

## Illinois Judge Rules 'Amazon' Law Unconstitutional

by John Buhl

Full Text Published by taxanalysts<sup>®</sup>

An Illinois circuit court judge on April 25 found the state's "Amazon" law unconstitutional, saying that the click-through nexus statute violates the commerce clause.

In a summary judgment, Judge Robert Lopez Cepero also said that Illinois acted prematurely in adopting the law, given the federal prohibition on so-called discriminatory taxes in the Internet Tax Freedom Act, according to a press release from the Performance Marketing Association (PMA).

PMA Executive Director Rebecca Madigan told Tax Analysts that she hopes the ruling helps Illinois affiliate marketers get back into business as soon as possible.

Illinois Department of Revenue spokesperson Susan Hofer provided Tax Analysts with the DOR's written response.

"We respectfully disagree with the court's ruling and are reviewing our appeal options with the Attorney General's office. We need to protect bricks-and-mortar stores from an unlevel playing field and we need to recoup some of the estimated \$153 million that was not paid by on-line merchants prior to the law being implemented. The law was a bipartisan initiative that passed both houses of the General Assembly with overwhelming support," Hofer said.

Signed into law by Gov. Pat Quinn (D) in March 2011, Illinois's Amazon law requires remote vendors to collect sales taxes if they do sales through in-state affiliates that receive a commission. It is similar to nexus laws adopted in New York, Arkansas, California, Connecticut, North Carolina, and Rhode Island, while Pennsylvania is planning to enforce click-through nexus rules administratively.

Many online retailers have responded to the laws in Illinois and other states by terminating their affiliate programs.

The PMA on June 1 filed the lawsuit against the DOR, arguing that the law violates the commerce clause by imposing tax collection requirements on retailers that lack substantial nexus with the state and by regulating commerce taking place outside Illinois. (For the complaint, see *Doc 2011-11874*.)

The complaint also argues that the law violates the Internet Tax Freedom Act by imposing on some electronic commerce activities requirements that do not apply to other forms of advertising.

However, backers of expanded state sales tax nexus laws argue that the Amazon laws are supported by the U.S. Supreme Court's ruling in *Scripto* and *Tyler Pipe*.

Amazon and Overstock.com are also challenging the New York law in court. An appellate court upheld the facial constitutionality of the law but remanded the case to the lower court to reanalyze whether the law can be applied constitutionally. (For coverage, see *State Tax Notes*, Dec. 13, 2010, p. 737, *Doc 2010-26299*, or *2010 STT 237-20*.)

Most recently, Amazon filed an appeal again challenging the ruling of New York's law as facially constitutional and seeking a decision from the higher court on the "as applied" challenge.

### **Mixed Reaction From Policy Community**

With the Illinois court providing the first judicial response to the click-through nexus laws since a 2010 New York appellate court ruling, the state tax community has differing opinions on the decision and its potential impact.

Joseph Henchman, vice president of legal and state projects for the Tax Foundation, told Tax Analysts that he hopes the ruling gives pause to other states considering Amazon laws. Henchman said that the Supreme Court in the 1992 *Quill* decision reiterated that states can only impose tax collection obligations on businesses with a physical presence.

Asked about the ruling in cases such as *Scripto* and *Tyler Pipe*, Henchman replied that the Court found those situations to be the furthest extension of nexus that states could use. While *Scripto* and *Tyler Pipe* dealt with employees critical to maintaining the company's market in a state, online affiliates fulfill a much more tangential role, Henchman argued.

Amazon laws "don't raise revenue, they don't level the playing field, and they lead to job losses and extended litigation," Henchman said.

In an e-mail to Tax Analysts, NetChoice Executive Director Steve DeBianco added, "There was never much doubt that this law had commerce clause infirmities. But I'm delighted to see the judge found what I believe is the first-ever violation of the Internet Tax Freedom Act moratorium against 'discriminatory' e-commerce taxes."

However, Multistate Tax Commission Executive Director Joe Huddleston countered that there is a long line of case law supporting activities such as online affiliate marketing as nexus-creating activities. In the ongoing New York case, the courts have thus far upheld the constitutionality of the law as it's written, he added.

Huddleston also said that he believes states will continue to consider Amazon laws despite the Illinois ruling.

"I think there is strong momentum for [the consideration of] pretty similar statutes," Huddleston said. "I think you could argue that many statutes already apply to these types of transactions."

As for the judge's ruling that the Illinois law could run afoul of the Internet Tax Freedom Act, Huddleston said that he would need to see the official ruling. But he said

he does not see how the federal law would prohibit the enactment of Amazon laws by the states.

John Buhl

[jbuhl@tax.org](mailto:jbuhl@tax.org)