

A Discourse on the Discordant State of Collecting Domestic Digital Duties

Current statutes taxing inter-state e-commerce are facially unconstitutional because they violate the Commerce Clause by creating serious burdens on interstate commerce through requiring foreign corporations to collect sales taxes on e-commerce regardless of whether they have a substantial nexus within the taxing states and violate Federal Legislation. State and Federal courts across the country have come to different conclusions regarding this topic. Congress has not yet resolved this public policy issue in part because technology has been moving faster than legislation has been enacted. As a result of the recent economic downturn and states' fiscal duress, this matter's significance is increasing as more states enact legislation that tax inter-state e-commerce. An equitable remedy is warranted for all unconstitutional duties that harm taxpayers and litigation including class action suits by consumers and merchants may be used as a strategy to resolve and obtain redress in the future. Should states be required to refund duties paid by businesses or taxpayers, these governments must adhere to the doctrines of prospective retroactivity. In the event that states are deemed liable to refund these unconstitutional state taxes, the liabilities will further exacerbate some states' fiscal condition.

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Note: Due to the dynamic and changing nature of these issues, this work reflects the current state of these proceedings as of April 10, 2011.

Introduction

States facing worsening budgets in the present economic downturn have two obvious options: raising taxes or cutting the budget. The latter is difficult and the former is unpopular; consequently, states look for new ways to increase revenue. One increasingly popular solution to a state's financial dilemma is to enact a statute requiring out-of-state Internet retailers to collect and remit state sales taxes on their in-state e-transactions, regardless of the retailer's non-transactional connections to, or "nexuses," within the state. Various known as an "Amazon Tax," an "Internet-Sales Tax," an "Affiliate Tax," an "e-Sales Tax," or an "Internet Retail Tax," similar statutes have been enacted by many states and are already having an impact on scores of interstate retailers such as the giant online retailer Amazon. As more and more commerce expands from brick-and-mortar to virtual marketplaces, these statutes will have increasingly greater effects on the economy.

Federal statutory and decisional law has not kept pace with these developments. This paper argues that by unduly burdening interstate commerce, such e-commerce sales-tax-collection statutes, violate the United States Constitution and Federal legislation and should be abrogated by the courts and/or by Congress. This issue is only growing in importance as an increasing number of states are illegally imposing such Amazon Taxes on taxpayers. By being unduly taxed, taxpayers will be entitled to an equitable remedy – one that should potentially include class action litigation and the doctrine of prospective retroactivity. Further, should the state statutes be invalidated by the courts, the public and government will face an uphill battle trying to sort out remitting the collected duties to taxpayers – which will adversely impact state budgets.

This paper seeks to clarify the issue and discuss the implications that such state legislation has on e-commerce and its violation of Federal Statutes and case law. Firstly, this paper examines the history of sales taxes and then the legal doctrines concerning the matter of affiliate nexus and entity isolation. The paper then turns to the misapplication of such principles by examining as an example the State of New York by chronicling the illegal statute that the state has enacted and imposed on its taxpayers. Following this discussion, the current decisional law relating to the subject is examined and statutes such as those enacted by the State of New York are found to violate this case law and the principles of Federal supremacy declared by the Founding Fathers. Then such statutes are examined with respect to the Federal legislation, The Internet Tax Freedom Act, and found to be facially in violation of its context and intent. The paper subsequently discusses the ramifications of these Amazon Tax statutes and then chronicles the history of proposals and enactments of similar legislation across the nation. Following this, the paper then highlights the public policy ramifications of these statutes and discusses the concept of prospective retroactivity. Finally, the paper concludes with a discourse on the potential

remedies for taxpayers that were harmed by proposing potential solutions including the possibility for class action litigation.

Sales Taxes

Sales taxes are historical products that have been a part of society since nearly 2000 BC in cultures such as ancient Egypt, ancient Athens, and ancient Rome. Part of the general theory behind taxes is the principle that taxpayers yield these duties in exchange for their government's protection of their property and of the exercise of their freedoms; such is the case with certain sales taxes.

Chief Justice John Marshall noted in the landmark case, *McCulloch v. Maryland* that the power of the states to tax is a reserved right and is founded on the Constitution's 10th Amendment: "That the power of taxation is one of vital importance; that it is retained by the States; that it is not abridged by the grant of a similar power to the government of the Union; that it is to be concurrently exercised by the two governments: are truths which have never been denied." The limits of state taxes, including sales taxes, are applied to taxes which unfairly discriminate against certain populations and those which are in violation of Federal statute. (*McCulloch v. Maryland*, 1819)

The history of US state sales taxes is also longstanding with Pennsylvania introducing the equivalent of the first state sales tax in 1821. Arguably the first modern sales tax was levied in Kentucky during the early 20th Century, and many states began to adopt this practice of taxing sales to augment the states' treasury. To date, 45 of the 50 states levy a tax on sales; Alaska, Delaware, New Hampshire, Montana and Oregon do not levy such a tax. (Fox, 2002) (Padgitt, 2011)

Sales taxes constitute a significant portion of state funding. In 1999, state and local sales taxes raised over \$200 billion. Historically, these collections represent around 2% of personal income. Sales taxes used to be the largest source of state government finances from 1970 through 1998 until personal income taxes surpassed it. Sales tax dependency varies by state but these taxes constitute a larger portion of the state and local government's revenue in the South and West, compared to New England and the Midwest. Economics Professor William Fox of the University of Tennessee has noted that Florida, Washington, Tennessee, and Texas have historically generated more than 50% of their tax revenue from sales taxes, whereas sales taxes only make up one-fifth of the revenue in states such as New York. (Fox, 2002)

Sales taxes are known as "transparent" taxes because individuals can easily determine how much they must pay and when they must pay. But, this transparency is often occluded because

according to the Tax Foundation, two-thirds of the country allows local-option sales taxes that can make paying a standard rate more difficult. (Padgitt, 2011)

Affiliate Nexus and Entity Isolation

Modern corporations are an integral element of the national economy, enabling America's economy to grow in ways unanticipated by our Founding Fathers. Entity isolation, the ability of companies basing operations and offices in one state and soliciting business in a different state, is the current concept applied to sales taxes and their interstate legislative reach. Some states have considered collecting sales taxes on e-commerce from foreign corporations that have a quasi-presence within their state. Their authority to do so is unsettled.

The concept of the affiliate nexus lies at the heart of the uncertainty.¹ Most case law regarding this concept involves corporations that have subsidiaries or divisions located in states where a sales tax was instituted. For these businesses, the right of the states to mandate sales tax collection is relatively clear; in the past, companies such as Sears Roebuck and Bloomingdale's have had two divisions: a department store division in one state and a mail-order division in a second state. Even though the mail-order division had no physical presence in the first state, the Supreme Court held that since many of the products sold via mail-order were identical to those sold in the stores, states had the authority to mandate the collection of sales taxes by the companies. (Amazon.com LLC, 2010) (Menhart, 2007)

The case law is less settled regarding corporations that have no primary or subsidiary presence in a state, but instead have associates in that same state whose sole purpose is to direct traffic to a website while participating in none of the actual sales processes or have product fulfillment centers that are legally a separate business entity. This former situation is the case that "e-tail" giant Amazon faces in many states, but most notably in New York.

