

Internet Sales Taxes and the Main Street Fairness Act

by Sophia M. Stadnyk, Senior Associate Counsel

This summer, bills were introduced in both houses of Congress to address the issue of a sales tax for sales by out-of-state retailers made over the internet. These bills, S. 1452 and H.R. 2701, are both titled The Main Street Fairness Act. Sen. Richard Durbin (D-Ill.), who introduced the Senate bill, stated: "Main street retailers collect sales taxes on behalf of consumers, why shouldn't online retailers do the same?" Sen. Durbin claims that in 2012, States will lose an estimated $24 billion in uncollected state and local taxes on internet and catalog sales.

This issue—e-commerce equity—is one that IMLA has been supporting for at least the past ten years. IMLA has taken the position that sales-tax free electronic commerce transactions have a detrimental impact on local government revenues and jeopardize the ability of local government to collect sales tax on purchases made over the internet; further, the exemption places local businesses and vendors who are liable to pay sales taxes at a competitive disadvantage.

To back up a bit, in 1998, the Internet Tax Freedom Act was signed into law by then President Bill Clinton. Except as otherwise provided in the Act, this established a three-year moratorium on federal, state, and local governments from imposing certain internet-related taxes (e.g., taxes on internet access) and "multiple or discriminatory taxes on electronic commerce." It did not, however, ban sales taxes imposed on online sales. The legislation was intended to delay the imposition of any new taxes while the Advisory Commission on Electronic Commerce (established by the Act) studied the matter and reported back to Congress within 18 months of the date that the Act was passed.

Since then, the 1998 Act has been extended several times, most recently by the Internet Tax Freedom Act Amendment Act of 2007 (Pub. L. 108435, 47 U.S.C. § 151), signed into law by then President George W. Bush. This Act extended the moratorium until November 01, 2014.

In addition, in 1992, the U.S. Supreme Court ruled, in *Quill Corp. v. North Dakota,* 504 U.S. 298 (1992), that a state could not impose a use tax on a retailer that had no physical presence or employees in the taxing jurisdiction. Quill was a Delaware corporation selling office equipment and supplies through catalogs, flyers, magazine advertisements, and phone calls. It had about 3,000 customers in North Dakota and was the sixth largest retailer of office supplies in that state. North Dakota imposed a use tax on property purchased for storage, use or consumption within the State, and required every "retailer maintaining a place of business in" the State to collect the tax from the consumer, and remit it to the State. The definition of "retailer" included "every person who engages in regular or systematic solicitation of a consumer market" in the State.

The Supreme Court, applying the "substantial nexus" requirement under the Commerce Clause, ruled that a seller whose only connection with customers in the State was by common carrier or the United States mail lacked the requisite minimum contacts with the State to collect and pay the use tax. The Court added that:

> [t]his aspect of our decision is 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 burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. [*Quill* at 318.]

The fallout from *Quill* resulted in the Streamlined Sales and Use Tax Agreement (SSUTA), a multi-state attempt to simplify and modernize sales and use tax administration. According to one source, 24 States (representing over 30 percent of the population) have adopted the Agreement (for more information about the SSUTA, see http://www.streamlinedsalestax.org).

The Main Street Fairness Acts refer to the decision in *Quill*, the need to treat similar sales transactions equally, without regard to the format in which the sales occur, and the importance of a uniform sales and use tax collection system that is fair, efficient, and nondiscriminatory. The proposed legislation would allow States, provided they meet certain conditions, to require large internet and mail-order retailers to collect State and local sales taxes—more specifically, that each "Member State" under the SSUTA would be authorized to require "all sellers not qualifying for the small seller exception to collect and remit sales and use taxes with respect to remote sales sourced to that Member State" under the Agreement. The authorization is dependent on at least 10 States, comprising at least 20 percent of the total population of all States imposing a sales tax (as determined by the most recent Federal census) first petitioning for membership and becoming Member States under the Agreement; second, on certain "necessary operational aspects" of the Agreement, as specified, being implemented. These include the implementation of an online multi-state registration system and rules and procedures for dispute resolution. The proposal also recognize that online consumer privacy is "of paramount importance to the growth of electronic commerce and must be protected."

