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"Amazon Laws" and Taxation of Internet Sales: Constitutional Analysis

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Summary

As more purchases are made over the Internet, states are looking for new ways to collect taxes on online sales. There is a common misperception that the U.S. Constitution prohibits states from taxing Internet sales. This is not true. States may impose sales and use taxes on such transactions, even when the retailer is outside the state. However, if the seller does not have a constitutionally sufficient connection ("nexus") to the state, then the seller is under no enforceable obligation to collect the tax and remit it to the state. The purchaser is still generally responsible for paying the tax, but few comply and the tax revenue goes uncollected.

Nexus is required by two provisions of the U.S. Constitution: the Fourteenth Amendment's Due Process Clause and the Commerce Clause. In the 1992 case *Quill v. North Dakota*, the Supreme Court held that the dormant Commerce Clause requires that a seller have a physical presence in a state before the state may impose tax collection obligations on it, while due process requires only that the seller have purposefully directed contact at the state's residents. Notably, under its power to regulate commerce, Congress may choose a different standard than physical presence, so long as it is consistent with other provisions of the Constitution, including due process. Congress has not used this authority to provide a different standard, although legislation has been introduced in the 114th Congress (S. 698, Marketplace Fairness Act).

In recent years, some states have enacted laws, often called "Amazon laws" in reference to the Internet retailer, to try to capture uncollected taxes on Internet sales and yet still comply with the Constitution's requirements. States have used two basic approaches. The first is enacting "click-through nexus" statutes, which impose the responsibility for collecting tax on those retailers who compensate state residents for placing links on their websites to the retailer's website (i.e., use online referrals). The other is requiring remote sellers to provide information about sales and taxes to the state and customers. New York was the first state to enact click-through nexus legislation, in 2008. In 2010, Colorado was the first to pass a notification law.

"Amazon tax laws" have received significant publicity, in part due to questions about their constitutionality and whether they impermissibly impose duties on remote sellers without a sufficient nexus to the state. Both the New York and Colorado laws have been challenged on constitutional grounds. While the New York click-through nexus law was upheld by the state's highest court against facial challenges on due process and Commerce Clause grounds, Colorado's notification law was struck down by a federal district court as impermissible under the Commerce Clause for applying to sellers without a physical presence in the state and discriminating against out-of-state retailers. However, the Tenth Circuit Court of Appeals subsequently determined that federal courts do not have jurisdiction to hear the Colorado challenge due to the federal Tax Injunction Act. In March 2015, the U.S. Supreme Court held in *Direct Marketing Association v. Brohl* that the Tax Injunction Act did not apply to this suit. However, the Court left open the possibility that the suit might be barred under the comity doctrine and instructed the Tenth Circuit to determine if the doctrine applied. Notably, Justice Kennedy wrote a concurrence in which he suggested that *Quill* was wrongly decided and should be reconsidered in light of technological advances and the development of the Internet.

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Recently, several states have enacted legislation intended to capture use taxes on sales made by out-of-state sellers to in-state customers. These laws are commonly referred to as "Amazon laws," in reference to the Internet retailer.

A use tax is the companion to a sales tax—in general, the sales tax is imposed on the sale of goods and services within the state's borders, while the use tax is imposed on purchases made by the state's residents from out-of-state (remote) sellers.[1] The purpose of the use tax is to dissuade residents from purchasing goods and services from out-of-state merchants in order to avoid the sales tax.[2]

Two common misconceptions exist about the ability of states to impose sales and use taxes on Internet sales. The first is that the Internet Tax Freedom Act, enacted in 1998, prevents such taxation.[3] This is not true. The act contains a moratorium only on state and local governments imposing "multiple or discriminatory taxes on electronic commerce," as well as new taxes on Internet access services.[4] As a result of this law, a state may not, for example, impose a tax on electronic commerce that is not imposed on similar transactions made through other means (such as traditional "brick and mortar" stores).[5] It remains permissible, however, for a state to impose a sales or use tax that is administered equally without regard to whether the sale was face-to-face, mail order, or Internet.[6] For more information on the act, see CRS Report R43800, *Taxation of Internet Sales and Access: Legal Issues*, by Erika K. Lunder; CRS Report R43772, *The Internet Tax Freedom Act: In Brief* , by Jeffrey M. Stupak.

