

PUBLICATION

Spotlight on SALT: Illinois Trial Court Declares "Click-Through Nexus" Law Unconstitutional

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Following on the heels of New York's 2008 law, Illinois enacted its own "click-through nexus" statute that became effective on July 1, 2011. While New York's law was sustained in 2010 in *Amazon.com LLC v. New York State Dept. of Taxation and Finance*, the Circuit Court of Cook County, Illinois has declared the Illinois law unconstitutional. As a number of other states have enacted similar laws in recent years, including Georgia, North Carolina, and Texas, this significant statutory expansion of state sales and use tax jurisdiction establishes a troubling precedent.

Cook County Click-Through Decision

In the Illinois decision, the Performance Marketing Association (PMA) brought a suit for declaratory judgment and alleged that the Illinois click-through nexus law violated the Commerce Clause to the U.S. Constitution by unduly burdening interstate commerce and that such law violated the federal Internet Tax Freedom Act. The PMA not only sought a declaration by the court that the Illinois law was unconstitutional and violated federal law, but also sought a permanent injunction against the Illinois Department of Revenue from enforcing the statute.

Like the New York and other state click-through nexus laws, the Illinois statute targets bloggers or "in-state publishers of on-line advertisements" who provide a link on their websites to the websites of out-of-state internet sellers. Under the terms of "Associate" or similar contracts with an internet seller, the Illinois publisher of online advertisements usually receives a commission based on a percentage of sales made by the internet seller to Illinois residents. Under the Illinois law, if the out-of-state internet seller's gross receipts from such sales were at least \$10,000, then the seller is considered a "retailer maintaining a place of business in this State." Physical presence is required by the U.S. Supreme Court's decisions, including *Quill Corp. v. North Dakota*, before a state may exercise tax jurisdiction over out-of-state taxpayers. Even though the internet seller does not have direct physical presence in Illinois, the challenged law effectively classifies the blogger as the internet seller's agent or representative in Illinois -- similar to the other states having click-through nexus laws.

Although the trial judge's written opinion is not yet available, the judge issued a bench decision granting PMA's request for a declaratory judgment that the Illinois click-through nexus law is unconstitutional and violates the Internet Tax Freedom Act. It is also reported that the state is expected to appeal the ruling.

Customer Lists and Notices

Performance Marketing Ass'n, Inc. v. Hamer, Director, Illinois Department of Revenue, is a welcome decision, but is certainly not the last word in this controversial exercise of state tax jurisdiction. In addition, some states are now requiring that out-of-state retailers without physical presence must issue notice to their customers that they are responsible for self-assessing and paying the state's use tax on their purchases from the remote seller. A recent Federal District Court for the District of Colorado decision, *The Direct Marketing Ass'n v. Huber*, struck down Colorado's notice requirement. However, compromise agreements being reached by Amazon.com with other states, such as Tennessee, include these notice requirements in exchange for delayed implementation of tax collection obligations imposed on the company. Other states, so far unsuccessfully, have

engaged in "fishing expedition audits" seeking customer lists and information from remote sellers. A 2010 decision from the Federal District Court for the District of Washington, *Amazon.com, LLC v. Lay*, rejected North Carolina's attempts to gather this information.

If you would like to discuss these developments and how they may affect your company, please contact one of the attorneys in the Firm's Tax Department.