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*In this
special issue:*

- On December 2, 2013 U.S. Supreme Court Declines to Review State Law Imposing Internet Sales Tax Collection Requirement

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In a case of significance to both Internet retailers and brick-and-mortar retailers, the U.S. Supreme Court on December 2nd declined to review New York State Court of Appeals decisions upholding the constitutionality of a State of New York statute that creates a rebuttable presumption that out-of-state Internet retailers having no physical presence in New York State are in-state vendors required to collect, and remit to the State, New York State sales taxes on all sales to New York State residents effected over the Internet. [*Overstock.Com, Inc. v. New York State Department of Taxation and Finance, et al.*; and *Amazon. Com LLC and Amazon Services LLC v. New York State Department of Taxation, et al.* Supreme Court docket numbers 13-252 and 13-259]

The question of out-of-state retailers collecting sales tax for the state of residence of its customers is not new. In 1967 the U.S. Supreme Court held that the U.S. Constitution's Commerce Clause prohibited states' requiring such sales tax collection by out-of-state retailers who merely advertised in a state and lacked a physical presence there. There the Court noted that requiring a physical presence as a bright-line test for bringing an out-of-state vendor under a state's taxing power served the purpose of having a national economy "free from...unjustifiable local entanglements." [*National Bellas Hess v. Department of Revenue*, 386 U.S. 753 (1967)] In 1992 the Court held that the Commerce Clause prohibited states from requiring businesses that lack a physical presence in a state to collect state sales tax. There the Court rejected the argument that economic contacts with a state are enough to bring a business under the taxing power. [*Quill Corp. v. North Dakota*, 504 U.S. 298 (1992)]

At the heart of the cases here was Overstock's and Amazon's practice of using third-party "affiliates" who contract to post on their own website a "click through" link that directs viewers to the retailer's website where the transaction can be effected. The affiliate receives from the retailer a percentage of sales revenue resulting from its "click throughs." In declining to hear the case, the Supreme Court let stand the New York decision that the physical presence test required by the Commerce Clause was met by the physical presence within a state of the affiliate website, even though that website was not an agent of the retailer, and thus the state could require the retailer to collect sales tax on sales made to residents of the state.

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While these decisions may be hailed by brick-and-mortar retailers who saw themselves at a disadvantage in being required to collect sales tax when Internet vendors were not, this issue is sure to be revisited. Four states have highest court decisions holding that the Commerce Clause prevents states from exercising taxing authority over out-of-state businesses based on in-state activities of non-agent affiliates. New York now joins three other states' decisions that an agency relationship is not required to bring the out-of-state business under the taxing authority. There has been talk of Congressional action to effect a national sales tax scheme, though the possibility of that in the immediate future remains remote.

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Department of Employment and Economic Development

1st National Bank Building ■ 332 Minnesota, Suite E-200 ■ Saint Paul, MN 55101-1351 USA

651-259-7114 | Toll Free: 800-657-3858 | Fax: 651-296-5287 | TTY/TDD: 651-282-5909 | <http://mn.gov/deed/>

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