The second misperception is that the U.S. Constitution prohibits states from taxing Internet sales. States have the power to tax their residents who purchase goods or services on the Internet, even when the seller is located outside the state and has no real connection with it. However, if the seller does not have a constitutionally sufficient connection ("nexus") to the state, then the seller is under no enforceable obligation to collect the tax and remit it to the state. In this situation, the purchaser is still generally responsible for paying the use tax, but few comply and the tax revenue goes uncollected. As a result of this low compliance rate and the increasing amount of Internet commerce, states have been motivated to develop new ways—"Amazon laws"—to capture uncollected use taxes, while still complying with the U.S. Constitution. The report first examines the Constitution's requirements as to state laws that impose use tax collection obligations on remote sellers. It then looks at how these requirements apply to state "Amazon laws."

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[1] For information on state sales and use taxes, see CRS Report R41853, *State Taxation of Internet Transactions*, by Steven Maguire.

[2] *See* Miller Bros. Co. v. Maryland, 347 U.S 340, 343 (1954) (use taxes, while not significant revenue raisers, complement sales taxes in two ways: "One is protection of the state's revenues by taking away from inhabitants the advantages of resort to untaxed out-of-state purchases. The other is protection of local merchants against out-of-state competition from those who may be enabled by lower tax burdens to offer lower prices.").

[3] P.L. 105-277, Div. C, Title XI; 47 U.S.C. §151 note.

[4] *Internet Tax Freedom Act,* §1101(a). Originally set to expire in 2001, the moratorium has been extended several times. Most recently, Congress acted in December 2014 to extend the moratorium until October 1, 2015. *See* P.L. 107-75, §2 (extended moratorium through Nov. 1, 2003); P.L. 108-435, §§2, 8 (extended it retroactively from Nov. 1, 2003, to Nov. 1, 2007); P.L. 110-108, §2 (extended it to Nov. 1, 2014); P.L. 113-164, §126 (extended it to Dec. 11, 2014); P.L. 113-235, §624 (extends it to October 1, 2015).

[5] *Internet Tax Freedom Act*, §1105(2) (definition of "discriminatory tax").

[6] *Internet Tax Freedom Act,* §1101(b) ("Except as provided in this section [imposing the moratorium] nothing in this title shall be construed to modify, impair, or supersede, or authorize the modification, impairment, or superseding of, any State or local law pertaining to taxation that is otherwise permissible by or under the Constitution of the United States or other Federal law and in effect on the date of enactment of this Act.").

Constitutional Requirements

As discussed below ("State "Amazon Laws""), some states have enacted legislation aimed at collecting use taxes from Internet sales by imposing tax collection or notification requirements on Internet retailers. These laws potentially implicate two provisions of the U.S. Constitution: the Fourteenth Amendment's Due Process Clause and the dormant Commerce Clause.[7] The clauses have different purposes, and a state's imposition of tax obligations on a retailer may be acceptable under one and not the other. The focus for due process is whether imposition of the obligation or liability is fair, while the concern under the dormant Commerce Clause is whether it unduly burdens interstate commerce. Together, these clauses impose two requirements relevant for analyzing state "Amazon laws": (1) each requires there be some type of nexus between the state and remote seller before the state can impose obligations on the seller; and (2) the dormant Commerce Clause prohibits states from discriminating against out-of-state sellers.

One point to make at the outset is that Congress has the authority under its commerce power to authorize state action that would otherwise violate the Commerce Clause, so long as it is consistent with other provisions in the Constitution.[8]

Nexus

Before a state may impose a tax liability on an out-of-state business, a constitutionally sufficient connection or "nexus" must exist between the state and business. Nexus is required by both the Due Process Clause and the dormant Commerce Clause. Due process requires there be a sufficient nexus between the state and the seller so that (1) the state has provided some benefit for which it may ask something in return and (2) the seller has fair warning that its activities may be subject to the state's jurisdiction.[9] The dormant Commerce Clause requires a nexus in order to ensure that the state's imposition of the liability does not impermissibly burden interstate commerce.[10]

