STATES' NET FAILS TO ENSNARE INTERNET VENDORS.

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I. Introduction

Sales are beginning to take place over the Internet and online in significant numbers. [1] While a local vendor with a store physically located in a city probably only sells to customers also located in the same geographic area, a seller with a virtual storefront on the Internet or online can sell to customers located throughout the country, in states where the seller has no physical presence.

As commerce grows over the Internet and online, moving from the real world to the virtual world, so does concern over revenue lost by states because of uncollected sales or use taxes on products sold over the Internet or online. [2] States are extremely concerned about an erosion of their key revenue base: sales taxes. [3] It is feared that "interstate sales may explode over the Internet, leaving state and local government finances in tatters." [4] At the same time, companies already engaged in commerce over the Internet, or desiring to do so, are confused about their tax collection obligations, and need clear guidelines. [5]

This article examines the constitutionality of imposing sales and use tax collection obligations on vendors selling over the Internet or online to customers in states where the vendors do not have any physical presence, and concludes that states do not have the authority to impose such tax collection obligations, and should focus their efforts on persuading Congress to grant them such authority.

II. Constitutional Barrier to States' Imposition Of Sales or Use Tax

A. Sales and Use Taxes Generally

States impose sales taxes on the sales of goods and services. Retailers and vendors generally collect and then remit the taxes to the state taxing authority. [6] States that impose a sales tax also invariably impose a compensating use tax to ensure that residents who purchase goods in or from another state will pay the equivalent of a sales tax on the purchase in their state of residence. [7]

[P. 1000]

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Collecting the use tax from the purchaser, particularly where the purchaser is an individual, is often inefficient and not cost- effective; this is especially so because many consumers do not realize they are subject to the use tax. [8] One possible solution is to require the out-of-state vendor to collect the tax from the purchaser and remit it to the taxing state. However, requiring an out-of-state vendor to collect the use tax from the in-state purchaser and remit it to the taxing state presents constitutional problems.

B. Constitutional Barriers

A state cannot impose a sales or use tax collection obligation on an out-of-state seller unless the imposition of the obligation meets certain constitutional jurisdictional requirements. As discussed below, the Commerce Clause [9] and the Due Process Clause of the Fourteenth Amendment [10] are constitutional barriers.

1. Governing Supreme Court Cases

The Supreme Court has held that it is unconstitutional for a state to impose a tax collection obligation on an out-of-state seller who has no "physical presence" in, or nexus with, the taxing state. In both National Bellas Hess Inc. v. Illinois Department of Revenue [11] and Quill Corp. v. North Dakota, [12] the two seminal cases on the issue, although the out-of-state sellers had no physical presence in-state, they were marketing and selling their goods to in-state residents through mail-order catalogs. It is undisputed that their holdings regarding tax collection obligations of sellers with no physical presence in the taxing state also apply to vendors who sell to in-state residents through the Internet or online, rather than through mail-order catalogs.

a. National Bellas Hess Inc. v. Illinois Department of Revenue

In National Bellas Hess, Illinois imposed the duty of use tax collection on National Bellas Hess Inc. ("National"), a mail-order house incorporated in Delaware with its principal place of business in Missouri. [13] National did not maintain any office, sales house, distribution house, warehouse, or any other place of business in Illinois; it did not have an agent, sales representative, solicitor, or other representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise in Illinois; nor did it own any real or personal tangible property in Illinois. [14] Twice a year, it mailed catalogs and fliers to the company's active or recent customers throughout the various states. It received orders through the mail, and then it sent the ordered goods through the mail. [15]

Illinois imposed the use tax collection duty on "retailers maintaining a place of business" in the state. [16] The statute at issue defined a "retailer maintaining a place of business" in Illinois as including any retailer "[e]ngaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." [17]

The U.S. Supreme Court found that the statute violated the Due Process Clause of the Fourteenth Amendment and the Commerce Clause. [18] The Court described the Commerce Clause as pertaining to the justification of the burden imposed on interstate commerce by a particular tax: "State taxation

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falling on interstate commerce...can only be justified as designed to make such commerce bear a fair share of the cost of the local government whose protection it enjoys." [19]

