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Court Continues a Fairly Busy Term

Perhaps coincidence, perhaps not, but on "Cyber Monday" the U.S. Supreme Court refused to "click yes" to consider two cases contesting the constitutionality of click-through-nexus when, as discussed further below, it denied the petitions for certiorari filed in the New York "Amazon tax" cases brought by Overstock.com, Inc. and Amazon.com, LLC. The Court did set a date for oral argument in a case in which it previously granted certiorari, *U.S. v. Quality Stores, Inc.,* concerning whether severance payments are subject to the Federal Insurance Contributions Act (FICA). This case has state and local tax implications, given the importance of the term "wages" for purposes of various state payroll taxes.

Two new petitions for certiorari in cases involving state and local taxes have been filed, while another request for review in a state and local tax case still remains pending from the Court's prior term. And we await the Court's decision in *DaimlerChrysler AG v. Bauman,* a due process challenge to the exercise of personal jurisdiction by a California federal district court over a German corporation based solely on the fact that an indirect corporate subsidiary performs services on the foreign company's behalf in the forum state. Although this case does not involve a tax matter, the Court's ruling could have a profound effect on state tax matters because a state tax must comport with the Due Process Clause to withstand a constitutional challenge.

Oral Argument Date Set in FICA Severance Pay Case

The Supreme Court has set 1/14/14 as the date for oral argument in *U.S. v. Quality Stores, Inc.,* Docket No. 12-1408, *cert. granted* 10/1/13, ruling below as *In re Quality Stores, Inc.,* 110 AFTR 2d 2012-5827, 693 F3d 605, 2012-2 USTC ¶50551 (CA-6, 2012), *reh'g and reh'g*

en banc den. 1/4/13, *aff'g* 105 AFTR 2d 2010-1110, 424 Bkrptcy. Rptr. 237, 2010-1 USTC ¶50250 (DC Mich., 2010). In this case, the federal Court of Appeals for the Sixth Circuit held that payments made by a corporation to its employees upon terminating their employment involuntarily due to business cessation were supplemental unemployment compensation benefit payments, and not taxable "wages" under the Federal Insurance Contributions Act (FICA). The government argues in its petition for review that the payments at issue do not qualify for an exemption under FICA because they were not linked to the receipt of state unemployment compensation, and thus should be wages subject to FICA withholding.

The Supreme Court's decision to grant certiorari is not surprising given the split in the Circuits between the Sixth Circuit in this case and the Federal Circuit in *CSX Corp. v. U.S.,* 101 AFTR 2d 2008-1120, 518 F3d 1328, 2008-1 USTC ¶50218 (CA-F.C., 2008), *reh'g and reh'g en banc den.* CA-F.C., 5/13/08, and other appellate courts, as well as the amount of money at issue (i.e., for this and other claims the amount currently exceeds $1 billion, as noted in the government's petition for certiorari). Taxpayers who have paid FICA taxes should consider filing protective refund claims in the event that the Supreme Court affirms the Sixth Circuit's decision.

Ultimately, employers and employees should monitor this case given the importance of the definition of the term "wages" for purposes of various federal and state payroll taxes, including, e.g., federal and state unemployment insurance taxes, and federal and state income taxes for withholding purposes. And the federal determination of "wages" may affect the states' determination as to the nature of such payments.

(For more on this case, see U.S. Supreme Court Update, 23 J. Multistate Tax’n 43 (August 2013).)

Resident Income Tax Credit Commerce Clause Challenge

In *Comptroller of the Treasury of Maryland v. Wynne,* Docket No. 13-485, petition for cert. filed 10/13/13, ruling below at 431 Md. 147, 64 A3d 453 (2013), the Maryland Court of Appeals (the state's highest court), in a 5-2 decision, held that Maryland's law that provides

a credit against Maryland state income tax for income taxes paid to other states violated the Commerce Clause of the U.S. Constitution because the credit was not available to offset county-level income taxes.