The nexus standard for sales and use tax collection liability is not the same under both clauses. In the 1992 case *Quill v. North Dakota*,[11] the Supreme Court ruled that, absent congressional action, the standard required under the dormant Commerce Clause is the seller's physical presence in the state, while due process imposes a lesser standard under which the seller must have directed

[7] U.S. CONST. Amend. 14, §1 ("nor shall any State deprive any person of life, liberty, or property, without due process of law ... "); Art. 1 §8, cl.3 ("The Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."). The Supreme Court has long held that because the Constitution grants Congress the authority to regulate interstate commerce, the states may not unduly burden such commerce—this is known as the dormant Commerce Clause. *See* Okla. Tax Comm'n v. Jefferson Lines, 514 U.S. 175, 180 (1995).

[8] *See* Northeast Bancorp v. Board of Governors of Fed. Reserve Sys., 472 U.S. 159, 174 (1985) ("state actions [that burden interstate commerce] which [Congress] plainly authorizes are invulnerable to constitutional attack under the Commerce Clause. [citations omitted]"); *see also* Prudential Insurance Co. v. Benjamin, 328 U.S. 408, 434 (1946) (describing Congress's Commerce Clause power as plenary and limited only by other constitutional provisions).

[9] *See* Quill v. North Dakota, 504 U.S. 298, 308 (1992).

[10] *See* Complete Auto Transit, Inc. v Brady, 430 U.S. 274 (1977).

[11] 504 U.S. 298 (1992). While *Quill* is the current standard for nexus, Justice Kennedy wrote a concurrence in a March 2015 decision, *Brohl v. Direct Marketing Association,* in which he suggested that *Quill* should be overruled. *Brohl* is discussed below in "Constitutionality of Colorado's Notification Requirements."

purposeful contact at the state's residents.[12] The Court reasoned that physical presence was required under the dormant Commerce Clause because otherwise collecting the tax would impermissibly burden interstate commerce in light of the country's numerous taxing jurisdictions.[13] With respect to the Fourteenth Amendment, the Court explained that while it had previously found physical presence to be necessary for due process,[14] its jurisprudence had evolved so that physical presence was not necessary so long as the seller had directed sufficient action toward the state's residents.[15] The Court found such purposeful contact existed in *Quill* since the seller had "continuous and widespread solicitation of business" within the state.[16]

As mentioned, Congress has the authority under its commerce power to authorize state action that would otherwise violate the Commerce Clause, so long as it is consistent with other provisions in the Constitution. Thus, Congress could change the "physical presence" standard, so long as the new standard complied with due process.[17] Congress has not used this authority, although legislation has been introduced in the 114th Congress (S. 698, Marketplace Fairness Act). For more information on the act, see CRS Report R43800, *Taxation of Internet Sales and Access: Legal Issues*, by Erika K. Lunder.

When Does Sufficient Nexus Exist?

The Supreme Court has not revisited the issue of when states may impose use tax obligations on remote sellers since *Quill*. Nonetheless, several pre-*Quill* cases provide guidance on determining when a state may impose tax collection responsibilities on out-of-state retailers. Clearly, a state can impose such responsibilities on a company with a "brick and mortar" retail store or offices in the state.[18] This seems to be the case even if the in-state offices and the sales giving rise to the tax liability are unrelated to one another. For example, the Court held that a state could require a company to collect use taxes on mail order sales to in-state customers when the company maintained two offices in the state that generated significant revenue, even though the offices were used to sell advertising space in the company's magazine and had nothing to do with the company's mail-order business.[19] The Court firmly rejected the argument that there needed to be a nexus not only between the company and the state, but also between the state and the sales activity. It reasoned that there was a sufficient connection between the state and company as the

[12] *See id.* at 308, 317-18.

[13] *Id*. at 313.

[14] *See* National Bellas Hess Inc. v. Dep't. of Rev. of Illinois, 386 U.S. 753 (1967).

[15] *See Quill,* 504 U.S. at 308.

[16] *Id.*

[17] *See id*. at 318 ("[O]ur decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions ... Accordingly, Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes.").

