

SYLLABUS

(This syllabus is not part of the opinion of the Court. It has been prepared by the Office of the Clerk for the convenience of the reader. It has been neither reviewed nor approved by the Supreme Court. Please note that, in the interests of brevity, portions of any opinion may not have been summarized).

Lanco, Inc. v. Director, Division of Taxation (A-89-05)

(NOTE: This Court wrote no full opinion in this case. Rather, the Court's affirmance of the judgment of the Appellate Division is based substantially on the reasons expressed in Judge Stern's written opinion below.)

Argued September 12, 2006 -- Decided October 12, 2006

PER CURIAM

The issue before the Court is whether New Jersey may constitutionally subject a foreign corporation to the Corporation Business Tax, N.J.S.A. 54:10A-1 to -41, (CBT), when the corporation lacks physical presence in New Jersey but derives income through a licensing agreement with a company conducting retail operations in the State.

Lanco, Inc. (Lanco), a Delaware corporation, licenses intellectual property (trademarks, trade names and service marks) to Lane Bryant, a clothing retailer. Lanco has no real or personal property or personnel in the State. The Tax Court, in a published opinion, held that because Lanco was not physically present in the State, subjecting it to the CBT would violate the Commerce Clause of the U.S. Constitution.

The Director of the Division of Taxation (Director) appealed the Tax Court's decision to the Appellate Division, arguing that Lanco derived receipts from sources in New Jersey, thereby making it subject to the CBT. The Director further argued that there are no constitutional impediments to application of the tax given Lanco's substantial nexus to New Jersey that satisfies the Commerce Clause pursuant to Quill Corp. v. North Dakota. In that case, the U.S. Supreme Court applied a four-prong test to determine whether a state tax will withstand a Commerce Clause challenge and held that physical presence in the taxing state was necessary in the context of sales and use tax.

The Appellate Division reversed and remanded, holding that the physical presence requirement applicable to use and sales taxes is not applicable to income tax and therefore, the CBT may be constitutionally applied to income derived by Lanco from licensing fees attributable to New Jersey.

This Court granted certification.

HELD: Judgment of the Appellate Division is **AFFIRMED** substantially for the reasons expressed in Judge Stern's written opinion below. New Jersey may constitutionally subject a foreign corporation to the Corporation Business Tax notwithstanding the taxpayer's lack of physical presence in New Jersey.

1. The Court adds the following comments. In Quill, the U.S. Supreme Court affirmed the four-part standard for cases involving Commerce Clause challenges to state taxation. In that case, the Supreme Court determined that, in the context of sales and use taxes, an entity must be physically present in the taxing jurisdiction to establish the constitutionally required "substantial nexus." Since Quill, a split of authority has developed in respect of whether this holding is limited to sales and use taxes. (Pp. 1-3)
2. The better interpretation of Quill is the one adopted by those states that limit the Supreme Court's holding to sales and use taxes, an interpretation that reflects the language of Quill. The Supreme Court carefully limited its language to a discussion of sales and use taxes. This Court does not believe that the Supreme Court intended to create a universal physical-presence requirement for state taxation under the Commerce Clause. (Pp. 3-4)

**JUSTICES LONG, ZAZZALI, LaVECCHIA, ALBIN, WALLACE and RIVERA-SOTO
join in this PER CURIAM opinion. CHIEF JUSTICE PORITZ did not participate.**

SUPREME COURT OF NEW JERSEY
A-89 September Term 2005

LANCO, INC.,
a Delaware corporation,

Plaintiff-Appellant,

v.

DIRECTOR, DIVISION OF
TAXATION,

Defendant-Respondent.

Argued September 12, 2006 -- Decided October 12, 2006

On appeal from and certification to the Superior Court, Appellate Division, whose opinion is reported at 379 N.J. Super. 562 (2005).

Paul H. Frankel argued the cause for appellant (McCarter & English, attorneys; Mr. Frankel, and Michael A. Guariglia, of counsel and on the brief).

Patrick DeAlmeida, Assistant Attorney General argued the cause for respondent (Anne Milgram, Acting Attorney General).

Francis X. Manning submitted a brief on behalf of amicus curiae The Investment Company Institute (Stradley Ronon Stevens & Young, attorneys).