The Court went on to state that the Due Process Clause required fairness. [20] It explained that the "simple but controlling question [in determining whether it has been violated] is whether the state has given anything for which it can ask [in] return." [21] The Due Process Clause required "some definite link, some minimum connection, between a state and the person, property, or transaction it seeks to tax." [22]

The Court noted that its previous decisions drew sharp distinctions "between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." [23] It decided that the distinction was a valid one and declined to obliterate it. [24] Thus, it held that the Due Process Clause and the Commerce Clause required that the seller maintain some sort of presence in the taxing state. [25]

b. Quill Corp. v. North Dakota

Approximately 25 years later, in Quill Corp. v. North Dakota, [26] the Supreme Court revisited its National Bellas Hess holding. Here, Quill Corp. a Delaware corporation, sold "office equipment and supplies through catalogs and flyers, advertisements in national periodicals, and telephone calls." [27] It had no offices, warehouses, or employees in North Dakota. It owned no tangible property in the state, and it delivered all of its [P. 1001] merchandise to its North Dakota customers by mail or common carrier from out-of-state locations. [28]

North Dakota required every "retailer" in the state to collect a use tax from each customer and remit it to the state. [29] The term "retailer" included "every person who engages in regular or systematic solicitation of a consumer market in the state." [30] North Dakota filed an action in state court to require Quill to collect and pay a use tax on goods purchased for use in the state. [31] The trial court ruled in favor of Quill; the North Dakota Supreme Court reversed. [32] The U.S. Supreme Court granted certiorari and held that North Dakota could not require Quill to collect and pay the use tax. [33] It concluded that even though a state's imposition of a tax may be consistent with the Due Process Clause, it may nevertheless violate the Commerce Clause. [34]

The Court first explained that due process jurisprudence had evolved in the 25 years since National Bellas Hess and suggested that some sort of physical presence was no longer necessary for jurisdiction under the Due Process Clause. [35] It explained that it was "an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a State in which business is conducted." [36] Looking to its personal jurisdiction decisions as authority, the Court noted it had "abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum" made it

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reasonable to require it to defend a suit there. [37] It overruled National Bellas Hess insofar as it held that the Due Process Clause required a physical presence in the state. [38]

The Court next analyzed whether the state's imposition of the tax violated the Commerce Clause. It noted that because the Due Process Clause and the Commerce Clause were animated by different constitutional concerns and policies, their nexus requirements were different. [39] The Court stated that, while the Due Process Clause was concerned with fairness, the Commerce Clause, which prohibits any state activity interfering with or burdening interstate commerce, was concerned with the effects of state regulation on the national economy and with limiting state burdens on interstate commerce. [40] The Court upheld the physical presence requirement for purposes of the Commerce Clause based on (1) principles of stare decisis, (2) the need to have a "bright-line" rule in the area of sales and use tax that encourages settled expectations and fosters investment by businesses and individuals, and (3) the burden that the imposition of a use tax collection obligation on sellers with no in-state presence would have on interstate commerce. [41] Thus, Quill established that while the Due Process Clause does not require an out-of-state seller to have physical presence in a state before the state may impose a use tax collection duty on the seller, the Commerce Clause does require it.

c. Quill Leaves Open Avenue for Taxation Of Out-of-State Sellers

The Court's holding in Quill is significant. Although at first glance it seems the Court precluded the state taxation of out-of- state sellers, a closer reading of Quill reveals that the Court did leave an avenue open to achieve this goal. By removing the physical presence requirement for Due Process Clause purposes, but leaving it intact for Commerce Clause purposes, the Court left "open the possibility that National Bellas Hess could be legislatively preempted by congressional action." [42]

The Constitution gives Congress plenary power to regulate interstate commerce. [43] This has been interpreted as giving Congress the ultimate power to authorize actions that unduly burden interstate commerce. [44] Thus, even if the Court finds that an action by a state unduly burdens interstate commerce, because the Constitution gives Congress the power to regulate interstate commerce, Congress can authorize such a violation. [45]

By finding that North Dakota's action violated the Commerce Clause (but not the Due Process Clause), the Quill Court left to Congress the final decision as to whether state imposition of use tax collection obligations on out-of-state sellers should be barred by a lack of physical presence in the taxing state. [46] The Court recognized as much by stating that its decision that the Commerce Clause required physical presence in the taxing state was:

made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the [P. 1002] burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. Indeed, in recent years Congress has considered legislation that would "overrule" the Bellas Hess rule. Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in Bellas Hess that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest. Accordingly,

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Congress is now free to decide whether, when, and to what extent the States may burden interstate mail-order concerns with a duty to collect use taxes. [47]
To this day, Congress has not authorized any violations of the Commerce Clause regarding the state taxation of out-of-state sellers.

