

**UP THE AMAZON WITHOUT A PADDLE: EXAMINING SALES  
TAXES, ENTITY ISOLATION, AND THE “AFFILIATE TAX”**

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*As a result of the Supreme Court’s decision in Quill v. North Dakota, unless a retailer has a physical presence in a state, it is not obliged to collect sales taxes in that state. In order to avoid collecting sales taxes, many companies like Amazon.com have set up subsidiary companies in many states to ship, but not sell, goods to customers. This tactic is called entity isolation. In response, states are creating legislation, commonly, but inaccurately, called an “affiliate tax,” which provides that if a company makes a certain amount of money through an affiliate’s presence in the state, it is deemed to have legal physical presence and is required to collect sales taxes. This Recent Development discusses how Quill has reacted to the Internet age, the possibility of states cutting through entity isolation, and the constitutionality of the so-called “affiliate tax.”*

**I. INTRODUCTION**

In many states, sales tax accounts for a large portion of the state’s total revenue;<sup>1</sup> nationally, in 2008, 30.8% of nationwide state tax revenue came from sales tax, and individual states that had sales taxes obtained anywhere from 22% to 63% of their revenue from it.<sup>2</sup> Thus, with the recent economic downturn cutting

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<sup>1</sup> FEDERATION OF TAX ADMINISTRATORS, 2008 STATE TAX REVENUE BY SOURCE (2009), <http://www.taxadmin.org/FTA/rate/08taxdis.html> (on file with the North Carolina Journal of Law & Technology).

<sup>2</sup> *Id.* Washington state collected the most, with 63.2% of its tax income coming from sales tax, while, of the states that had sales taxes, West Virginia collected the least, at only 22.7%. *Id.* It is worth noting that Washington does not have an individual or corporate income tax. *Id.*

into tax revenue,<sup>3</sup> it is no surprise that states have begun to fight for all the tax revenue to which they believe they are entitled.<sup>4</sup> Online retailers with no physical presence in a state have been, until recently,<sup>5</sup> exempt from collecting the sales tax, effectively giving them in some cases an 8% or more discount over their local “brick-and-mortar”<sup>6</sup> competition.<sup>7</sup> In many states, including New York,<sup>8</sup> North Carolina,<sup>9</sup> and California,<sup>10</sup> purchasers of goods online are obliged to pay the appropriate amount in tax to the state, but this rarely occurs.<sup>11</sup> According to one recent study, over \$7.7 billion was lost by states in sales and use taxes from e-commerce sales in

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<sup>3</sup> Conor Dougherty, *State, Local Tax Revenues Decline 7%*, WALL STREET JOURNAL, Dec. 30, 2009, at A3.

<sup>4</sup> See, e.g., Appropriations Act of 2009, No. 451, § 27A.3.(a), 2009-4 N.C. ADV. LEGIS. SERV. 284, 502-03 (LexisNexis); Act of April 23, 2008, ch. 57, pt. OO-1 2008 N.Y. LAWS 2704, 2844, § 1.

<sup>5</sup> See, e.g., Appropriations Act of 2009, No. 451, § 27A.3.(a), 2009-4 N.C. ADV. LEGIS. SERV. 284, 502-03 (LexisNexis); Act of April 23, 2008, ch. 57, pt. OO-1 2008 N.Y. LAWS 2704, 2844, § 1.

<sup>6</sup> A “brick-and-mortar” store is a traditional store with a physical storefront, not just an electronic storefront. See Brick And Mortar, INVESTOPEdia, <http://www.investopedia.com/terms/b/brickandmortar.asp> (last visited Feb. 21, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>7</sup> Saul Hansell, *Amazon Plays Dumb in Internet Sales Tax Debate*, THE NEW YORK TIMES BITS BLOG, Feb. 13, 2008, <http://bits.blogs.nytimes.com/2008/02/13/amazon-plays-dumb-in-internet-sales-tax-debate/> (on file with the North Carolina Journal of Law & Technology).

<sup>8</sup> *Id.*

<sup>9</sup> N.C. GEN. STAT. § 105-164.16 (2009); see also North Carolina Department of Revenue, FORM D-401: INDIVIDUAL INCOME TAX INSTRUCTIONS FOR FORM D-400 7 (2009), available at <http://www.dornrc.com/downloads/D401.pdf>.

<sup>10</sup> California State Board of Equalization, PUBLICATION 79B: CALIFORNIA USE TAX 1 (July 2009), available at <http://www.boe.ca.gov/pdf/pub79b.pdf>.

<sup>11</sup> See Hansell, *supra* note 7 (stating that New York would collect additional sales tax by passing the “affiliate tax” despite the fact that “the buyer of the [product] . . . technically owes the tax to New York State”). As many of the readers of this paper are likely to be North Carolinians, the author invites the reader to look over his or her past D-400 forms’ Consumer Use Tax line (line 19 on the 2009 D-400, line 17 on the 2008 D-400) to see how much he or she remitted to the state. These taxes, when remitted by the purchaser, are technically use taxes and not sales taxes, but the distinction between the two is slim, as the use tax is to be paid on out-of-state purchases for use in the state while sales tax is paid on in-state purchases. Form D-401, *supra* note 9, at 7.

2008, including \$145 million lost by North Carolina alone.<sup>12</sup> The situation described creates a virtual arms race between the states, who want online retailers to collect taxes, and the online retailers, who do not want to take on the burden and expense of calculating and collecting taxes.<sup>13</sup> The factor that has most limited the states in their race to collect sales tax is the United States Supreme Court’s decision in *Quill Corp. v. North Dakota*,<sup>14</sup> which held that a state may only impose a duty to collect sales tax upon a corporation when that corporation has minimum contacts with the state for the purposes of the Due Process Clause<sup>15</sup> and a substantial nexus with the state for the purposes of the Dormant Commerce Clause.<sup>16</sup> The methods being used by online retailers to avoid collecting sales tax, such as entity isolation, while legal, can be bypassed by states and used to force the collection of tax. The “affiliate taxes” are also constitutional, and are likely to see increasing use.