Amazon v. New York State

The State of New York was one of the hardest hit by the economic recession. Seeking to remedy a looming budgetary crisis, the state passed a law that would require ecommerce sites to collect and remit sales taxes to the government. Some academicians purportedly posit that the State of New York might forfeit over \$4 billion in lost revenues between 2008 and 2012 by not actively collecting Internet sales taxes. During FY09-10, New York State collected \$70 million on some \$500 million in e-Commerce sales. Additionally, five percent of taxpayers declared \$45 million in unpaid taxes on their tax returns. Not everyone agrees with the \$4

¹ Affiliate nexus is the concept where an out-of-state corporation has nexus within a state due to a related corporation, or affiliate, being present within that state.

billion figure; Brad Maione, a spokesman for the New York State Department of Taxation and Finance says that \$4 billion “significantly overstates the amount of uncollected taxes on e-commerce for New York.” (Byrne, 2010)

The area of contention revolves around “e-tailers” vendors/affiliates. The New York "Amazon Tax Law", NY Tax Law §§ 1131[1], 1105, defines a "vendor" as, "a person who solicits business either: (I) by employees, independent contractors, agents or other representatives... and by reasons thereof, makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article." (Amazon.com LLC, et al. v. New York State Department of Taxation and Finance, et al., 2008) This law requires companies like Amazon to collect sales taxes on sales made. In this instance, the New York State Legislature has overstepped its legal authority by declaring that any corporation that retains affiliates who "solicit sales" has a substantial presence within the state and therefore must collect sales taxes. Additional New York state legislation codified into N.Y. Tax Law § 1101(b)(8)(vi) clarifies the law:

[A] person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative 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, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November. This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question.

(Amazon.com LLC, et al. v. New York State Department of Taxation and Finance, et al., 2008)

This clarification, based around Amazon’s practices, violates the Commerce Clause of the US Constitution and Federal legislation (Title 47, U.S. Code Chapter 5 Subchapter I § 151) and unfairly discriminates against Amazon because, among other things, the legislature’s dubbing of the tax as the "Amazon Tax." (Groos, 2009)

New York State tax agency spokesman Brad Maione said that New York “believes that states must be innovative and proactive to increase sales tax collection by remote sellers... Our focus on requiring remote sellers, primarily retail websites, to collect sales tax from their customers at the time of the sales has proven to be effective way to ensure that sales tax is collected up front.” (Collecting tax on Internet buys stymies local officials [Newsday, Melville, N.Y.], 2010)

When online sales tax requirements have been enacted, an increasing number of companies have ended their relationships with affiliates rather than collecting the taxes. After New York passed its "Amazon Tax", Overstock canceled deals with 3,400 affiliates in New York. (2 more Web retailers cancel R.I. ties, 2009) States that have enacted similar legislation have been met with “e-tailers” terminating affiliate relationships. These states, expecting increased revenue from "Amazon taxes," are finding just the opposite as large companies begin to relocate to states with a more favorable regulatory climate.

“Legal arguments and strategies aside, collection and enforcement would be a logistical nightmare,” writes Laura Kennedy of Kiplinger Magazine. “The state sales tax in New York is 4%, but it’s higher in New York City, for example, where the sales tax is 8.375% -- and there are 78 different tax jurisdictions in this state alone . . . Taxing online sales will require retailers to install complex collection systems to monitor the more than 7,400 tax jurisdictions nationwide.” (Kennedy, 2008) Without Federal discretion and deliberation, the automatic institution of collection requirements would impair “e-tailers” and place an undue burden on interstate commerce.

Even for New York, collecting Internet sales taxes have proven burdensome. For example, the New York State Department of Taxation misallocated \$5 million in sales taxes because a taxpayer accidentally said that he owed \$10 million on out-of-state Internet purchases – he meant only \$1,000. (TMC News, 2010)

Amazon only collects Internet sales taxes on shipments from where it has operations – Kansas, Kentucky, North Dakota and Washington, in addition to New York, the latter because of New York’s legislation. Amazon does not collect taxes in the 14 states where Amazon Kydc LLC, a separate retail entity, has fulfillment and customer service centers. (Flessner, 2010) (Martinez, 2011) (Demery, Ads rip Amazon on sales tax, 2011)

The State’s Violation of the Supremacy Clause

Statutes such as those enacted by the state of New York are facially unconstitutional because they violate the Commerce Clause of the United States Constitution as they create serious burdens on interstate commerce by requiring foreign corporations to collect sales taxes on e-commerce regardless of whether they have a substantial nexus within the taxing state. Brought

on by Amazon, *Amazon.com LLC, et al. v. New York State Department of Taxation and Finance, et al. No. 60124/08* is Amazon's defense against the interstate sales tax on e-commerce.

In *McLeod v. J.E. Dilworth Co.*, the Supreme Court held that the Commerce Clause "vested the power of taxing a transaction forming an unbroken process of interstate commerce in the Congress, not the states." (*McLeod v. J.E. Dilworth Co.*, 1944, p. 4) Later, the court held in *Complete Auto Transit, Inc. v. Brady*, that the only way a state may tax a company while not violating the Interstate Commerce Clause is if the tax is "applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state." (*Complete Auto Transit, Inc. v. Brady*, 1977, p. 6) (Menhart, 2007)

Justice Potter Stewart wrote in *National Bellas Hess v. Department of Revenue*, later upheld in *Quill Corp v. North Dakota*, "Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved . . . The very purpose of the Commerce Clause was to ensure a national economy free from such unjustifiable local entanglement. Under the Constitution, this is a domain where Congress alone has the power of regulation and control." (*National Bellas Hess v. Department of Revenue*, 1967, p. 6) (*Quill Corp v. North Dakota*, 1992) In the 1990's, commerce on the Internet supplemented mail-order catalogues but fifteen years later, mail-order catalogues supplement Internet commerce.

