
THE TAX MAN COMETH? AN ARGUMENT FOR THE TAXATION OF ONLINE PURCHASES

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I. INTRODUCTION: THE EXPLOSION OF E-COMMERCE AND RELATED LEGAL QUESTIONS

Electronic commerce, or e-commerce in today's common parlance,¹ has undergone substantial growth over the past few years as consumers have become more comfortable with the notion of purchasing products from their favorite stores without leaving the comfort of the home or office.² According to an August 2004 report released by the United States Department of Commerce, e-commerce now accounts for 1.7% of total retail sales in the United States.³ In the second quarter of 2004 alone, online sales amounted to almost \$16 billion, a 23.1% increase over the second quarter in 2003.⁴ The rapid migration to e-commerce is further illustrated by the fact that holiday shoppers increased their online spending by 42% in the period between Thanksgiving and Christmas in 2003.⁵

The popularity of e-commerce can be attributed to many factors, including

¹ KARL FRIEDEN, CYBERTAXATION 1 (CCH Inc.) (2000) ("The nations of the world are entertaining a promising yet volatile electronic commerce (e-commerce) realm that is characterized by a seamless, borderless, and timeless marketplace.").

² See Press Release, United States Department of Commerce, Retail E-Commerce Sales In Second Quarter 2004 Were \$15.7 Billion, Up 23.1 Percent From Second Quarter 2003, Census Bureau Reports, at <http://www.census.gov/mrts/www/current.html> (Aug. 20, 2004) (comparing e-commerce sales of the second quarter of 2004 with e-commerce sales from the second quarter of 2003).

³ *Id.*

⁴ See *id.*

⁵ ACCESS NEWS, INTERNET ADVERTISING RESEARCH AND NEWS, at <http://www.axcessnews.com/research/shtml> (last visited Sept. 1, 2004); see also Nick Wingfield, *For Web's Plucky Survivors, Holidays are Sales Bonanza; Shipping Perks at Zappos.com*, WALL ST. J., Dec. 8, 2003, at B1.

greater comfort with making purchases on the Internet, the increase in high speed home Internet connections, and the desire to avoid insufferably long lines at the mall.⁶ If the incentive of shopping in one's pajamas were not enough,⁷ shoppers can also effectively skirt state sales tax obligations by patronizing online companies that do not collect tax.⁸ As the beneficiaries of Supreme Court jurisprudence, many online companies are not required to factor in state sales tax when completing online transactions.⁹ In the seminal case *Quill Corp. v. North Dakota ex rel. Heitkamp*,¹⁰ the Supreme Court reaffirmed the "bright line test" for "substantial nexus" set forth in *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*,¹¹ holding that a company must have a physical presence within a taxing jurisdiction before a state can require

⁶ Wingfield, *supra* note 5 ("The growth reflects a steady shift of retail spending to the online world, as consumers grow more comfortable with the Internet and the spread of high-speed home connections makes browsing and ordering simpler"); Editorial, *Winds of Change*, DEMOCRAT & CHRON., Jan. 12, 2004, at 6A (explaining that one of the many reasons for the increased popularity in Internet shopping is founded in the desire to "avoid post-Thanksgiving mall mania").

⁷ See Christina Dyrness, *Online Shoppers Face More Taxes*, CHARLOTTE OBSERVER, Mar. 26, 2003, at F1 (noting that one of the Internet's biggest successes is the ability that it provides for consumers to shop from their family rooms); see also Editorial, *Louisiana May Make it Harder to Skirt Taxes*, SHREVEPORT TIMES, Mar. 5, 2004, at F1 (noting that many Louisiana residents "skirt" their obligation to pay a use tax for purchases made through mail-order, telephone or the Internet).

⁸ Larry Fiorino, *Commentary: U.S. Takes Stand on Internet Tax*, THE DAILY RECORD, at http://www.mddailyrecord.com/pub/4_33_friday/saturdaycolumns/144492-1.html (Aug. 8, 2003) ("One of the most prevalent benefits is the inherent savings of not having to pay sales tax on Web purchases. What many consumers don't realize is that they are personally responsible to remit sales tax to their state when the Internet vendor does not collect the tax.").

⁹ See Janice C. Griffith, *State and Local Revenue Enhancement and Taxation Policies in a Digital Age: E-Commerce Taxation, Business Tax Incentives, and Litigation Generated Revenues*, 34 URB. LAW. 429, 431 (2002).

Online sales by out-of-state vendors without a physical presence in the state do not form the substantial nexus *Quill Corp.* requires between the taxing body and the remote vendor. Electronic sellers argue that interstate commerce would be burdened should they be required to collect state and local sales and use taxes involving thousands of different taxing authorities that impose varied tax rates, define goods and services differently, and impose various requirements for registration, audits, and remittances.

Id.

¹⁰ 504 U.S. 298, 317 (1992) ("[A]lthough in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes.").

¹¹ 386 U.S. 753 (1967), *overruled by Quill*, 504 U.S. 298 (1992). While *Quill* did overrule *Bellas Hess*, the decision was founded upon due process grounds. Due process is discussed at length in *Quill* but for the purposes of this paper, attention will be devoted to the Commerce Clause and the physical presence requirement established by *Bellas Hess* and affirmed by *Quill*.

the collection of state sales and use taxes.¹² The *Quill* decision has had vast implications on e-commerce as it has allowed companies to establish a presence on the Internet without the worry of computing sales tax for 7,500 taxing jurisdictions.¹³ Many mail order, phone order, and Internet companies thus operate with a distinct advantage over their brick-and-mortar counterparts.¹⁴ *Quill* has thus made it even easier for consumers to dodge tax obligations, a pastime almost as American as baseball and apple pie.¹⁵ However, the sun may be setting on the days of tax free shopping on the Internet, and for states desperate to climb out of financial ruin, the moment could not arrive too soon.¹⁶

In the conclusion of his opinion in *Quill*, Justice Stevens, perhaps having recognized the impact of this decision, made it clear that Congress is the ultimate arbiter in deciding what constitutes a burden on interstate commerce.¹⁷ The prevailing thought has been that if the “dizzying patchwork of taxing jurisdictions”¹⁸ was simplified, thereby lessening the burden on interstate commerce, Congress would be willing to enact legislation allowing states to require online companies to collect and remit sales and use taxes.¹⁹ To that

¹² David T. Brown, *No Easy Solutions in the Sales Tax on E-Commerce Debate: Lessons From The Advisory Commission on Electronic Commerce Report to Congress*, 27 J. CORP. L. 117, 121 (2001) [hereinafter Brown].

¹³ See Janet E. Moran & Jeffrey Kummer, *U.S. and International Taxation of the Internet: Part I*, 20 COMPUTER & INTERNET LAW 1, 8 (Apr. 2003) (“As long as a seller does not have a physical presence in a particular state, it does not have to collect and remit sales tax.”).

¹⁴ PETER B. MAGGS ET AL., INTERNET AND COMPUTER LAW 542 (2001).

¹⁵ Albert B. Crenshaw, *Eyeing Tax Revenue From Internet Sales, States Find a Friend in Congress*, WASH. POST, Sept. 28, 2003, at F5 (noting that evading sales tax obligations is a deeply rooted practice for the average American taxpayer, and that the increase in remote sales, as well as the budget crunch facing many states, may prompt the passage of the Simplified Sales and Use Tax Act).

¹⁶ Leonard Wiener, *No Longer a Tax-Free Zone*, U.S. NEWS & WORLD REP., Nov. 3, 2003, at 40.

¹⁷ *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 318 (1992). Justice Stevens provides,

This 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.

Id.; see also W. Carl Spining, *Forcing Mail-Order Houses to Collect Use Taxes in the Wake of Quill Corp. v. North Dakota*, 60 TENN. L. REV. 1021, 1029 (1993) (“The Court also explicitly invited Congress to resolve this issue.”).

¹⁸ NATIONAL GOVERNORS ASSOCIATION, THE STREAMLINED SALES TAX PROJECT ANSWERS THE QUESTION . . . IS ORANGE JUICE A FRUIT OR A BEVERAGE, at <http://www.nga.org/nga/salestax/1,1169,,00.html> (last visited Nov. 5, 2004).