Part II of this Recent Development discusses the consequences of the *Quill* decision in the Internet world. Part III explores a sales tax avoidance tactic used by online retailers with mixed success called “entity isolation.” Part IV analyzes the constitutionality of the “affiliate tax” used by states, including New York and North Carolina, to require out-of-state companies with affiliate marketing programs, such as Amazon.com, to collect sales tax. Part V lays out policy arguments for and against imposing the duty to collect sales tax on out of state retailers, and Part VI concludes that online retailers collect sales taxes in states to which they have a substantial connection.

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<sup>12</sup> Donald Bruce, William F. Fox, & LeAnn Luna, *State and Local Sales Tax Revenue Losses from E-Commerce*, 52 STATE TAX NOTES 537, 545 (2009), available at <http://cber.utk.edu/ecom/ecom0409.pdf>.

<sup>13</sup> See Hansell, *supra* note 7 (“Amazon has stated that they aren’t opposed to collecting state sales tax, so long as the tax laws are simplified.”).

<sup>14</sup> 504 U.S. 298 (1992).

<sup>15</sup> *Id.* at 306 (“The Due Process Clause ‘requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax’ . . . .”) (citation omitted).

<sup>16</sup> *Id.* at 314–15 (affirming the bright-line rule of *Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of the State of Ill.*, 386 U.S. 753 (1967)).

## II. *QUILL* AND POST-*QUILL* SALES TAX LAW

### A. *Quill v. North Dakota*

The Supreme Court's decision in *Quill* has had a major influence on state sales tax jurisprudence.<sup>17</sup> The case set the standards governing the ability of states to collect sales tax from retailers based out-of-state.<sup>18</sup> It clarified the requirements set in *National Bellas Hess, Inc. v. Department of Revenue of Ill.*<sup>19</sup> *Quill* Corporation had no offices or employees in North Dakota, but it solicited sales from customers in the state.<sup>20</sup> While North Dakota posited that the solicitation of sales was sufficient to force *Quill* to collect sales tax, the United States Supreme Court disagreed.<sup>21</sup> Although taking advantage of the North Dakota market was sufficient to create jurisdiction under the Due Process Clause,<sup>22</sup> it did not create a sufficient nexus requiring *Quill* to collect sales tax under the Dormant Commerce Clause.<sup>23</sup> North Dakota contended

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<sup>17</sup> Edward A. Zelinsky, *Rethinking Tax Nexus and Apportionment: Voice, Exit, and the Dormant Commerce Clause*, 28 VA. TAX. REV. 1, 14 (2008). It is beyond the scope of this Recent Development to explore the reasoning of the *Quill* decision or the intricacies of sales and use tax law. For a more detailed description of the law as it stands, see generally *id.*

<sup>18</sup> *Id.* at 14–16.

<sup>19</sup> 386 U.S. 753 (1967). *National Bellas Hess* decided that the Due Process Clause was violated by Illinois collecting sales tax from a corporation whose only connection to Illinois was the use of a common carrier, such as the US Post Office, to deliver to customers in the state. *Quill*, 504 U.S. at 301 (citing *National Bellas Hess*, 386 U.S. at 758).

<sup>20</sup> *Quill*, 504 U.S. at 302.

<sup>21</sup> *Id.* at 301–02.

<sup>22</sup> *Id.* at 307–08 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985); *International Shoe Co. v. Washington*, 326 U.S. 310 (1945)).

<sup>23</sup> *Quill*, 504 U.S. at 314–15. Under the Dormant Commerce Clause, states may not levy a tax that would burden interstate commerce or interstate sales. *Id.* at 311 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977)). However, companies, “with certain restrictions, . . . may be required to pay [their] fair share of state taxes.” *Id.* at 310 n.5 (quoting *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988)). These restrictions were described in *Complete Auto* as requiring that the “tax [be] applied to an activity with a substantial nexus with the taxing State, [be] fairly apportioned, . . . not discriminate against interstate commerce, and [be] fairly related to the services provided by the state.” *Id.* at 311 (quoting *Complete Auto*, 430 U.S. at 279).

that modern sales methods had rendered the physical presence test of *National Bellas Hess*, which states that a seller could only be forced to collect sales taxes for a state if it had physical presence in the state, obsolete.<sup>24</sup> The Court found that interstate commerce could be burdened by “state-imposed duties to collect sales and use taxes.”<sup>25</sup>

In this way, *Quill* both clarifies and expands the *National Bellas Hess* bright-line test of physical presence in a state. To pass the *Quill* test, a statute that imposes a duty to collect sales tax must be consistent with both the Due Process Clause and the Dormant Commerce Clause.<sup>26</sup> Simply because a corporation has minimum contacts with the state does not mean the state can constitutionally force the corporation to collect sales taxes.<sup>27</sup> The ability of a state to impose such a duty “may turn on the presence in the taxing State of a small sales force, plant, or office.”<sup>28</sup> Justice Stevens, speaking for the majority, admitted that this creates a bright-line rule that “appears artificial at its edges.”<sup>29</sup> It is easy to imagine situations where the *Quill* test seems inappropriate.<sup>30</sup> Despite the artificiality of the *Quill* bright-line test, the Court found that the benefits of simplicity in administering the tax laws outweighed any benefit of having a rule that better reflects present-day economic realities.<sup>31</sup> The Court, however, stated that Congress would be permitted to

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<sup>24</sup> *Quill*, 504 U.S. at 314. The North Dakota Supreme Court came to the conclusion that “*Bellas Hess* is no longer good law” based on changing methods of Supreme Court analysis. *Id.*

<sup>25</sup> *Id.* at 315.

<sup>26</sup> *Id.* at 313, 315.

<sup>27</sup> *Id.* at 315, n.8 (quoting *National Geographic Society v. Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977)).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Consider, for example, a corporation that employs a field sales person stationed in each of the fifty states, which could therefore be held liable to collect sales taxes for every state. Additionally, consider a South Carolina corporation that exists solely to fill mail order sales for North Carolina customers, which conversely would not be required to collect North Carolina sales taxes.