Maryland's income tax scheme. In Maryland, as in most states that impose an income tax, residents are subject to tax on all of their income whatever and wherever the source (i.e., worldwide income). The state's individual resident income tax is composed of two parts: a state tax (at uniform tax rates statewide) and a county tax (at rates that vary by county). To avoid double taxation, Maryland's law allows resident individuals to claim a credit against the state tax for taxes paid in other states (Md. Code Ann. Tax-Gen. §10-703). At the county level, however, no credit is given for taxes paid in other states. A credit against the county tax had previously applied but was eliminated by the Maryland legislature in 1975.

The dormant commerce clause. The Commerce Clause (U.S. Const., Art. I, §8, cl. 3) provides Congress with the power to "regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes." The dormant Commerce Clause (or "negative aspect of the Commerce Clause") denies states the power to unjustifiably discriminate against or burden interstate commerce. The Maryland Court of Appeals determined that the application of the county taxes without a credit for taxes paid in other states implicated the dormant Commerce Clause. The court found that "whether the tax is nominally a state or county tax is irrelevant for purposes of analysis under the dormant Commerce Clause because a state may not unreasonably burden interstate commerce through its subdivisions any more than it may at the state level" (citing *Associated Industries of Missouri v. Lohman,* 511 US 641, 128 L Ed 2d 639 (1994), which was discussed in U.S. Supreme Court Update, 4 J. Multistate Tax'n 142 (Jul/Aug 1994); also see Barrie, "Missouri: State-Wide Local Use Tax Void in Light of Legislative Intent," 6 J. Multistate Tax'n 178 (Sep/Oct 1996)).

The Missouri court also rejected the Comptroller's arguments that the county income tax is not directed at interstate commerce and that the taxpayers failed to identify any intrastate commercial activity affected by a failure to allow the credit against the county tax.

In this case, the Maryland-resident taxpayers, a married couple, owned stock in a corporation that engaged in a multistate business and that elected to be treated as an S corporation for both federal and Maryland purposes. They reported pass-through income of the corporation on their Maryland personal income tax return and claimed, as a credit against the state and county taxes, their pro-rata share of taxes paid to other states on the S corporation income. The Maryland high court concluded that "[t]he limitation of the credit for payments of out-of-state income taxes to the State portion of the Maryland income tax can result in significantly different treatment for a Maryland resident taxpayer who earns substantial income from out-of-state activities when compared with an otherwise identical taxpayer who earns income entirely from Maryland activities." The court expanded on this idea, explaining how "[i]n particular, the first taxpayer may pay more in total state and local income taxes than the second. This creates a disincentive for the taxpayer—or the S corporation of which the taxpayer is an owner—to conduct income-generating activities in other states with income taxes. Thus, the operation of the credit with respect to the county tax may affect the interstate market for capital and business investment and, accordingly, implicate the dormant Commerce Clause."

A county tax without a resident credit violates the dormant Commerce Clause. Pursuant to *Complete Auto Transit, Inc. v. Brady,* 430 US 274, 51 L Ed 2d 326 (1977), a state tax will pass constitutional muster if the tax: (1) applies to an activity with a substantial nexus with the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate or foreign commerce; and (4) is fairly related to the services provided by the state. Focusing on the requirements of fair apportionment and the prohibition against discrimination against interstate commerce, the Maryland court found that the county tax without a credit failed under both prongs.

First, the court addressed fair apportionment, noting that in order to assess such fairness, it was necessary to decide whether the tax was both "internally consistent" as well as "externally consistent." The court concluded that Maryland's tax was neither. Applying the internal consistency test of *Oklahoma Tax Commission v. Jefferson Lines, Inc.,* 514 US 175, 131 L Ed 2d 261 (1995), the court ruled that the tax was not internally consistent because if each state imposed a county tax without a credit, intrastate commerce would be favored over interstate commerce. This conclusion was based on the finding that "a taxpayer with

income sourced in more than one state will consistently owe more in combined state income taxes than a taxpayer with the same income sourced in just the taxpayer's home state," which may discourage interstate investment and business activity. The court also concluded that the tax provision was not "externally consistent" because the tax liability under the Maryland income tax law failed to reasonably reflect how the income was generated, and thus, there was the possibility for multiple taxation of the same income.