¹⁹ Carol L. Hesz, *What's Holding Up E-Commerce Tax Laws?*, at http://www.bwhllc.com/publications/ecommerce_tax.htm (last visited Nov. 5, 2004).

end, the Streamlined Sales Tax Project (“SSTP”), a collaborative effort of 42 state governments and the District of Columbia, has focused on creating measures to design, test, and implement a tax system that drastically simplifies sales and use tax administration and collection.²⁰ Regardless of the ultimate success of the SSTP, however, collection by sellers of sales and use taxes on remote sales will remain voluntary under the agreement until either Congress or the Supreme Court acts to make this collection mandatory.²¹ The requisite intervention by Congress may very well be the Streamlined Sales and Use Tax Act (“The Act”), H.R. 3184.²² The bill, introduced in the House of Representatives on September 25, 2003 by Representative Ernest J. Istook Jr., (R-OK), and William Delahunt, (D-MA), essentially serves as the enabling legislation for the work of SSTP.²³ It would “allow states that have implemented the Streamlined Sales and Use Tax Agreement, the model legislation designed to allow states to form the multistate compact, to require remote sellers to collect and remit sales taxes[.]”²⁴

While the bill was not voted on by the 108th Congress,²⁵ the legislation has garnered a great deal of discussion because there are strong arguments on both sides of the issue. Opponents argue that e-commerce is just beginning to experience substantive growth and the collection of sales tax would have a

²⁰ STREAMLINED SALES TAX PROJECT, EXECUTIVE SUMMARY 1, at <http://www.streamlinedsalestax.org/execsum0404%20.pdf> (Apr. 2004) [hereinafter EXECUTIVE SUMMARY]; see also Carl Tubbesing, *A Blueprint for Streamlining Sales Taxes: An Agreement on How to Simplify Sales Taxes Across State Lines has been Reached. Now It's Up to Legislatures to Concur*, STATE LEGISLATURES, Feb. 1, 2003, at 12. The author explains that while forty five states and the District of Columbia have sales taxes, the variation in rates among the various taxing jurisdictions can be quite confusing. For example, the author notes that in Hawaii, the sales tax is 4% while the state sales tax in Missouri is 4.225%. In addition to charging a state sales tax rate, many states also have local sales taxes. Further complicating the matter, the author points out that different sales tax return forms are used in different states and definitions of taxable items often vary across state lines. SSTP has devoted its efforts on fostering interstate agreement to simplify state sales taxes. These efforts have resulted in the development of the Streamlined Sales and Use Tax Agreement. *Id.*

²¹ Chad Schuldt et al., *South Dakota, the Sales Tax, and the Internet: What's Happening? What Might Happen?*, S. D. BUS. REV., Sept. 1, 2003, at 10.

²² H.R. 3184, 108th Cong. (2003); see Brian Krebs, *Internet Sales Tax Effort on Hold for Now*, TechNews.com, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A5949-2003Dec16¬Found=true> (Dec. 17, 2003) [hereinafter *Tax Effort on Hold for Now*] (“[L]egislatures have already voted to modify their sales tax codes to accommodate the plan, but the endgame almost certainly will play out in the halls of Congress.”).

²³ Timothy Catts, *Istook, Delahunt Introduce Internet Sales Tax Bill in House*, 100 TAX NOTES 1629, 1629 (Sept. 29, 2003).

²⁴ *Id.*

²⁵ See *Tax Effort on Hold for Now*, *supra* note 22 (noting that Congress is unlikely to hear this legislation in 2004 as it is an election year and there is expected to be strong resistance to the initiative from lawmakers and business interests).

deleterious impact on its development.²⁶ On the other hand, brick-and-mortar stores²⁷ maintain that they are at a distinct disadvantage, as they do not have the option of hiding behind the Internet tax loophole created by Supreme Court jurisprudence.²⁸

This comment begins with a brief description of sales and use taxes. An examination of the difficulties in collecting use tax from consumers will provide the framework for an understanding as to why states believe it is necessary to force vendors to collect taxes on online purchases. This comment will then explain why online companies are free to complete Internet transactions without collecting a sales tax. Next, the comment will specifically examine the SSTP, providing background on its development as well as its provisions. An analysis of The Act will directly follow, including an explanation of the support and criticism of the movement as a whole as well as an examination of the legislation in particular. The comment will conclude with a discussion of the importance of enactment of The Act.

II. SALES AND USE TAXES – FAILURE OF THE “HONOR CODE” SYSTEM OF COLLECTING TAXES FROM INTERNET PURCHASES MAKES CONGRESSIONAL INTERVENTION A NECESSITY

A. Background on Sales and Use Taxes

A sales tax, at its most basic level, is “a tax imposed on the sale of tangible

²⁶ See *Internet Tax Nondiscrimination Act: Hearing Before the Subcomm. on Comm. and Admin. Law of the Comm. on the Judiciary*, 108th Cong., 13-14 (2003) (statement of the Honorable Jack Kemp, Co-Director, Empower America) [hereinafter Kemp] (equating the effort to streamline sales tax collection among states to the creation of a “sales tax cartel.” Kemp held that this initiative would frustrate attempts to foster the development of e-commerce); see also Editorial, *The Internet Tax Grab*, WALL ST. J., Oct. 21, 2003, at A26 [hereinafter *Tax Grab*] (“[S]ome politicians are . . . pushing for an Internet sales tax. We can’t think of a better way to handicap a technology with uses the world is just beginning to understand.”).

²⁷ ADVISORY COMMISSION ON ELECTRONIC COMMERCE, REPORT TO CONG. 47, at http://www.ecommercecommission.org/acec_report.pdf (Apr. 2000) [hereinafter REPORT TO CONG.] (defining a brick-and-mortar business as “a firm that operates with a physical storefront and conducts business through physical mechanisms.”).

²⁸ Crenshaw, *supra* note 15 (explaining that brick-and-mortar stores are concerned that they may lose business to online competitors because of the inherent tax savings that many online stores offer); see also Steven Pearlstein, *It’s Time Uncle Sam Taxed Techies*, WASH. POST, Jan. 7, 2004, at E1 (“[T]raditional bricks-and-mortar retailers are at a significant competitive disadvantage, because they still have to collect state sales taxes. Ask the techies about this injustice, and you generally get a lecture about how sales taxes are outdated anyway.”).

personal property sold at retail. The retail sales tax is collected by the seller at the time of the sale and is imposed by the state and/or local jurisdictions in which the retail seller is located.”²⁹ Forty-five states in the United States have some form of sales tax; thirty-three states also allow for local sales taxes.³⁰

As a result of *Quill*, some online companies are not obligated to remit sales tax for transactions made through the Internet. However, consumers are responsible for a use tax³¹ on any purchase that is made outside the jurisdiction for use within the taxing jurisdiction.³² The purpose of the use tax is “to ensure that residents who purchase goods in or from another state pay the equivalent of a sales tax on the purchase in their state of residence.”³³ Collection of the use tax is seen as a vital source of revenue as it assists states in “prevent[ing] the erosion of their individual tax bases.”³⁴ Since many online vendors do not have a “physical presence” or “substantial [tax] nexus” in a particular state, the collection of tax revenue on online purchases is often dependent on consumers reporting their use tax obligations.³⁵ How is this tax collected? Many different approaches are used by states,³⁶ but an increasingly common method is to include a line on tax returns where taxpayers are expected to calculate and declare unpaid taxes.³⁷ At the present time, about eighteen states have a consumer use tax reporting line on their income tax returns.³⁸ One of the prevailing motivations behind adding this line is the desire to inform taxpayers

²⁹ Kathryn L. Moore, *State and Local Taxation: When Will Congress Intervene?*, 23 J. LEGIS. 171, 176-77 (1997).

³⁰ See Brown, *supra* note 12, at 119; see also Press Release, CCH Inc., States All Over the Map with Consumption Taxes, CCH Says, at <http://cch.com/press/news/2004/20040629t.asp> (July 1, 2004). There are five states - Alaska, New Hampshire, Delaware, Oregon, and Montana - that do not impose a sales tax. *Id.*

³¹ REPORT TO CONG., *supra* note 27, at 49.

³² See MAGGS ET AL., *supra* note 14.

³³ Moore, *supra* note 29, at 177.

³⁴ Nathaniel T. Trelease & Andrew W. Swain, *Nexus & Remote Sellers: The Taxation of Electronic Commerce*, 15 UTAH BAR J. 10, 10 (Mar. 2002).

³⁵ *Id.* at 10-11 (“[I]t is practically impossible for a state to audit all of its residents for use tax purposes, they must instead rely on remote vendors to collect and remit the tax . . . This highlights the necessity for taxing jurisdictions to establish nexus with remote vendors, particularly in the context of e-commerce.”).

³⁶ See generally Nina Manzi, *Use Tax Collection on Income Tax Returns in Other States*, at <http://www.house.leg.state.mn.us/hrd/pubs/usetax.pdf> (Mar. 2003).

³⁷ Tom Herman & Michelle Higgins, *Attention, Shoppers: Pay Your Sales Tax*, WALL ST. J., Nov. 13, 2003, at D1 (“A growing number of states, looking for ways to bridge budget shortfalls, are adding lines to their tax returns where filers are supposed to declare unpaid taxes.”).

³⁸ *Id.*; see also Vivian Marino, *That Out-of-State Shopping Trip May Buy a Higher Tax Bill*, N.Y. TIMES, at <http://nytimes.com/2004/02/15/business/yourtaxes/15Stat.html> (Feb. 15, 2004). Following a trend in state government that has been adopted by more than a dozen states, the 2003 income tax forms for California, New York, and Oklahoma included new lines for taxpayers to report their use tax obligations. *Id.*

that they have a legal obligation to pay a sales tax on goods purchased in other states or counties that have either lower or no sales tax.³⁹

B. The Use Tax: A Failed Attempt to Collect Tax Revenue

Compliance with the use tax obligation has traditionally been quite poor as it puts the onus on consumers to record, declare, and calculate their use tax obligations to their respective states.⁴⁰ The difficulty of enforceability has led to the understandable, yet mistaken, notion that out-of-state, and thus online, purchases are essentially tax-free.⁴¹ Faced with a seemingly endless budget crunch, however, states are no longer willing to ignore the loss of tax revenue from on-line, out-of-state, and mail order catalogs.⁴² Stricter enforcement of the use tax obligation is commonly seen as one way to “bridge budget shortfalls.”⁴³ In New York, for example, the former Chief Executive of Tyco International Ltd., L. Dennis Kozlowski, was indicted on charges that he conspired to evade over one million dollars in state and city sales taxes on artwork purchased⁴⁴ in New Hampshire.⁴⁵ However, while New York consumers have apparently taken a cue from the plight of Mr. Kozlowski,⁴⁶ in general, the effort to improve collection of use tax has not yet yielded substantial results.⁴⁷ Optimists in the New York legislature hope to realize \$25

³⁹ Tom Precious, *Dodging Sales Taxes Online? The State Wants to Know About It*, BUFF. NEWS, Dec. 13, 2003, at A6. In the spring of 2003, the New York State Legislature added a new line to the 2003 state income tax form entitled “Sales or Use Tax.” Residents will now be expected to report and pay the New York State sales tax that they escaped when making purchases through the Internet or mail order. The intent is to remind New York State citizens that they owe a sales tax on such transactions. *Id.*

⁴⁰ Hal R. Varian, *Taxation of Electronic Commerce*, 13 HARV. J.L. & TECH. 639, 640 (Summer 2000). The author notes that past efforts in collecting use taxes directly from the consumer have not been met with great success. Michigan and Wisconsin are two states that, having requested that taxpayers report out-of-state purchases on state income tax forms, have seen very poor taxpayer response. *Id.*

⁴¹ *Id.* at 641.