<sup>31</sup> *Quill*, 504 U.S. at 315.

regulate how state sales taxes may be collected,<sup>32</sup> but Congress has yet to act.<sup>33</sup>

### B. *Quill in the Internet Age*

With the bright-line test in mind and no congressional action to regulate state sales taxes for remote sellers, corporations began to devise ways to avoid collecting sales and use taxes in order to make their prices appear lower.<sup>34</sup> A prime example came in a 2005 California Court of Appeal case, *Borders Online, LLC v. State Bd. of Equalization*,<sup>35</sup> in which the requirement to collect California sales tax was stretched to its limit. Borders Group, Inc. owned both Borders Online, LLC and Borders, Inc.<sup>36</sup> The latter owned Borders Books and Music stores across the United States, including in California.<sup>37</sup> Borders stores accepted returns from online orders, Borders Online advertised that the products could be returned to the physical stores, and store employees were encouraged to refer customers to the website.<sup>38</sup> The court determined that because the Borders Books and Music stores were accepting returns, they were acting as Borders Online's agents.<sup>39</sup> Therefore, Borders Online had an effective presence in California and could be taxed.<sup>40</sup>

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<sup>32</sup> *Id.* at 318–19.

<sup>33</sup> Neither the Internet Tax Nondiscrimination Act of 2004, Pub. L. No. 108-435, 118 Stat. 2615, nor the Internet Tax Freedom Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681-719 (as amended by the Internet Tax Freedom Act Amendments Act of 2007, Pub. L. No. 110-108, 121 Stat. 1024) performs the function envisioned by Justice Stevens in his *Quill* opinion. *Quill*, 504 U.S. at 318–19. See also Walter J. Baudier, *Internet Sales From Borders to Amazon: How Long Before All of Your Purchases Are Taxed?*, 2006 DUKE L. & TECH. REV. 5, ¶ 16 (describing the functions performed by the Internet Tax Freedom Act).

<sup>34</sup> As noted in Part I, *supra*, the prices are not actually any lower because consumers are required to remit the tax they would have paid on the item at a later time.

<sup>35</sup> 29 Cal. Rptr. 3d 176 (Cal. Ct. App. 2005).

<sup>36</sup> *Id.* at 178–79.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 179–80.

<sup>39</sup> *Id.* at 185.

<sup>40</sup> *Id.*

The practical consequence of the *Borders* decision is that companies with online divisions that do not wish to collect sales taxes for online orders must create a corporate structure where the online division is completely distinct from the “brick-and-mortar” division.<sup>41</sup> However, *Borders* cannot point us to a direct conclusion about tactics used by online-only retailers like Amazon.<sup>42</sup> The case also lays the groundwork for a state to impose sales tax liability based on a “brick-and-mortar” company promoting an online company’s products and services and vice versa.<sup>43</sup>

Two years later, in *St. Tammany Parish Tax Collector v. Barnesandnoble.com, LLC*,<sup>44</sup> however, a separate court faced with similar facts found that bookseller Barnesandnoble.com, LLC was not responsible for collecting state and local taxes. The main differences between this case and *Borders* were that: 1) Barnes & Noble stores only gave Barnesandnoble.com customers store credit, not cash, for merchandise purchased online and returned to the stores; and 2) stores would give similar credit to purchasers from competitive stores.<sup>45</sup> The *St. Tammany* court reached the opposite conclusion of the *Borders* court: Barnesandnoble.com did not have a sufficient nexus to pass the *Quill* test.<sup>46</sup>

In spite of an attempt to create a bright-line rule in *Quill*,<sup>47</sup> numerous gray areas continue to exist in areas like the determination of physical presence, as illustrated by *Borders* and *St. Tammany*. However, it appears from the post-*Quill* jurisprudence that a business may be structured such that it serves the entire United States while never having to collect sales taxes.<sup>48</sup>

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<sup>41</sup> Baudier, *supra* note 33, at ¶ 11.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> 481 F. Supp. 2d 575 (E.D. La. 2007).

<sup>45</sup> *St. Tammany Parish Tax Collector v. Barnesandnoble.com, LLC*, 481 F. Supp. 2d 575, 578, 580 (E.D. La. 2007).

<sup>46</sup> *Id.* at 582.

<sup>47</sup> *Quill v. North Dakota*, 504 U.S. 298, 315 (1992).

<sup>48</sup> For example, consider a company with all its operations in Delaware, a state with no sales tax. Delaware Department of Finance Division of Revenue, Gross Receipts Taxes, [http://revenue.delaware.gov/services/Business\\_Tax/Step4.shtml](http://revenue.delaware.gov/services/Business_Tax/Step4.shtml)

This leaves the door open to online retailers trying to find a way to both provide timely delivery service to their customers while maintaining the price advantage over local “brick-and-mortar” retailers. Retailers attempt to provide timely service by having warehouses in more states than those that do not impose sales taxes.

### III. TAKING ADVANTAGE OF *QUILL*: ENTITY ISOLATION

To avoid being forced to collect sales taxes, some online retailers such as Amazon.com take advantage of the *Quill* physical presence requirement by using a tactic called “entity isolation.”<sup>49</sup> To use this tactic, a corporation sets up other companies to perform specific functions, such as order fulfillment or research and development on new products.<sup>50</sup> Because the subsidiaries are legally distinct from the company selling the product, the seller is not deemed to have a physical presence in the state. Thus, under *Quill*, the seller cannot be required to collect sales tax.<sup>51</sup>

As stated earlier, Amazon has been one online retailer to take advantage of this loophole in *Quill*.<sup>52</sup> In Pennsylvania, Amazon operates five distribution centers, but it does not collect sales taxes.<sup>53</sup> The distribution centers are legally operated by two subsidiary companies, Amazon.com DEDC LLC (DEDC) and

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(last visited Jan. 18, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>49</sup> Randall Stross, *Sorry, Shoppers, but Why Can't Amazon Collect More Tax?*, N.Y. TIMES, Dec. 27, 2009, at BU3, available at <http://www.nytimes.com/2009/12/27/business/27digi.html>. See generally Mark J. Cowan, *Tax Planning Versus Business Strategy: The Rise and Fall of Entity Isolation in Sales and Use Taxes*, 44 IDAHO L. REV. 63, 65–66 (2007).

<sup>50</sup> Stross, *supra* note 49, at BU3.; MICHAEL MAZEROV, CTR. ON BUDGET & POLICY PRIORITIES, AMAZON'S ARGUMENTS AGAINST COLLECTING SALES TAXES DO NOT WITHSTAND SCRUTINY 5 (2009), <http://www.cbpp.org/files/11-16-09sfp.pdf> (on file with the North Carolina Journal of Law & Technology).

