

NEW YORK STATE AMAZON LAW UPHELD ON APPEAL

Among the many reasons that consumers enjoy shopping for goods on the Internet is the fact that many purchases are made without the need for the consumer to pay, and the merchant to collect, sales taxes. While this makes consumers and online merchants happy, it frustrates states facing budget crunches and infuriates off-line merchants who resent an advantage that they see as unfair. Numerous states have attempted to address this issue by passing new laws or clarifying the applicability of existing laws to the Internet.

In many circles this has been branded the “Affiliate Tax” because of the significant and potentially detrimental effect this has upon the Internet affiliate marketing industry. A recent appellate court decision in New York has provided some clarity as to whether such laws are likely to be upheld and enforced.

Historically, under New York State Tax Law, every vendor of tangible personal property is required to collect sales and use taxes on sales of tangible personal property. A “vendor” includes a person who solicits business in New York through employees, independent contractors, agents or other representatives and as a result of such solicitations makes sales in New York.

In April of 2008, the Tax Law was amended to create a presumption that an out-of-state seller will be deemed to be soliciting business in New York through an independent contractor or other representatives if the seller enters into an agreement with a New York State resident under which the resident for a commission or other

consideration, directly or indirectly, refers potential customers, whether by link on an Internet website or otherwise to the seller. However, the presumption can be rebutted by proof that the resident did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirements of the United States Constitution.

After the statute became effective, Amazon.com and Overstock.com each commenced lawsuits in New York State Supreme Court challenging what has come to be referred to as the “Amazon Law” on the basis that the

- >> statute was unconstitutional on its face on the basis it violates the Commerce Clause, the Due Process Clause and the Equal Protection Clause of the U.S. Constitution, and
- >> it is also unconstitutional as applied to Amazon and Overstock’s specific facts.

The New York State Department of Taxation and Finance subsequently issued two memoranda providing

THE BOTTOM LINE

In light of the recent decision to uphold the so called “Amazon Law” or “Affiliate Tax” those involved in the affiliate marketing industry or any online commerce should pay close attention to the continuing developments in this case and similar statutory initiatives in other states.

further clarification as to how the law is to be applied. In the memoranda, the Department clarified that the statutory presumption would only be triggered by commission based referral agreements as compared to an agreement where the New York resident would only be paid a flat fee. Additionally, the Department clarified that the solicitation presumption could be rebutted if the seller can establish that the only activity of the in-state representative consisted of placing Internet links that connected their websites to the out-of-state seller’s

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website. Thus, more than a mere pass-through click is required to impose sales tax collection responsibilities on an out-of-state seller. The Department also stated that a seller can rebut the presumption of solicitation by including in their agreements with a New York representative a provision prohibiting the New York representative from engaging in any solicitation activities in New York that refer potential customers to the seller and requires each New York representative to submit a signed certification each year stating that it has not engaged in any such solicitation during the prior year.

In February 2009, the New York State Supreme Court issued a decision that upheld the constitutionality of the statute on its face, and also as it applied to Amazon and Overstock, and dismissed both complaints in their entirety.

Amazon and Overstock appealed the decision and the Appellate Division, First Department, in a decision earlier this month, upheld the constitutionality of the statute on its face but ruled that further factual discovery was warranted so that a determination can be made as to whether the statute, as applied specifically to Amazon and Overstock, violated the Commerce and Due Process Clauses.

In the court's opinion the statute on its face does not violate the Commerce Clause, as there are a set of

circumstances under which the statute would be valid under the Commerce Clause which are where a New York representative uses some form of proactive solicitation which results in a sale by a company such as Amazon, and a commission is paid to the representative who has sufficient presence in New York to satisfy the substantial nexus requirements of the Commerce Clause. The court also found that a facial challenge to the statute on Due Process grounds must also fail since

- >> the rebuttable presumption of solicitation where an in-state representative is paid a commission on a per sale basis is not an irrational presumption and
- >> the statute is not unconstitutionally vague.

Amazon and Overstock additionally contended that the statute as specifically applied to them violates the Commerce Clause because their representatives do nothing more than advertise on New York based websites. In this regard, the court noted that there has not been significant enough factual development for a court to make such determination.

In response to the Due Process Claim, the court noted that the determination of whether the statute as applied to Amazon and Overstock is irrational

requires an analysis as to whether it is irrational to conclude that the Amazon and Overstock agreements with New York based websites and the nature of compensation paid to such New York websites are by their nature sufficient to establish that such websites go beyond mere advertising and amounts to solicitation. In response to Amazon and Overstock's argument that it would be impossible to rebut any presumption due to the hundreds of thousands of websites that could be involved that would render it impossible for them to keep tabs on all of them in a manner sufficient to rebut the presumption, the court believed it premature to make that determination without greater factual development.

Finally, the court rejected Amazon's claim that the statute as applied to it violates the Equal Protection Clause.

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