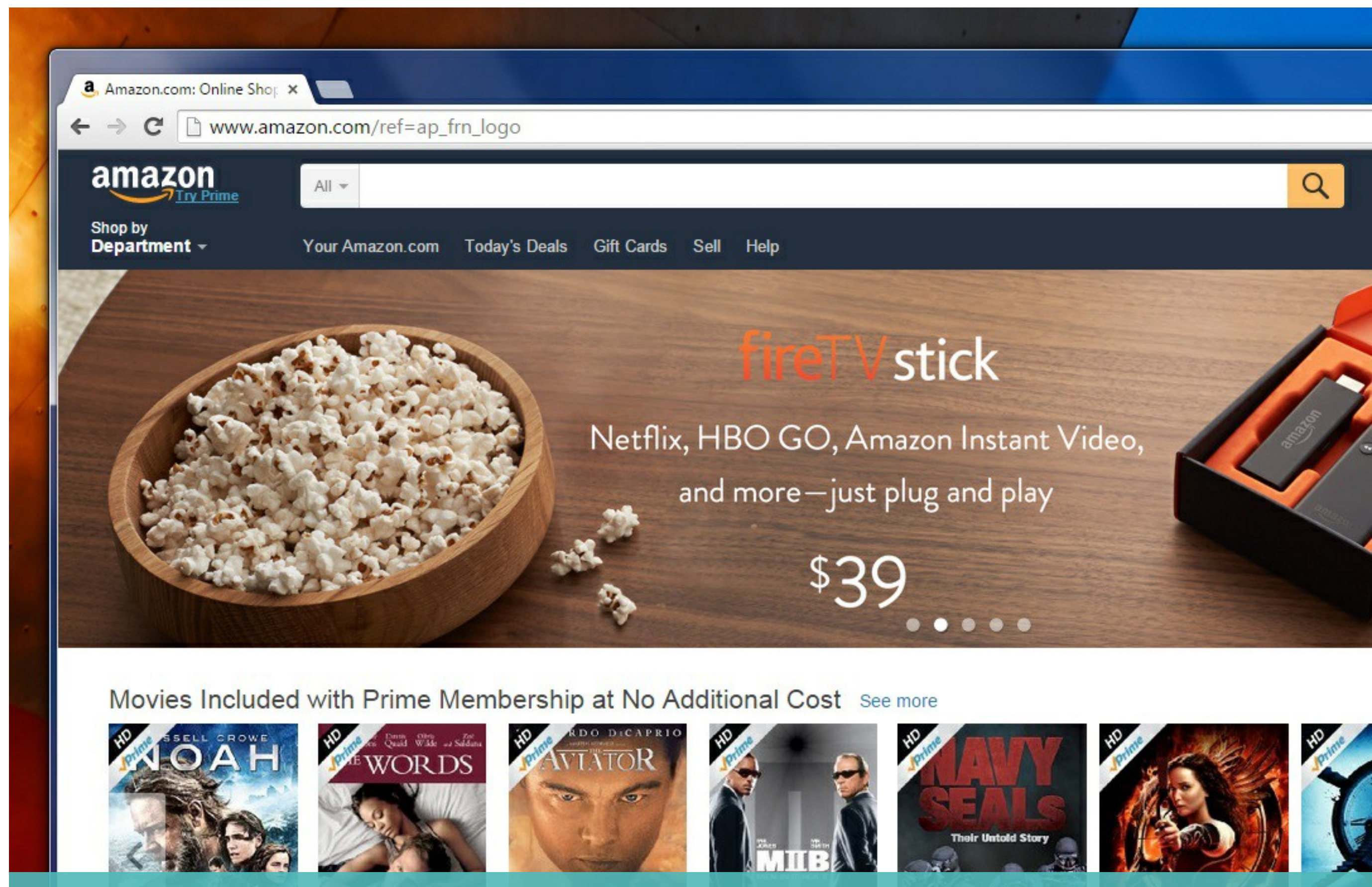
Growth in internet commerce causing states to work around the Supreme Court



David M. Kall | Friday, April 8, 2016

May 26, 2016, marks the 24-year anniversary of the United States Supreme Court's decision in ***Quill v. North Dakota*** that precluded states from requiring out-of-state retailers to collect and remit sales taxes on in-state sales. Quill does not prevent states from lodging a sales tax. But, it makes collecting such taxes difficult in the absence of a retailer's meaningful physical presence in a state, known as nexus, because it forces jurisdictions to rely on consumers themselves to calculate and remit the necessary payments. With the relatively recent phenomenon of internet-based commerce and its explosive growth, millions of dollars of tax revenues have simply evaporated for lack of a collection mechanism. In addition, out-of-state sellers enjoy a significant competitive advantage over in-state sellers that are required to collect and remit sales taxes.