In *Quill*, Justice John Paul Stevens referred to *Bellas Hess*: "We affirmed the continuing vitality of *Bellas Hess's* 'sharp distinction... between mail order sellers with [a physical presence in the taxing] state and those... who do no more than communicate with customers in the state by mail or common carrier as part of a general interstate business.'" (*Quill Corp v. North Dakota*, 1992, p. 307)

As was argued by Amazon in *Amazon.com LLC, et al. v. New York State Department of Taxation and Finance, et al. No. 60124/08*, many "e-tailers" rely on the most recent case of *Quill Corp v. North Dakota* to support the basis of opposition to inter-state sales tax collection requirements. Here, the Supreme Court held that a company that is a mail-order house which engages in "minimal contacts" with the taxing state may lack a "substantial nexus" within that state. Decided in 1992, *Quill* is the highest leading decision of case law regarding disputes over presence in a state via the Internet in the context of e-commerce. This decision was made prior to the "digital revolution" and the mass migration of retailers to online marketplaces. The lack of more recent decisions presents the legal community with the possibility of defining "e-tailers," such as Amazon, as "out-of-state, mail-order retailers." Amazon argues that *Quill* provides that Amazon is a "modern day, Internet-Age version of the out-of-state, mail-order retailers held not to have a substantial nexus in *Quill*," because it has only a substantial physical

nexus in states where Amazon's physical buildings and warehouses are located. None of these physical facilities are located in New York State. (Amazon.com LLC, et al. v. New York State Department of Taxation and Finance, et al., 2008)

The crux of the *Quill* decision, written by Justice Stevens was the following:

Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills... It is in this light that we have interpreted the negative Commerce Clause. Accordingly, we have ruled that the Clause prohibits discrimination against interstate commerce and bars state regulations that unduly burden interstate commerce... [*Bellas Hess*] created a safe harbor for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States Mail.' Under *Bellas Hess*, such vendors are free from state imposed duties to collect sales and use taxes... Moreover, a bright line rule in the area of sales and use taxes also encourages settled expectations and, in doing so, fosters investment by business and individuals. Indeed it is not unlikely that the mail order industry's dramatic growth over the last quarter century is due in part to the bright line exemption from state taxation created in *Bellas Hess*.
(*Quill Corp v. North Dakota*, 1992, p. 312)

Therefore, it is evident that such state tax laws identical to New York's "Amazon Tax" are against prior case law.

Internet Tax Freedom Act

Currently, the states, such as New York, that have enacted legislation that assesses taxes on e-commerce are in violation of Federal law. Over ten years ago, Congress recognized that the collecting of taxes in cyberspace would soon become an area of contention. In 1998, Congress passed the Internet Tax Freedom Act imposing a three-year moratorium on new Internet taxation, later extended through 2014. (The Advisory Commission on Electronic Commerce) (Open Congress)

The original bill called for the establishment of an advisory commission to "conduct . . . a thorough study of Federal, State and local, and international taxation and tariff treatment of transactions using the Internet and Internet access, and other comparable intrastate,

interstate, or international sales activities . . . The Commission's recommendations on the critical issues of e-Commerce and tax policy were submitted to Congress on April 12, 2000." (The Advisory Commission on Electronic Commerce)

The report recommended that, "the best way to strike a balance between the national and state interests will be through earnest and open debate among all affected parties." (Advisory Commission on Electronic Commerce, 2000)

"There was general agreement among the Commissioners that the current sales and use tax system is complex and burdensome. Most, if not all, of the Commissioners expressed the view that fundamental uniformity and simplification of the existing system are essential. The need for nationwide consistency and certainty for sellers as well as the need to alleviate the financial and logistical tax collection burdens and liability of sellers were common themes throughout discussions." (Advisory Commission on Electronic Commerce, 2000)

The current law, though not expressly followed, states:

"SEC. 1101. MORATORIUM.

"(a) Moratorium.—No State or political subdivision thereof may impose any of the following taxes during the period beginning November 1, 2003, and ending November 1, 2014:

"(1) Taxes on Internet access.

"(2) Multiple or discriminatory taxes on electronic commerce.

(Title 47 U.S. Code Chapter 5 Subchapter I § 151)

This legislation shows that Congress acknowledges that the issue of Internet sales taxes requires further deliberation and debate. However, currently, as the state's legislation is enacted, it clearly violates this Federal Legislation by establishing such "Multiple or discriminatory taxes on electronic commerce. The states' preemptive institution of interstate Internet sales tax collection mandates is unconstitutional.

Taxing and Regulating the Internet Across the Country

The ramifications of such "Amazon Taxes" are already evident across the country: In 2008 and 2009 when they were first enacted or proposed, major "e-tailers" such as Textbook.com, Overstock.com, BlueNile.com, and Amazon.com began to terminate their agreements with in-state affiliates anticipating the coming state Internet sales tax collection requirements. Many parties are harmed in the process of these Amazon Tax statute enactments: Internet Retailers

are unduly burdened when ordered to comply with such legislation, affiliate marketers lose thousands of dollars and their livelihood, and taxes are unjustly levied against state taxpayers. Amazon Taxes have thus begun to impede commerce; states are overreaching their legal authority, encroaching on Federal jurisdiction.

Currently, Internet sales taxes are unpopular with taxpayers. A report published by Rasmussen noted that 63% of American adults oppose taxing goods and services on the Internet, while only 24% favor such a tax, and 13% are undecided. (Rasmussen, 2011)

Further State Actions

The New York Case was decided erroneously in favor of the State and has been appealed to the New York State Appellate Court. This Court must decide in favor of Amazon and hold the Amazon Tax unconstitutional. As litigation is pending in the state of New York, other states have proactively enacted or considered enacting Internet sales taxes of their own.

Arizona

The National Conference on State Legislatures announced that Arizona could purportedly gain as much as \$708 million in 2012 by taxing Internet sales. However, there are more technicalities in Arizona because it is one of only four states where sales taxes are collected at the city, town, and county levels, as opposed to just by the state government. In 2008, state legislators considered enacting a bill that would have exempted sales and use taxes unless the retailer had a physical presence in the state, but this bill failed to move forward. (Beard & Hansen, 2010)

Arkansas

Northwestern legislators from Arkansas are proposed a more formal collection of sales tax on out-of-state purchases. Currently Arkansas residents only supposed to pay a “use tax” on goods purchased through ecommerce. (Vertex News, 2011) In 2011, State Senators Jake Files, Jack Crumbly, Linda Chesterfield, David Burnett, and Stephanie Flowers have introduced Senate Bill 738 that would require all Internet retailers to collect and remit sales taxes to the state. (Brock, 2011) This bill was then passed in the General Assembly and sent to Governor Mike Beebe who is expected to sign it. (Demery, Arkansas enacts an “Amazon tax” law, 2011)

California

Following legislation that was passed by California’s legislature in 2009 taxing Internet Sales, many Internet retailers preemptively terminated their relationships with their affiliates. Governor Schwarzenegger of California vetoed this legislation. Internet retailers reinstated affiliates in California following the Governor’s veto. (Gardner, 2009) In 2010, the California Retailers Association continued to press the legislature to pass an Internet sales tax citing

concerns for small retailers. (Dombrowski, 2010) Some groups declared that the state would not collect any more sales taxes, but would actually lose more revenue than it would raise due to the large number of affiliate marketers and advertisers who would no longer have contracts. (Rockwell, 2010) The affiliate marketers in California claim they are at risk of losing their income totaling \$1.6 billion in 2009. (Madigan, 2010) Figures released from the Board of Equalization amounted to \$1.1 billion lost in revenue from out-of state sales and \$150 million in tax revenue for the state though other estimates of tax revenue are as high as \$300 million annually. (Skelton, California's Gift to e-tailers, 2010) (Runner, 2011) (Norman, 2011) Only 1% of residents pay use tax voluntarily through reporting it on tax forms. (Woo & Bustillo, Retailers Push Amazon on Taxes, 2011) The legislation that was vetoed by Governor Schwarzenegger was repurposed in 2010, included in the Democrat's 2010 budget proposal and again submitted in 2011 by Assemblywoman Nancy Skinner of Berkeley who based her law on that of the state of New York's "Amazon Tax." (Assembly Committee on Revenue and Taxation, 2010) (Yamamura, 2010) (California Shouldn't Follow NY's Internet Tax Plan, 2011) (Skinner, 2011) (Lifsher, 2011)