The court also examined the third prong of the *Complete Auto* test, the prohibition against discrimination toward interstate commerce, focusing on the U.S. Supreme Court's analysis of a North Carolina tax in *Fulton Corp. v. Faulkner,* 516 US 325, 133 L Ed 2d 796 (1996). In that case, the tax at issue resulted in North Carolina stockholders being taxed at higher rates for holdings in companies that did not do business in North Carolina than for holdings in companies that did do business in North Carolina. In *Wynne,* the Maryland court found that, at least in the context of ownership of an S corporation, the application of the credit in Maryland's income tax law has a similar discriminatory effect: "The more a Maryland business can locate its value-creating activities within Maryland the less it will be taxed." Accordingly, the Maryland Court of Appeals held that "the application of the county tax to pass-through S corporation income sourced in other states that tax that income, without application of an appropriate credit, discriminates against interstate commerce."

The dissent. One judge filed a dissent in *Wynne* in which a second judge joined. The dissent disagreed with the majority's conclusion that the dormant Commerce Clause requires Maryland to reduce the taxpayers' county taxes. According to the dissent, the issue in the case was one "for the elected officials of Howard County and the State, not this Court."

Believing that the taxpayers "failed to prove that requiring them to pay a county tax without a credit either expressly discriminates against interstate commerce or places more than an incidental burden upon interstate commerce," the dissent concluded that the taxpayers "failed to prove that the dormant Commerce Clause is implicated."

Question presented to the U.S. Supreme Court. Maryland's petition for certiorari asks the Court to consider the following question: "Does the United States

Constitution prohibit a state from taxing all the income of its residents—wherever earned—by mandating a credit for taxes paid on income earned in other states?"

(For more on: *Complete Auto,* see Lieberman, "*Complete Auto Transit, Inc. v. Brady:* How Many Parts Are There?," 3 J. Multistate Tax'n 4 (Mar/Apr 1993); *Jefferson Lines,* see Haynes, Schultz, and Stromen, "*Jefferson Lines:* Will the U.S. Supreme Court's Decision Be Extended to Other Services?," 5 J. Multistate Tax'n 100 (Jul/Aug 1995); and *Fulton Corp.,* see Cummings, "U.S. Supreme Court's Decision in *Fulton* May Lead to More Findings of Tax Discrimination," 6 J. Multistate Tax'n 52 (May/Jun 1996).)

4R Act Tax Discrimination Challenge

In *Alabama Department of Revenue v. CSX Transportation, Inc.,* Docket No. 13-553, petition for cert. filed 10/30/13, ruling below as *CSX Transportation, Inc. v. Alabama Department of Revenue,* 720 F3d 863 (CA-11, 2013), the Alabama Attorney General is seeking review of the decision by the federal Court of Appeals for the Eleventh Circuit holding that Alabama's failure to provide a tax exemption from the state's sales and use taxes for railroads' purchases of diesel fuel, while exempting both interstate motor carriers and water carriers, was discriminatory in violation of the federal Railroad Revitalization and Regulatory Reform Act of 1976 (the "4R Act," codified at 49 USC §11501). This is the latest decision in the long-running dispute between the railroads and the state of Alabama. (The Eleventh Circuit's decision was discussed in more detail in Ely and Rhyne, "Alabama: Eleventh Circuit Says State's Sales Tax on Railroads' Fuel Violates 4R Act," 23 J. Multistate Tax'n 32 (October 2013). For more on the earlier rulings in this litigation (also discussed below), see Ely and Thistle, "Alabama: State May Have Dodged a Bullet in 4R Act Tax Discrimination Case," 22 J. Multistate Tax'n 37 (January 2013); U.S. Supreme Court Update, "Court OKs 4R Act Challenge Based on Alleged Discriminatory Exemption," 21 J. Multistate Tax'n 42 (May 2011).)

