

NEW YORK STATE SUPREME COURT UPHOLDS CONSTITUTIONALITY OF NEW YORK STATE SALES TAX STATUTE

Last year online merchants received unwelcome news from the State of New York. New York State revised its sales tax laws to require out-of-state merchants, such as Amazon.com, who sell products online to New York residents, to start collecting sales tax if the merchant's in-state independent agents and/or affiliates engaged in certain solicitation activities for a commission or other consideration.

Historically, the United States Constitution has prevented the States from requiring out-of-state sellers, who have no physical presence or similar contacts with a State, from being required to collect and remit sales tax to those States where the out-of-state seller's contacts with a particular state do not meet the "nexus" standards under the U.S. Constitution.

Under the law, a person will be presumed to be soliciting business in New York through an independent contractor if the seller enters into an agreement with a New York State resident under which the resident, for a commission or other consideration, refers potential customers, whether by a link on an internet website or otherwise, to the seller and the cumulative gross receipts from sales by the seller to customers in New York referred to the seller by all residents

referring business under commission agreements are in excess of \$10,000 during the preceding four quarterly periods. This solicitation presumption however can be rebutted by proof that the resident did not engage in any solicitation in New York on behalf of the seller during the prior four quarterly periods that would satisfy the nexus requirements of the U.S. Constitution. An out-of-state seller that includes in its agreement a condition that in-state commissioned representatives are prohibited from engaging in solicitation activities on its behalf and ensures compliance through certification may rebut the presumption so long as New York State does not subsequently determine that in-state solicitation activity took place.

Once the statute was enacted, Amazon.com and Overstock.com

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THE BOTTOM LINE

Based on the language of the statute and the guidance issued to date by the New York State Department of Taxation and Finance, an out-of-state seller who utilizes in-state residents to assist in the advertisement of their products on a commissioned basis

- >> Will need to be careful in structuring their commission agreements to expressly prohibit such in-state residents from engaging in solicitation activity and
- >> Ensure such compliance through certification from the in-state residents.

Whereas prudent merchants previously reviewed the promotional activities of their agents and affiliates for issues such as accuracy and compliance with advertising laws, such merchants will now need to further scrutinize such activities with respect to potential tax liabilities as well.

commenced litigation in the Supreme Court of the State of New York challenging the constitutionality of the statute on the basis that it violates the Commerce Clause, the Due Process Clause and the Equal Protection Clause of the U.S Constitution. The Supreme Court of the State of New York, in a decision rendered this month, has rejected these claims and upheld the constitutionality of the statute.

The Court determined that the statute does not broadly tax any and all internet sales to New York customers.

In the Court's view, the statute requires a substantial nexus between an out-of-state seller and a New York resident through a contract to pay commissions for referrals from a New York resident along with a realization of more than \$10,000 of revenue from New York sales earned through such referrals.

One would expect that Amazon.com and Overstock.com will appeal the decision in the case and since the case involves issues of constitutional law, could eventually be resolved by the United States Supreme Court.

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