Should current Governor Jerry Brown sign new legislation that would tax Internet sales, a number of major Internet companies claim that they will pull out of the state. Specifically, Overstock.com would join Amazon in removing all relationships with affiliates in the state. Previously in 2009, Overstock.com terminated 3,200 affiliates after the California State Legislature passed a similar tax measure. Amazon alone stands to lose 10,000 California based associates. California stands to lose over 25,000 Internet affiliates if major e-Commerce sites pull out. (Dvorak, 2011) (Ross, 2011) These affiliates paid \$124 million in state income taxes in 2009. (Skelton, Capitol Journal: California must enforce 'use' law — now, 2011)

Colorado

Introduced in January 2010, Colorado State bill HB 1193 established responsibility of out-of-state online retailers to collect sales taxes and remit them to Colorado. It specifically requires out-of-state retailers who have more than \$100,000 in sales in Colorado State to send a letter to customers telling that the products that they have purchased require that they pay a certain amount of sales tax. (Gallardy, 2010) Retailers also have to submit year-end summaries of total online purchases, broken down by category, to Colorado's Department of Revenue. (Rueter, 2010) (Second Regular Session Sixty-seventh General Assembly State of Colorado) (Paulson & Slevin, 2010) (Sealover, 2010) The state government estimated that the 2.9% sales tax would yield \$4.6 million in state revenue and affect the nearly 10,000 Colorado website operators. (Richardson, 2010)

Following Governor Bill Ritter Jr.'s signing of the bill into law, Amazon announced on March 8th that it has terminated agreements with over 4,200 local sales associates. (Richardson, 2010)

After the Republicans took control of the Colorado State House of Representatives, Rep. Amy Stephens and her colleagues introduced legislation to repeal the so called “Amazon Tax.” (Sheperd, 2010) (Hanel, 2011)

A lawsuit filed by the New York-based Direct Marketing Association, a trade organization for businesses engaging in direct marketing techniques, filed on the basis that the law presents an undue burden on out-of-state retailers and on in-state consumers who shop online. The case, naming Roxy Huber, executive director of the Colorado Department of Revenue as defendant, claims that the law is unconstitutional for five reasons: it imposes “discriminatory treatment on out-of-state retailers lacking any physical presence in Colorado, tramples the privacy rights of Colorado and non-Colorado residents, may have a ‘chilling’ effect on the exercise of free speech by consumers of or vendors of certain products with ‘expressive content, exposes security risks to confidential information for consumers and their purchases and deprives retailers without due process or compensation, of the value of their proprietary customers lists and the investments made to protect those lists.” (Goodland, 2010) (Rueter, 2010) Also at issue is the fact that retailers will be required to send billing and shipping address information to the state; this could raise privacy concerns. (‘Internet tax’ challenged, 2010)

On January 27, 2011, Federal Judge Robert E. Blackburn, in Denver granted a preliminary injunction against parts of the Colorado Amazon Tax law in the Direct Marketing Association case. He granted the preliminary injunction because “The DMA have shown a ‘substantial likelihood’ that they will succeed in showing the law discriminates against out-of-state retailers and imposes a burden on interstate commerce; it is unlikely that the state would not be able to implement nondiscriminatory alternatives to collecting the use tax; retailers impacted by the law would be subject to ‘irreparable injury’ and the preliminary injunction would not substantially impair the public’s interests.” (Demery, E-retailers win tax ruling in Colorado, 2011)

Connecticut

Legislators proposed similar legislation that would tax Internet Sales in Connecticut during their 2010 legislative session. This bill, however, failed to be passed. (Raised H.B. No. 5481, 2010) Many legislators felt caught between the threat of big online retailers pulling out from Connecticut and small Connecticut stores losing business. (Phaneuf, 2010) In 2011, members of the Connecticut legislator are planning on reviving the Amazon tax that was defeated last year. In addition to instating the Internet sales tax, legislators are also considering raising the state sales tax to 6.35 %. The state Office of Fiscal Analysis estimated that the state could gain \$9.3 million annually from the Internet Sales tax. (Lockhart, 2011)

Florida

Because the state of Florida cannot track every transaction, few people pay the duties on Internet sales. In the entire state, only 3,688 filings yielded \$7.56 million in 2009. (Pinell, 2011) The Florida Retail Federation estimates that it loses about \$1.5 billion annually. (Gagliano, 2010) Florida has considered taxing online travel website sales. An attempt to shield these companies from paying additional taxes was proposed but defeated by one vote in a committee in March of 2011. (Klass, 2011)

Hawaii

Just days after Hawaii's legislature enacted an Internet sales tax collection statute in 2009; Governor Linda Lingle vetoed it, citing concerns for the economy and Hawaiian businesses. (Gardner, 2009) In 2010, the legislation was proposed again, but the House of Representatives summarily rejected the bill by sending it back to committee where it died, after having passed in the state senate. Since Governor Lingle's veto, Amazon and Overstock have reinstated their affiliate advertisers. (Businessweek)

Idaho

Rep. Dennis Lake of the Idaho House Revenue and Taxation Committee had entertained the possibility of taxing Internet sales. This effort could potentially add \$30 million to the Idaho state budget. (Iverson-Long, 2011) After the proposal was introduced into the committee, the House speaker Lawrence Denny moved the bill to the House Ways and Means Committee – a sign that this measure will be tabled for the indefinite future – because he along with other party leaders were concerned that the legislation would violate the U.S. Constitution. (Fox 12 Idaho, 2011) (Hurst, Majority leader says Internet sales tax bill would violate U.S. Constitution, 2011) Representative Lake tried to use procedure to bring the Bill to a House floor vote, but this effort was soundly defeated by a 15-54 vote. (The Associated Press, 2011) State representative Julie Ellsworth, who had proposed the bill, reasoned that the state has been losing out on upwards of \$30 million annually because of the nature of Idaho's self-reporting tax system for Internet purchases. (Hurst, Push for greater compliance with Internet sales tax killed Wednesday, 2011)

Iowa

The state of Iowa has had efforts to tax Internet Sales but a growing number of individuals believe that Iowa should be an Internet tax-free state, citing the potential for increased jobs as retailers would move their headquarters and distribution centers to the state. Currently Iowa collects only \$12 million annually on sales through the Internet. (Leverington, 2010)