⁴² See Crenshaw, *supra* note 15 (“As long as the losses were confined to old-fashioned mail- and telephone-order businesses, states were annoyed but not frantic. But the growth of online sales, and the state and local budget crunches, has put the issue on the front burner.”).

⁴³ See Herman & Higgins, *supra* note 37.

⁴⁴ *Id.*

⁴⁵ Lisa Haarlander, *New York Wants You To Dig Deeper; Seeks Sales Tax on Internet, Other Nontaxed Items*, BUFF. NEWS, Feb. 3, 2004, at B4 (noting that Kozlowski had millions of dollars in artwork shipped to Tyco’s New Hampshire headquarters in order to evade New York state sales tax obligations).

⁴⁶ Herman & Higgins, *supra* note 37. In a possible response to the wrath felt by Mr. Kozlowski, the tax department in New York received \$57 million dollars in voluntary sales and use tax filings, a substantial increase over the \$9.5 million received in 2002. *Id.*

⁴⁷ Precious, *supra* note 39. According to the Federation of Tax Administrators, the

million dollars in additional revenue from the implementation of the use tax reporting line, but many believe that such expectations are unrealistic.⁴⁸

C. Solution? Collection of Online Sales Tax

Given the difficulty in relying upon the honor system to collect tax revenue, states are understandably eager to force online vendors to collect sales tax from consumers.⁴⁹ While there is a great amount of disagreement over the actual tax revenue lost on Internet transactions, states often point to a study conducted by Donald Bruce and William F. Fox, professors at the University of Tennessee's Center for Business and Economic Research.⁵⁰ According to this study, states could lose \$54.8 billion in tax revenue by 2011, if a mandatory sales tax on remote sales is not implemented.⁵¹ However, mandatory remittance will only happen if Congress is satisfied that collecting a state sales tax will constitute a lesser burden on interstate commerce.⁵²

III. THE "SUBSTANTIAL NEXUS" TEST – SUPREME COURT JURISPRUDENCE EXPLAINS WHY ONLINE COMPANIES WITHOUT "PHYSICAL PRESENCE" DO NOT COLLECT A SALES TAX

When the issue of the taxation of online purchases arises, reference is typically made to the Supreme Court's decision in *Quill Corp. v. North Dakota ex rel. Heitkamp*.⁵³ That attention is well deserved as *Quill* overruled the *National Bellas Hess, Inc. v. Department of Revenue*⁵⁴ on due process

greatest revenue yielded through such efforts was in 2001 when the state of Ohio collected \$1.8 million dollars. *Id.*

⁴⁸ *Id.* Governor Pataki's administration expects that the effort will, at best, result in the collection of an additional five million dollars. *Id.*

⁴⁹ Editorial, *A Tax of Choice*, ELMIRA STAR-GAZETTE, Jan. 4, 2004, at 8A. ("The honor system will be put to the test when New Yorkers fill out their income tax forms this year, and if a Star-Gazette online survey is any indication, only about one in 10 tax filers will pass.").

⁵⁰ Donald Bruce & William F. Fox, *State and Local Sales Tax Revenue Losses from E-Commerce: Updated Estimates*, at <http://cber.bus.utk.edu/ecomm/ecom0901.pdf> (Sept. 2001).

⁵¹ *Id.* at 1.

⁵² Pete Barlas, *Some States Seek Internet Sales Tax Law; Movement Has Momentum*, INVESTOR'S BUS. DAILY, Jun. 24, 2003, at A06; see generally ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, PRINCIPLES AND POLICIES 401 (2002) (discussing the "dormant" Commerce Clause, Chemerinsky notes that the clause stands for the proposition that "state and local laws are unconstitutional if they place an undue burden on interstate commerce . . . Even if Congress has not acted or no preemption is found, the state or local law can be challenged on the ground that it excessively burdens commerce among the states.").

⁵³ 504 U.S. 298 (1992).

⁵⁴ *Nat'l Bellas Hess Inc. v. Dep't of Revenue*, 386 U.S. 753, 753-754 (1967), *overruled*

grounds.⁵⁵ However, *Quill* also served as an affirmation of the “substantial nexus” test set forth in *Bellas Hess*.⁵⁶ Far from contradicting Commerce Clause jurisprudence, the “substantial nexus” threshold is an important piece in any debate over the taxation of online purchases. A discussion of the *Bellas Hess* case is therefore warranted and indeed necessary.

A. *National Bellas Hess, Inc. v. Dep’t of Revenue*: Setting the Standard

Bellas Hess arose out of an attempt by the Department of Revenue of Illinois to force National Bellas Hess (“National”), a mail order business with headquarters in Missouri, to collect and pay the use taxes imposed by Illinois law.⁵⁷ The company did not have outlets or sales representatives in Illinois; its only contact with the State was through the use of the United States mail and common carriers.⁵⁸ However, despite this seemingly minimal connection with the State, the Illinois Supreme Court held that National was required to collect the use tax obligation imposed by Illinois statute.⁵⁹ According to the statute, this mode of operation was sufficient to classify National as a “retailer maintaining a place of business in this State”⁶⁰ and therefore, National was expected to collect the tax imposed by the State upon consumers who purchase National’s products for use within the State.⁶¹

National maintained that the tax violated the Due Process Clause and also

by *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298 (1992).

⁵⁵ *Quill*, 504 U.S. at 308 (“Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a tax, we overrule those holdings as superseded by developments in the law of due process.”) While the due process discussion will not receive extensive treatment in this comment, it is important to understand the issue. In *Bellas Hess*, the Court held that physical presence was a prerequisite in establishing that a business was subject to the jurisdiction of the taxing state. *Bellas Hess*, 386 U.S. at 758. However, *Quill* overruled such a formalistic test, arguing that if a corporation continuously solicits business within a state, it should come as no surprise that it is subject to the jurisdiction of that taxing state. *Quill*, 504 U.S. at 307-308.

⁵⁶ *Quill*, 504 U.S. at 309-319.

⁵⁷ *Bellas Hess*, 386 U.S. at 753-754.

⁵⁸ *Id.* at 754. National did not have an office, distribution house, warehouse or any other place of business in the State of Illinois. The company did not maintain a sales or delivery staff in the State, nor did it hold any tangible property, real or personal. Additionally, National did not advertise through newspapers, billboards, television, or radio within the State. National would forward catalogues from Missouri headquarters to customers throughout the country. Customers would then mail merchandise orders to Missouri; the company would subsequently deliver the product by mail. *Id.*

⁵⁹ *Id.*

⁶⁰ *Id.* at 755 (citing Ill. Rev. Stat. c. 120, s. 439.2 (1965)).

⁶¹ *Bellas Hess*, 386 U.S. at 755 (citing ILL. REV. STAT. c. 120, s. 439.2 (1965)).

amounted to an unconstitutional burden on interstate commerce.⁶² With regard to the Due Process Clause, the Court noted that State taxation on interstate commerce is only justified if its purpose is to force commerce to shoulder an equitable share in the cost of maintaining a local government from which it benefits.⁶³ Previous Supreme Court jurisprudence maintains that a state tax meets the test of the Due Process Clause if “the state has given anything for which it can ask in return.”⁶⁴ While acknowledging the State’s power to force out-of-state vendors to collect local use taxes when the vendor has a physical presence within the State,⁶⁵ the Court held that a State cannot impose this duty when a seller’s connection to the State is limited to common carriers or the United States mail.⁶⁶

After delineating the distinction between a remote vendor with substantial presence within a state and a remote vendor who communicates and solicits solely through the mail, Justice Stewart explained that the Court was unwilling to eviscerate this critical difference by allowing Illinois the ability to impose the tax collection burden on National.⁶⁷ He noted that due to the interstate character of this mail order business, an imposition of a tax obligation on National would serve as a tremendous impediment.⁶⁸ If Illinois were allowed to impose such a burden, every other State and municipality could follow suit and impose tax burdens⁶⁹ on similarly situated vendors. Justice Stewart believed that the resulting variations in tax rates and related administrative requirements would strangle National’s business despite the absence of a plausible argument that the business owed a fair share of the cost of local government.⁷⁰ It was just such a burden that the Commerce Clause was designed to eliminate.⁷¹

⁶² *Id.* at 756.

⁶³ *Id.* (citing *Freeman v. Hewit*, 329 U.S. 249, 253 (1946)).

