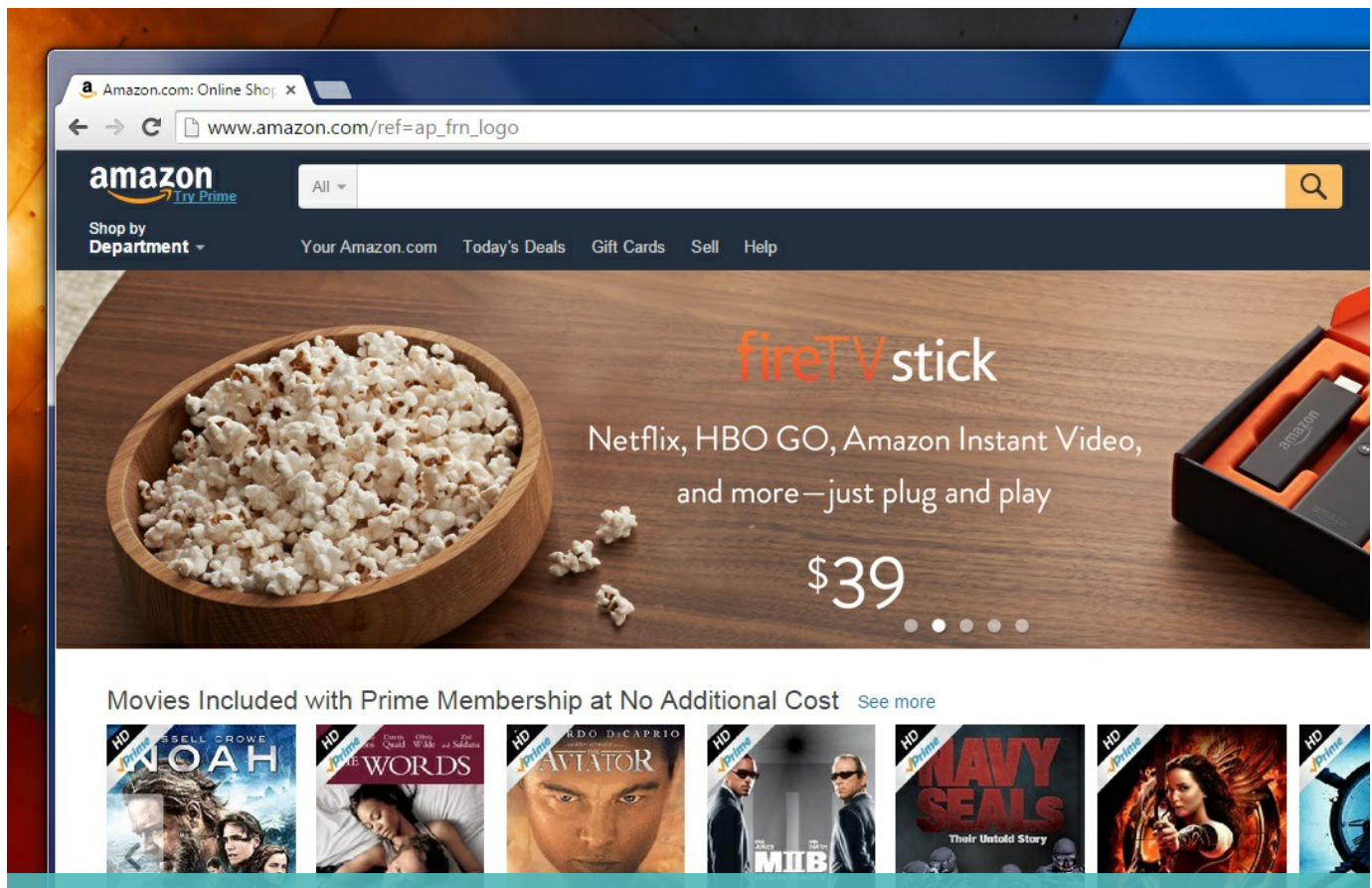


South Dakota: Unique nexus provision triggers immediate lawsuits



David M. Kall | Thursday, May 5, 2016

Since lawmakers began to realize how much revenue they are losing to out-of-state retailers that cannot be compelled to collect sales taxes, there has been much hand wringing about how to mitigate their losses while still remaining within the bounds of the law. The problem stems from the 1992 Supreme Court case [*Quill Corp. v. North Dakota*](#), which banned states from requiring out-of-state retailers to collect sales taxes on products they ship into those jurisdictions, absent some minimal contact or physical presence, known as nexus.

