

# Affiliate or Amazon Tax Laws

A state-by-state summary  
for our business partners

**Presented by:**

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# Tracking the latest developments

Ever since the state of New York passed the so-called Amazon tax in April 2008, we at PartnerCentric have been fielding questions from you, our merchants and affiliates, regarding the details of this legislation and what it means for your business.

Since that time, we've diligently followed developments in other states that debated the merits of similar legislation. Please understand that we are not tax law experts. You should consult your legal and tax representatives for professional advice in this regard. What we are providing here is a summary of the laws being debated, the laws already passed and how they are affecting our industry – whether you are a merchant or an affiliate.

We hope you find this information useful. As always, we are available to answer your questions. Send inquiries to [info @ partnercentric.com](mailto:info@partnercentric.com) or call us toll free at 1-800-930-0267.

# Precursors leading up to the first law

The U.S. Supreme Court has ruled that a state may require a company engaged in interstate commerce to collect taxes on its behalf if the tax is “applied to an activity with substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the state” (*Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977))

The Court has ruled that a company does not have the required nexus if it has no physical presence in a state and its only connection with it is to solicit business there through catalogs, flyers, advertisements in national publications, or phone calls and to fulfill orders by delivering merchandise to customers by mail or common carrier (*Quill Corp v. North Dakota*, 504 U.S. 298 (1992); *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967)). But the Court has also found that the physical presence requirement is met if an out-of-state company has contracts with state residents who, for a sales commission or other compensation, solicit orders on its behalf (*Scripto v. Carson*, 362 U.S. 207 (1960))

# First Salvo – The New York “Amazon” Tax

In **April 2008**, as part of its budget, New York enacted a new tax law called the Commission-Agent Provision, which requires out-of-state retailers to collect and remit sales and use taxes if they have a commission agreement with an in-state resident based on the referral of customers (provided that resident earns more than \$10,000 in revenues from New Yorkers).

■ **Summary:** Nexus occurs if and when the "cumulative gross receipts from sales by the seller to customers in New York state as a result of referrals to the seller by all of the seller's resident representatives under the type of contract or agreement described above total more than \$10,000 during the preceding four quarterly sales tax periods."

■ **Full text of the bill pertaining to affiliate sales tax:**

1. The seller enters into an agreement or agreements with a New York state resident or residents under which, for a commission or other consideration, the resident representative directly or indirectly refers potential customers to the seller, whether by link on an Internet web site or otherwise. A resident representative would be indirectly referring potential customers to the seller where, for example, the resident representative refers potential customers to its own web site, or to another party's web site which then directs the potential customer to the seller's web site.
2. The cumulative gross receipts from sales by the seller to customers in New York state as a result of referrals to the seller by all of the seller's resident representatives under the type of contract or agreement described above total more than \$10,000 during the preceding four quarterly sales tax periods.

# Aftermath

Amazon.com filed suit against a 2008 New York law that is similar to this bill, alleging that New York's law violates (1) the U.S. Constitution's Commerce Clause by taxing out-of-state entities that have no substantial nexus with New York, (2) the U.S. and New York constitutions' due process clauses by effectively creating an irrebuttable presumption of "solicitation" and being overly broad, and (3) both constitutions' equal protection clauses by intentionally targeting Amazon. The New York court dismissed all three complaints on the grounds that, even if all Amazon's alleged facts are accepted as true, "there is no basis on which the company can prevail." (*Amazon.com LLC v. New York State Department of Tax and Finance*, Supreme Court of the State of New York, Eileen Bransten, J., Index No. 601247/08, 2009 NY Slip Op. 29007; 2009 N.Y. Misc. Lexis 28, January 12, 2009.) Amazon appealed the decision to the New York Court of Appeals on February 27, 2009.

The larger effect of the New York affiliate tax is the ripple effect it had on other states that now saw this kind of tax as a way to boost state revenues. In the coming months and years, other states would draft and debate similar legislation, and our industry would start a massive nationwide campaign to combat such laws.