⁶⁴ *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

⁶⁵ *Bellas Hess*, 386 U.S. at 758 (noting that it has been held that the State has this power if the remote mail order vendor maintains local retail stores; typically, vendors have been provided ample protection and services from the taxing State). The Court noted that the “furthest constitutional reach to date of a State’s power to deputize an out-of-state retailer as its collection agent for a use tax is *Scripto, Inc. v. Carson*,” in which it was held that Florida could impose a use tax collection obligation upon a remote Georgia vendor that maintained a sales staff in Florida. *Id.*; see also *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960).

⁶⁶ *Bellas Hess*, 386 U.S. at 758–760.

⁶⁷ *Id.* at 759.

⁶⁸ *Id.* at 759–760.

⁶⁹ *Id.* at 759.

⁷⁰ *Id.* at 759–760.

⁷¹ *Bellas Hess*, 386 U.S. at 760; see, e.g., *Philadelphia v. New Jersey*, 437 U.S. 617, 629 (1978) (holding that a New Jersey statute prohibiting the importation of waste from outside state limits violated the Commerce Clause) (“The Commerce Clause will protect New Jersey in the future, just as it protects her neighbors now, from efforts by one State to isolate

Bellas Hess may have been decided almost forty years ago, but its relevance to e-commerce is readily apparent. Applying the “substantial nexus” test set forth in *Bellas Hess*, one can understand the logic behind imposing a sales tax obligation on a company that has an online presence and a brick-and-mortar presence. Such an endeavor has a definitive presence within a particular state. However, the argument for imposing a similar obligation on a company that operates exclusively through the Internet is tenuous. Twenty five years after the issue was raised in *Bellas Hess*, the “substantial nexus” test reared its head again in *Quill Corp. v. North Dakota ex rel Heitkamp*.

B. *Quill Corp. v. North Dakota ex rel. Heitkamp*

Quill Corporation (“Quill”), an office supply company, maintained facilities in Illinois, California, and Georgia.⁷² There were no Quill employees who worked or lived in North Dakota, and there was a negligible amount of corporate property located in the state.⁷³ No permanent sales staff solicited business in the state; the company acquired customers through circulars, periodical advertisements, and telephone solicitation.⁷⁴

The North Dakota statute at issue in *Quill* required every retailer with a business in the state to collect and remit a state sales tax.⁷⁵ What did it mean, according to the statute, to be a retailer with a business in North Dakota? In 1987, the State amended the definition of the term “retailer” to include anyone who regularly or systematically solicited a consumer in North Dakota.⁷⁶ Such a definition provided the State with the necessary language to force a company such as Quill to collect sales tax on products sold in North Dakota.⁷⁷

In its discussion of the Commerce Clause,⁷⁸ the *Quill* Court noted that while the clause explicitly allows for the regulation of commerce among the several states, it also permits Congress to prohibit certain state actions that interfere with interstate commerce.⁷⁹ The meaning of the “dormant” Commerce Clause⁸⁰

itself in the stream of interstate commerce from a problem shared by all.”).

⁷² *Quill Corp. v. North Dakota ex rel. Heitkamp*, 504 U.S. 298, 302 (1992).

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Quill*, 504 U.S. at 302 (citing N.D. CENT. CODE §57-40.2-07 (Supp. 1991)).

⁷⁶ *Id.* (citing N.D. CENT. CODE §57-40.2.01(6) (Supp. 1991)).

⁷⁷ *Quill*, 504 U.S. at 303.

⁷⁸ While the Supreme Court provided analysis of both the Due Process question and the Commerce Clause question in its opinion, this comment will focus specifically on the Commerce Clause aspect of the decision.

⁷⁹ *Quill*, 504 U.S. at 309 (citing S.C. State Highway Dept. v. Barnwell Bros. Inc., 303 U.S. 177 (1938)).

⁸⁰ CHEMERINSKY, *supra* note 52 at 374-375 (According to Chemerinsky, “The dormant commerce clause . . . ‘the negative commerce clause’ – is the principle that state and local

has evolved a great deal over time⁸¹ as the Court has moved away from the position that “no state has the right to lay a tax on interstate commerce in any form,”⁸² to the notion that states have this authority so long as certain thresholds are met.⁸³ Those standards were set forth in a four-part test articulated in *Complete Auto Transit, Inc. v. Brady*⁸⁴. The Court stipulated in *Complete Auto Transit* that a tax will be upheld against a Commerce Clause challenge⁸⁵ if the “tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3], does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.”⁸⁶ According to the *Quill* Court, *Complete Auto* did not squelch the “physical presence” test of *Bella Hess*.⁸⁷ In fact, the influence of *Bella Hess* is evident in the first prong of the four-part test.⁸⁸ That prong “stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.”⁸⁹ In the years following *Complete Auto*, the *Bella Hess* bright line test was consistently upheld and was reaffirmed by the Court in *Quill*.⁹⁰

In explaining the development of the Commerce Clause, Justice Stevens noted that the Framers of the Constitution understood that state taxes could inhibit the growth of interstate commerce.⁹¹ This historical background provides the framework for the rationale of the negative implication of the Commerce Clause and thus explains the determination that the Clause “prohibits discrimination against interstate commerce, . . . and bars state regulations that unduly burden interstate commerce.”⁹² The concern regarding the insidious impact of state action on interstate commerce is a sentiment repeatedly expressed in *Complete Auto*, *Bella Hess*, and *Quill*.

laws are unconstitutional if they place an undue burden on interstate commerce . . . Even if Congress has not acted, state and local government cannot place an undue burden on interstate commerce.”).

⁸¹ *Quill*, 504 U.S. at 309.

⁸² *Id.* (quoting *Leloup v. Port of Mobile*, 127 U.S. 640, 648 (1888)).

⁸³ *Quill*, 504 U.S. at 309-310.

⁸⁴ 430 U.S. 274, 279 (1977).

⁸⁵ *Quill*, 504 U.S. at 311.

⁸⁶ *Id.* (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. at 279 (1977)).

⁸⁷ *Quill*, 504 U.S. at 311.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (citing *Nat’l Geographic Soc’y v. Cal. Bd. of Equalization*, 430 U.S. 551, 559 (1977) and *Golberg v. Sweet*, 488 U.S. 252, 263 (1989)).

⁹¹ *Quill*, 504 U.S. at 312 (“Under the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills.”).

⁹² *Quill*, 504 U.S. at 312 (citing *Philadelphia v. New Jersey*, 437 U.S. 617 (1978) and *Kassel v. Consol. Freightways Corp. of Del.*, 250 U.S. 662 (1981)).

Quill made it abundantly clear that while the *Complete Auto* test and subsequent Supreme Court jurisprudence may not necessarily espouse a bright line test such as the one enunciated in *Bellas Hess*, the decisions should not be seen as conflicting.⁹³ *Quill* noted the benefits of such a test⁹⁴ and held that “the *Bellas Hess* [bright-line] rule remains good law.”⁹⁵

Far from claiming the final voice on the matter, however, the Court indicated that the issue might be one that would be best answered by Congress, pointing out that Congress is “free to disagree with our conclusions.”⁹⁶ At the conclusion of his opinion, Justice Stevens openly invited Congress to re-examine the issue.⁹⁷ Almost fourteen years after *Quill*, it appears the time for Congress to act has finally arrived.

The question of remote sales tax collection has been examined by Congress before,⁹⁸ but the issue appears to be of greater urgency today as state governments as well as brick-and-mortar companies are eager to collect tax on a segment of the economy that has grown substantially over the past few

⁹³ *Id.* at 314. The North Dakota Supreme Court in *North Dakota v. Quill Corporation*, 470 N.W.2d 203, 214 (N.D. May 7, 1991) held that recent Supreme Court cases dealing with the Commerce Clause indicated a marked departure from a strict physical presence test, therefore justifying its decision not to adhere to *National Bellas Hess*. However, Justice Stevens noted that the Commerce Clause portion of *Bellas Hess* remains good law. *Id.*

⁹⁴ *Quill*, 504 U.S. at 314-316. The aims of the “dormant” Commerce Clause are undoubtedly furthered by a bright line test that clearly delineates a zone of commercial activity free of taxation. In addition to creating a better understanding of the limits of state authority to force a vendor to remit sales and use taxes, the *Bellas Hess* test provides a definitive expectation for the vendor and the consumer regarding tax collection. Finally, a remote vendor who has a realistic expectation of his tax burdens is more likely to attract investment and enjoy increased growth. *Id.*

⁹⁵ *Id.* at 317.

⁹⁶ *Id.* at 318. Justice Stevens spent a significant amount of text emphasizing the role of Congress in determining this issue. He explained that, “Congress is now free to decide whether, when and to what extent the States may burden interstate mail-order concerns with a duty to collect taxes.” *Id.*

⁹⁷ *See id.* Justice Stevens noted that even if *Bellas Hess* was inconsistent with Commerce Clause jurisprudence, the Court could take comfort in the fact that Congress can ultimately decide the question of “intolerable” burdens on interstate commerce. Quoting from Justice White’s concurrence in *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 637-638 (1981), Justice Stevens wrote that “the better part of both wisdom and valor is to respect the judgment of the other branches of the Government.” *Id.*; *see also* Hesz, *supra* note 19.