<sup>51</sup> Mazerov, *supra* note 50, at 6–7.

<sup>52</sup> See *supra*, Part I.

<sup>53</sup> David Dekok, *To Tax or Not To Tax: An Online Dilemma*, THE HARRISBURG PATRIOT-NEWS (Harrisburg, Pa.), May 27, 2008, at A1.



Amazon.com kydc Inc. (KYDC).<sup>54</sup> All the corporate officers for DEDC and KYDC are identical and have addresses in Seattle, Washington,<sup>55</sup> where Amazon.com, Inc. has its corporate headquarters.<sup>56</sup> It is clear from their operations, corporate structure, and the names of DEDC and KYDC that they exist solely to fulfill orders for Amazon.com, Inc. Without these subsidiaries, Amazon would find it very difficult to fulfill its customers’ orders. According to Amazon’s annual report, the company leases facilities in at least nineteen states,<sup>57</sup> but it pays sales tax in only five of them.<sup>58</sup>

Without separate order fulfillment services, online retailers would have to fulfill their own orders. If a retailer could not fulfill orders, it would not be effectively selling goods. However, a retailer that contracts with truly separate companies in order to fulfill orders in many different states is not taking advantage of the resources of the other states. Instead, it would be the contractor that is doing so. The company would then be “undu[ly] burden[ed]” by a requirement to collect taxes for the states in which it only has a contractor perform services.<sup>59</sup> Having a

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<sup>54</sup> *Id.* According to the Pennsylvania Department of State, there are three Amazon.com companies that may operate in Pennsylvania: Amazon.com.DEDC LLC, Amazon.com.kydc, Inc., and Amazon.com.kyde LLC. Pennsylvania Department of State, Corporation Search, <https://www.corporations.state.pa.us/corp/soskb/CSearch.asp> (search for “amazon.com”) (last visited Mar. 30, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>55</sup> Pennsylvania Department of State, Business Entity [Amazon.com.kydc, Inc.], <https://www.corporations.state.pa.us/corp/soskb/Corp.asp?2485424> (last visited Jan. 18, 2010) (on file with the North Carolina Journal of Law & Technology); Pennsylvania Department of State, Business Entity [Amazon.com.DEDC LLC], <https://www.corporations.state.pa.us/corp/soskb/Corp.asp?2061061> (last visited Jan. 18, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>56</sup> Amazon.com, Inc., Annual Report (Form 10-K), at 3 (Jan. 30, 2009), available at <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9MjAyN3xDaGlsZEIEPS0xfrFR5cGU9Mw==&t=1>.

<sup>57</sup> *Id.* at 16, n.1.

<sup>58</sup> Stross, *supra* note 49. One of these five states is New York, in which Amazon.com is collecting sales taxes only as a result of the “affiliate tax” discussed in Part IV, *infra. Id.*

<sup>59</sup> *Quill v. North Dakota*, 504 U.S. 298, 314–15 (1992).

company burdened by a state's long-arm sales tax requirements is precisely the situation that *Quill*'s bright-line test was designed to prohibit.<sup>60</sup> The question, therefore, is how to distinguish between a retailer that structures itself to avoid physical presence in a state, but equitably should have physical presence and a retailer with no presence in the state.<sup>61</sup>

One way to answer this predicament would be to use legislation to deem the real property of the retailer's property (a subsidiary company) to be legal presence in the state. Amazon even claims in its own annual report that the company "lease[s] . . . facilities throughout the United States . . ."<sup>62</sup> The *Quill* court reaffirmed the *National Bellas Hess* requirement for "retail outlets, solicitors, or property within a State,"<sup>63</sup> so if a company's subsidiary owns property in a state, a state could deem by statute that the parent company has a sufficient nexus for the purpose of sales tax. There does not seem to be any constitutional bar to the creation of such a law, but no such law currently exists.<sup>64</sup> It seems similar to the "cross-selling"<sup>65</sup> seen in *Borders*,<sup>66</sup> as Amazon's online store and the "brick-and-mortar" distribution centers have the same parent company.<sup>67</sup> By conducting sales through DEDC, KYDC, and similar companies, Amazon is, in fact, advertising for the services of the distribution centers.

Before deciding *Quill*, the Supreme Court in *Scripto, Inc. v. Carson*<sup>68</sup> held that a state may require a company to collect sales taxes even if "all of the seller's in-state . . . [operations were] performed by independent contractors."<sup>69</sup> In *Quill*, the majority

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 315 (establishing a bright-line rule of physical presence to allow states to collect sales taxes).

<sup>62</sup> Amazon.com, Inc., *supra* note 56, at 16, n.1.

<sup>63</sup> *Quill*, 504 U.S. at 307 (quoting *Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753, 758 (1967)).

<sup>64</sup> *See id.*

<sup>65</sup> *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176, 187 (Ct. App. 2005).

<sup>66</sup> *Id.* at 179–80.

<sup>67</sup> Dekok, *supra* note 53.

<sup>68</sup> 362 U.S. 207 (1960).

<sup>69</sup> *Quill*, 504 U.S. at 306 (citing *Scripto*).

opinion insinuated that the *Scripto* holding still has validity.<sup>70</sup> Amazon’s situation in Pennsylvania is hardly different from the one in *Scripto*. It has contracted with entities to fulfill orders for it in Pennsylvania.<sup>71</sup> This is very similar to *Scripto*’s independent contractors that solicited for sales in Florida.<sup>72</sup> The only real difference is that the process happened in reverse, as Amazon is legally soliciting for sales only where it has corporate offices, while the items are shipping from the state that would like to collect taxes. For example, a purchaser in Pennsylvania would be purchasing from Amazon, a Washington state company,<sup>73</sup> while the product may ship from a subsidiary’s warehouse in Pennsylvania.<sup>74</sup> The question to the *Quill* court was whether the company has some physical connection to the state in more than the “slightest” aspect.<sup>75</sup> Because Amazon’s subsidiary companies operate as agents of the online retailer, it would appear that Amazon’s subsidiaries are that the necessary physical connection, and thus the duty to collect sales taxes can be constitutionally imposed on Amazon.<sup>76</sup>

#### IV. COUNTER-STRIKE: THE “AFFILIATE TAX”

Starting in 2008, states began to fight back against online retailers using tactics like entity isolation to avoid collecting sales tax. New York passed an amendment to its tax law that deemed a company to have physical presence in New York if it had paid independent contractors consideration for referring customers to them, and those referred sales brought in over \$10,000 in the past year.<sup>77</sup> North Carolina, in its budget for the 2009 and 2010 fiscal

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<sup>70</sup> *Id.* at 306–07 (citing *Scripto*).