The 4R Act. Congress enacted the 4R Act in 1976 to restore the financial stability of the railroad industry. One provision of the Act, 49 USC §11501(b), expressly prohibits four forms of discriminatory state and local taxation. Subsections (b)(1) through (b)(3) involve discriminatory property tax rates and unfair assessments on "rail transportation property" vs. other "commercial and industrial property." Subsection (b)(4), and the specific provision

at issue in this case, provides a catch-all prohibition against a state's imposition of "another tax that discriminates against a rail carrier."

Alabama's sales and use taxation of diesel fuel purchases. Alabama imposes a 4% state sales and use tax on diesel fuel purchased or used in the state (Ala. Code §§40-23-2(1) and 40-23-61(a)). CSX Transportation, Inc., the taxpayer in the case, is an interstate rail carrier that pays the sales tax on its purchases of diesel fuel in Alabama. Under Ala. Code §40-23-4(a)(10), however, ships and other watercraft "engaged in foreign or international commerce or in interstate commerce" are exempt from the sales and use tax and pay no tax on their diesel fuel purchases. And under the Alabama Terminal Excise Tax Act (Ala. Code §40-17-320 *et seq.,* effective 10/1/12), motor carriers pay an excise tax of 19 cents per gallon, in lieu of the state's 4% sales and use tax (Ala. Code §40-17-325).

Procedural history. As indicated above, this is not the first time that CSX has asked the Supreme Court to review Alabama's taxation of diesel fuel purchases. In 2008, CSX brought suit against the Alabama Department of Revenue questioning whether the state's sales and use tax on diesel fuel discriminates against rail carriers through the use of exemptions, but the complaint was dismissed by the federal district and circuit courts (see *CSX Transportation, Inc. v. Alabama Department of Revenue,* 350 Fed. Appx. 318 (CA-11, 2009)) based on the precedent in *Norfolk Southern Railway Co. v. Alabama Department of Revenue,* 550 F3d 1306 (CA-11, 2008), an identical challenge that, as noted by the Eleventh Circuit in its 2013 *CSX* decision, "established the rule that a railroad could not challenge its competitors' exemptions from a sales tax as discriminatory under the 4-R Act."

In February 2011, however, in a 7-2 decision, the U.S. Supreme Court overruled the Eleventh Circuit's 2009 decision and held that a railroad has the right, under the 4R Act, to challenge whether Alabama's sales and use taxes on diesel fuel discriminates against rail carriers through the use of exemptions (*CSX Transportation, Inc. v. Alabama Department of Revenue,* 131 S.Ct. 1101, 179 L Ed 2d 37 (2011)). In its decision, the Court determined only that the exemptions provided to interstate motor carriers and water carriers *could* violate the 4R Act's prohibition on discriminatory taxation. The Court's opinion did not address whether Alabama's tax structure, as a whole, does in fact discriminate. The Court

remanded the case for further proceedings to determine whether the tax at issue does, in fact, discriminate against rail carriers by exempting interstate motor carriers and water carriers. The Court noted that "[w]hether the railroad will prevail ... depends on whether the State offers a sufficient justification for declining to provide the exemption at issue to rail carriers."