⁹⁸ *See generally* Internet Tax Simplification Act of 2000, H.R. 4460, 106th Cong. (2000); Internet Tax Moratorium and Equity Act, S. 512, 107th Cong. (2001); Internet Tax Moratorium and Equity Act, H.R. 1410, 107th Cong. (2001). S. 512 was filed by Senator Byron Dorgan (D-ND) and H.R. 1410 was filed by Representative Ernest J. Istook, Jr. Sen. Dorgan and Rep. Istook (R-OK) continue to trumpet the necessity of a federalized effort to streamline tax collection. The focus of this comment is on H.R. 3184 (filed by Rep. Istook); however, it should be noted that an identical bill was filed in the Senate (S. 1736), co-sponsored by Sen. Dorgan. *Id.*

years.⁹⁹ However, Congress will only address the issue raised in *Quill* if it is satisfied that the collection of sales and use tax has been simplified to a sufficient degree as to constitute a minimal burden on interstate commerce.¹⁰⁰

IV. OVERCOMING *QUILL*: THE BROAD-BASED EFFORT OF THE STREAMLINED SALES TAX PROJECT

A. A Brief Introduction to the Streamlined Sales Tax Project

If the most recent attempt to force remote vendors to collect sales and use taxes is successful, it will undoubtedly be due to the efforts of the Streamlined Sales Tax Project (“SSTP” or “the Project”). An initiative spearheaded by state governments with the assistance of local governments and the private sector, SSTP is designed “to simplify and modernize sales and use tax collection and administration.”¹⁰¹ It is expected that SSTP’s effort to simplify will include allowing states to collect taxes from online and mail order catalogs even if they do not have a “physical presence” within that state.¹⁰²

Armed with the goal of providing a Streamlined Sales Taxing System,¹⁰³ the SSTP began its work in March 2000.¹⁰⁴ While a great number of the participants in the SSTP are state revenue department administrators, SSTP is also comprised of representatives from state and local governments as well as members of the business community.¹⁰⁵ One of the most significant challenges facing remote vendors in collecting taxes from multiple jurisdictions is the complexity in deciphering the varying definitions of taxable items.¹⁰⁶ A key feature of the SSTP is the implementation of uniform definitions within state tax laws.¹⁰⁷ While legislatures will still determine what items are taxable or

⁹⁹ See Crenshaw, *supra* note 15.

¹⁰⁰ See Hesz, *supra* note 19.

¹⁰¹ Diane L. Hardt et al., *A Lawmaker’s Guide to the Streamlined Sales Tax Project*, J. OF ST. TAX’N, Oct. 1, 2003, at 1.

¹⁰² See Barlas, *supra* note 52.

¹⁰³ EXECUTIVE SUMMARY, *supra* note 20, at 1-4. The Streamlined Sales Tax System is the moniker for what the SSTP hopes will be the end result of this collaborative effort. The system would provide states with uniform definitions within tax laws and rate simplification, among other features. *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Hardt et al., *supra* note 101, at 1.

¹⁰⁶ Robert Dodge, *States are Lobbying Congress to Allow Internet Sales Taxes*, DALLAS MORNING NEWS, July 28, 2003, at D1. “For instance, miniature marshmallows are classified as non-taxed “food” in one state but are but defined as taxable “candy” elsewhere.” *Id.* at D3.

¹⁰⁷ Hardt et al., *supra* note 101, at 7.

exempt in their particular state, participating states will “use the common definitions for key items in the tax base.”¹⁰⁸ This will undoubtedly reduce confusion among remote vendors, as they will not have to concern themselves with navigating complex distinctions between taxing jurisdictions. Another key component of the SSTP is that participating states will be required to simplify tax rates.¹⁰⁹ Specifically, states and local jurisdictions will each be allowed to charge one sales tax rate.¹¹⁰ Why is this significant? It will prevent a state or local taxing jurisdiction from charging one rate for a particular item and then taxing all other items at another rate.¹¹¹ The rate simplification effort will also result in the development of databases that will describe all of the rates of the taxing jurisdictions within the state.¹¹²

The SSTP also tackles how to source taxable transactions to state and local governments.¹¹³ SSTP has determined that sellers will source sales on a “destination-based rule,” which means that a vendor “would source the sale to the seller’s business location for over-the-counter taxable transactions and to the customer’s shipping address for other transactions.”¹¹⁴ With an aim toward limiting the administrative burden on vendors, SSTP also stipulates that businesses will not be required to “file tax returns with each local government within which it conducts business.”¹¹⁵ Finally, since the SSTP necessarily involves the creation and integration of new technologies required to improve the collection process, the Project has commissioned a study, that is being conducted by Price Waterhouse Coopers, to determine the cost of this program to the vendor.¹¹⁶

In order to accomplish the goals set forth by the Project, there are two separate legislative steps that must be taken. First, participating states must enact the “enabling legislation referred to as The Uniform Sales and Use Tax

¹⁰⁸ *Id.* at 2.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 9-10. One of the criticisms of SSTP is that it has not arrived at a simplified tax collection system in which there is “one state rate per state with no variations from local jurisdictions.” Ideally, instead of contending with 7,500 taxing jurisdictions, remote vendors would only have to navigate the sales tax rates of the 45 states that have a sales tax. Such a plan has proved to be an impossibility as local governments have “become increasingly reliant on local sales taxes.” *Id.*

¹¹¹ Hardt, *supra* note 101, at 9.

¹¹² *Id.*

¹¹³ *Id.* at 11. According to the article, sourcing “refers to determining for which state and local jurisdictions, if any, tax is to be collected.” *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 21. Participating states will maintain “a central point of administration for all state and local sales and use taxes and the distribution of the local taxes to the local governments.” *Id.*

¹¹⁶ Telephone Interview with Diane L. Hardt, SSTP Co-Chair (Feb. 19th, 2004) [hereinafter Hardt Interview].

Administration Act.”¹¹⁷ Secondly, states must adjust their current “sales and use tax laws to achieve the simplifications and uniformity required by the participating states.”¹¹⁸ The proposed legislation to effectuate this goal is referred to as the Streamlined Sales and Use Tax Agreement (“Agreement”).¹¹⁹ The Agreement would not go into effect until a minimum of 10 states, representing at least 20% of the total population of the 45 states with a sales tax, approved the pact.¹²⁰

The effort to simplify tax collection has seemingly sparked pro-active response as several large retailers, including Wal-Mart, Target and Toys “R” Us, have recently begun collecting taxes for items sold online.¹²¹ While cynics may note this willingness was prompted by an arrangement in which 38 states and the District of Columbia agreed not to hold retailers liable for past Web tax obligations, it is certainly an important development in the process.¹²² It is important to remember, however, that until Congress intervenes, the effort to simplify and promote the collection of online sales tax will remain voluntary.¹²³

¹¹⁷ EXECUTIVE SUMMARY, *supra* note 20, at 3. The Uniform Sales and Use Tax Administration Act “allows the state to enter into an agreement with one or more states to simplify and modernize sales and use tax administration.” *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ Hardt et. al, *supra* note 101, at 3. See Matthew Vadum, *State & Local Finance: Multi-State Sales Tax Collection Project Moves Forward*, THE BOND BUYER, Aug. 6, 2003, at 4. During the summer of 2003, North Carolina Governor Michael F. Easley signed a bill that brought the state’s laws into conformity with the Agreement. This sets the state for the Agreement to go into effect as this development brought the level of compliance to a total of seventeen states, meaning that 20.8% of the population in states where there is a sales tax had enacted implementing legislation. *Id.*

¹²¹ See Eric Chabrow, *Retailers Agree to Online Tax*, INFORMATION WEEK, Feb. 10, 2003, at 16; see also Hardt Interview, *supra* note 116.

¹²² See Chabrow, *supra* note 121; see also Brian Krebs, *Retailers’ Online Tax Deal Faces New Challenges*, Newsbytes News Network, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A64257-2003Feb25¬Found=true> (Feb. 25, 2003) [hereinafter *Retailers’ Online Tax Deal*]. In February 2003, several large retailers began voluntarily collecting sales tax on their online sales in return for forgiveness of past taxes “they were liable for collecting on previous online sales.” While most states were a party to the agreement, not every state believed that amnesty in return for collection of online sales tax obligations was a fair exchange. This is evidenced by the fact that the State of Illinois joined a lawsuit against several of these same retailers in an effort to collect past tax obligations. *Retailers’ Online Tax Deal*.

¹²³ Tubbesing, *supra* note 20, at 13. Speaking about the agreement, Illinois State Senator Steve Rauschenberger (R-Elgin) said, “The key to the interstate agreement is that it is voluntary. States will voluntarily join by adjusting their sales tax laws. Remote sellers – companies that make sales over the Internet or through catalogues – will volunteer to collect the sales for the states that have simplified their sales tax systems.” *Id.*

V. ACCEPTING THE INVITATION: HOUSE RESOLUTION 3184, THE STREAMLINED SALES AND USE TAX ACT

On September 25, 2003, Congressmen Ernest J. Istook Jr., (R-OK), and William Delahunt, (D-MA), accepted the invitation of Justice Stevens to reexamine the issue of remote sales tax as they filed H.R. 3184 (The Act).¹²⁴ If enacted, the legislation would essentially serve as a formal authorization of the efforts of the SSTP.¹²⁵ The language of The Act establishes that the sales and use tax system developed by the Sales and Use Tax Agreement has reached sufficient simplification and uniformity to warrant federal authorization.¹²⁶ States that are parties to the Agreement can require remote sellers, subject to the conditions provided in The Act, “to collect and remit the sales and use taxes of such States and of local taxing jurisdictions of such States.”¹²⁷ The word ‘require’ is of particular significance, as the SSTP was a voluntary arrangement, but this legislation would allow states to force vendors, regardless of their physical presence within the state, to collect sales tax.¹²⁸

An integral aspect of the legislation is an exception for small businesses.¹²⁹ The Act specifically quells the fear of small businesses owners¹³⁰ who doubted their ability to comply with the obligation to collect and remit sales tax across multiple jurisdictions by mandating that no seller will be subject to collect and remit sales tax on a remote sale if the seller has “gross remote taxable sales of less than \$5,000,000” per calendar year.¹³¹ Supporters of the movement naturally see this initiative as the proverbial slam-dunk, but it is unclear whether the legislation will be enacted any time soon.¹³²

Not surprisingly, state and local officials are in favor of taxing Internet

¹²⁴ H.R. 3184, 108th Cong. (2003).