<sup>71</sup> Dekok, *supra* note 53.

<sup>72</sup> *Scripto*, 362 U.S. at 209. *Scripto* contracted with “jobbers” in Florida to solicit orders for it in that state. *Id.*

<sup>73</sup> Amazon.com, Inc., *supra* note 56, at 16 n.1.

<sup>74</sup> Dekok, *supra* note 53.

<sup>75</sup> *Quill*, 504 U.S. at 315 n.8 (quoting *Nat’l Geographic v. Cal. Bd. of Equalization*, 430 U.S. 551, 556 (1977)).

<sup>76</sup> *See id.* at 314 (upholding a bright-line physical presence rule for the constitutional imposition of the duty to collect sales tax).

<sup>77</sup> Act of April 23, 2008, ch. 57, pt. OO-1, 2008 N.Y. LAWS 2704, 2844, § 1; N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney Supp. 2009).

years, created an almost identical tax provision.<sup>78</sup> The special provisions were targeted directly at companies like Amazon who run affiliate programs.<sup>79</sup> In Amazon's affiliate program, called Amazon Associates, website owners place an Amazon advertisement on their website, which often links to specific items discussed on or relevant to the website.<sup>80</sup> In return, Amazon gives the website owner up to 15% of the sale price on the items purchased by users who used that advertisement to visit the Amazon.com website.<sup>81</sup> Many Amazon Associates members have no distinct appeal to a particular state, but they appeal instead to a global audience of interested readers.<sup>82</sup> For that reason, the New York law allows the company making the sales to rebut the presumption that it has created a nexus with the State of New York by showing that its conduct and that of its affiliates was not sufficient to create a nexus.<sup>83</sup>

In response to threatened legislative action in North Carolina, Amazon closed the Associates accounts of all North Carolinians.<sup>84</sup>

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<sup>78</sup> Appropriations Act of 2009, No. 451, § 27A.3.(a), 2009-4 N.C. ADV. LEGIS. SERV. 284, 502-03 (LexisNexis).

<sup>79</sup> Kenneth Corbin, *N.Y. Lawmakers Near Vote on 'Amazon Tax,'* INTERNET NEWS, Apr. 4, 2008, [http://www.internetnews.com/ec-news/article.php/10793\\_3738701](http://www.internetnews.com/ec-news/article.php/10793_3738701) (on file with the North Carolina Journal of Law & Technology).

<sup>80</sup> Amazon Associates, Links and Banners, <https://affiliate-program.amazon.com/gp/associates/promo/buildlinks.html> (last visited Mar. 30, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>81</sup> *Id.*

<sup>82</sup> Consider, e.g., Hemant Mehta, *The Friendly Atheist*, <http://friendlyatheist.com/> (last visited Mar. 25, 2010) (on file with the North Carolina Journal of Law & Technology), which has Amazon Associates links. The author, Hemant Mehta, lives in the Chicago area of Illinois, but very few of the visitors visible on the site at any given time are actually Illinoisans. At the time the author visited the site's real-time traffic feed, the last twenty-seven U.S. visitors were from the states of Ohio, Connecticut, Alabama, New York, Massachusetts, California, Michigan, Texas, North Carolina, Florida, Colorado, Washington, Tennessee, Minnesota, Alaska, Indiana, Wisconsin, and Pennsylvania. Feedjit, *Live Traffic for Friendlyatheist.com*, <http://live.feedjit.com/live/friendlyatheist.com/> (last visited Mar. 25, 2010) (on file with the North Carolina Journal of Law & Technology). There were multiple visitors from some states. *Id.*

<sup>83</sup> N.Y. TAX LAW § 1101(b)(8)(vi) (McKinney Supp. 2009).

<sup>84</sup> Mark Binker, *Amazon Drops N.C. Affiliates*, NEWS & RECORD (Greensboro, N.C.), June 27, 2009, at A3.

At the time, the bill had not been passed, and, as a result, Amazon was accused of political posturing,<sup>85</sup> but the General Assembly still passed the bill.<sup>86</sup> In support of Amazon, a number of bloggers, often those with Amazon Affiliates accounts, have claimed that the proposed “affiliate tax” scheme was unconstitutional and voiced their arguments in response to North Carolina’s legislation.<sup>87</sup>

Their arguments, however, do not seem to be supported by recent case law. First, Amazon’s lawsuit against the State of New York was dismissed in January 2009 because the court, drawing on the *Scripto* example,<sup>88</sup> determined that the law did not violate the Dormant Commerce Clause.<sup>89</sup> Second, and perhaps even more importantly, the New York opinion is following the trend of cases regarding the enforcement of sales tax collection. The Court of Appeals of New Mexico addressed a similar issue in *Dell Catalog*

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<sup>85</sup> *Id.* Interestingly, Amazon did not take the same route in New York. There, Amazon began collecting tax for the state under protest and filed a lawsuit in the state courts to challenge the constitutionality of the law. Cade Metz, *Amazon Sues New York Over Amazon Tax*, THE REGISTER, May 2, 2008, [http://www.theregister.co.uk/2008/05/02/amazon\\_sues\\_new\\_york/](http://www.theregister.co.uk/2008/05/02/amazon_sues_new_york/).

<sup>86</sup> Appropriations Act of 2009, No. 451, § 27A.3.(a), 2009-4 N.C. ADV. LEGIS. SERV. 284, 502–03 (LexisNexis).