[18] *See* Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) (upholding imposition of state use tax collection liability on mail order sales when company had retail stores in the state); Nelson v. Montgomery Ward, 312 U.S. 373 (1941) (same); *see also* D.H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24, 32-33 (1988) (upholding imposition of use tax on company with 13 stores in the state).

[19] Nat'l Geographic Soc. v. California Bd. of Equalization, 430 U.S. 551 (1977).

two in-state offices had enjoyed the "advantage of the same municipal services" whether or not they were connected to the mail-order business.[20]

Absent some type of physical office or retail space in the state, it also seems that having in-state salespeople or agents is sufficient contact. In several cases pre-dating *Quill*, the Court upheld the power of the state to impose use tax collection liabilities on remote sellers when the sales were arranged by local agents or salespeople.[21] In *Scripto, Inc. v. Carson*,[22] the Court held that a state could impose use tax collection liability on an out-of-state company that had no presence in the state other than 10 "independent contractors" who solicited business for the company. These individuals had limited power and had no authority to make collections or incur debts on behalf of the company. They merely forwarded the orders they solicited to the company's out-of-state headquarters, where the decision to fill the order was made. Finding their status as independent contractors rather than employees to be constitutionally insignificant,[23] the Court held that there was a constitutionally sufficient nexus between the company and the state because the individuals had conducted "continuous local solicitation" in the state on behalf of the company.[24] The Court later described this case as "represent[ing] the furthest constitutional reach to date" of a state's ability to impose use tax collection duties on a remote seller.[25]

Discriminatory Taxes

In addition to requiring nexus, the Commerce Clause prohibits state laws that discriminate against interstate commerce.[26] A state law that "regulates even-handedly to effectuate a legitimate local public interest" and has "only incidental" effect on interstate commerce is constitutionally permissible "unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[27] On the other hand, a state law that facially discriminates against out-of-state sellers is "virtually *per se* invalid."[28] Traditionally, such laws have only been permissible if they meet the high standard of "advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[29] Thus, a state law that subjected remote sellers to tax-related burdens not imposed on in-state sellers would appear to be facially discriminatory and subject to a high level of judicial scrutiny.

[20] *Id*. at 561.

[21] *See* Scripto, Inc. v. Carson, 362 U.S. 207, 211 (1960) (discussed *infra*); Felt & Tarrant Co. v. Gallagher, 306 U.S. 62 (1939) (upholding state imposition of use tax collection liability on company with two agents in the state); General Trading Co. v. Tax Comm'n, 322 U.S. 335 (1944) (upholding state imposition of use tax collection liability on company with salespeople in the state).

[22] 362 U.S. 207.

[23] *Id.* at 211.

[24] *Id.*

[25] *Bellas Hess*, 386 U.S. at 757.

[26] *See Complete Auto Transit, Inc.,* 430 U.S. at 279; *see also* Oregon Waste Systems, Inc. v. Dep't of Environmental Quality, 511 U.S. 93, 98 (1994) (dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce").

[27] Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[28] Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 575 (1997) (internal citations omitted); *see also* Hughes v. Oklahoma, 441 U.S. 322, 336 (1979).

[29] New Energy Co. of Indiana v. Limbach, 486 U.S. 269, 278 (1988); *see also Hughes,* 441 U.S. at 336-37 (imposing same test).

State "Amazon Laws"

In light of consumers' low compliance with state use tax laws and the increasing amount of Internet commerce, some states have enacted legislation that attempts to capture uncollected use taxes from online sales. Two primary approaches have developed: "click-through nexus" and notification requirements. This section first examines these approaches by focusing on the laws in the first states to enact legislation: New York's click-through nexus statute, enacted in 2008, and Colorado's 2010 required notification law. It then examines whether these laws violate the U.S. Constitution.

Click-Through Nexus

One approach adopted by some states is "click-through nexus." This term arises from the "click-throughs"—online referrals—that some Internet retailers solicit through programs where an individual or business (called an associate or affiliate) places a link on its website directing Internet users to an online retailer's website. The associate or affiliate receives compensation for their referral, which is typically based on the sales that occur when users click through from one of these links and purchase goods and services. "Click-through nexus" statutes require an online retailer to collect use taxes on sales to customers located in the taxing state based on the physical presence in that state of the retailer's associates or affiliates.