¹²⁵ Brian Krebs, *Stating the Case for Online Sales Taxes*, TECHNEWS.COM, at <http://washingtonpost.com/ac2/wp-dyn?pagename=article&node=&contentId=A17211-2003Sep29¬Found=true> (Sept. 29, 2003) [hereinafter *Stating the Case for Online Sales Taxes*].

¹²⁶ H.R. 3184, 108th Cong. (2003).

¹²⁷ *Id.*

¹²⁸ Catts, *supra* note 23.

¹²⁹ H.R. 3184, 108th Cong. § 4(b) (2003).

¹³⁰ See Brian Krebs, *Small Businesses Wary of Internet Sales Tax Plan*, TECHNEWS.COM, (Feb. 21, 2003) at <http://www.washingtonpost.com/ac2/wp-dyn/A41336-2003Feb21?language=printer> (Feb. 21, 2003). (quoting Reyne Haines, founder and co-owner of JustGlass.com, “This is really going to put the hurt on the little guys. With the costs and all the paperwork . . . I could see where this could get to the point where many of our vendors feel it’s no longer worth it for them.”) *Id.*

¹³¹ H.R. 3184, 108th Cong. § 4(b) (2003).

¹³² See generally Brian Krebs, *Internet Sales Tax Effort May be Dead for 2003*, TECHNEWS.COM, at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A1524-2003Jul6¬Found=true> (July 16, 2003) [hereinafter *Tax Effort May be Dead*].

purchases¹³³ as states continue to face budget shortfalls.¹³⁴ This fiscal crisis has left state governments in a desperate situation.¹³⁵ State governments argue that if they are not permitted to tax remote sales “funding for key public services will be lost”¹³⁶ as “[s]ales and use taxes . . . account for roughly one-third of state revenues.”¹³⁷

A. Supporters: Those Who Would Benefit from Enactment of H.R. 3184

While the revenue numbers lost to Internet purchases is subject to debate,¹³⁸ there is no question that state and local officials are clamoring for every possible source of tax dollars. The stakes are particularly high for a state like South Dakota.¹³⁹ The state does not have a personal income tax and, as a result, 70% of its income is derived from its sales tax.¹⁴⁰ In Ohio, county officials across the state have expressed their support for The Act as sales tax represents the most vital source of revenue for the majority of their counties.¹⁴¹ According to Larry Long, the president of the County Commissioners Association of Ohio, the initiative could mean up to 9% more revenue for

¹³³ Matthew Vadum, *State and Local Finance: Tax Opponents Spar Over Internet Taxation at Hearing*, THE BOND BUYER, Oct. 2, 2003 at 4 [hereinafter *Tax Opponents Spar*]. The legislation proposed by Congressmen Istook and Delahunt has garnered broad support among many state and local government advocacy groups (e.g., the National Governors Association, the National Association of Counties, and the National League of Cities). *Id.*

¹³⁴ See Leigh Dyer, *Bill in Congress May End Internet Sales Tax Break; Retail Industry Supports Making Online Firms Collect Levy From Customers*, CHARLOTTE OBSERVER, Oct. 6, 2003, at 4D (“It’s no surprise most states have come out in favor of the measure, since many are facing budget gaps. The National Governors Association estimates state shortfalls will top \$60 billion by 2004.”).

¹³⁵ Brian Knight et al., *Problems and Prospects for State and Local Governments*, 29 STATE TAX NOTES 427, 427 (Aug. 11, 2003).

¹³⁶ Matthew Vadum, *Relief Is on the Way; Analysts See a Good ‘04 for States, Localities*, THE BOND BUYER, Dec. 24, 2003, at 20.

¹³⁷ NATIONAL GOVERNORS ASSOCIATION, *at* http://www.nga.org/nga/legislativeUpdate/1,1169,C_ISSUE_BRIEF^D_1248,00.html (Feb. 23, 2001).

¹³⁸ According to the Donald Bruce & William F. Fox study, it is expected that states will lose \$54.8 billion in uncollected revenue by 2011. Bruce and Fox, *supra* note 50. *But see* DIRECT MARKETING ASSOCIATION, THE TRUTH ABOUT ONLINE SALES TAXES, *at* <http://the-dma.org/cgi/disppressrelease?article=399> (last visited on Nov. 5, 2004) (“potential uncollected revenue to the states is about 85 percent less than compared to prior studies.”) [hereinafter TRUTH ABOUT ONLINE SALES TAXES].

¹³⁹ See generally Frank Jossi, *The Taxing Issue of E-commerce*, FEDGAZETTE, Vol. 15, Issue 6, Nov. 1, 2003, at 9-11.

¹⁴⁰ *Id.* According to Alison Jares, revenue supervisor at the South Dakota Department of Revenue and Regulations, “we live and die by the sales tax in part because our residents do not want an income tax.” *Id.*

¹⁴¹ Leo Shane III, *Counties Seeking to Tax Online Sales*, LANCASTER EAGLE-GAZETTE, Dec. 7, 2003, at A3.

counties in Ohio.¹⁴²

While lost revenue is a popular reason for state and local government support of the Act, there also exists a strong sentiment that the effort to streamline sales taxes could elicit potential federalism concerns.¹⁴³ For instance, Illinois State Senator Steve Rauschenberger (R-Elgin) maintains that declining revenues brought about by the erosion of the sales tax will threaten state sovereignty because states will become more reliant on the federal government.¹⁴⁴ Oklahoma State Senator Angela Monson (D-Oklahoma City) notes that states have accepted the responsibility for many vital social programs but continued support will require extensive revenues and therefore a healthy sales tax base.¹⁴⁵

The motivation of elected officials to push for sales tax on Internet purchases is also founded upon their sympathy for established offline companies within their jurisdiction.¹⁴⁶ Brick-and-mortar stores have to compete with online merchants who will get to enjoy what amounts to a tax break.¹⁴⁷ State and local governments may be best served by protecting the interests of traditional retail outlets as opposed to smaller, unstable e-commerce retailers.

Some of the most ardent supporters of the effort to collect sales tax on Internet purchases are retailers who have both brick-and-mortar shops and online stores.¹⁴⁸ A retailer such as Staples, which has physical outlets throughout the United States, is forced to collect sales tax on purchases made through its web site as its brick-and-mortar stores create a sufficient enough nexus with the state to be subject to sales tax collection obligations.¹⁴⁹ Unfortunately for Staples, this puts them at a marked disadvantage when competing with online office supply stores who do not have a physical presence in any taxing jurisdiction, and, as result, do not have to collect sales tax.¹⁵⁰

Jack VanWoerkom, Executive Vice President and General Counsel of

¹⁴² *Id.*

¹⁴³ *See* Tubbesing, *supra* note 20.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *See Tax Effort May be Dead, supra* note 132.

¹⁴⁷ *Id.*

¹⁴⁸ Hiawatha Bray, *For Staples Founder Stemberg, Net Taxes Make Business Sense*, BOSTON GLOBE, May 12, 2003, at C3.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* Tom Stemberg, the chairman of Staples, Inc., illustrated this competitive disadvantage by noting that a Palm handheld computer sold online by his company will be subject to a state sales tax. However, if a consumer bought that same product on Amazon.com, it is up to the consumer to remit a use tax. A consumer may or may not choose to fulfill this obligation. *Id.*

Staples, Inc., testified on behalf of *The Streamlined Sales and Use Tax Act* in the fall of 2003 and provided a tremendous illustration of the difficulty that a store like Staples faces when competing with online competitors.¹⁵¹ He recounted the story of a Staples general manager who had spent a significant amount of time working with a small business customer contemplating the purchase of a \$10,000 computer system.¹⁵² Instead of purchasing the system from Staples, the customer ultimately bought the product from the manufacturer's web site as he could purchase the product without paying a sales tax.¹⁵³ Since the customer was in New York, the sales tax savings amounted to almost \$1,000.¹⁵⁴ It is difficult to argue that this is a fair outcome. Moreover, the competitive disadvantage does not end there. Staples.com not only has to collect a sales tax but also has to pay for the cost of computing the tax obligations of its customers.¹⁵⁵ It is no wonder why Tom Stemberg, the founder and Chairman of Staples, Inc. and Mr. VanWoerkom have spent so much time drumming up support for this legislation.