<sup>87</sup> See, e.g., Patrick O’Keefe, *Amazon: North Carolina Affiliates Will Be Terminated When “Unconstitutional Tax Collection Scheme” is Enacted (Another Good Reason to Use Skimlinks?)*, <http://www.patrickokeefe.com/2009/06/17/amazon-north-carolina-affiliates-will-be-terminated-when-unconstitutional-tax-collection-scheme-is-enacted-another-good-reason-to-use-skimlinks/> (on file with the North Carolina Journal of Law & Technology); Geno Prussakov, *What Makes Affiliate Tax (aka “Amazon Tax”) Unconstitutional*, AFFILIATE MARKETING BLOG, June 29, 2009, <http://www.amnavigator.com/blog/2009/06/29/what-makes-affiliate-tax-amazon-tax-unconstitutional/> (claiming that “the 1992 Quil [sic] Corporation v. North Dakota case . . . appl[ies] in [a] case with [a] merchant-affiliate relationship” without much further elaboration) (on file with the North Carolina Journal of Law & Technology).

<sup>88</sup> See Part III, *supra*.

<sup>89</sup> *Amazon.com LLC v. N.Y. State Dep’t of Taxation and Fin.*, 877 N.Y.S.2d 842, 847–48 (Sup. Ct. 2009) (citing *Scripto, Inc. v. Carson*, 362 U.S. 207, 209 (1960)) (“Amazon argues that the statute is facially invalid because ‘it imposes obligations based on activities that are insufficient to create a substantial nexus under the dormant Commerce Clause’ . . . . Amazon is wrong.”).

*Sales L.P v. Taxation and Revenue Dep't.*<sup>90</sup> The pivotal issue in that case was that Dell contracted with a third party to provide warranty technical support in New Mexico.<sup>91</sup> Dell exercised a significant amount of control over that third party's performance and could revoke its contract at any time.<sup>92</sup> The contract with the third party helped Dell "establish and maintain a market" in New Mexico.<sup>93</sup> Therefore, the contractor was Dell's agent, and the presence of an agent in the state was sufficient to require the company to collect sales tax.<sup>94</sup>

However, whether a party is an agent of the company selling the goods appears to be a matter of state law, as courts in different states reached different results on almost identical facts in two cases involving Scholastic Book Clubs.<sup>95</sup> In Connecticut, despite the fact that Scholastic trained teachers on how to conduct sales and gave rewards to teachers for selling books, the court concluded that the teachers were not representatives of Scholastic under Connecticut's agency law.<sup>96</sup> However, the Kansas Supreme Court decided that teachers in Kansas with the same training and incentives as those in Connecticut were agents of Scholastic under Kansas law.<sup>97</sup> Thus, the question is primarily not one of constitutionality, as the bloggers would put it, but instead one of state law. There is a possibility that a state could define agency so broadly that applying it would violate the constitution. For example, if a state declared that common carriers were agents of the companies whose goods they deliver, the imposition on the seller of the duty to collect sales tax for the state solely for that

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<sup>90</sup> 199 P.3d 863 (N.M. Ct. App. 2008).

<sup>91</sup> *Id.* at 866.

<sup>92</sup> *Id.* at 865.

<sup>93</sup> *Id.* at 872-73 (quoting *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250 (1987)).

<sup>94</sup> *Id.*

<sup>95</sup> *Scholastic Book Clubs v. Comm'r of Revenue Serv.*, 2009 WL 1175675 (Conn. Super. Apr. 9, 2009) (finding no agency); *In re Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996) (finding agency).

<sup>96</sup> *Scholastic Book Clubs v. Comm'r of Revenue Serv.*, 2009 WL 1175675, at \*6.

<sup>97</sup> *In re Appeal of Scholastic Book Clubs, Inc.*, 920 P.2d 947 (Kan. 1996).

reason would be unconstitutional.<sup>98</sup> Additionally, the issue created by New York and North Carolina’s “affiliate taxes” is distinguishable from the Connecticut case because that court took issue with calling the teachers agents of Scholastic when the book sale only took place once a year and it was not the teachers’ primary duty.<sup>99</sup> Amazon affiliates solicit on their websites twenty-four hours per day, three hundred sixty-five days per year, and some even make their entire living from Amazon.<sup>100</sup>

Bloggers like Geno Prussakov have also stated that *Quill* makes the “affiliate tax” unconstitutional,<sup>101</sup> but calling upon *Quill* to declare that all out-of-state catalog sellers need not collect sales tax is too simplistic in Amazon’s situation.<sup>102</sup> By using independent contractors to solicit sales within the state, Amazon is putting representatives into the state to create sales for Amazon. Still, it cannot be compared to *Borders* or *St. Tammany* because Amazon does not solely employ the representatives or engage in advertising for its affiliates.<sup>103</sup> However, the similarity to *Scripto*’s independent contractors or “jobbers” is quite striking.<sup>104</sup> There, *Scripto* had ten “jobbers” in Florida working on a commission basis.<sup>105</sup> The Supreme Court found that these contractors provided sufficient presence in Florida to allow the state to impose upon *Scripto* the duty to collect Florida sales tax.<sup>106</sup> The *Tyler Pipe Industries v. Dep’t of Revenue*<sup>107</sup> requirement, which was best articulated by the Connecticut *Scholastic* court, states that if the

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<sup>98</sup> Nat’l Bellas Hess, Inc. v. Dep’t of Revenue of Ill., 386 U.S. 753, 758 (1967) (reaffirmed by *Quill v. North Dakota*, 504 U.S. 298, 301 (1992)).

<sup>99</sup> *Id.*

<sup>100</sup> Mark Binker, *Amazon.com May Cut Affiliates in N.C. if Tax Law Change Passes*, NEWS & RECORD (Greensboro, N.C.), June 18, 2009, at A3 (discussing “those who have built a business by way of affiliate marketing”).

<sup>101</sup> Prussakov, *supra* note 87.

<sup>102</sup> *See id.*

<sup>103</sup> *See St. Tammany Parish Tax Collector v. Barnesandnoble.com, LLC*, 481 F. Supp. 2d 575, 578–80 (E.D. La. 2007); *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr 3d 176, 179–80 (Cal. Ct. App. 2005).

<sup>104</sup> *Scripto, Inc. v. Carson*, 362 U.S. 207, 209 (1960).

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 211, 213.

