



## Robert W. Wood

THE TAX LAWYER

TAXES | 3/31/2013

# Court Rules Internet Sales Tax Constitutional So Get Ready To Click And Pay

New York's Amazon sales tax—requiring tax collected at time of purchase by online sellers with affiliate programs—has been held constitutional in this Appeals Court [decision](#). The two giant plaintiffs—Amazon and Overstock—are unlikely to be affected. Despite its no-tax past, Amazon now supports nationwide sales tax rules, while Overstock stopped its New York affiliate program.



But for the rest of us and smaller merchants everywhere this is yet another indication that we'll soon click and pay. Sales tax applies in 45 states and D.C., so why does it surprise us when we order online and get stuck with tax? Online sellers are already required to collect sales tax from customers in their own states.

Tax also applies to phone, mail or online orders if the merchant had a presence like a store in our state. So says [Quill v. North Dakota](#), the 1992 U.S. Supreme Court case that is still good law. It says retailers must collect sales tax from out-of-state customers only if they have a physical presence (such as a store, warehouse or office) in the customer's state.

Yet that was in the dark ages of technology, and Internet purchases are now huge. Many states including New York expanded sales tax to require merchants to collect taxes if they merely have in-state affiliates they contract with and link to. Wow, is that constitutional under [Quill](#)?

Amazon and Overstock sued claiming it isn't but lost. In a 4 to 1 [decision](#) of New York's Court of Appeals, the court upheld the constitutionality of the statute. The Appeals Court found Internet and mail order sales to have similarities. To the court, the key was the affiliations and links that gear sites to local audiences including radio stations, religious institutions and schools.

Many websites urge local constituents to support them by making purchases through Amazon links. Essentially, through these types of affiliation agreements, a vendor can be considered to have established an in-state sales force. So said the court. This is more than mere advertising, which would not create nexus under [Quill](#).

Yet many disagree and the last chapter in this saga hasn't yet been written. Interestingly, though Amazon has mostly now reversed course on its no-tax mantra, it does say it wants a nationwide solution, not state-by-state answers. Meanwhile, Congress is getting closer with the pending [Marketplace Fairness Act \(S.336/H.R.684\)](#).

The Senate [passed](#) it in a [symbolic Senate vote](#) demonstrating support for the Marketplace Fairness Act. But it really wasn't the Act itself but rather a budget amendment, and only in the Senate. So will it pass? Not necessarily, but regardless, the days of tax-free clicks are numbered.

*Robert W. Wood practices law with [Wood LLP](#), in San Francisco. The author of more than 30 books, including *Taxation of Damage Awards & Settlement Payments* (4th Ed. 2009 with 2012 Supplement, [Tax Institute](#)), he can be reached at [Wood@WoodLLP.com](mailto:Wood@WoodLLP.com). This discussion is not intended as legal advice, and cannot be relied upon for any purpose without the services of a qualified professional.*