# Rhode Island passes affiliate tax in June 2009

## Summary:

Nexus occurs "if the retailer enters into an agreement with a resident of this state, under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the retailer, provided the cumulative gross receipts from sales by the retailer to customers in the state who are referred to the retailer by all residents with this type of an agreement with the retailer, is in excess of five thousand dollars (\$5,000) during the preceding four (4) quarterly periods ending on the last day of March, June, September and December."

## Full text of the bill pertaining to affiliate sales tax:

SECTION 8. Section 44-18-15 of the General Laws in Chapter 44-18 entitled "Sales and Use Taxes – Liability and Computation" is hereby amended to read as follows:

44-18-15. "Retailer" defined. — (a) "Retailer" includes:

- (1) Every person engaged in the business of making sales at retail, including sales at auction of tangible personal property owned by the person or others.
- (2) Every person making sales of tangible personal property through an independent contractor or other representative, if the retailer enters into an agreement with a resident of this state, under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the retailer, provided the cumulative gross receipts from sales by the retailer to customers in the state who are referred to the retailer by all residents with this type of an agreement with the retailer, is in excess of five thousand dollars (\$5,000) during the preceding four (4) quarterly periods ending on the last day of March, June, September and December. Such retailer shall be presumed to be soliciting business through such independent contractor or other representative, which

# Rhode Island – another state follows suit

presumption may be rebutted by proof that the resident with whom the retailer has an agreement did not engage in any solicitation in the state on behalf of the retailer that would satisfy the nexus requirement of the United States Constitution during such four (4) quarterly periods.

## **Update:**

The Rhode Island Division of Taxation recently issued notices to more than 100 online retailers, the latest salvo in the growing national battle over collection of state sales tax.

The agency issued the notices to advise the retailers about Rhode Island's newly adopted Amazon law and tell them that they may be obligated to collect the state's 7-percent sales tax on certain online purchases made by Rhode Islanders, said state Tax Administrator David M. Sullivan.

# North Carolina passes law in August 2009

## **Summary:**

Nexus occurs "if the cumulative gross receipts from sales by the retailer to purchasers in this state who are referred to the retailer by all residents with this type of agreement with the retailer is in excess of ten thousand dollars (\$10,000) during the preceding four quarterly periods."

## **Full text of the bill pertaining to affiliate sales tax:**

105 164.8(b) Remote Sales. – A retailer who makes a remote sale is engaged in business in this State and is subject to the tax levied under this Article if at least one of the following conditions is met:

105 164.8(b)(3) (3) The retailer solicits or transacts business in this State by employees, independent contractors, agents, or other representatives whether the remote sales thus subject to taxation by this State result from or are related in any other way to the solicitation or transaction of business.

A retailer is presumed to be soliciting or transacting business by an independent contractor, agent, or other representative if the retailer enters into an agreement with a resident of this State under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet Web site or otherwise, to the retailer, if the cumulative gross receipts from sales by the retailer to purchasers in this State who are referred to the retailer by all residents with this type of agreement with the retailer is in excess of ten thousand dollars (\$10,000) during the preceding four quarterly periods. This presumption may be rebutted by proof that the resident with whom the retailer has an agreement did not engage in any solicitation in the State on behalf of the seller that would satisfy the nexus requirement of the United States Constitution during the four quarterly periods in question.

# An ongoing legal battle

Several states are currently moving forward with their own affiliate tax legislation, including:

Maryland  
Minnesota  
Tennessee  
Wisconsin

Several states considered and, for now, have defeated, such legislation, including:

California (terminated by Governor Schwarzenegger in July 2009)  
Connecticut  
Hawaii (vetoed by governor in July 2009)

# Where do we go from here?

As we have learned since passage of the New York Amazon tax, the best reaction is slow and measured. Businesses that took a knee-jerk approach to handling this legislation lost revenue and business partners in the process.

When affiliate tax legislation is enacted in a state, the first thing to do is determine if nexus exists within your business dealings in that state. Then, consultation with legal and tax experts is advisable.

Your affiliate program managers have gained experience in the past two years dealing with this issue – and with the potential fallout for your business. We're happy to assist you in any way we can as you work to adhere to these new laws.