III. Way to Constitutionally Tax Sales

States are left with the problem of how to constitutionally require merchants selling taxable goods to in-state customers over the Internet, to collect and remit use taxes to the state, where their only connection with the taxing state is their Web site on the Internet, accessed by in-state residents on computer nodes located in the state, and they otherwise have no physical presence in-state. [48]

A. Congressional Authorization for States To Impose Tax

1. Previous Efforts to Obtain Congressional Authorization Failed in Area of Mail-Order Sales

The obvious solution is to have Congress pass a law authorizing state imposition of use tax collection obligations upon out-of-state vendors selling to in-state customers over the Internet or online. It is not clear how likely this is to happen. States have been faced with a similar problem in the area of mail-order sales. Many have expressed concern in the past over the loss by states of great amounts of needed revenue because of the states' inability to impose the use tax collection obligation on out-of-state mail-order vendors with no in-state presence. Numerous bills authorizing such action by the states have been proposed in the past. They have never progressed beyond subcommittee hearings. [49]

Admittedly, before Quill, Congress was not likely to consider these proposed bills seriously because, even if it had authorized the burden on interstate commerce, the bills would have nonetheless violated the Due Process Clause. [50] However, even since the handing down of the Quill decision, similar proposed legislation has come before Congress. For example, in February of 1994, then-Sen. Dale Bumpers, D-Ark. (a longtime proponent of federal legislation in the area of taxation of out-of-state mail-order sellers) introduced the Tax Fairness for Main Street Business Act of 1994. [51] The bill authorized states to require out-of-state sellers to collect and remit a state sales tax if the destination of the tangible personal property was in the state, and if the seller's gross receipts from sales of such tangible personal property exceeded $3 million in the United States, or exceeded $100,000 in the state. On April 13, 1994, the Senate Small Business Committee heard testimony from business representatives who had a stake in the fate of SB 1825. [52] The bill however, never got out of committee.

On March 13, 1995, Senator Bumpers introduced a nearly identical bill, the Consumer and Main Street Protection Act of 1995. [53] On April 5, 1995, the New York State Bar Association Tax Section submitted a report on SB 545, generally supporting, although with some reservations, the expansion of sales [P. 1003] tax collection responsibilities of out-of-state vendors. [54] The last action date on the bill was October 27, 1995. The Independence for Families Act [55] also contained provisions addressing taxation of out-of-state sellers. It authorized state and local governments to require out-of-state

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businesses to collect sales taxes with respect to tangible personal property where the destination of the property was in the state. [56]

At the time these bills were introduced, there existed concerns, similar to current concerns in the area of electronic commerce, that states were losing tremendous revenue because of failure to tax interstate mail-order sales. [57] For example, at the time SB 1825 was under consideration, a May 1994 report by the U.S. Advisory Commission on Intergovernmental Relations (ACIR) estimated that total potential revenue from taxation of interstate mail-order sales for 1994 was $4.57 billion. The ACIR recommended that Congress pass legislation to allow mail-order vendors to collect state use taxes on interstate sales. [58] Still, Congress never took significant action toward passing the legislation. Congress's past record on similar legislation (even post-Quill proposals) may suggest that it is unlikely that such legislation will now be enacted in the area of electronic commerce.