<sup>107</sup> *Tyler Pipe Indus. v. Dep’t of Revenue*, 483 U.S. 232, 249–50 (1987).

companies are trading on Amazon's "name recognition, market share, good will and individual customer relations[,] it makes no difference what they are called; they are representatives of Amazon in the state."<sup>108</sup> Additionally, because Amazon's operating agreement with its affiliates gives Amazon a large amount of control over the content and context of the solicitations,<sup>109</sup> there may be, under certain state laws, an agency relationship.<sup>110</sup>

As the New York court put it, this is not a blanket tax, as it places a reasonably high threshold on revenues from these sales before the duty to collect tax is triggered.<sup>111</sup> Only once state-based affiliates generate over \$10,000 of revenue for the company in the previous year does the company need to collect tax for that state.<sup>112</sup> That is a substantial amount of money, which indicates that those affiliates are, in fact, generating sales in the state. They are being used as proof of nexus.<sup>113</sup> While the issue is ultimately a constitutional one that could be decided by the Supreme Court under the Commerce Clause, North Carolina and New York appear to be operating legally, according to trends in the law, when enacting this so-called "affiliate tax."

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<sup>108</sup> *Scholastic Book Clubs v. Comm'r of Revenue Services*, 2009 WL 1175675, at \*5 (Conn. Super. Apr. 9, 2009) (citing *Tyler Pipe*, 483 U.S. at 249–50).

<sup>109</sup> Amazon Associates, Operating Agreement, <https://affiliate-program.amazon.com/185-8438650-3014133> (click hyperlink for "Operating Agreement" under "Customer Support" header in box on the right side of the page) (last visited Apr. 1, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>110</sup> *See, e.g., In re Appeal of Scholastic Book Clubs*, 920 P.2d 947 (Kan. 1996); *Dell Catalog Sales L.P v. Taxation and Revenue Dep't*, 199 P.3d 863 (N.M. Ct. App. 2008).

<sup>111</sup> *Amazon.com LLC v. New York State Dep't of Taxation and Fin.*, 877 N.Y.S.2d 842, 848 (N.Y. Sup. Ct. 2009).

<sup>112</sup> *Id.* *See also* Act of April 23, 2008, ch. 57, pt. OO-1, 2008 N.Y. LAWS 2704, 2844, § 1; Appropriations Act of 2009, No. 451, § 27A.3.(a), 2009-4 N.C. ADV. LEGIS. SERV. 284, 502–03 (LexisNexis).

<sup>113</sup> *See* Act of April 23, 2008, ch. 57, pt. OO-1, 2008 N.Y. LAWS 2704, 2844, § 1; Appropriations Act of 2009, No. 451, § 27A.3.(a), 2009-4 N.C. ADV. LEGIS. SERV. 284, 502–03 (LexisNexis).



## V. POLICY CONSIDERATIONS

As noted by policy analyst Michael Mazerov, Amazon's arguments as to why it should not collect sales taxes do not hold much water.<sup>114</sup> Amazon argues that it is equitably too burdensome to collect the sales taxes for the myriad jurisdictions across the United States when it sells products on its own behalf.<sup>115</sup> For example, in North Carolina alone, there are three different sales tax rates.<sup>116</sup> Amazon's own actions demonstrate that to be untrue, as it already collects tax for most U.S. jurisdictions when it acts as the sole online retailer for the department store Macy's or the superstore Target.<sup>117</sup> Logically, then, Amazon and other nationwide e-commerce companies that employ entity isolation tactics must be simply attempting to make their prices *appear* lower.<sup>118</sup> Because the purchaser has to pay an identical use tax to the state,<sup>119</sup> the price is not actually any lower except to the law-breaker who does not pay the tax.

Additionally, other nationwide e-commerce companies already collect sales taxes nationwide.<sup>120</sup> Netflix, which has distribution centers for DVD rentals by mail across the United States, collects sales taxes "in nearly every state."<sup>121</sup> It would likely be possible for Netflix to pull the same trick on states that Amazon does by

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<sup>114</sup> Mazerov, *supra* note 50, at 4.

<sup>115</sup> Stross, *supra* note 49, at BU3.

<sup>116</sup> North Carolina Department of Revenue, Sales and Use Tax Rates Effective October 1, 2009, [http://www.dornr.com/taxes/sales/salesrates\\_10-09.html](http://www.dornr.com/taxes/sales/salesrates_10-09.html) (last visited Feb. 22, 2010) (on file with the North Carolina Journal of Law & Technology). Most counties have a 7.75% tax rate, but Alexander, Catawba, Cumberland, Haywood, Martin, Pitt, Sampson, and Surry Counties have an 8% tax rate, and Mecklenburg County has an 8.25% tax rate, including a 0.5% transportation tax. *Id.*

<sup>117</sup> Mazerov, *supra* note 50, at 4. This arrangement uses Amazon's website, but the products are actually sold by Macy's or Target. *Id.*

<sup>118</sup> See Stross, *supra* note 49, at BU3.

<sup>119</sup> Form D-401, *supra* note 9, at 7.

<sup>120</sup> Stross, *supra* note 49, at BU3.

<sup>121</sup> Netflix, Inc., Frequently Asked Questions, <http://www.netflix.com/Static?id=5157> (last visited Mar. 25, 2010) (on file with the North Carolina Journal of Law & Technology) ("Because the rented DVDs in customers' homes are 'owned' by Netflix, we in fact have a physical presence in the state and therefore must collect tax.").

using “entity isolation.”<sup>122</sup> Instead of using entity isolation, however, Netflix contracts with a company that specializes in sales tax collection to comply with the laws of each state in which it has a warehouse.<sup>123</sup> Apple, Inc. collects sales tax on sales in the iTunes Store,<sup>124</sup> which offers songs for sale as low as 69 cents.<sup>125</sup>

By avoiding the collection of sales taxes Amazon is given a competitive advantage over its competitors with an in-state presence.<sup>126</sup> If a consumer is given a choice between two equally priced products, one on which she must pay sales tax at the time of purchase and one on which she must pay sales tax on later, if at all,<sup>127</sup> the consumer is likely to pick the latter. The difference is “no small discount,” and the law should be modified so that Amazon does not profit from the tactics it is using to circumvent the law.<sup>128</sup>

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<sup>122</sup> Netflix’s statement that it is the DVDs that are in customers’ homes which create the physical presence, *id.*, may seem to contradict this assertion. However, these DVDs are more like the goods delivered by a common carrier in *Quill v. North Dakota*, 504 U.S. 298 (1992), than they are like the “jobbers” in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1959). It seems that the distribution centers which are “located throughout the United States[.]” Netflix, Inc., Press Kit, <http://www.netflix.com/MediaCenter?id=5379#snapshot> (last visited Mar. 25, 2010) (on file with the North Carolina Journal of Law & Technology) are more likely to create a physical presence required by *Quill* than the presence of a DVD in a customer’s home.