Illinois

Illinois legislators Rep. Patrick Verschoore and Senate President John Cullerton passed legislation that was signed by Governor Pat Quinn that requires all Internet retailers who do

business with an affiliate in Illinois to collect sales taxes on purchases and remit them to the Illinois Department of Revenue. (State of Illinois, 2011) The legislation was passed 88-29. (Chase, 2011) Internet retailers now must collect the 6.25% retail sales tax. State officials estimates that in 2010, the law would have brought in \$169 million to the state. (Di Benedetto, 2011) Illinois has previously taken action against retail websites such as walmart.com, target.com, and officedepot.com receiving \$2.4 million in damages for sales tax collection issues. (My Journal Courier, 2010) The state has additionally run an amnesty program targeting consumers for unpaid use-taxes between June 30, 2004 and December 31, 2010. (Demery, Illinois offers Internet 'use' tax amnesty to consumers, 2010)

After Governor Quinn signed the law, many Internet retailers located in Illinois began to contemplate moving. Scott Kluth, CEO of Coupon Cabin, noted that his company was exploring moving to Indiana. (Jones, 2011) The company stated that the law "will do significant harm to our growth by cutting our business by nearly one-third." (Chase, 2011) Amazon responded by terminating all business with its affiliates. Rebecca Magidan, director of the Performance Marketing Association, an affiliate trade group, discussed how Illinois' 9,000 affiliates will be adversely impacted. This group generated \$611 million in advertising revenue in 2009 and tax revenue equal to \$18 million. Magidan believes that the state will lose 25% - 30% of that tax revenue because the affiliate will move out of the state, cut costs and employment, and lose business. (Woo, Amazon Takes Action in Illinois as War on Sales Taxes Continues, 2011)

Fatwallet.com, an e-Commerce deals website based in Rockton, Illinois decided to move its headquarters and operations across the state border to Beloit, Wisconsin. Fatwallet.com was concerned that the company might lose 30% - 40% of its revenue by not working with companies like Amazon and Overstock after they have terminated their relationships in Illinois. (Strebel, 2011) FatWallet.com CEO and founder Tim Storm remarked that "My customers don't care if we're in Illinois, Wisconsin, or lower Uganda. The reality is that they just don't care." (Snell, 2011)

Indiana

Several states have gone even further, enacting legislation denying the concept of entity isolation and requiring companies with agents in a particular state to collect sales taxes on e-commerce. For instance, Indiana has amended its tax code to prohibit Internet retailers from using the concept of entity isolation as a reason to not collect sales taxes. (Indiana Code Section 8. IC 6-2.5-8-10) State representatives have been encouraged by retail developers to push for Internet sales taxes and are interested in passing a General Assembly resolution that would encourage Congress to change the law to allow states to collect Internet sales taxes. (Dieter, Indiana lawmakers push for Internet taxes, 2010) In the 2010 legislative session, a bill was proposed to apply the sales tax to specifically "digital goods." This, however, was not

adopted by the legislature. (Senate Bill 0250, 2010) The majority of taxes collected in Indiana on ecommerce takes place through the application of use taxes. The Indiana Department of Revenue estimates that \$1.4 million in use taxes were reported, though all of these figures must be self-reported by the taxpayer. Approximately \$400 million in use taxes are estimated not to have been paid by residents. (Hayden, 2010) (Dieter, Indiana lawmakers push for Internet taxes, 2010)

Kansas

Kansas's House of Representatives passed a bill in March of 2011 that would permit the state government to collect sales taxes on any purchases made over the Internet at the point of sale, regardless of where the item was delivered. The state had previously taxed items based upon where the customer received the item. This bill now winds its way through the senate and the Governor's desk. (Dornes, 2011)

Michigan

Taxpayers in Michigan are required to pay the 6% sales tax on all Internet purchases, but this tax, a "use" tax must be claimed during the filing of one's taxes – and to add to the confusion, some websites collect this tax, and some do not – the consumer is expected to maintain receipts of all purchases and report the use tax. This is a part of the Streamlined Sales Tax Project. (Jovonovich, 2010) The Streamlined Sales Tax Project is an organization that advocates for modifications to state tax codes to enhance collection of sales and use taxes. States who become "members" agree to adopt changes that are recommended by the organization. (Streamlined Sales Tax Governing Board, 2011)

Minnesota

State legislators are considering legislation that would require e-Commerce sites to pay sales taxes in Minnesota. Governor Mark Dayton is also proposing an Internet Sales Tax as part of his budget plan. (Sheck, 2011)

Mississippi

Representative Jessica Upshaw introduced House Bill 363 on January 4, 2011 that would have required all Internet sales to be subject to a use tax collectable by the state. This effort, however, was defeated in the legislature. (Allen, 2011)

Missouri

Taxing Internet sales was a solution that was floated in the state government to cover a \$700 million budget shortfall. (Moring, 2010) A study conducted by the University of Tennessee has identified \$187 million allegedly lost in 2011 from untaxed internet sales. (Patane, 2011) Other estimates are as high as \$200 million. (Duplaintier, 2011) Government officials noted that this special legislation would not require companies to cooperate with the state; but companies

working with the state would pay 2% less than the local state sales tax. (Patane, 2011) State representatives Margo McNeil and Rory Ellinger have introduced legislation to collect these sales taxes from Internet retailers. (Garrison, 2011)

New Mexico

New Mexico's fielded a proposition for taxing online sales; however this bill failed to pass committee. (EDITORIAL: Legislature shouldn't lag on electro-business tax [The Santa Fe New Mexican], 2010)

Nebraska

According to studies cited by several government officials, Nebraska loses an estimated \$120 million each year in unpaid taxes on Internet sales. Some Nebraska lawmakers are pushing for the state to modify their tax code to make it conform to that of the Streamlined Sales Tax Movement. (O'Hanlon, 2011) Only 150 tax returns reported the use tax that is associated with Internet sales, even though the special form that is required to fill out the use tax has been around since 1967. Government officials expect only 1% of returns to pay the voluntary tax. (Mastre, 2011)

Nevada

In 2008, Nevada voters rejected a ballot question in 2008 that would levy taxes on Internet Sales by a 3-to-1 margin. In November of 2010, the question will return to the ballot asking whether state legislators may modify the tax code, "to resolve a conflict with any Federal law or interstate agreement" that deals with sales tax collection. The underlying reason for this question is to allow the state to collect Internet sales taxes should Federal Congress give states the authority to collect Internet sales taxes. The word "Internet" was omitted from the ballot question because the proponents were concerned that new technologies beyond the Internet might restrict the bill and the state might need to impose a quick sales tax on the new medium. (Vogel, 2010) The governor of Nevada, Governor Jim Gibbons, has been in support of this bill and unsuccessfully tried to call a special session of the legislature to pass an Internet Sales Tax. (Ryan, 2010)

North Carolina

In the summer of 2009, the North Carolina legislature passed legislation requiring out-of-state retailers to collect sales taxes if they had a network of local affiliates. Amazon ceased its relationship with the affiliates, but North Carolina has sought to collect taxes from the years that the affiliates were operating. (Dalesio, 2010) Overstock.com has similarly followed suit by severing its relationships with thousands of marketing affiliates. (craver, 2011) On December 1, 2009, the North Carolina Department of Revenue demanded that Amazon turn over the names of North Carolina residents who have purchased anything from Amazon since 2003 along with records of items purchased and prices paid. In an act of good faith, Amazon provided