While it may be hard to illicit sympathy for a Fortune 500 company,¹⁵⁶ empathy may be more forthcoming for "mom and pop" stores that suffer as a result of the "tax free zone" of the Internet.¹⁵⁷ So-called "Main Street" retailers have expressed strong concern over the inequity between themselves and their online counterparts.¹⁵⁸ A common scenario in the marketplace is that a consumer will visit a brick-and-mortar store to browse the merchandise and then visit an online store to purchase the product.¹⁵⁹ The sentiment among many small businesses is that allowing online stores to operate without the burden of collecting sales tax is akin to selecting winners and losers regarding tax policy.¹⁶⁰ The economic pinch is particularly strong for brick-and-mortar vendors who specialize in high-price merchandise, as the tax incentive to make

¹⁵¹ *Streamlined Sales and Use Tax Agreement: States' Efforts to Facilitate Sales Tax Collection from Remote Vendors: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 108th Cong., 74-76 (Oct. 1, 2003) (statement of Jack VanWoerkom, Executive Vice President and General Counsel of Staples, Inc.).

¹⁵² *Id.* at 75.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Index to the Fortune 500 and the Fortune 1,000*, FORTUNE MAGAZINE, Apr. 14, 2003, at 68.

¹⁵⁷ Doug Abrahms, *Cyber Buying Power, Tax Policy Pits Main Street Head-on Against Internet*, COSHOCTON TRIBUNE, at <http://www.coshoctontribune.com/news/stories/2003-1227/localnews/119873.html> (Dec. 27th, 2003).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 157.

the actual purchase online is even greater.¹⁶¹

The argument from the retail industry in support of the taxation of online purchases boils down to leveling the playing field between brick-and-mortar stores and their online and mail-order competitors.¹⁶² According to Congressman Mel Watt (D – NC), a supporter of the streamlined tax principle, “[i]t’s a question of fairness. We want competition to be based on service, and not a tax differential.”¹⁶³ While sales tax rates vary among the states, the average “Main Street” retailer is at a 5% price disadvantage when in direct competition with online stores that do not charge a sales tax.¹⁶⁴

Maureen Riehl, Vice President of the National Retail Federation, believes that the current tax collection system can either be changed by a cooperative effort, such as the one spearheaded by the SSTEP, or it will be implemented by force.¹⁶⁵ For example, in early 2003, the Attorney General for the State of Illinois, Lisa Madigan, announced that the state was suing retailers for their failure to collect sales tax on purchases made through their Web sites.¹⁶⁶ In order to avoid the physical presence threshold set forth in *Quill*, retailers such as Wal-Mart established their Internet divisions as completely separate endeavors from their brick-and-mortar operations as a way to avoid the sales tax requirement.¹⁶⁷ Walmart.com thus makes the argument that since they have no physical operations in Illinois, they have no corresponding obligation to collect a sales tax from their Illinois customers.¹⁶⁸ However, the suit alleges that Wal-Mart “uses its stores and advertising in Illinois to attract customers to its Web site and that, since merchandise purchased over the Web can be returned at Wal-Mart stores, there is no real separation between the two.”¹⁶⁹ Should this suit be successful, one can expect that other states will follow the lead of Illinois.¹⁷⁰

¹⁶¹ *Id.*

¹⁶² Leigh Dyer, *Bill in Congress May End Internet Sales Tax Break; Retail Industry Supports Making Online Firms Collect Levy from Customers*, CHARLOTTE OBSERVER, Oct. 6, 2003, at 4D.

¹⁶³ *Id.*

¹⁶⁴ Abrahms, *supra* note 157.

¹⁶⁵ *Tax Opponents Spar*, *supra* note 133.

¹⁶⁶ Debra Pickett, *State Wants Wal-Mart, Target to Pay Up; Attorney General Says Retailers Owe Taxes for Online Sales*, CHI. SUN TIMES, Feb. 23, 2003, at 16.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Retailers’ Online Tax Deal*, *supra* note 122.

B. Critics: Those Who Stand to Lose from Enactment of The Streamlined Sales and Use Tax Act

While the argument for forcing remote vendors to collect sales tax may seem like a logical step, there is some sentiment that such a move would prove to be a disastrous development as it would impede the growth of an economic engine just beginning to gain steam.¹⁷¹ The thought is that the growth of e-commerce has been fostered by legislation such as the Internet Tax Freedom Act,¹⁷² which was designed to limit the number of taxes likely to have a deleterious impact on Internet use.¹⁷³ Forcing online companies to collect a sales tax would eliminate one of the incentives for online shopping, thus leading to a decrease in online commerce, profits, and employment.¹⁷⁴ Additionally, while the fiscal crunch faced by states is real, some believe that the blame should be placed on the states themselves as consumers remitted a record \$872 billion to state and local governments in 2002.¹⁷⁵ Critics believe that requiring an online vendor to remit sales and use taxes in taxing jurisdictions where no nexus exists forces the vendor to pay for local services it does not use, such as police and fire protection.¹⁷⁶

Many state legislators have been vociferous in supporting the effort to streamline state sales tax, but Colorado Governor Bill Owens has been outspoken in his criticism.¹⁷⁷ In his testimony delivered at the Fall 2003 Oversight Hearing on the Streamlined Sales and Use Tax Agreement, Governor Owens argued that an attempt to allow the collection of taxes on online purchases would serve as a new expense levied on the American consumer.¹⁷⁸ In support of his position, the Governor explained that when government forces purchasers to pay an additional sales tax, their overall sales

¹⁷¹ See *Tax Grab*, *supra* note 26.

¹⁷² Pub. L. No. 105-277, 112 Stat. 2681-719 (1998).

¹⁷³ See *Tax Grab*, *supra* note 26.

¹⁷⁴ See David C. Wyld, *Internet Sales Tax Ambush?*, WASH. TIMES, Dec. 10, 2003, at A16 (quoting the CEO of eFashionconsulting, who discussed the impact of online companies being forced to collect sales tax saying, “we’re talking about layoffs. And that ultimately means less tax money going to the states, and no one – not the government, the consumer or business – wins.”).

¹⁷⁵ *Tax Grab*, *supra* note 26 (noting that while states point to budget deficits as justification for taxing online sales, they were also the recipients of a record level of tax revenue in 2002).

¹⁷⁶ *Id.*

¹⁷⁷ See *Tax Opponents Spar*, *supra* note 133.

¹⁷⁸ *Streamlined Sales and Use Tax Agreement: States’ Efforts to Facilitate Sales Tax Collection from Remote Vendors: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. on the Judiciary*, 108th Cong. 4–12 (Oct. 1, 2003) (statement of the Honorable Bill Owens, Governor, State of Colorado.).

taxes have risen.¹⁷⁹ Expressing federalism concerns, the Governor also articulated his fear that the Act would force states to surrender a great deal of their influence over state tax policy by granting such sweeping authority to an imposing federal bureaucracy.¹⁸⁰

Perhaps the most interesting and convincing aspects of Governor Owens' thoughts regarding SSTP is his contention that it would not simplify tax compliance; rather, it would exacerbate the situation.¹⁸¹ While it was the hope of SSTP to create one tax rate for every state, this effort ultimately failed due to local jurisdictions within the states insisting on retaining control of their tax revenue.¹⁸² As a result, there remain 7,500 taxing jurisdictions within the United States.¹⁸³ The SSTP is often seen as the panacea that will reduce the burden of collecting online sales tax. Unfortunately, the number of taxing jurisdictions remains the same, with the reduction of a burden not apparent to everyone.¹⁸⁴ In fact, Mark Micali, Vice-President of Government Affairs with the Direct Marketing Association ("DMA"), expressed his concern that the initiative does very little to reduce the burden of sales tax collection.¹⁸⁵

George Isaacson, Tax Counsel for the DMA, cited numerous concerns regarding The Act in his recent testimony before the Committee on the Judiciary.¹⁸⁶ According to Isaacson, both the opinion in *Quill* as well as previous efforts to simplify sales tax collection for remote vendors, support the argument that the complexity of the current system stems from the large number of taxing jurisdictions in the United States.¹⁸⁷ He argued that this

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.* The Governor stated that the governing board of the initiative would be "vested with legislative, administrative, and judicial powers." *Id.*

¹⁸¹ Bill Owens, *Nine Problems with Taxing the Internet: Questions Governors and Legislators Must Consider*, at <http://www.house.gov/judiciary/owens100103.pdf> (last visited Nov. 5, 2004).

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See Wyld, *supra* note 174.

¹⁸⁵ Sarah Hale Meitner, *States Reach for Sales Tax Online, Catalog and Mail-Order Revenue Sought*, ORLANDO SENTINEL, Oct. 14, 2003, at C1 (quoting Mark Micali).

Simplifying the tax codes sounds like a good thing . . . [h]owever, the proposal is premature. It does nothing to reduce the burden that interstate retailers would face when trying to file paperwork for thousands of taxing districts . . . [t]he brick-and-mortar retailers say that forcing the interstate retailers to collect sales tax would level the playing field . . . [w]hat about shipping-and-handling charges? What about all the time it would take to keep track of the tax forms? This wouldn't level the playing field at all.

Id.

¹⁸⁶ *Streamlined Sales and Use Tax Agreement: States' Efforts to Facilitate Sales Tax Collection from Remote Vendors: Hearing Before the Subcomm. on Commercial and Admin. Law of the House Comm. On the Judiciary*, 108th Cong. 19-35 (Oct. 1, 2003) (statement of George S. Isaacson, Tax Counsel, DMA).