An example of such a law is the one enacted by New York in 2008. New York requires vendors to collect sales and use taxes, with vendors defined to include any entity which "solicits business" through "employees, independent contractors, agents or other representatives."[30] The 2008 law added a statutory presumption that sellers of taxable property and services meet this requirement "if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the seller."[31] The presumption may be rebutted by proof that the resident "did not engage in any solicitation in the state on behalf of the seller that would satisfy the [Constitution's] nexus requirement" during the preceding four sales and use tax quarterly periods.[32] Guidance issued by the state tax agency provides that the presumption is not triggered by placing an advertisement.[33] The guidance also discusses how to rebut the presumption.

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[30] N.Y. TAX LAW §1101(b)(8)(i)(C)(I) (McKinney 2013).

[31] N.Y. TAX LAW §1101(b)(8)(vi) (McKinney 2013). For the presumption to apply, the cumulative gross receipts from sales by the seller to in-state customers as a result of all referrals must exceed $10,000 during the preceding four quarterly sales tax periods.

[32] N.Y. TAX LAW §1101(b)(8)(vi) (McKinney 2013).

[33] New York State Dept. of Taxation and Finance, Office of Tax Policy Analysis, Taxpayer Guidance Division, *TSB-M08(3)S: New Presumption Applicable to Definition of Sales Tax Vendor* (May 8, 2008), available at http://www.tax.ny.gov/pdf/memos/sales/m08_3s.pdf.

Required Notification

The second approach requires remote retailers to provide information to the state and customers, rather than requiring the retailers to collect the use taxes themselves. This approach is illustrated by Colorado's law, which was enacted in 2010.

Among other things, Colorado's law imposes three duties on any "retailer that does not collect Colorado sales tax."[34] Retailers must (1) inform Colorado customers that a sales or use tax is owed on certain purchases and that it is the customer's responsibility to file a tax return; (2) send each Colorado customer a year-end notice of the date, amount, and category of each purchase made during the previous year, as well as a reminder that the state requires taxes be paid and returns filed for certain purchases; and (3) provide an annual statement to the Colorado department of revenue for each in-state customer showing the total amount paid for purchases during the year. Unless the retailer can show reasonable cause, each failure to notify a customer about the duty to file a state use tax return carries a $5 penalty, while each failure of the other two duties carries a $10 penalty.[35]

Constitutionality of "Amazon Laws"

State "Amazon laws" potentially implicate the dormant Commerce Clause and the Fourteenth Amendment's Due Process Clause. In fact, both the New York and Colorado laws have been challenged on these grounds. As discussed below, it appears Colorado's notification law is the more constitutionally problematic approach.

Constitutionality of New York's Click-Through Nexus Statute

With respect to click-through nexus laws such as New York's, it might be argued that the law complies with *Quill* by targeting only Internet retailers whose affiliate programs create some degree of physical presence in the state and whose affiliates solicit (i.e., do more than merely advertise) on the retailer's behalf. Examined in this light, the law might be characterized as similar to the one at issue in *Scripto*, where the Court upheld the power of the state to require use tax collection by a remote seller whose sales were arranged by local independent contractors who forwarded the orders they solicited to the company's out-of-state headquarters.[36] In that case, the Court made clear that the individuals' title was unimportant, as was the fact that they had no authority over the sales (e.g., could not approve them).[37] Rather, the key factor in the Court's decision was that the individuals had conducted "continuous local solicitation" in the state on behalf of the company.[38] By targeting those affiliates that solicit in the state, it seems the argument could be made that the New York law is within the Court's *Scripto* holding and, therefore, is constitutional with respect to affiliates with sufficient solicitation activities.

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[34] COLO. REV. STAT. ANN. §39-21-112(3.5); *see also* COLO. REV. STAT. ANN. §39-26-102(4) (defining "retailer").

[35] COLO. REV. STAT. ANN. §39-21-112(3.5)(c)(II), (d)(III)(A) and (B).

[36] *Scripto*, 362 U.S. at 211.

[37] *See id.*

[38] *Id*.