On remand from the Supreme Court, in *CSX Transportation, Inc. v. Alabama Department of Revenue,* 639 F3d 1040 (CA-11, 2011), the Eleventh Circuit vacated its own 2009 opinion in the case and the district court's order dissolving the preliminary injunction and dismissing CSX's case, and remanded the matter to the district court "for further proceedings consistent with the Supreme Court's opinion." In 2012, the federal district court reexamined the case and held that Alabama's tax was *not* discriminatory under the 4R Act (*CSX Transportation, Inc. v. Alabama Department of Revenue,* 892 F Supp 2d 1300 (DC Ala., 2012)). The district court judge did not focus his review solely on the sales and use tax regime at issue. Instead, Judge Kallon adopted a broader view taking into account all taxes under Alabama law imposed on the railroad's competitors. While acknowledging "that the tax rate paid on diesel fuel by rail carriers and motor carriers is not precisely the same," Judge Kallon stressed that "as the rates are substantially similar, the court finds any differences sufficiently justified, and, most importantly, the court finds that these differences offer no favoritism to motor carriers as opposed to rail carriers. As such, CSX failed to meet its burden of proof that it suffered from discrimination." And with respect to water carriers, Judge Kallon found that "CSX offered no evidence at trial regarding the alleged discriminatory effects as it relates to water carriers." Thus, the district court dismissed the matter, and CSX again appealed to the Eleventh Circuit.

The appellate court's latest opinion. In looking at the case again, the Eleventh Circuit held that Alabama's sales tax does discriminate against railroads in violation of §11501(b)(4) of the 4R Act, and that the state offered no sufficient justification for declining to provide rail carriers with the exemption at issue.

Before considering the discriminatory nature of the exemption, the Eleventh Circuit addressed what it found to be a threshold question "that the Court left untouched and has yet to be answered in this circuit: against what do we compare the railroads." The court

noted that if you compare CSX to all of the state's taxpayers, then CSX is no worse off because most taxpayers pay the sales tax when they purchase diesel fuel. If, however, "we compare CSX to motor and water carriers, questions of favorable treatment arise because they do not pay the sales tax." The Eleventh Circuit found that other federal circuits have primarily used two approaches: "the functional approach and the competitive approach." After reviewing the Seventh and Ninth Circuits' functional approach, which compares rail carriers to other "commercial and industrial" taxpayers at large (citing *Kansas City Southern Railway Co. v. Koeller,* 653 F.3d 496 (CA-7, 2011), *cert. den.* U.S.S.Ct. 12/12/11, and *Atchison, Topeka and Santa Fe Railway Co. v. Arizona,* 78 F.3d 438 (CA-9, 1996), *cert. den.* U.S.S.Ct.12/9/96), the court rejected this broad comparison. According to the court, the Eighth Circuit's narrower, competitive approach, which compares rail carriers to only other commercial transportation services (e.g., motor and water carriers), is more in line with the "4-R Act's purpose of ensuring 'financial stability' for rail carriers," and thus, "best serves that goal in the context of a state's sales tax on diesel fuel."

Having determined that the proper comparison class was CSX's competitors, and by virtue of the fact that such competitors do not pay the Alabama diesel fuel sales tax, the Eleventh Circuit ruled that CSX "established a prima facie case of discrimination." As such, the court noted, "[i]t therefore becomes the State's burden to justify its discriminatory tax." According to the court, the state has defended the motor carriers' exemption to sales tax on the ground that motor carriers pay a roughly equivalent levy under the state's fuel excise tax. In the court's view, this holistic approach, "misses the mark": "Rather than framing the tax in question at its highest level of abstraction as 'all the taxes paid on diesel-fuel purchases,' we agree with the Eighth Circuit that 'we look only at the sales and use tax with respect to fuel to see if discrimination has occurred.'" The court cited numerous cases in which other circuits held that courts should not evaluate a state sales tax against other taxes in the state code. The court also found that "[t]his construction of the 4-R Act finds support in the Act's text," noting that "Section 11501(b)(4) prohibits the states from 'impos[ing] another tax that discriminates against a rail carrier,' but the statute hardly 'suggests that an individually discriminatory tax should be assessed for fairness against the entire tax structure of the state.'" (Internal citation omitted.)