As of the time of writing, S. 1452 has

continued on page 38

Zoning Decision Immunity

cont'd from page 37

Joe's").
2. *Id.* at *3.
3. 438 U.S. 478 (1978).
4. *Id.* at 481.
5. *Id.* at 485.
6. *Id.* at 508.
7. *Id.* at 512-13.
8. *Id.* at 512-13.
9. *Id.* at 517.
10. 438 F.3d 320 (3rd Cir. 2006).
11. *Id.* at 325-26.
12. *Id.* at 326-27.
13. *Id.* at 325-326, quoting *Bass v. Attardi*, 868 F.2d 45, 50 (3rd Cir. 1989).
14. 229 F. Supp. 2d 1056, 1065-67 (D. Haw. 2002).
15. 326 F. Supp. 2d 1128, 1135-36 (E.D. Cal. 2003).
16. *Id.* at 1135.
17. *Id.* at 1136.
18. *See, e.g.*, Associates in Obstetrics & Gynecology v. Upper Merion Township, 270 F. Supp. 2d 633 (E.D. Pa. 2003); Hyatt v. Town of Lake Lure, 225 F. Supp. 2d 647, 656 (W.D.N.C. 2002); Ryan v. Lower Merion Township, 205 F. Supp. 2d 434 (E.D. Pa. 2002); Buckles v. King County, 191 F.3d 1127 (9th Cir. 1999).
19. *Hyatt*, 225 F. Supp. 2d at 656, quoting *Antoine v. Byers & Anderson, Inc.*, 508 U.S. 429, 435-436 (1993) (internal citations omitted).
20. *Buckles*, 191 F.3d at 1136.
21. *See, e.g.* Bettencourt v. Bd. of Registration in Medicine, 721 F. Supp. 382, 385 (D. Mass. 1989).
22. Killinger v. Johnson, 389 F.3d 765, 770-71 (7th Cir. 2004); Reed v. Village of Shorewood, 704 F.2d 943, 952 (7th Cir. 1983).
23. *Id.*
24. *Chicago Joe's*, 2009 WL 3824723 (N.D. Ill. Nov. 12, 2009).
25. *Id.* at *1.
26. *Id.* at *2, citing 65 ILCS 5/11-13-25 (2006).
27. *Id.*
28. *Id.*
29. *Id.* at *2-*3.
30. *Id.*
31. *Id.* at *3.
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* (citing *Corn v. City of Lauderdale Lakes*, 997 F.2d 1369, 1392 (11th Cir. 1993) and *Biblia Abierta v. Banks*, 129 F.3d 899, 904 (7th Cir. 1997), to support the denial of absolute immunity to "local legislators").
38. No. 10 C 2168, 2011 WL 1225459, 2011 U.S. Dist. LEXIS 33481 (N.D. Ill. Mar. 28, 2011).
39. *Id.* at *8.
40. *Id.* at *9-*11.
41. *Id.* at *11.
42. *Id.* ML

Federal

cont'd from page 18

been referred to the Committee on Finance, and H.R. 2701 has been referred to the Subcommittee on Courts, Commercial and Administrative Law. The text and status updates for both bills are available online from the Library of Congress website, http://thomas.loc.gov.

In California, Governor Brown signed a bill that gave Amazon, reportedly the world's largest online retailer, a one-year moratorium on the obligation to collect the State's 7.25% sales tax on internet transactions imposed by a June law, in return for the company discontinuing its efforts for a referendum to repeal the sales tax measure. According to the *Washington Post*, Amazon is due to begin collecting the tax in September 2012 if no national online sales tax is in place by then. ML

Supreme Court

cont'd from page 23

require public improvements and fund those improvements by levying special assessments against the properties that benefitted, either as a lump sum or in installments. In 2005, the City discontinued the Barrett Law method in favor of a new system that imposed less of a financial burden on property owners. As part of this transition, the City passed a resolution discharging all Barrett Law assessments owing as of November 1, 2005, but did not give refunds to those property owners who had previously paid their Barrett Law assessments, including the plaintiffs. When the refund request was denied, the plaintiffs brought a Section 1983 action alleging that the City violated their federal constitutional rights to due process and equal protection under the Fourteenth Amendment. The trial court entered judgment against the City; on appeal, the Supreme Court of Indiana reversed, finding that, on application of rational basis review, the law was rationally related to legitimate governmental interests and survived constitutional challenge. The question before the U.S. Supreme Court is whether the Equal Protection Clause precludes a local taxing authority from refusing to refund payments made by those who paid their assessments in full, while forgiving the obligations of identically-situated taxpayers who chose to pay using a multi-year installment plan.

Magner v. Gallagher, 619 F.3d 823 (8th Cir. 2010), *petition for cert. filed* (U.S. Feb. 14, 2011) (No. 10-1032). The plaintiffs, owners of rental properties, brought an action claiming that the City of St. Paul's enforcement of its housing code was discriminatory, being based on the large percentage of minority tenants in their properties, and violated the Fair Housing Act. As evidence, they cited statements made by the relevant City official indicating his desire and intent to reduce the amount of low-income tenants in the City. The district court granted the City's motion for summary judgment; on appeal, the Eighth Circuit affirmed with the exception of the owners' disparate impact claim, which was reversed. It was reasonable to infer that racial minorities, particularly African-Americans, were disproportionately affected by these events. The question for the U.S. Supreme Court is whether disparate impact claims are cognizable under the Fair Housing Act; if so, which test should be used to analyze them? IMLA has filed an *amicus* brief in this case.

As mentioned in a recent IMLA Newsletter, the Court has agreed to hear the appeal in *Filarsky v. Delia*, 621 F.3d 1069 (9th Cir. 2010), *cert. granted*,