Department of Revenue officials with information about millions of purchases; however, Amazon did not provide information about the customer's name, address, phone number, e-mail address or any other personally identifiable information. On March 19, 2010, the North Carolina Department of Revenue requested Amazon provide the personally identifiable information that was omitted in their previous report and permitted Amazon to provide this by April 19, 2010. Amazon asserts that it has no employees, computer servers, equipment, warehouses, office space, property or physical evidence in North Carolina. Consequently, Amazon did not respond to the request. (Amazon.com LLC, 2010)

Amazon subsequently filed a lawsuit in Federal court to block North Carolina's Department of Revenue's request for disclosure of all of the personally identifiable information regarding customer transactions. In doing so, Amazon is seeking to address the states' definition of whether the company had a North Carolina Presence. (Reuters, 2010) The case, *In re: Amazon.com LLC vs Kenneth R. Lay*, claims that the state's demands are not only unreasonable, but a violation of privacy. If Amazon lost the case, Amazon would be forced to turn over all their records relating to North Carolina Purchases. North Carolina residents would potentially face an audit and civil fines. (Mick, 2010) Concerned about the potential privacy implications, the American Civil Liberties Union joined the litigation with Amazon. (WRAL, 2010)

Amazon and the ACLU, in terms of the privacy concern, cited that providing the names of the customers would violate the First Amendment because the government could match the names of the customers with sensitive data such as what books and products the customers bought. During the proceedings the presiding Federal judge, Judge Marsha Pechman, questioned North Carolina whether the state needed all of the customer names. North Carolina responded that the state has a duty to determine taxes correctly and to investigate and verify transactions; therefore it needs the names of the customers. (Gohring, 2010)

North Carolina offered an amnesty program to 450 merchants to forgive uncollected sales taxes in exchange for a promise to remit taxes later. By the August 31, 2010 deadline, only 27 signed up. (Demery, Sales tax amnesty falls flat, 2010)

Judge Pechman ruled in favor of Amazon and the ACLU stating that the information regarding the purchases of customers and their names are protected under the First Amendment. Pechman penned that "The court is aware of the sensitive nature of this case. The declaratory relief issued here is of limited scope and cannot be interpreted to grant Amazon a free pass from complying with any valid tax law of North Carolina or elsewhere." (Amazon LLC v. Kenneth R. Lay, 2010) While the matter regarding the personally identifiable information was resolved, the legality of the levying of the Internet Sales Tax was not.

While Amazon has completely pulled out of North Carolina, a number of online travel websites filed a lawsuit against North Carolina's collecting of Internet sales taxes. The companies – Orbitz, Trip Network, Travelocity.com, Travelscape, Hotels.com and Hotwire argue that North Carolina's statute is unconstitutional and violates the Internet Tax Freedom Act. The state statutes, which became effective January 1st, 2011, required that fees paid to third-party travel website intermediaries be included in the gross receipts of the Hotel industry and subject to state taxes. (Bracken, 2011)

Ohio

In 2000, the Ohio Income Tax form began to include a line that allowed residents to identify unpaid sales taxes. This line, Line 17, only has been used by 48,411 residents in 2008 – out of a total 5.37 million taxpayers. The tax collected nearly \$2.4 million. (Lin-Fisher, 2010)

Oklahoma

Governor Brad Henry proposed the idea of taxing Internet sales, expecting to generate \$30 million for the state which has had a \$1.2 billion revenue deficit this year. (McNutt, 2010) (Strahle, 2010) This bill passed under "emergency" circumstances. (Revenue and taxation; relating to the Oklahoma Use Tax Code; modifying provisions; modifying procedures. Effective date. Emergency., 2010)

Pennsylvania

Further seeking to eliminate massive state deficit, the legislature of Pennsylvania entertained Christopher Rants, a former speaker of the Iowa House of Representatives, now leader of the Main Street Coalition, who noted in his Speech that the state of Pennsylvania fails to collect about \$706 million in sales taxes each year on Internet goods. (Times-Tribune, 2011)

The Pennsylvania Revenue Department reported in March 2011 that they would begin to crack down on nonpayment of Internet purchase use taxes. Acting Revenue Secretary Daniel Meuser said that \$350 million are paid each year on use taxes, only about half of what is owed. Mesuer reported that the government plans to add a use-tax line to tax forms to encourage reporting. (Bloomberg, 2011)

Amazon has four distribution centers in Pennsylvania but asserts that they aren't selling from them; consequently Amazon has no nexus within the state. The Pennsylvania Retailors Association is lobbying the legislature to redefine nexus to force Internet retailers to collect Internet sales taxes. (Wardle, 2011)

Rhode Island

To avert budgetary issues, the Rhode Island legislature passed a law that forces all residents to pay a 7% sales tax on all purchases from out-of-state companies on the Internet which have a

nexus within the state. As a result, on June 29, 2009, Amazon terminated all business with affiliates in the state. At the time, Rhode Island was the second state where affiliates' relationships were terminated, following North Carolina. (Nesi, 2009) Rhode Island will not immediately feel the effect of Amazon's departure as the state did not project any new tax revenue from the law. (Peoples & Downing, Amazon cuts its R.I. ties over sales tax, 2009) Following Amazon's departure, Blue Nile Inc. and Overstock.com both terminated their contracts with affiliates in the state. (Grimaldi, 2009) On July 4, 2009, the Rhode Island division of Taxation sent notices to over 100 online commerce sites detailing the steps that thyme must take to comply with Rhode Islands' new law. (Downing, R.I. advises Web retailers of tax, 2009)

South Carolina

South Carolina has taken steps to enforce their sales tax on foreign Internet retailers. The South Carolina Supreme Court has ordered Travelscape, a subsidiary of Expedia, the large online travel company, to pay over \$6.3 million in sales taxes. (Monk, 2011) Amazon was taking steps to open a new distribution center in South Carolina. Former Governor Mark Sanford promised the company that Amazon wouldn't have to collect sales taxes from South Carolinians. The current Governor, Nikki Haley, has expressed concern that she might not be able to support former governor Sanford's promise. (Novack, 2011)

South Dakota

In 2009, then-Governor Mike Rounds announced in his State of the State address that the state losing \$40 million on annual revenue and that cities were losing nearly \$20 million due to not collecting Internet sales taxes. A state hit hard by the economic downturn, South Dakota is looking at different ways of balancing their budget. (Daily Republic, 2011) On March 10, 2011, Governor Dennis Daugaard signed a sales and tax use bills. Senate Bill 146 "creates certain notice requirements for retailers without South Dakota nexus that are selling tangible personal property, services, or products transferred electronically for use in South Dakota." Senate Bill 147 "expands the application of nexus for the purpose of collecting sales and use taxes owed by the state." (Deloitte Multistate Tax Alert, March 11, 2011)