¹⁸⁷ *Id.* at 21.

puzzle of tax rates could be solved if states were willing to adopt a “one rate per state” standard in which a state would only be afforded one tax rate for all transactions in the state.¹⁸⁸ One rate per state has been viewed as an essential component to any substantive reform of states sales and use tax systems.¹⁸⁹ However, state and local officials working on the SSTP swiftly rejected the requirement as “too politically unpalatable for state legislatures.”¹⁹⁰

Critics of the SSTP argue that the fiscal crisis that faces many of the states is the product of irresponsible management and therefore, state and local government officials should not look to consumers to rescue them from their own folly.¹⁹¹ As the booming 1990s came to a close, state spending increased by 7.7% in Fiscal Year (“FY”) 1999, 7.2% in FY 2000, and 8.3% in FY 2001.¹⁹² Despite the onset of an economic downturn and substantial budgetary shortfalls, state spending continued to increase in FY 2002 and FY 2003.¹⁹³ Not surprisingly, the loudest voice for implementing Internet sales tax collection appears to be coming from state and local governments, who often decry their fiscal health as they face staggering budget deficits.¹⁹⁴ However, this plea for help may shock the conscience in light of state spending tendencies over the past few years. Additionally, while states often rely on a study by the University of Tennessee that claims the loss of \$54 billion in taxes from remote sales,¹⁹⁵ an analysis by the DMA demonstrates that the potential uncollected revenue from remote sales is about 85% *less* than the numbers devised by previous reports.¹⁹⁶ According to H. Robert Wientzen, President and CEO of DMA, the effort to create new burdens for remote vendors will not result in the proverbial pot of gold at the end of the rainbow.¹⁹⁷ Thus, the question remains as to whether the uncertain rate of return from online sales is worth impeding the growth of the developing e-commerce industry.

Another concern related to the effort to streamline sales tax collection

¹⁸⁸ *Id.* at 22-23.

¹⁸⁹ *Id.* at 23.

¹⁹⁰ *Id.*

¹⁹¹ Dodge, *supra* note 106 (quoting Dan Mitchell, an economic policy expert at the Heritage Foundation, who equated state efforts in collecting sales tax on Internet purchases to termites creating a “cartel” to save themselves from the reckless spending characteristic of the 1990s economic boom). He maintains that during this boom, instead of preserving funds, states increased spending at a rapid rate. *Id.*

¹⁹² Adam D. Thierer and Veronique de Rugy, *The Coming Internet Tax Quid Pro Quo?*, at <http://cato.org/tech/tk/031007-tk.html> (October 7, 2003).

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Bruce & Fox, *supra* note 50 (calculating the \$54 billion e-commerce loss by projecting trends through 2011).

¹⁹⁶ TRUTH ABOUT ONLINE SALES TAXES, *supra* note 138.

¹⁹⁷ *Id.*

concerns the cost of software necessary to collect the sales tax from the multiple taxing jurisdictions across the United States.¹⁹⁸ According to Weintzen, some estimates hold that the software necessary for this task could be \$25,000 per license and \$60,000 for set-up.¹⁹⁹ In addition, many businesses would have to develop entire departments and staff to handle this new responsibility.²⁰⁰ The prospect of a small online business in Orchard Park, New York maintaining expensive software to calculate the tax owed by a consumer in San Jose, California certainly might dampen the excitement of a prospective e-commerce entrepreneur.²⁰¹

C. Prospects for Enactment: Is H.R. 3184 Ready for Prime Time?

The political debate surrounding the online sales tax plan can be difficult to navigate as the opposing sides do not fall neatly within traditional party lines.²⁰² For instance, *The Streamlined Sales and Use Tax Act* was co-sponsored by Congressman Istook, an ardent Republican who would not ordinarily be identified as a pro-tax advocate.²⁰³ However, Republicans are considered to be stalwart supporters of states' rights²⁰⁴ and some party members believe that tax policy is strictly a state matter.²⁰⁵ According to Istook, if the online sales tax plan is not passed, Congress will be inundated with requests from states to plug the holes in state budgets.²⁰⁶ Other legislators, who share a similar disposition against taxes, have expressed support for Internet taxes as it is viewed as a necessary response to the demands of their respective states.²⁰⁷

While the principle of streamlining sales tax collection has been met with a great deal of support, the prospects of imminent enactment of federal legislation appear bleak. One of the hurdles facing H.R. 3184 is the perception among some members of Congress that a vote in support of this legislation is a

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ TRUTH ABOUT ONLINE SALES TAXES, *supra* note 138.

²⁰² See Dodge, *supra* note 106. According to Dodge, "[i]t's difficult to sort out the politics of the issue, which does not break down along convenient party lines . . . it divides conservatives who are anti-tax versus those who support the constitutional right of states to levy taxes." *Id.*

²⁰³ *Stating the Case for Online Sales Taxes*, *supra* note 125.

²⁰⁴ *Id.*

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ W. David Gardner, *Web Sales Tax to be Hot Topic in 2004 Congress*, TECHWEB NEWS, Dec. 17, 2003 at <http://www.techweb.com/wire/26803257> (last visited Nov. 5, 2004).

vote in favor of a tax increase.²⁰⁸ The proposal will undoubtedly be cast as “taxing the Internet” and that depiction may be difficult to sell to constituents.²⁰⁹ Additionally, under Majority Leader Tom Delay (R-TX), House leadership has promoted a strong anti-tax platform, and the online sales-tax plan is not viewed in a favorable light.²¹⁰ At the time the legislation was filed in September 2003, the Co-Chair of the United States Congressional Internet Caucus, Congressman Rick Boucher (D-VA), expressed doubt that the bill would pass in the near future.²¹¹ At the present time, H.R. 3184 is in the Subcommittee on Commercial and Administrative Law and, considering the tepid reception of the House subcommittee chairman, Chris Cannon (R-Utah), it appears that the bill is a low priority.²¹² While Chairman Cannon convened a hearing on the bill on October 1, 2003, this action was prompted by a promise to Congressman Delahunt (D-MA) rather than any particular interest in promoting the movement of the legislation.²¹³

VI. CONCLUSION: THE TIME HAS ARRIVED FOR TAXATION OF ONLINE PURCHASES

The appeal of depicting the Internet as a tax-free “Wild West” frontier is understandable,²¹⁴ but there appears to be little rationale in promoting an economic vehicle that mysteriously lacks the normal burdens of commerce. While critics view the effort to tax online purchases as the inevitable death knell of e-commerce, Internet experts maintain that price is not the impetus behind the explosion of online transactions.²¹⁵ According to David Berkowitz,

²⁰⁸ Joe Kafka, *Official Optimistic About Internet Taxes*, ABERDEEN AMERICAN NEWS, Jan. 15, 2004, at 6. South Dakota State Revenue Secretary Gary Viken believes that a state like South Dakota has a good chance of being allowed to collect sales tax on Internet, mail-order and telephone purchases within the next few years but also notes that many view voting for a bill such as H.R. 3184 as a vote for a tax increase. *Id.*

²⁰⁹ *Stating the Case for Online Taxes*, *supra* note 125.

²¹⁰ *Id.*

²¹¹ *Id.* Congressman Boucher offered a blunt assessment of the possibility of enactment. Boucher “would rate the chances of this bill passing at the present time at close to zero.” *Id.*

²¹² *E-Commerce Sales Tax Bill Receives Frosty House Reception*, WARREN’S WASH. INTERNET DAILY, Vol. 4, Issue 205, Oct. 23, 2003, at 5. In an interview with Fox News Channel, Cannon noted, “I’ve actually not taken a position on the SSTP yet because it’s so much more important to me to get that Internet Tax Freedom Act passed and signed by the President.” *Id.*

²¹³ *Id.* The hearing was not deemed an “official” hearing on H.R. 3184, which is a distinction that generally precedes a markup. *Id.*

²¹⁴ Lee Gomes, *Battle Over Access Tax is Going to Determine Future of the Internet*, WALL ST. J., Dec. 8, 2003, at B1; *see also* Jay Evensen, *Internet is Feeling the Taxing Pull of Law, Order*, DESERET NEWS, Feb. 2, 2003, at AA01.

²¹⁵ *See* Meitner, *supra* note 185.

a spokesman for eMarketer, an Internet and e-business research firm, “[p]rice is an important factor for consumers but is not the be-all, end-all . . . [i]t’s a matter of convenience. People shop online . . . because they don’t have time to shop elsewhere.”²¹⁶

Even if implementing an agreement to tax online purchases does affect consumer spending, it is a moot point. Consumers are obligated to pay a use tax on the purchases they make over the Web; the argument that online stores will lose a unique competitive advantage if forced to collect sales tax is simply unpalatable. Online stores should not promote tax evasion. Despite the expected attempts to label H.R. 3184 as a new tax initiative, it must be noted that this issue is about collecting an obligation that is already owed to the states.²¹⁷ The argument that the collection of a sales tax would unduly burden retailers because of associated costs is also nullified by the fact that a remote seller will be reimbursed for the cost of collection.²¹⁸

The Act is not a perfect piece of legislation and enactment does not appear imminent.²¹⁹ However, the effort to collect sales tax on online purchase makes sense; it is a matter of equity and necessity.

²¹⁶ *Id.*; see also Wiener, *supra* note 16. According to Patti Freeman, a retail analyst with Jupiter Research, consumers “worry more about shipping fees, easy returns, and user-friendly Web sites than about taxes.” She notes, “[c]onsumers are used to paying tax.” *Id.*

²¹⁷ See Wiener *supra* note 16. According to Maureen Riehl, “[t]his is about an uncollected tax, not a new one.” *Id.*

²¹⁸ *E-Commerce Sales Tax Bill Receives Frosty House Reception*, WARREN’S CONSUMER ELECTRONICS DAILY, Vol. 3, Issue 192, Oct. 3, 2003, at 3-4.

²¹⁹ *Id.*