One case that gave lawmakers reason to be hopeful was Colorado's [*Direct Marketing Association v. Brohl*](#), which was resolved in February. We followed that case up to the Supreme Court and back, most recently [explaining](#) that the Tenth Circuit, the last stop for the case, upheld Colorado's notice and reporting law, created to enable tax collection rules that were heretofore unenforceable.

Other states are crafting their own laws that alter nexus standards. One common element of this legislation is the establishment of a relatively low sales threshold amount that triggers assessment and collection obligations, as in Louisiana and Alabama, at \$50,000 and \$250,000, respectively. [Louisiana's law](#) took effect in mid-March, and [Alabama's](#) has been in place since January 1.

South Dakota's solution

One tactic that South Dakota has taken to maximize revenues is to increase its [sales and use tax](#), effective June 1, 2016, from 4 percent to 4.5 percent.

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Another is the passage of a new nexus law, [SB 106](#). Reasoning that “an emergency is hereby declared to exist,” the authors proclaim that South Dakota is suffering “especially serious” harm because it has no income tax, making sales and use tax revenues that much more important for the funding of essential state and local services. It may give the Supreme Court an opportunity to reconsider the stance it took in *Quill* that prevents states from requiring remote sellers to collect sales tax.

In the meantime, SB 106 aims to step in and abate the damage resulting from the Quill decision. Signed on March 29, 2016, it 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. It took effect May 1, 2016. If any company meets one or both of these requirements, it is required to obtain a business tax license. On its [website](#), the South Dakota Department of Revenue posted a link to its [Tax Application web page](#).

The legislation allows South Dakota to sue any “person” for a judicial declaration that the person’s obligation to remit sales tax is applicable and valid under state and federal law. Further, it gives any such declaratory action “priority over any other action presenting the same question in any other venue,” justified as “necessary and appropriate” because and refusal to collect the necessary taxes causes “imminent harm to this state.”

Recognizing the difficulty the law can place on out of state retailers, its authors included an injunction provision. Thus, while a declaratory action is pending, the state may not enforce the tax collection obligation unless there is already a declaration of applicability establishing the validity of the obligation.

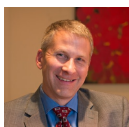
Finally, no obligation can be applied retroactively, and only the South Dakota’s Supreme Court can hear an appeal.

Prompt legal action

[The Dakota Free Press](#) reported that South Dakota could recoup \$48 million to \$58 million a year in online sales tax from remote sellers. The ink on the statute to do just that is barely dry, but several entities have already filed lawsuits. In one, on April 28, 2016, the state itself sued four internet retailers, Newegg Inc., Overstock.com Inc., Systemax Inc. and Wayfair LLC , according to [Internet Retailer](#). The magazine ranked these firms at numbers 17, 29, 32 and 24, respectively, on its 2016 Top 500 Guide of e-tailers. This suit is based on the fact that the four defendants have not yet followed up on South Dakota’s notification, of a total of 206 sellers, including these four, that they would likely be subject to SB 106’s mandates. Forty have responded by registering with the state.

The Internet Retailer article also addressed a second action, this one with the Mount Rushmore State as the defendant. On April 29, 2016, the American Catalog Mailers Association and NetChoice filed their complaint. Their position is that SB-106 is unconstitutional because it impermissibly interferes with interstate commerce and violates due process.

Quoting NetChoice’s executive director, Internet Retailer asserted that SB 106 “acknowledges it would require a change in federal constitutional doctrine...[and] was designed to fast-track to the state Supreme Court and on to the U.S. Supreme Court this challenge to the *Quill* doctrine.”



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