On the other hand, it might be argued there is reason to question whether linking on a website is substantively similar to the "continuous local solicitation" conducted by the salespeople in *Scripto*. It might be argued that the *Scripto* salespeople's on-going activities are distinguishable from the one-time action of placing a link on a website. A court examining whether this difference is constitutionally significant might be particularly hesitant about extending *Scripto's* holding since the Court later referred to it as "represent[ing] the furthest constitutional reach to date" of a state's ability to require use tax collection by a remote seller.[39] Another question may be whether a court would find a click-through nexus law to be unconstitutionally burdensome because it requires remote sellers to potentially monitor thousands of affiliates in order to determine whether the nexus requirement has been met.[40]

In 2012, New York's highest court rejected facial challenges to the law on both Commerce Clause and Fourteenth Amendment grounds.[41] The plaintiffs—Amazon and Overstock.com—appealed the decision to the U.S. Supreme Court, but the Court declined to hear it.[42]

Before the New York court, Overstock and Amazon asserted that the New York law was facially unconstitutional under the Commerce Clause because it applied to sellers without a physical presence in the state. In rejecting this argument, the court noted it had previously held that the physical presence required under *Quill* did not have to be "substantial," but rather "demonstrably more than a slightest presence" and could be met if economic activities were performed in the state on the seller's behalf.[43] Applying that standard, the court found it was met since the law was based on "[a]ctive, in-state solicitation that produces a significant amount of revenue."[44] The court also noted, that while not dispositive, sellers did not pay these taxes themselves, but rather "are collecting taxes that are unquestionably due, which are exceedingly difficult to collect from the individual purchasers themselves, and as to which there is no risk of multiple taxation."[45]

With respect to the Due Process Clause, the court found that "a brigade of affiliated websites compensated by commission" was clearly sufficient to meet *Quill's* standard of "continuous and widespread solicitation of business within a State."[46] The court also rejected the plaintiffs' argument that the law violated due process because the presumption that retailers were required to collect use tax if they entered into an online referral agreement with a state resident was irrational and essentially irrebuttable. The court determined that the presumption (1) was reasonable because it presumed that affiliate website owners would solicit in-state acquaintances in order to increase referrals and therefore their compensation and (2) was rebuttable, as evidenced by the state tax agency guidance that discussed the methods and information needed to rebut it.[47]

[39] *Bellas Hess*, 386 U.S. at 757.

[40] *Cf. Quill,* 504 U.S. at 313 (imposing use tax collection liability was an impermissible burden on interstate commerce due to potential burden of such tax in light of the numerous taxing jurisdictions across the country).

[41] Overstock.com, Inc. v New York State Dept. of Taxation & Fin., 987 N.E.2d 621 (N.Y. 2013).

[42] Overstock.com, Inc. v New York State Dept. of Taxation & Fin., 134 S. Ct. 682 (2013).

[43] *Overstock.com,* 987 N.E.2d at 625 (internal quotations omitted).

[44] *Id*. at 626 ("The bottom line is that if a vendor is paying New York residents to actively solicit business in this state, there is no reason why that vendor should not shoulder the appropriate tax burden.").

[45] *Id*.

[46] *Id*. at 627.

[47] *See id.* The court left open the possibility that the presumption might not be reasonable in all circumstances, specifically as applied to those who receive compensation unrelated to actual sales since "[i]t is difficult to distinguish that arrangement from traditional advertising." *Id*. However, the court found this possibility was not sufficient to strike (continued...)

While other states have adopted laws similar to New York's, it does not appear that any court has examined the constitutionality of those laws.

Constitutionality of Colorado's Notification Requirements

Colorado's notification requirements appear to raise potentially significant constitutional concerns. This is because they apply only to companies that do not collect Colorado sales and use taxes, which would appear to be primarily those retailers without a substantial nexus to the state. In other words, the law applies to companies that do not have a physical presence in the state.

The first question is whether this violates due process. While the law targets companies without physical presence in the state, it applies to "retailers" who, by definition, must be "doing business" in the state. This means the notification law applies only to retailers who have some type of contact with the state. However, there may be retailers for whom the "doing business" standard would not result in the requisite minimum connection with the state.