Ultimately, the court concluded that "[i]t is not a sufficient justification for the State to counter that its tax code will ultimately level the playing field." Since "the State offers no 'reasonable distinctions between the favored and the disfavored'; ... it has failed to carry the burden set forth by the Supreme Court in *CSX II* [the Court's 2011 decision in this litigation]," and thus, the sales and use tax scheme violates the 4R Act.

A dissent. One member of the three-judge panel filed a dissent, finding that the state had provided sufficient justification for not awarding rail carriers the exemption at issue, at least with regard to motor carriers. Noting the district court's finding that rail carriers often paid state tax on fuel that was *less* than motor carriers paid under the fuel excise tax, the dissent was willing to look at Alabama's overall tax structure and, accordingly, found that railroads have not been competitively disadvantaged in any way by the sales and use tax exemptions for motor carriers. This, according to the dissent, was sufficient justification for the differential treatment.

Although water carriers are not subject to the same fuel excise tax as motor carriers, the dissent noted that the district court, in its 2012 decision, had held that the exemptions for water carriers did not discriminate against rail carriers, "in part because CSX 'fail[ed] to meet it[s] evidentiary burden of proof.'" But the dissent found that this ruling was based on the application of an incorrect legal standard, insomuch as the district court required CSX to prove more than simply that the tax in question exempts competitors. Accordingly, the dissent "would remand this case so the district court can apply the correct standard ... and determine whether the State has offered sufficient justification for the tax exemption given to water carriers."

Question for the Court's consideration. Alabama asks: "Whether a State 'discriminates against a rail carrier' in violation of 49 U.S.C. §11501(b)(4) when the State generally requires commercial and industrial businesses, including rail carriers, to pay a sales-and-use tax but grants exemptions from the tax to the railroads' competitors."

Petition Still Pending

As we go to press, we still await the Court's decision on whether to grant certiorari in one case held over from last term.

Madison County, N.Y. v. Oneida Indian Nation of New York, Docket No. 12-604, petition for cert. filed 11/12/12, ruling below as *Oneida Indian Nation of New York v. Madison County, N.Y.,* 665 F3d 408 (CA-2, 2011), follows a remand from the U.S. Supreme Court in an earlier action in this ongoing litigation, in which the federal Court of Appeals for the Second Circuit affirmed in part, vacated in part, and remanded with instructions, the district court's judgments. Specifically, the circuit court held that the Oneida Nation waived its claim to tribal sovereign immunity from enforcement of real property taxation through foreclosure by state, county, and local governments, when the tribe issued a formal declaration to that effect. Accordingly, the appellate court vacated the district court's judgments to the extent that they granted summary judgment to the Oneida Nation based on claims relating to the doctrine of sovereign tribal immunity to suit.

The Second Circuit also reversed the district court's judgment in favor of the Oneida Nation on its claims of violations under the Due Process Clause of the Fourteenth Amendment, finding that the Oneida Nation had sufficient notice of the counties' tax enforcement proceedings to enable it to take steps to protect its property interests. And the circuit court also declined to exercise supplemental jurisdiction over the tribe's state law claims, thereby vacating the district court's grant of injunctive relief barring the counties from foreclosing on the Oneida Nation's properties. Citing its prior holding on this question, the Second Circuit also affirmed the dismissal of the counties' counterclaims regarding the issue of whether the Oneida reservation had been disestablished.

As previously reported, in February 2013 the Court asked the U.S. Solicitor General to file a brief expressing the views of the federal government in this case but, at this writing, such brief has yet to be filed. On 12/13/13, the Court received a letter from Petitioner's counsel, but no conference has yet been scheduled in this case.

(For more background on this litigation, and more on the current request for certiorari, see U.S. Supreme Court Update, 22 J. Multistate Tax’n 41 (February 2013).)

