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Tax Law

ALERT

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Illinois "Amazon" Law Ruled Unconstitutional

An Illinois circuit court in *Performance Marketing Association, Inc. v. Hamer* ruled that the Illinois "click-through" nexus statute (otherwise known as the Illinois "Amazon" law) violates the Commerce Clause of the United States Constitution because the activity described in the statute (below) does not establish nexus. The court also ruled that Illinois acted prematurely in adopting the law because of the federal moratorium against discriminatory taxes on electronic commerce under the Internet Tax Freedom Act (ITFA), which is currently effective until November 1, 2014. The Performance Marketing Association argued that the law discriminates, in violation of the ITFA, because it imposes a use tax collection obligation on out-of-state retailers that make sales through Internet-based performance marketing, but not on out-of-state retailers that make sales of similar goods and services through other advertising media. The Illinois Department of Revenue has indicated that it is reviewing its appeal options.

Beginning July 1, 2011, the Illinois Amazon law required an out-of-state retailer to collect use tax on all of its sales into Illinois if it (1) had a contract with a person in Illinois who, for a commission or other consideration based on the sale of tangible personal property by the retailer, directly or indirectly referred potential customers to the retailer by a link on the person's website and (2) the retailer made more than $10,000 in sales of tangible personal property through referrals from all of these Illinois persons during the preceding four calendar quarters. New York, California, Rhode Island, Georgia, Arkansas, Connecticut, Vermont and North Carolina have enacted similar Amazon laws and Pennsylvania has indicated in administrative guidance that it has the authority under current law to require use tax collection from out-of-state retailers under similar arrangements without having to adopt a separate statute.

In response to these Amazon laws, many out-of-state retailers have terminated their relationships with their in-state referring affiliates and some retailers are challenging the laws in court. In cases brought by Amazon.com and Overstock.com challenging the New York Amazon law, a New York appellate court upheld the law as facially constitutional, and remanded the case to a lower court to determine whether the law can be applied constitutionally. Amazon.com filed an appeal again challenging the ruling of the law as facially constitutional and requesting a decision from the New York Court of Appeals, New York's highest court, on the as applied challenge.

Oklahoma and South Dakota have taken a different approach, requiring non-collecting remote sellers to notify in-state customers of their use tax obligations. Colorado had gone a step further, requiring non-collecting remote sellers to notify in-state customers of their use tax obligations and send annual reports to the Department of Revenue identifying those customers and the amounts of their purchases. These rules do not apply to retailers that have less than $100,000 in gross sales in the state in the prior calendar year and that reasonably expect to have less than $100,000 in sales in the state in the current calendar year. Last month, however, a Colorado district court permanently enjoined the Colorado Department of Revenue from enforcing Colorado's law on the grounds that it violates the Commerce Clause of the Constitution. The Colorado Department of Revenue has filed a notice of appeal.

Tax Group

MICHELLE W. ALBRECHT	MALBRECHT@LOEB.COM	212.407.4181
JOHN ARAO	JARAO@LOEB.COM	310.282.2231
MARLA ASPINWALL	MASPINWALL@LOEB.COM	310.282.2377
RYAN M. AUSTIN	RAUSTIN@LOEB.COM	310.282.2268
AMY BELL	ABELL@LOEB.COM	310.282.2170
LAURA B. BERGER	LBERGER@LOEB.COM	310.282.2274
LEAH M. BISHOP	LBISHOP@LOEB.COM	310.282.2353
DEBORAH J. BROSS	DBROSS@LOEB.COM	310.282.2245
TARIN G. BROSS	TBROSS@LOEB.COM	310.282.2267
CHRISTOPHER W. CAMPBELL	CWCAMPBELL@LOEB.COM	310.282.2321
THERESA R. CLARDY	TCLARDY@LOEB.COM	310.282.2058
REGINA I. COVITT	RCOVITT@LOEB.COM	310.282.2344
TERENCE F. CUFF	TCUFF@LOEB.COM	310.282.2181
LINDA N. DEITCH	LDEITCH@LOEB.COM	310.282.2296
PAMELA J. DRUCKER	PDRUCKER@LOEB.COM	310.282.2234
PAUL N. FRIMMER	PFRIMMER@LOEB.COM	310.282.2383
ANDREW S. GARB	AGARB@LOEB.COM	310.282.2302
ELIOT P. GREEN	EGREEN@LOEB.COM	212.407.4908
RACHEL J. HARRIS	RHARRIS@LOEB.COM	310.282.2175
NEAL B. JANNOL	NJANNOL@LOEB.COM	310.282.2358
KAREN L. KUSHKIN	KKUSHKIN@LOEB.COM	212.407.4984
THOMAS N. LAWSON	TLAWSON@LOEB.COM	310.282.2289
JEROME L. LEVINE	JLEVINE@LOEB.COM	212.407.4950
JEFFREY M. LOEB	JLOEB@LOEB.COM	310.282.2266
ANNETTE MEYERSON	AMEYERSON@LOEB.COM	310.282.2156
DAVID C. NELSON	DNELSON@LOEB.COM	310.282.2346
LANNY A. OPPENHEIM	LOPPENHEIM@LOEB.COM	212.407.4115
RONALD C. PEARSON	RPEARSON@LOEB.COM	310.282.2230
ALYSE N. PELAVIN	APELAVIN@LOEB.COM	310.282.2298
STANFORD K. RUBIN	SRUBIN@LOEB.COM	310.282.2090
LAURIE S. RUCKEL	LRUCKEL@LOEB.COM	212.407.4836
MAHDI D. SALEHI	MSALEHI@LOEB.COM	310.282.2293
JOHN F. SETTINERI	JSETTINERI@LOEB.COM	212.407.4851
C. MICHAEL SPERO	CMSPERO@LOEB.COM	212.407.4877
REBECCA M. STERLING	RSTERLING@LOEB.COM	310.282.2301
MEGAN A. STOMBOCK	MSTOMBOCK@LOEB.COM	212.407.4226
ADAM F. STREISAND	ASTREISAND@LOEB.COM	310.282.2354
ALAN J. TARR	ATARR@LOEB.COM	212.407.4900
JESSICA C. VAIL	JVAIL@LOEB.COM	310.282.2132
STUART P. TOBISMAN	STOBISMAN@LOEB.COM	310.282.2323
NICHOLAS J. VAN BRUNT	NVANBRUNT@LOEB.COM	310.282.2109
GABRIELLE A. VIDAL	GVIDAL@LOEB.COM	310.282.2362
JOHN S. WARREN (Ret.)	JWARREN@LOEB.COM	310.282.2208
BRUCE J. WEXLER	BWEXLER@LOEB.COM	212.407.4081
DANIEL M. YARMISH	DYARMISH@LOEB.COM	212.407.4116