Tennessee

In late 2005, Amazon proposed open two distribution centers in southeast Tennessee to handle hundreds of millions of dollars in shipments annually. Amazon has been in discussion with the state to receive assurances that it will not have to collect Internet sales taxes for the state because according to Fred Kiga, director of policy for Amazon, "the distribution centers here are not retailers, but rather drop shippers." The distribution centers could potentially bring 1,500 full time and 2,200 part time jobs for the local communities. (Flessner, 2010) They would represent a \$139 million investment into the state. (Johnson, 2011) In addition to legislative exemptions, the state has offered Amazon free land, job-training assistance and more than \$12

million in property-tax breaks. (Martinez, 2011) Governor Bill Haslam reinforced that he believes that Amazon shouldn't have to collect sales taxes because of the new proposed distribution center. (Pare, 2011) The state government has planned to give Amazon a sales tax exemption and Amazon is defending that exemption from upset lawmakers. (Sher, Amazon, lacking 'nexus,' won't tax, 2011) Tennessee revenue Commissioner Richard Roberts noted that "a Federal solution is clearly the best option to decide whether state governments can get revenue from Internet companies locating in the state and shipping goods elsewhere." (Hayes, 2011) However, the Virginia based Alliance for Main Street Fairness, a national retailers group, began running advertisements in Nashville, Knoxville, and Memphis urging government officials to collect Internet sales taxes. Governor Haslam still remains adamant in his position: "I don't think because Amazon decides to build a distribution center here, that that should change their tax status." House Majority Leader Gerald McCormick of Chattanooga concurs: "Making the Amazons of the world collect sales taxes will have to be a 50-state effort." (Sher, National group runs ads claiming Amazon deal 'hurts Main Street', 2011)

Texas

In October of 2010, Amazon suddenly received a \$269 million assessment from the state of Texas for interest and penalties during the period of December 2005 to December 2009 regarding uncollected sales taxes within the state of Texas. (Fowler, 2010) In response, Amazon filed a lawsuit on January 14th in Travis County District Court seeking the Texas comptroller's office release information about the calculation of the \$269 million figure. Amazon claimed that under the Texas Public Information Act, documents pertaining to the calculations must be released. (Harrell, 2011) Amazon then decided to close its distribution center near Dallas, which had opened in 2005, on April 12 due to an "unfavorable regulatory climate." Texas Comptroller Susan Combs estimates that Texas loses \$600 million each year from untaxed Internet sales. (Statesman.com, 2011) Sentiments regarding this issue are still varied within the state legislature. One lawmaker, Rep. Elliot Naishtat of Austin introduced a bill to close the loopholes that allow some Internet retailers to bypass collecting sales taxes. However, a group of lawmakers sent a letter to Comptroller Combs expressing their frustration about Amazon's decision to pull out of their communities. (Hinkle, 2011) Governor Rick Perry is lobbying the legislature to keep Amazon in Texas, but many view this effort as too late. The state will potentially lose 1,000 potential jobs and tens of millions of potential investment dollars when Amazon pulls out. (Kaiser, 2011) The Texas Supreme Court ruled that "having a physical presence in a state could make an online retailer liable for sales taxes in that state." (CVN Choices, 2011) Two bills in Texas's House of Representatives seek to broaden the definition of a retailer which would have to collect sales taxes in the state, including online purchases, while on the other hand, a third bill would amend the Texas tax code to provide that

retailers which operate only “fulfillment centers” or “computer servers” within the state are not required to collect an Internet sales tax. (Ley, 2011)

Vermont

It is estimated by government sources that the state of Vermont is losing between \$30 million and \$40 million each year to taxes not collected on Internet purchases. As a result, the Vermont House Ways and Means committee is investigating the possibility of implementing such a tax. (Kinzel, 2011) Amazon had announced that it would terminate all Vermont affiliates should such legislation pass. (Canevari, 2011) The Vermont House passed a bill to step up Internet sales tax collection that officials say could bring up to \$25 million in revenue. The bill specifies that retailers doing more than \$10,000 annually in sales and has affiliates in the state must begin to collect the 6% sales tax starting July 1, 2012. The bill is now moving into the Senate for consideration. State representative Mark Higley noted that “If big online retailers end their affiliate relationships with Vermont businesses, no additional sales tax revenue will be realized.” (Gram, 2011)

Wisconsin

The Wisconsin Department of Revenue estimates that the state misses out on nearly \$150 million per year on sales taxes from Internet sales. (The Associated Press, 2010) Additionally, only \$2 million is collected each year on out-of-state purchases in self-reported sales taxes with an additional \$32 million collected through audits. In response to the increasing size of the state debt, the state decided to sign on to the Streamlined Sales Tax Governing Board. (Contorno, 2010)

Public Policy Ramifications

The proceedings by states constitute preemptive unconstitutional legislation that must be reviewed by the Federal Government. These statutes violate the Commerce Clause of the United States Constitution and are against rulings of the United States Supreme Court. It is imperative that the concept of entity isolation be respected and upheld to protect out-of-state corporations until the US Congress has had the opportunity to review this matter.

As discussion over the issue is pending in Congress, many individuals and corporations affected by these so called “Amazon Taxes” have sought relief and redress through the state and Federal courts. Should the courts find in favor of the consumers and individuals who have since the duties’ enactment require a remedy, the case law is ambiguous regarding the appropriate remediation and its impact on the state’s bottom line.

While it is clear that unconstitutional taxes require a remedy, current case law is unclear as to the specific remedy appropriate for these situations. Much of the debate centers on the

retroactivity of court decisions once a court decides that a state taxation statute is invalid and whether taxpayers are allowed prospective relief. More specifically, this regards the possibility of whether once a statute has been deemed invalid, if taxpayers who have paid taxes in the past are able to recover the unconstitutional taxes that they have previously paid.

Among the arguments for a “meaningful backward looking relief” is the judicial principle of corrective justice. This is described in the Connecticut Law Review Journal article, Remedies for Unconstitutional State Taxes:

The focus in corrective justice is not, however, on whether the defendant was aware that he was acting unjustly in acquiring the plaintiff’s goods, but rather on whether the defendant acquired the goods justly and can justly retain them. In every case of an unconstitutional tax, the government is in possession of the taxpayer’s money which it took without legal authority, and would act unjustly by retaining it no matter how great its good faith in collecting it.
(Cloverdale, 2000)

Beyond the moral requirements for remedying the taxpayers who have been unjustly taxed, there is a government structural imperative for returning the funds: the deterrence of states from unconstitutionally levying duties on taxpayers in the future. (Cloverdale, 2000)

The concepts of retroactivity and nonretroactivity were first established in the criminal court case *Linkletter v. Walker*. (*Linkletter v. Walker*, 1965) Later, this principle was applied to civil cases most notably in *United States v. Estate of Donnelly* mentioned in Justice Harlan’s Concurring opinion. (*United States v. Estate Of Donnelly*, 1970) The concepts of retroactivity were then applied in the case *Chevron Oil Co. v. Huson Chevron Oil Co. v. Huson*, where the Court established a three-prong test to determine the factors bearing on a retroactivity question. Since that decision, three Supreme Court cases have defined the environment of the civil retroactivity issue. (Ciochon, 1992)