<sup>123</sup> Stross, *supra* note 49, at BU3. The company with which Netflix contracts is Vertex. *Id.*

<sup>124</sup> Apple, Inc., iTunes Store Terms & Conditions, <http://www.apple.com/legal/itunes/us/terms.html> (last visited Jan. 19, 2010) (on file with the North Carolina Journal of Law & Technology).

<sup>125</sup> Rik Myslewski, *Apple iTunes Unwraps (Precious Few) 69 Cent Tracks*, THE REGISTER, Apr. 7, 2009, [http://www.theregister.co.uk/2009/04/07/no\\_bargains\\_at\\_the\\_itunes\\_store/](http://www.theregister.co.uk/2009/04/07/no_bargains_at_the_itunes_store/) (on file with the North Carolina Journal of Law & Technology).

<sup>126</sup> Mazerov, *supra* note 50, at 3.

<sup>127</sup> See Bruce et. al., *supra* note 12, at 539.

<sup>128</sup> Mazerov, *supra* note 50, at 3 (quoting Louis Navellier, *All-American Stock #2: Amazon*, BLOGGING STOCKS, Jul. 4, 2009, <http://www.bloggingstocks.com/2009/07/04/all-american-stock-2-amazon-amzn/> (on file with the North Carolina Journal of Law & Technology)).

## VI. CONCLUSION

The methods that some states have used to force Amazon and similar companies to collect sales taxes are constitutional, and the states could likely constitutionally neuter the effectiveness of entity isolation. Additionally, entity isolation, while effective, may be able to be penetrated while still being consistent with the Constitution. Doing so could provide a vital source of revenue for states in difficult economic times. A small company would no doubt be heavily burdened by having to determine the appropriate tax rate for each and every shipment they make. It is important to remember, however, that small companies will not be affected by a policy that slices through entity isolation or designates affiliates who bring in over \$10,000 as agents. Entity isolation is most commonly used for companies with physical stores and an online retail outlet and for multi-state companies.<sup>129</sup> A company that makes over \$10,000 in a single state solely from affiliate-produced sales is not a small company. Finally, if the company had no connection to the state to which it was to ship the goods, the state could not impose the duty to collect taxes on the company under *Quill*.<sup>130</sup>

When considering whether or not to implement tax law changes that would require companies like Amazon to collect sales tax, it is important to recall that requiring a company to collect taxes would not actually require the company to pay more taxes to the state. In theory, even consumers should not have to pay more taxes, as they are already obligated to pay use tax on out-of-state purchases in all states that impose a sales tax.<sup>131</sup> Amazon’s prices may appear to increase,<sup>132</sup> but the record-keeping burden to consumers will, in fact, decrease, as they will no longer have to worry about reporting the correct amount of use tax on their income tax return.<sup>133</sup> While it is true that Amazon may have to pay

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<sup>129</sup> Cowan, *supra* note 49, at 65–67.

<sup>130</sup> *Quill v. North Dakota*, 504 U.S. 298, 314–15 (1991).

<sup>131</sup> N.C. GEN. STAT. § 105-164.16 (2009); *see also* Form D-401, *supra* note 9, at 7.

<sup>132</sup> *See* Mazerov, *supra* note 50, at 3.

<sup>133</sup> Form D-401, *supra* note 9, at 7. As it stands right now, consumers must keep track of their purchases that they were not charged sales tax on, then

some administrative overhead to collect these taxes,<sup>134</sup> the “affiliate tax” or “Amazon tax” is truly not a tax but is instead a constitutional way to collect taxes *that are already owed*. Entity isolation, too, is simply a tricky method that the states can cut through if they choose to do so under existing case law. Attempts to avoid the duty to collect sales taxes may unfortunately continue to be a game of cat and mouse.

While it may seem that a state is enacting these measures to make it easier to collect taxes that it is owed, states may end up losing money on the endeavor. If the companies with affiliate marketing programs decide to no longer conduct affiliate business in the state, as Amazon has threatened to do,<sup>135</sup> states may be in the same position in terms of sales tax, but actually lose revenue because the affiliates will no longer have income on which to pay taxes to the state.<sup>136</sup> In other words, the states will have the same amount of sales and use tax revenue, but less income tax revenue. Unfortunately, without further research, it is difficult to determine what states should do. It may be worthwhile, as Justice Brandeis suggested, to use the states as laboratories to determine what the best path is.<sup>137</sup>

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calculate and remit the appropriate amount of tax to the state on their annual income tax return. The North Carolina Department of Revenue sets by policy the standard amount of use tax that one may pay based on one’s income. *Id.* at 8. However, the relevant statute requires that the consumer pay the actual amount. N.C. GEN. STAT. § 105-164.16(d) (2009). New York permits the payment of use tax based on income as well, but only for certain purchases. NEW YORK STATE DEPT. OF TAXATION & FIN., PUBLICATION 774: PURCHASER’S OBLIGATIONS TO PAY SALES AND USE TAXES DIRECTLY TO THE TAX DEPARTMENT QUESTIONS AND ANSWERS 14 (Jan. 2010), *available at* <http://www.tax.state.ny.us/pdf/publications/sales/pub774.pdf>. *See also* N.Y. Tax. Law § 1110(a) (McKinney 2008). However, California does not have the same policy. *See* JOHN CHIANG ET AL., CAL. FRANCHISE TAX BD. FORMS & INSTRUCTIONS: CALIFORNIA 540 & 540A, at 14 (2009), *available at* [http://www.ftb.ca.gov/forms/2009/09\\_540bk.pdf](http://www.ftb.ca.gov/forms/2009/09_540bk.pdf); California State Board of Equalization, *supra* note 10, at 1.

<sup>134</sup> *See* Stross, *supra* note 49, at BU3.

<sup>135</sup> Binker, *supra* note 100.

<sup>136</sup> *See, e.g.*, Binker, *supra* note 100; O’Keefe, *supra* note 87.

<sup>137</sup> *New State Ice Co. v. Liebmann*, 285 U.S. 262, 310–11 (1931) (Brandeis, J., dissenting).