

PUBLICATION

Spotlight on SALT: New York Court of Appeals Upholds the State's "Click-Through Nexus" Statute

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On March 28, 2013, in *Overstock.com, LLC v. New York State Dept. of Taxation and Finance*, the New York Court of Appeals, New York's highest court, upheld the New York State "click-through nexus" statute against a challenge that the statute was unconstitutional on its face. New York's statute was the first of its kind and spawned similar legislation in other states, including Arkansas, Connecticut, Georgia, Illinois (declared unconstitutional by a trial court, appeal pending), North Carolina, Pennsylvania, Rhode Island and Vermont. Similar legislation has been proposed in a number of other states.

In *Overstock.com, LLC*, and its companion case *Amazon.com, LLC v. New York State Dept. of Taxation and Finance*, New York residents under Overstock.com's "Affiliates Program" and Amazon.com's "Associates Program" would post links to the Overstock or Amazon website on the resident's website or blog. The residents would earn commissions from Overstock.com or Amazon.com sales to customers who linked to their websites from the New York residents' websites. Beginning in 2008, Overstock.com and Amazon.com initiated their constitutional challenges to New York's "click-through nexus" statute on the basis that the statute as-applied and on its face was unconstitutional in violation of the Commerce Clause because they did not have the requisite substantial nexus with New York (and also that the statute violated the minimum contacts requirement of the Due Process Clause). A New York Supreme Court (trial level) rejected these challenges, and it was upheld on appeal by the Appellate Division, although the appellate court remanded for further discovery on the as-applied claim. Overstock.com and Amazon.com withdrew their as-applied challenges and appealed to the New York Court of Appeals on the basis that the statute was unconstitutional on its face.

The challenge has now concluded in New York with the Court of Appeals holding that New York residents who operated websites or blogs with links to Overstock and/or Amazon websites pursuant to affiliation agreements were an "in-state sales force" that provided the requisite substantial nexus with New York. Although the dissenting opinion believed the affiliation programs were mere passive advertising, the majority, while acknowledging that passive advertising does not create substantial nexus, viewed the New York residents as actively soliciting business on behalf of Overstock.com and Amazon.com.

It remains to be seen whether the taxpayers will petition the U.S. Supreme Court for writs of certiorari, although initial reports are that Overstock.com is considering an appeal. Nevertheless, the culmination of the "click-through nexus" dispute in New York will certainly embolden other states that have enacted similar statutes, as well as proponents in other states.

If you would like to discuss the issues raised by the *Overstock.com* and *Amazon.com* cases, or other state tax nexus issues, please contact one of the attorneys in the Firm's Tax Department.