McKesson Corp. v. Florida Alcohol & Tobacco Division was a case brought by McKesson Corporation against the state of Florida because of a discriminatory tax applied to the company. The Court unanimously declared that “the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.” In its holding, the Court did not specifically address the application of retroactivity because of certain aspects of the case. (*McKesson Corp. v. Florida Alcohol & Tobacco Division*, 1990) *McKesson*, however, is facially not as great a victory for taxpayers because the Court did not specifically define what should constitute “meaningful

backward-looking relief” and states have allowed what Carl D. Ciochon notes, “‘meaningful’ into meaningless.” Further, the case encouraged the state’s implementation of procedural requirements for tax refund actions, but did not identify such roadblocks, allowing for wide state interpretation. (Ciochon, 1992)

The following two cases, *American Trucking Associations v. Smith* and *James M. Beam Distilling Co. v. Georgia* present the discord within the Court over prospective relief. *Smith* presented no majority opinion as the justices could not come to consensus on the issues revolving around retroactivity. The plurality, in an opinion authored by Justice O’Conner, concluded that the only issue that needed to be addressed was whether the opinion, handed down by the Arkansas Supreme Court regarding a state taxing issue, correctly applied the *Chevron Oil* test. The dissent, authored by Justice Stephens, argued that the case should have been considered in the same manner as *McKesson*, and would have required the state to provide the appropriate “backward-looking relief.” (*American Trucking Associations v. Smith*, 1990) In *Beam*, the Justices clashed again over the doctrine of retroactivity – five separate opinions were authored with no one joined by more than three Justices of the Court. Ciochon notes that “Because the decision is so badly fragmented, *Beam* confuses at least as much as it clarifies.” (Ciochon, 1992) The plurality opinion, penned by Justice Souter, rejected the principles of selective prospectively² in civil cases, thereby requiring prospective application either in all or no cases. In the end, Justice Souter concluded that a previous court case, *Bacchus Imports Ltd. V. Dias*, which did not speak to the retroactivity, but rather the terms of the relief applied to the parties for prior periods, must be applied retroactively in all cases. (*Bacchus Imports Ltd. v. Dias*, 1984) (*James M. Beam Distilling Co. v. Georgia*, 1991) (Cloverdale, 2000)

The majority in *Harper v. Virginia Department Of Taxation* further upheld the prospective relief retroactivity of all cases still open to direct review but implicitly rejected the issue of pure prospectively. (*Harper v. Virginia Department Of Taxation*, 1993) Since *Harper*, the Court has failed to address retroactive application of its decisions in tax cases and instead just remanded the cases for a proper remedy. These cases, particularly due to the Justices’ non-unanimity in decisions lead to ambiguity in the current situation of prospective retroactivity that faces the nation. (Cloverdale, 2000)

Many experts agree that should the Amazon taxes be held unconstitutional, redress would be imperative. Joseph Henchman, tax counsel and director of state projects at the Tax Foundation says, “If the state’s tax is held to be unconstitutional, the state would have no authority to keep the money.” (Byrne, 2010) Brad Maione, spokesman for the New York State Department of

² “Retroactive application to the parties before the court but prospective application in other cases” (Cloverdale, 2000)

Taxation and Finance, notes that prospective retroactivity would be very hard to implement. “Should [Internet retailers] be ultimately successful [in their overturning of Internet sales tax collection by the state], there would be no mechanism for them to refund their customers.” Others insist that not refunding these unconstitutional taxes would be legally and morally intolerable. Tom Hanson, former state finance commissioner of Minnesota said, “There’s nothing worse than collecting \$11 million for a couple biennium and then having to pay it back because the U.S. Supreme Court ended up deciding differently.” (Sheck, 2011)

Among the justifications against repaying the taxpayers for their illegal taxes is the concern regarding the state’s financial stability. This is perhaps the most salient concern for courts to consider, particularly in light of the budget crises; however, justice should not be denied just because the states made a mistake – taxpayers deserve compensation and redress.

Class Action Remedies

Among the possibilities for further redress of these unconstitutional statutes would be the filing of a class action lawsuit. In many states, class certification is a guaranteed common law right when contesting an unconstitutional state tax. However, in other states, class action suits are prohibited by case law and legal precedent. (Dickerson, 2003)

Lawsuits requesting injunctive and prospective retroactivity relief should be filed as the requirements for class action should be completely satisfied in regards to numerosity and commonality. Specifically, those members of the class would be constituted of taxpayers who have been levied and paid such unconstitutional “Amazon Taxes” by their state government. As states continue to collect such duties, this claim is not moot. The defendant in these lawsuits should be regarded as the financial operator responsible for the assessment and collection of these duties such as departments of revenue and taxation.

The requirement for numerosity is easily satisfied as the taxes are levied on the thousands and thousands, if not millions, of individuals who purchase online goods from vendors with merely an affiliate nexus, including, but not limited to sites such as Amazon. The prospect for joinder is infeasible due to the class being so numerous.

Commonality requirements are also satisfied due to the non-discriminatory nature of this tax – it applies to all consumers who have purchased from online vendors with an affiliate nexus within their state. While the degree that individuals are financially impacted depends on the amount purchased online, due to the sweeping nature of this tax, commonality in this situation is achieved.

Specifics regarding typicality and representation are currently unable to be determined due to the fact that neither the putative class has not been assembled nor has the representation been selected.

The potential for a class action lawsuit within the appropriate venue could lead to further legal action that would cause this constitutional issue to be resolved in a manner that would shed light on these unconstitutional practices and encourage the High Court to issue a nationally binding resolution to this issue.

Conclusion

Justice takes time. With the digitization of many modern tasks and services, the government must continue to carefully and cautiously consider the legal aspects of such technology. Unwitting actions could potentially impact the progress of our nation; well thought-out and deliberate measures are the best solution to balancing policies and procedures that will affect future generations.

While debate over this matter has just begun, jurisdiction and decision does not lie with the states. The Appellate Court should rule that New York's Internet sales tax is unconstitutional and the taxpayers that have paid it are entitled to a remedy. But even if the dispute between Amazon and New York State is resolved in court, the larger issue of interstate Internet taxation and affiliate nexuses remain. Class action lawsuits challenging the validity of such unconstitutional duties and requesting an injunction and prospective retroactive relief provide a possibility for redress for taxpayers. While ideally the Supreme Court would render a decision regarding this encroachment by the states, Congress should also take action in resolving the Internet sales tax matter. ". . . Congress has the power to protect interstate commerce from intolerable or even undesirable burdens. In this situation, it may be that 'the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.'" ³

³ The remarks of Justice Stevens in *Quill* regarding the Supreme Court's role in deciding interstate commerce affairs.

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