2. Efforts in the Area of Electronic Commerce May Succeed

It is, however, important to note that although a legislative solution has not been provided for in the context of catalog sales, some have remarked that such a solution is not foreclosed in the Internet arena. "Because electronic sales are not an established industry as catalog sales are, the money and power are not yet behind the industry, forestalling change." [59] Some urge that to obtain congressional approval, states should agree to use a portion of the taxes collected to better electronic commerce. [60] By having a fund to improve the system "states would create 'sex appeal' in Washington because there would be a new funding source." [61]

Furthermore, an important factor that may influence Congress in passing legislation is that, because of recently introduced new software, the recordkeeping and administrative burden imposed upon out-of-state vendors, which worried the Supreme Court in National Bellas Hess and Quill, has significantly decreased. [62] New software, such as TAXWARE, specifically designed for sales over the Internet, can track sales and use tax rates in more than 65,000 tax jurisdictions through ZIP code information required of a customer before an electronic commerce transaction takes place. [63] Perhaps this software will ease Congress's concern that out-of-state sellers will be greatly burdened.

3. Boundaries of State Authority Cannot Be Ignored Until Congressional Authorization Obtained

In recent discussions of the problems arising out of taxation related to telecommunications, including the taxation of electronic commerce, it has repeatedly been suggested that the various states, after discussions with industry representatives, adopt a uniform statute governing the taxation of electronic commerce. It is urged that such uniformity in taxation of electronic commerce is needed so that states and businesses have certainty, and so that future litigation and the pyramiding of taxes on the same transaction, which burden electronic vendors, may be avoided. Further, it is hoped that a uniform statute will be adopted more readily by the various legislatures. [64] Such discussions, however, seem to assume that states have the authority to impose tax collection obligations on electronic vendors selling to customers within the imposing state's borders.

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It has been observed that the National Governors' Association and the National Conference of State Legislatures strongly oppose federal preemption of state taxation authority. [65] Others also seem to view federal preemption of state taxation of electronic commerce as an act that has not yet occurred, [66] and that should be avoided. As the discussion above demonstrates, this is not the case. States are already preempted in the area of taxation of Internet vendors with no in-state presence. In order to impose tax collection obligations on out-of-state Internet [P. 1004] vendors, states need authority from Congress. Before formulating their policies as to how to tax electronic transactions, states should spend some of their efforts on persuading Congress to give them the authority to impose such taxes, in order that a state policy toward the taxation of the transactions becomes necessary.

The Supreme Court clearly stated, in its Quill decision, what the law in this area is. It has been said that "Quill is like the finger in the dike; it is by no means clear that the single bright line will be there to save the industry into the next century. Lack of physical presence may well be the future of jurisdictional tax." [67] These statements seem to assume that either the Supreme Court will reverse its Quill holding or that Congress has already granted, or is very willing to grant, states the right to violate the Commerce Clause by imposing the tax collection obligations on out-of-state vendors. This is not the case. [68] It remains to be seen whether Congress will do so or not.

In the meantime the states should spend their efforts on trying to persuade Congress to let them impose their taxes. Perhaps, as some have noted, the best way to obtain congressional permission is for states and industry to work together to agree to a taxation approach satisfactory to both of them, and then jointly persuade Congress to grant states the authority to violate the Commerce Clause in ways set out in the approach suggested. [69] Until the states are given such authority they must work toward a system of taxation of electronic commerce given the boundaries established by Quill. They "have to tie back into things the Supreme Court has said [they] can and cannot do." [70]

IV. Conclusion

It has been asserted that Internet sales are "too significant a part of the economy" to suggest that they should be exempt in the longterm from taxation. [71] While the idea of millions or billions of dollars of Internet and online sales taking place untaxed may seem outrageous to some, it appears that currently the only way states can constitutionally impose use tax collection obligations on out-of-state vendors selling to in-state customers over the Internet and online is if Congress passes a definitive statute allowing such taxation.

Until states persuade Congress to allow them to tax out-of-state vendors based on their presence on the Internet or online and their electronic dealings with in-state customers, companies are free to sell goods without collecting use tax, as long as they do not otherwise have physical presence in-state.