Sheldon H. Laskin submitted a letter in lieu of brief on behalf of amicus curiae Multistate Tax Commission.

PER CURIAM

This appeal involves the issue of whether New Jersey may constitutionally subject a foreign corporation to the Corporation Business Tax, N.J.S.A. 54:10A-1 to -41, when the corporation lacks physical presence in New Jersey but derives income through a licensing agreement with a company conducting retail operations in New Jersey. The Appellate Division answered that question affirmatively. Lanco, Inc. v. Director, Div. of Taxation, 379 N.J. Super. 562, 573 (2005). We agree and affirm substantially for the reasons expressed in Judge Stern's thorough and thoughtful opinion. We write only to add the following brief comments.

In Quill Corp. v. North Dakota, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992), the United States Supreme Court affirmed the four-part standard it created in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977), for cases involving Commerce Clause challenges to state taxation. In that case, the Court determined that, in the context of sales and use taxes, an entity must be physically present in the taxing jurisdiction to establish the constitutionally required "substantial nexus." Quill, supra, 504 U.S. at 311-17, 112 S. Ct. at 1914-16, 119 L. Ed. 2d at 105-10. Since the Court decided Quill, a split of authority has

developed regarding whether the Supreme Court's holding was limited to sales and use taxes. See, e.g., A & F Trademark, Inc. v. Tolson, 605 S.E.2d 187, 193-96 (N.C. Ct. App. 2004) (holding North Carolina can impose corporate franchise and income taxes on companies not physically present in North Carolina), certif. denied, 359 N.C. 320, cert. denied, ___ U.S. ___, 126 S. Ct. 353, 163 L. Ed. 2d 62 (2005); J.C. Penney Nat'l Bank v. Johnson, 19 S.W.3d 831, 838-39 (Tenn. Ct. App. 1999) (holding Tennessee cannot impose franchise and excise tax on company not physically present in Tennessee), cert. denied, 531 U.S. 927, 121 S. Ct. 305, 148 L. Ed. 2d 245 (2000).

We believe that the better interpretation of Quill is the one adopted by those states that limit the Supreme Court's holding to sales and use taxes. That interpretation reflects the language of Quill. In Quill, the Court did not attempt to equate the substantial-nexus requirement with a universal physical-presence requirement. See id. at 314, 112 S. Ct. at 1914, 119 L. Ed. 2d at 108 ("[W]e have not, in our review of other types of taxes, articulated the same physical-presence requirement that Bellas Hess established for sales and use taxes . . ."). Rather, the Court carefully limited its language to a discussion of sales and use taxes. See, e.g., id. at 316,

112 S. Ct. at 1915, 119 L. Ed. 2d at 109 (acknowledging benefits of imposing bright-line rule "in the area of sales and use taxes"). Simply put, we do not believe that the Supreme Court intended to create a universal physical-presence requirement for state taxation under the Commerce Clause. We therefore affirm the Appellate Division's determination that the Director constitutionally may apply the Corporation Business Tax notwithstanding a taxpayer's lack of a physical presence in New Jersey, and we further affirm the Appellate Division's remand of this matter to the Tax Court for additional proceedings.

JUSTICES LONG, ZAZZALI, LaVECCHIA, ALBIN, WALLACE, and RIVERA-SOTO join in this per curiam opinion. CHIEF JUSTICE PORITZ did not participate.

SUPREME COURT OF NEW JERSEY

NO. A-89

SEPTEMBER TERM 2005

ON APPEAL FROM Appellate Division, Superior Court

LANCO, INC.,
a Delaware corporation,

Plaintiff-Appellant,

v.

DIRECTOR, DIVISION OF
TAXATION,

Defendant-Respondent.

DECIDED October 12, 2006

Justice Long

PRESIDING

OPINION BY Per Curiam

CONCURRING OPINION BY _____

DISSENTING OPINION BY _____

CHECKLIST	AFFIRM		
CHIEF JUSTICE PORITZ	-----	-----	-----
JUSTICE LONG	X		
JUSTICE LaVECCHIA	X		
JUSTICE ZAZZALI	X		
JUSTICE ALBIN	X		
JUSTICE WALLACE	X		
JUSTICE RIVERA-SOTO	X		
TOTALS	6		