Awaiting Decision in Due Process Personal Jurisdiction Challenge

On 10/15/13, the Supreme Court heard oral arguments in *DaimlerChrysler AG v. Bauman,* Docket No. 11-965, *cert. granted* 4/22/13, ruling below as *Bauman v. DaimlerChrysler Corp.,* 644 F3d 909 (CA-9, 2011), *reh'g and reh'g en banc den.* CA-9, 11/9/11. In this case, the federal Court of Appeals for the Ninth Circuit found that it was reasonable to subject a foreign (German) corporation, DaimlerChrysler Aktiengesellschaft (DCAG), to the jurisdiction of a federal district court in California, in a case involving claims of human rights violations that occurred in Argentina (allegedly at a subsidiary plant, Mercedes-Benz Argentina) more than 30 years ago, with jurisdiction based on the activities of DCAG's wholly owned U.S. subsidiary, Mercedes-Benz USA (a Delaware corporation), which distributes its cars in California.

Although DCAG conducted no manufacturing activities in California, had no property or employees in the state, and asserts that the California company is an indirect subsidiary acting independently of DCAG, the Ninth Circuit nevertheless found a sufficient connection (requisite contacts) between the parent company and the subsidiary—the sale of Mercedes-Benz vehicles in California (2% of DCAG's overall vehicle revenue). Applying an "agency" test, the Ninth Circuit found that the services provided by the California subsidiary were sufficiently important to DCAG that, if the California subsidiary were to go out of business, DCAG would continue selling vehicles in California either by selling them itself, or alternatively, by selling them through a new representative. The court further said that actual control of the subsidiary was not necessary, but that the "right to control" the subsidiary through a distributorship agreement was sufficient.

As indicated above, the Court heard oral arguments in this case from attorneys for DCAG and the petitioners, and from the Deputy Solicitor General of the U.S. as amicus curiae supporting the petitioner (see 2013 WL 5629592). For a review of the oral argument, see U.S. Supreme Court Update, 23 J. Multistate Tax’n 38 (January 2014).

As noted above, although this case does not involve a tax matter, the Court's ruling could have a profound effect on state tax matters because a state tax must comport with the Due Process clause to withstand a constitutional challenge. Thus, the Supreme Court's decision in this case may make a major new pronouncement regarding the scope of U.S. courts' reach over claims of foreign transgression, and impact state and local tax matters.

Certiorari Has Been Denied in:

Overstock.com, Inc. v. New York State Department of Taxation and Finance, Docket No. 13-252, petition for cert. filed 8/22/13, and ***Amazon.com, LLC v. New York State Department of Taxation and Finance,*** Docket No. 13-259, petition for cert. filed 8/23/13, *cert. den.* 12/2/13, ruling below as *Overstock.com, Inc. v. New York State Department of Taxation and Finance,* 20 N.Y.3d 586, 965 N.Y.S.2d 61, 987 NE2d 621 (2013), in which Internet retailers Amazon.com and Overstock.com sought review of the decision by the New York Court of Appeals (the state's highest court) holding constitutional New York's "Amazon" tax (also known as the Internet tax). The state legislation, codified in N.Y. Tax Law §1101(b)(8)(vi), expanded the definition of the term "vendor" for New York's sales and use tax purposes, by creating a presumption of vendor status for certain out-of-state Internet sellers. Since New York's action, many other states have enacted their own "Amazon taxes."

(For more on this matter, see U.S. Supreme Court Update, 23 J. Multistate Tax'n 38 (January 2014). See also Bingel and Genz, "New York: High Court Upholds 'Amazon Tax' Provision for Internet Retailers," 23 J. Multistate Tax'n 33 (July 2013). For more background on New York's "Amazon law," see Cristman, "New York: Novel Sales Tax Law Seeks to Reach Internet and Other Out-of-State Vendors," 18 J. Multistate Tax'n 35 (August 2008); and Hecht, Burkard, Melone, Sutton, Yesnowitz, and Jones, "New York: State Clarifies New Affiliate Nexus Standard for Sales Tax Vendors," 19 J. Multistate Tax'n 32 (February 2010).)

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