, the Court might use reliance on physical presence as a less-complex answer to this very complex question.⁵⁰

If Geoffrey did not legitimately rely on physical presence, which it probably did not, the strength of its position is unclear. Relying on the Delaware taxing scheme would not protect Geoffrey in any other state. Geoffrey might assert that it relied on the statutory scheme of South Carolina and that the absence of a unitary statute is a legitimate interest. However, these assertions seem somewhat weak.

Considering the uncertainty in this area, along with the Court's desire for Congress to act, it is difficult to evaluate Geoffrey's position under the Commerce Clause. Several justices have suggested that, in the absence of reliance interests, the states have broad powers of taxation under the

46. See *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 18.

47. See *Quill*, ___ U.S. at ___, 112 S. Ct. at 1916.

48. *Id.* ___, 112 S.Ct. at 1913. See also *Allied-Signal, Inc. v. Director, Div. of Taxation*, ___ U.S. ___, 112 S. Ct. 2251, 2258 (1992).

49. See, e.g., *Quill*, ___ U.S. at ___, 112 S. Ct. at 1914; see also Petition for Writ of Cert. at 11-12 ("Indeed, the Court has *never* held in *any* state tax case that the nexus requirement of the Commerce Clause can be satisfied in the absence of a taxpayer's physical presence in the state.").

50. See *Quill*, ___ U.S. at ___ n.10, 112 S. Ct. at 1916 n.10 ("The precise allocation of such burdens is better resolved Congress rather than this Court.").

Commerce Clause.⁵¹ If the Tax Commission clears the due process hurdle, the Commerce Clause might provide no bar to asserting jurisdiction over Geoffrey.

In conclusion, the South Carolina Supreme Court's view is the better view conceptually.⁵² Economic presence, rather than physical presence, better reflects current financial and economic realities. In a limited sense, economic presence is part of the test under the Due Process Clause. The court correctly sensed that the economic relationship between Geoffrey and its parent suggest that the company should be subject to the state's jurisdiction.

Yet, the court never satisfactorily answers the question of how South Carolina obtains jurisdiction over Geoffrey. The court asserts that Geoffrey gains an economic presence in South Carolina simply by licensing its trademark to Toys "R" Us for use in other states. However, even though it is related to Geoffrey, Toys "R" Us still is a separate corporation.

The answer to the court's dilemma probably lies in the unitary business analysis. Under this analysis, a state can tax a corporation having no presence in the taxing state if the corporation is part of a unitary business connected to the state. However, because South Carolina apparently has no unitary business statute, South Carolina's assertion of jurisdiction over Geoffrey might violate the due process requirements of notice and fair warning.

After finding Geoffrey has economic presence in South Carolina through Toys "R" Us, the court supports its analysis by finding that Geoffrey's intangible assets are present in the state. The accrual of accounts receivable and the presence of a trademark name seem odd bases upon which to establish legislative jurisdiction.

In summary, the court's due process analysis seems in line with the economic reality of Geoffrey's corporate structure. The question is whether the court properly reached that result on its own, or whether the South Carolina General Assembly first must act to extend the state's jurisdiction to Geoffrey.

Finally, this case demonstrates the uncertainty created by the *Quill* decision, through the Court's statement that physical presence never has been required except for use taxes. The Supreme Court apparently believes Congress should act in this area. Yet, Congress shows no indication of changing the Supreme Court's previous enforcement role. Interstate

51. See 1 HELLERSTEIN & HELLERSTEIN, *supra* note 32, ¶ 4.08[2] (noting that Justice Scalia has challenged the notion that the Commerce Clause imposes limitations on a state's power to tax in light of Congress' silence).

52. See *Geoffrey, Inc.*, ___ S.C. at ___, 437 S.E.2d at 18 (citing 1 HELLERSTEIN & HELLERSTEIN, *supra* note 32, ¶ 6.08 for the proposition that "[a]ny corporation that regularly exploits the markets of a State *should be* subject to its jurisdiction to impose an income or franchise tax" even though not physically present (emphasis added)).

1994]

TAX LAW

163

corporations, writers, and actors, among others, are waiting for someone to settle this issue.

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