Statista reports that the total number of digital shoppers worldwide grew by over 100 million between 2011 and 2012, and in 2016, global business-to-consumer e-commerce sales are expected to reach $1.92 trillion. In the United States, business-to-consumer e-commerce sales jumped from $211 billion in 2006 to $703 billion in 2013. In 2013, **InternetRetailer** envisioned e-commerce sales in the U.S. reaching $434.2 billion in 2017.

The National Conference of State Legislatures (NCSL) **estimated** that in 2012, states lost $23.3 billion in tax revenues, which could have been useful in closing the $527.7 billion budget gap that they faced between fiscal years 2008-2012. Instead, states had to reduce programs to balance their budgets.

POSSIBLE SOLUTIONS

States are searching for ways to capture lost tax revenues while remaining within the bounds of legal precedent. To this end, the NCSL has offered **model language** to assist lawmakers when drafting their own expanded nexus legislation. However, the problem may not be resolved so peacefully. **Bloomberg** opines that Colorado's recently resolved case, ***Direct Marketing Association v. Brohl*** (Brohl), has set the stage "for a showdown between the states and remote sellers, either before the Supreme Court or in Congress."

Brohl held that Colorado could require out-of-state sellers to comply with notice and reporting obligations for sales to in-state purchasers that are subject to sales tax, but for which there is no practical collection apparatus. It should be noted that Brohl is compliant with Quill, but allows Colorado to impose more stringent reporting and notification requirements, enabling broader enforcement of its tax laws.

Bloomberg asserts that Brohl "clear[s] the way for states to start adopting rules and other changes that may help them collect sales and use tax on goods that, at the moment, are likely escaping tax completely." These include the following:

- Expansion of nexus standards such that out-of-state vendors would have a significant enough presence with a state that they would be subject to tax collection rules.
- Altering tax forms to contain a line for reporting taxes due on purchases from out-of-state sellers.
- Otherwise authorizing and encouraging out-of-state sellers to collect sales tax in the absence of requirements to do so, similar to the law at issue in Brohl that requires out-of-state retailers to:

1. Notify their customers that they may be subject to Colorado's use tax.
2. Provide an annual purchase summary to customers who bought more than $500.00 that year, and remind them of their obligation to pay taxes on those purchases.
3. Send the Colorado Department of Revenue an annual customer information report listing their customers' names, addresses, and total amounts spent.

At the end of last year, the non-partisan group **CQRollCall** predicted that Ohio, Oklahoma, and Utah would take decisive action in 2016.

Alabama is one state that already has. Its **law**, effective Jan. 1, 2016, establishes circumstances under which out-of-state sellers that lack an Alabama physical presence, but are making retail sales of tangible personal property into the state, have a substantial economic presence in Alabama for sales and use tax purposes. One of these is a sales threshold of $250,000.

In Louisiana, **HB 30** requires a remote dealer to collect sales tax if it has sales of more than $50,000 for the previous 12 months, unless it can show that it will not likely have that amount of sales in the subsequent 12 months. A vendor qualifies as a dealer if it engages in "regular or systematic solicitation of a consumer market…by the distribution of catalogues, periodicals, advertising fliers, or other advertising, or by means of print, radio, or television media…." HB 30's effective date was March 14, 2016.

Similarly, South Dakota's **SB 106**, which Gov. Dennis Daugaard signed on March 29, 2016, sets a sales tax remittance obligation for out-of-state retailers at $100,000 of in-state sales, or, 200 or more separate electronic or delivery transactions.

Ultimately, the author of the Brohl opinion, quoting Quill, implored Congress to step up and resolve the issue once and for all. That body "holds the 'ultimate power' and is 'better qualified to resolve' the issue of 'whether, when, and to what extent the States may burden interstate [retailers] with a duty to collect [sales and] use taxes.'"

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