FOOTNOTES

[1] A study by Input, a California-based information services research firm, estimated that in 1994, $20 million worth of business was conducted online; in 1995, the number grew to $40 million, and the 1996 estimate is a staggering $260 million. See Elizabeth Weise, "What a Tangled Web We Weave," Associated Press, Dec. 29, 1995, available in LEXIS, News Library, AP File. Even more astounding, by other estimates, the volume of sales generated by the Web in 1995 was $436 million, and is predicted

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to rise to $46 billion in 1998. See World Wide Web Statistics (visited Oct. 4, 1996) http://www.why-not.com/company/stats.html

[2] See Nathan Newman, "Proposition 13 Meets the Internet: How State and Local Government Finances Are Becoming Roadkill on the Information Superhighway," State Tax Notes, Sept. 25, 1995, p. 927.

[3] Id.

[4] See id.

[5] See Patricia E. Neil, KPMG Peat Marwick, "Electronic Commerce: Taxation Without Clarification; A Study of Senior Financial Executives' Attitudes and Concerns About Tax Policies and Trends Affecting the Internet" (visited Nov. 5, 1996) http://usserve.us.kpmg.com/salt/archive/july96/story1.html. Nine out of 10 executives of American companies engaged in buying and selling over the Internet called for clarification in the governing regulations. An overwhelming 51 percent of the 291 executives surveyed (of companies with gross revenues in excess of $50 million) stated that the lack of clarity in state and local tax laws governing electronic commerce was inhibiting their involvement with Internet business applications. An alarming 20 percent admitted that they did not know whether their companies were even subject to sales and transaction taxes on the sale of products and services over the Internet.

[6] See, e.g., Arthur R. Rosen and Walter Nagel, "Sales and Use Taxes: General Principles," Tax Mgmt. Multistate Tax Portfolios (BNA) No. 1300, Dec. 22, 1995, at 2.

[7] See "New York State Bar Tax Section Report Outlines Nexus Standards for Out-of-State Vendors," State Tax Notes, Mar. 25, 1996, p. 982. The use tax is generally equal to the rate of sales tax in the purchaser's state of residence minus the sales tax, if any, paid at the time of sale. See id.

[8] See NYSBA, supra note 7.

[9] "The Congress shall have Power to...regulate Commerce with foreign Nations, and among the several States...." U.S. Const. art. I, sec. 8, cl. 3.

/10/"No State shall...deprive any person of life, liberty, or property, without due process of law...." U.S. Const. amend. XIV, sec. 1.

[11] 386 U.S. 753 (1967).

[12] 504 U.S. 298 (1992).

[13] See 386 U.S. at 753-54.

[14] See id. at 754.

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[15] See id. at 755.

[16] See id.

[17] Id. (quoting Ill. Rev. Stat. ch. 120, section 439.2 (1965)).

[18] Id. at 756-60.

[19] Id. at 756 (quoting Freeman v. Hewit, 329 U.S. 249, 253 (1946)).

[20] See id.

[21] Id. at 756 (quoting Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940)).

[22] Id. (quoting Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45(1954)).

[23] Id. at 758.

[24] See id.

[25] The Court also made note of the heavy recordkeeping or administrative burden that would be imposed on vendors if they were forced to collect the sales or use tax. It stated:

[I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

Id. at 759-60 (footnotes omitted).

[26] 504 U.S. 298 (1992).

[27] Id. at 302.

[28] See id.

[29] See id. (quoting N.D. Cent. Code sec. 57-40.2-07 (Supp. 1991)).

[30] Id. at 302-03 (quoting N.D. Cent. Code sec. 57-40.2-01(6) (Supp. 1991)).

[31] See id. at 303.

[32] See id.

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[33] See id. at 318.

[34] See id. at 305.

[35] See id. at 307.

[36] Id. at 308 (quoting Burger King Corp. v. Rudzewicz, 471 U.S. 462, 476 (1985)).

[37] Id. at 307.

[38] See id. at 308.

[39] See id. at 312.

[40] See id.

[41] See id. at 314-18. The Court said:

North Dakota's use tax illustrates well how a state tax might unduly burden interstate commerce. On its face, North Dakota law imposes a collection duty on every vendor who advertises in the State three times in a single year. Thus, absent the Bellas Hess rule, a publisher who included a subscription card in three issues of its magazine, a vendor whose radio advertisements were heard in North Dakota on three occasions, and a corporation whose telephone sales force made three calls into the State, all would be subject to the collection duty. What is more significant, similar obligations might be imposed by the Nation's 6,000 plus taxing jurisdictions. [Further,] "the many variations in rates of tax, in allowable exemptions, and in administrative and record- keeping requirements could entangle [a mail-order house] in a virtual welter of complicated obligations"....

