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Remote Sales Taxation

The U.S. Constitution provides an essential protection against burdensome State regulation. The Commerce Clause uniquely empowers Congress “[t]o regulate Commerce ... among the several States” and, as interpreted by the Supreme Court, bars States from burdening interstate commerce without specific Congressional approval. On the matter of State sales taxation, the Supreme Court has held, in the *National Bellas Hess* and *Quill* decisions, that the Commerce Clause bars States from requiring out-of-state (a.k.a. “remote”) sellers to collect taxes on sales to residents within that State unless a remote seller has “substantial nexus” with the State. Otherwise, held the Court, the current sales tax regime is so complicated that such a requirement would impose an unconstitutional burden.

Thus, a fundamental constitutional protection, not a mere policy choice, bars States from requiring remote sellers without nexus to collect sales tax, and the current debate is not merely about being pro-Internet or not (although that element also is present); it fundamentally is about whether remote sellers will continue to be afforded the constitutional protection they are due.

In part because the Supreme Court also said that Congress could determine at some point in the future that, as a matter of fact, States had so radically simplified the sales tax regime that they could require sellers without substantial nexus to collect tax, some States are attempting to simplify their tax codes. Appointed by Governor Locke as one of two private sector representatives of Washington State to the Streamlined Sales Tax Project, Amazon.com is working with States to address the confounding sales tax complexities that currently exist. The sheer number of taxing jurisdictions is staggering: there are over 7000 that already collect tax (up by several thousand since the *Quill* decision), each of which has its own rates, rules, and definitions.

Unfortunately, the States have made little progress, perhaps because uncollected taxes are so minimal (only about 3% of U.S. retail is online, and a large portion of that is either not taxable or is already taxed). For example, the States have failed to address the bundling of goods and services or of physical and digital goods. (There are many other examples.) Although the simplifications the States have accomplished thus far are fine for a voluntary collection system, they certainly are not sufficient to meet constitutional minimums for a mandatory regime.

Beyond the factual issues of simplification or not, key policy questions remain. Fundamentally, Congress needs to consider whether remote sales commerce – which uses fewer local resources, causes less pollution, and saves citizen time – should be taxed the same as local sales, especially when brick and mortar retailers regularly receive local tax abatements. And, importantly, Congress needs to close any loophole – such as a so-called “small seller exemption” – that inadvertently would favor one remote sales business model over others.