Additionally, the Colorado statute raises two issues under the Commerce Clause. First, since the law applies to companies that do not have a physical presence in the state, it would appear that the notification requirements would have to be distinguishable from the use tax collection responsibilities at issue in *Quill* in order to be permissible. While some might attempt to distinguish between them since the notification law does not actually impose any tax collection obligation, they are arguably functionally similar since all are intended to increase use tax collection. As such, it might be argued that the notification requirements are at least as burdensome as tax collection obligations since both require similar types of recordkeeping and, unlike collection responsibilities, the notification law also involves reporting information to the consumer. A court adopting this characterization of the notification duties would likely find them to be an impermissible burden on interstate commerce.

Second, by targeting remote sellers that do not have a physical presence in the state, the law imposes duties on out-of-state business that are not similarly imposed on Colorado businesses. Thus, it appears to be a facially discriminatory law. As discussed above, such laws are "virtually *per se* invalid" and only permissible if they meet the high standard of "advanc[ing] a legitimate local purpose that cannot be adequately served by reasonable nondiscriminatory alternatives."[48] Whether the Colorado law would survive this strict scrutiny is open to question. While collecting use tax on purchases made to in-state customers seems an obvious legitimate government purpose, some might argue that there are other alternatives to Colorado's approach, such as collecting use tax from state residents on the state income tax form.

In 2012, a federal district court struck down the law, examining both of the above arguments.[49] The court found that the notification requirements were "inextricably related in kind and purpose" to the tax collection responsibilities at issue in *Quill* and therefore subject to the physical presence standard, which the law plainly did not meet.[50] The court further found that the law only applied

(...continued)

the statute as facially unconstitutional. *See id.*

[48] *New Energy Co. of Indiana,* 486 U.S. at 278.

[49] Direct Mktg. Ass'n v. Huber, Civil Case No. 10-cv-01546-REB-CBS, 2012 U.S. Dist. LEXIS 44468 (D. Colo. March 30, 2012).

[50] *Id*. at *27.

to, and thus discriminated against, out-of-state vendors and determined that it failed to survive strict scrutiny.[51] While there were legitimate governmental interests involved (e.g., improving tax collection and compliance), the court determined that the state had not provided evidence to show that these interests could not be served by reasonable nondiscriminatory alternatives, such as collecting use tax on the resident income tax return and improving consumer education).[52]

However, in August 2013, the Tenth Circuit Court of Appeals dismissed the case after finding that the Tax Injunction Act (TIA) prohibits federal courts from hearing it.[53] The act is a federal law that provides,

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.[54]

In March 2015, the Supreme Court held that the TIA does not apply to this suit.[55] The Court concluded that the notice and reporting requirements were not an act of "assessment, levy, or collection" within the specific meaning of those terms as used in tax law, and that the suit could not be said to "restrain" the assessment, levy, or collection of a tax if it "merely inhibits," rather than stops, those activities.[56] While holding that the TIA did not enjoin federal courts from hearing the suit, the Court left open the possibility that it might be barred by the comity doctrine, under which federal courts refrain from interfering with state fiscal operations "in all cases where the Federal rights of the persons could otherwise be preserved unimpaired."[57] The Court instructed the Tenth Circuit to determine if the doctrine applied to this suit.

The Court's opinion was unanimous. Notably, Justice Kennedy wrote a concurrence in which he raised the possibility that *Quill* was wrongly decided and should be reconsidered in light of technological advances and the development of the Internet.[58] Characterizing the *Quill* holding as "tenuous" and "inflicting extreme harm and unfairness on the States," he stated that "[i]t should be left in place only if a powerful showing can be made that its rationale is still correct."[59]

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[51] *See id.* at *13-*17.

[52] *See id.* at *18-*20.

[53] Direct Mktg. Ass'n v. Brohl, 735 F.3d 904 (10th Cir. 2013).

[54] 28 U.S.C. §1341.

[55] Direct Mktg. Ass'n v. Brohl, 135 S. Ct. 1124 (2015).

[56] *Id* at 1133.

[57] *Id*.(quoting Levin v. Commerce Energy, Inc., 560 U. S. 413, 422 (2010)).

[58] *See id.* at 1134-35 (J. Kennedy, concurring).

[59] *Id*. at 1134, 1135 (J. Kennedy, concurring).

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