Id. at 313 n.6 (quoting National Bellas Hess, 383 U.S. at 759-60) (second alteration in original).

[42] Id.

[43] See U.S. Const. art. I, sec. 8, cl. 3.

[44] See Quill, 504 U.S. at 318.

[45] Compare U.S. Const. art I., sec. 8, cl. 3 ("Congress shall have power To...regulate Commerce...among the several States,...") with id. amend. XIV, sec. 1 ("No state shall...deprive any person of life, liberty, or property, without due process of law. ..."). Unlike the Commerce Clause, the Due Process Clause does not grant Congress any affirmative power. Thus, the Supreme Court, rather than Congress, has the final say as to whether it has been violated. Congress does not have the power to authorize a violation of the Due Process Clause. See 504 U.S. at 305.

[46] See 504 U.S. at 318.

[47] Id. at 318 (citations omitted).

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[48] When states were first faced with the problem of establishing constitutional nexus, some suggested that states could obtain nexus over electronic vendors using the constitutional theories of representational nexus. Under these theories it was asserted that certain parties (which already had physical presence in the taxing state) that the seller had contracted with -- such as the Internet Service Providers (ISPs), the commercial online services, and the owners of the in-state telecommunications structure allowing for delivery of messages over the Internet -- served as instate representatives of the electronic vendor for nexus purposes. However, the representational theories of nexus are not workable in this area. The Supreme Court cases these theories relied on were all concerned with representatives who engaged in active solicitation, or customer service on behalf of the out-of-state vendor, which allowed for the establishment and maintenance of an in-state market for the out-of- state seller. By contrast, the "representatives" of the electronic out-of-state vendors do not engage in the kind or magnitude of activities that the agents in the representational nexus line of cases engaged in. It seems that it is now largely accepted that these representational theories of nexus do not establish jurisdiction for states to tax out-of-state electronic vendors with no other in-state presence. For an in-depth discussion of why the representation theories of nexus do not serve to provide the required nexus, see Saba Ashraf, "Virtual Taxation: State Taxation of Internet and On-Line Sales," 24 Fla. St. L. Rev. 605 (1997).

[49] Prior to the Quill decision, during the late 1980s, the following legislative proposals would have authorized states to tax outside vendors:

The Main Street Fair Competition Act of 1988, S. 2368, 100th Cong., would have authorized states to collect taxes with respect to sales of tangible personal property by nonresident persons who solicit such sales. SB 2368 set forth a three-prong jurisdictional standard that must have been satisfied before a state could require an out-of-state seller to collect and remit tax on mail-order sales: (1) the destination of the sale must have been within the taxing state; (2) the out-of-state retailer must have been engaged in regular or systematic solicitation of sales within the taxing state; and (3) the out-of-state retailer's annual sales must have exceeded $15 million in the United States, or $750,000 in the taxing state alone. See id. section 3.

The Interstate Sales Tax Collection Act of 1987, H.R. 1242, 99th Cong., would have authorized states to require a retailer engaged in business in-state to collect state and local sales and use taxes on the sale or use of tangible personal property shipped or delivered into the state. The bill defined a "retailer engaged in business in that state" to include: "Any retailer soliciting orders for tangible personal property by mail if the solicitations are substantial and recurring and if the retailer benefits from any banking, financing, debt collection, telecommunications, or marketing activities occurring in that State or benefits from the location in that State of authorized installation, servicing...facilities." Id. The proposal exempted retailers whose annual nationwide gross sales of tangible personal property did not exceed $5 million. See id.

For similar legislation, see Equity in Interstate Competition Act, H.R. 2230, 101st Cong. (1989); S. 480, 101st Cong. (1989); H.R. 3521, 100th Cong. (1987); H.R. 3549, 99th Cong. (1985); S. 983, 96th Cong. (1979).

[50] See National Bellas Hess Inc. v. Illinois Dep't of Revenue, 386 U.S. 753, 756-60 (1967).

[51] S. 1825, 103d Cong. (1994).

