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New York Amazon Tax Decision

A constitutional challenge to a sales tax on Internet purchases brought by Amazon.com and Overstock.com recently fell short in New York's highest court. On March 28, the Court of Appeals of New York in *Overstock.com, Inc. v. N.Y. Department of Taxation and Finance* [1] upheld the constitutionality of New York's sales tax on remote sellers whose only connection with New York is through a New York resident's website.

New York's "Amazon Law" was the first of its kind when it was enacted in 2008. [2] The statute creates a rebuttable presumption that a seller is soliciting business in New York if the seller enters into an agreement with a resident of New York under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by link on an Internet website (referred to as "click-through nexus") or otherwise, to the seller. [3] In interpreting the statute, the New York Department of Taxation and Finance has provided that advertising alone would not invoke the statutory presumption, but the placement of a link to the seller's website for which the resident was compensated on the basis of completed sales deriving from that link would invoke the statutory presumption. [4] The presumption can be rebutted through proof that the resident's only activity in New York on behalf of the seller was to provide a link to the seller's website and that the resident did not engage in any in-state solicitation directed toward potential New York customers. [5] The presumption is also deemed successfully rebutted if the seller satisfies two conditions: (1) if the parties' contract prohibited the resident representative from engaging in any solicitation activities in New York on behalf of the seller; and (2) if each resident representative submitted an annual, signed certification stating that the resident had not engaged in any of the proscribed solicitation. [6]

Amazon.com and Overstock.com claimed the tax is facially unconstitutional. In rejecting the online retailers' constitutional challenges, the Court of Appeals stated that it was adhering to U.S. Supreme Court precedent requiring that an entity have a "physical presence within the state" in order for its sales to be subject to sales tax. The Court of Appeals previously had held that the physical presence test will be satisfied if economic activities are performed in New York by the seller's employees or on its behalf. In *Overstock.com*, the court held that the physical presence test was satisfied because "if a vendor is paying New York residents to actively solicit business in [New York], there is no reason why that vendor should not shoulder the appropriate tax burden." [7] The Court of Appeals also observed that because "[t]he world has changed dramatically in the last two decades," the physical presence test may be "outdated." [8]

Amazon.com and Overstock.com may petition the U.S. Supreme Court to review the decision of the Court of Appeals. Meanwhile, federal efforts to authorize the collection of state sales taxes by remote sellers are moving forward. On March 23, in a nonbinding vote, the U.S. Senate voiced its support by a margin of 75 to 24 for the Marketplace Fairness Act of 2013, [9] which would grant states the authority to require remote sellers to collect taxes on sales sourced to that state. [10] The bill, which has also been introduced in the House of Representatives, [11] would require that states simplify their tax laws before seeking collection authority and also provides an exception for "remote seller[s]" whose sales are equal to or less than $1 million. [12]

Efforts to require remote sellers to collect sales taxes are likely to continue given the explosive rate of growth in Internet sales. The ruling from New York's highest court may encourage those efforts. Online retailers should be aware of the implications of these statutes and consult with experienced tax professionals about how they affect their business plans.

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[1] 2013 N.Y. Lexis 542, 2013 N.Y. Slip Op. 2102 (N.Y. Ct. of App. Mar. 28, 2013).

[2] Other states, including Connecticut and California, have similar statutes.

[3] *See* N.Y. Tax Law ? 1101(b)(8)(vi). The presumption applies only 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 are in excess of $10,000 during the preceding four quarterly periods. *Id.*

[4] *See* N.Y. St. Dep't of Taxation & Fin. Mem. No. TSB-M-08[3]S.

[5] *Id.*

[6] *See* N.Y. St. Dep't of Taxation & Fin. Mem. No. TSB-M-08[3.1]S.

[7] 2013 N.Y. Lexis 542, at *12.

[8] *Id.* at *9.

[9] *See* Aaron Souppouris, "US Senate Votes in Favor of Proposed Nationwide Internet Sales Taxes" (March 23, 2013), http://www.theverge.com/2013/3/23/4138388/us-senate-marketplace-fairness-act-of-2013-symbolic-vote-results-internet-sales-tax.

[10] Marketplace Fairness Act, S. 336, 113th Cong. (2013).

[11] Marketplace Fairness Act, H.R. 684, 113th Cong. (2013).

[12] *See id.*; Senate Bill 336.