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[52] At the time the bill was being considered by the subcommittees, it was hoped that the current administration was more favorably inclined to this legislation than past administrations because President Clinton had supported such legislation when he was governor of Arkansas. See Amy Hamilton, "House Small Business Panel Hears Testimony on Interstate Sales Tax Collection," State Tax Notes, Oct. 3, 1994, p. 914.

[53] S. 545, 104th Cong. (1995).

[54] See "NYSBA Reports on Bill to Require Out-of-State Vendors to Collect Sales Tax," Tax Notes Today, Apr. 17, 1995 (95 TNT 74-71).

[55] H.R. 4414, 103d Cong. (1994).

[56] A similar proposal in the area of electronic commerce may require tax collection with respect to tangible and intangible property delivered in-state.

[57] See "Taxation of Interstate Mail-Order Sales: 1994 Revenue Estimates," Gov't Fin. Rev., Oct. 1994, at 23, 26.

[58] See Oswald G. Graham, "ACIR Estimates Total Potential Revenue From Interstate Mail-Order Sales Taxes," State Tax Notes, Aug. 1, 1994, p. 292.

[59] See Harriet Hanlon, "MTC Examines Making (Tax) Money on the Internet," State Tax Notes, Aug. 7, 1995, p. 408 (discussing remarks of Stewart Baker, former general counsel for the National Security Agency, currently practicing with an international and technology law firm in Washington).

[60] See id.

[61] Id.

[62] See Amy Hamilton, "MTC Dialogue Highlights Breakthrough in Taxation of Online Sales," State Tax Notes, Nov. 13, 1995, p. 1397.

[63] See Hamilton, supra note 62.

[64] See Amy Hamilton, "Businesses Urge White House to Promote Uniform State 'Cybertaxes,'" State Tax Notes, Jan 27, 1997, p. 270.

[65] See R. Scot Grierson, "MTC Executive Panel Meets on Cyberspace, Direct Marketers," State Tax Notes, Feb. 3, 1997, p. 350.

[66] See Amy Hamilton, "An Electronic Commerce Initiative: The White House Tackles the Beast," State Tax Notes, Feb. 3, 1997, p. 347.

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[67] See Amy Hamilton, "Feds, States Ponder How to Tax the Internet," State Tax Notes, Nov. 18, 1996, p. 1447 (quoting Walter Hellerstein, University of Georgia law professor).

[68] The National Governors' Association (NGA) has voted to endorse a state-industry effort to draft a uniform model regulation for the sales and use taxation of electronic commerce. The NGA hopes that this process will lead to the proposal of "coordinated policies that will help states promote fair competition while ensuring that the telecommunications industry bears its fair share of taxation." Amy Hamilton, "Governors Talk Taxes, Endorse Two State Industry Negotiations," State Tax Notes, Feb. 10, 1997, p. 433. It has been reported that the resolution supporting this effort notes that Congress recognized the sovereign immunity of the states to determine their tax policy in the area when it included the State Tax Savings Clause in the Telecommunications Reform Act of 1996. The State Tax Savings Clause merely states that unless specifically stated in a list of enumerated sections, nothing in the Tax Reform Act of 1996 or its applications shall be considered to preempt state tax authority and practices that are otherwise legitimate under federal law and the U.S. Constitution. Quill clearly establishes that state taxation of sellers with no in-state physical presence is unconstitutional because it violates the Commerce Clause. Thus, the Telecommunications Reform Act of 1996 cannot be relied on as the grant by Congress of authorization to violate the Commerce Clause in this way.

[69] See Amy Hamilton, "States, Industry Consider Seeking Federal Law on Nexus and Electronic Commerce," State Tax Notes, Dec. 9, 1996, p. 1683 (see comments of Wade Anderson of the Texas Office of the Comptroller of Public Accounts).

[70] See Alison Bennett, "State Taxes: Electronic Commerce Is Top Tax Issue This Year," BNA Daily Tax Report, Jan. 10, 1997, S-26, S-27 (quoting Kendall Houghton, general counsel for the Committee On State Taxation (COST)).

[71] See Catherine Yang, "New Tolls on the Info Highway?" Business Week, Feb. 12, 1996, at 96, 97.

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