Journal of Multistate Taxation and Incentives (Thomson Reuters/Tax & Accounting)
Volume 26, Number 4, July 2016

SALES AND USE TAXES

DMA v. Brohl—Is It Time to Stop Fighting the Last War?

Rather than continuing the battle to persuade Congress or the Supreme Court to remove restraints on the states' existing tax collection mechanism, states might consider an alternative mechanism that makes use of 21st century technology.

By HELEN HECHT AND LILA DISQUE

HELEN HECHT is General Counsel and LILA DISQUE is Counsel to the Multistate Tax Commission. The views expressed in this article are not necessarily the views of the Multistate Tax Commission, its Executive Director, or its members.

For half a century, the states and their allies have been stuck in a struggle to enforce use taxes on sales made by "remote" retailers (those without physical presence in the state). The states' allies, traditional brick-and-mortar sellers who, unlike remote retailers, must collect tax, have supported this effort in the hopes of leveling the playing field.

Cross-border commerce complicates the enforcement of every kind of tax. So it should be no surprise that cross-border sales by remote sellers create a consumption tax enforcement problem for virtually every taxing sovereign on earth.

Still, if there were borders that commerce might cross without causing tax collection problems, you might expect those borders to be between U.S. states. It was, after all, a goal of our federal system to preserve state authority while mitigating the kinds of border-related complications commonly faced by completely separate sovereigns.

Ironically, our federal system has not only failed to supply the solution, it has instead supplied a particularly persistent version of the problem. And, it was the federal Supreme Court that handed states their biggest defeats—once by mistake, and then 25 years later, on purpose.

This article posits that, rather than continuing the battle to persuade Congress or the Supreme Court to remove restraints on the states' existing tax collection mechanism, states might consider an alternative mechanism that makes use of 21st century technology, an alternative made possible by the recent case of *DMA v. Brohl.*

The Supreme Court's Mistake

In *Nat'l Bellas Hess v. Dep't of Revenue*,[1] the U.S. Supreme Court discovered in the Constitution a bright-line physical-presence limitation on the states' ability to require remote sellers to collect tax, no matter how substantial their sales into the state might be. Assume for example that there are two sellers—X and Y, operating in 10 states. X sells $1,000 of widgets in each state through a traveling sales representative. Y sells $1 million worth of widgets in each state, remotely by mail order. While X must collect and pay taxes in 10 states, Y need not do so in any of them.

Given the curiousness of this result, it's understandable that states might have an interest in knowing precisely where in the Constitution the Court found this physical-presence limitation. At the time, it appeared the Court based the limitation on a particular view of due process jurisdiction. As a result, many thought Congress would be powerless to remove it.[2] But even in 1967, this application of due process jurisprudence seemed somewhat out-of-step.

As far back as 1944, in *International Shoe,* the Court had been moving away from physical presence as a requirement for state jurisdiction. There the Court noted that: "To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided . . . . 'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on . . . ."[3]

By the 1980s, the Court, in *Burger King*[4] and *Asahi*,[5] made unmistakably clear that physical presence was not essential under the basic theory of due process jurisdiction-now called "purposeful availment."

The Failed Frontal Assault

Given this clear shift, states assumed the Court would be willing to admit its mistake and mounted a challenge to *Bellas Hess.* That it was another mail-order company, the Quill Corporation, that became the focus of that contest was neither a coincidence nor a strategic decision.

Back then, the only true "remote" retailers—those making substantial sales without any localized physical presence—were mail-order companies. (The first retail sale across the Internet would not happen until two years after the Supreme Court's decision in *Quill.*[6]) The states simply had no other option but to attempt a pure frontal assault, a risky strategy even in the best of circumstances, as it proved to be here as well.

In *Quill*,[7] the Supreme Court confessed that the physical-presence restriction of *Bellas Hess* could not be defended on due process grounds, but it nevertheless salvaged the rule—asserting that it found support instead in the Commerce Clause—citing the burdens posed by the "many variations in rates . . . exemptions, and in administrative and record-keeping requirements."[8]

This allowed the Court to recognize the reliance interests of mail-order sellers (which it understandably felt some responsibility for) as well as to pay tribute to the doctrine of stare decisis.[9] But the Court in *Quill* also hedged its bets, signaling to Congress that it might want to, and now clearly had the power to, simply remove the restriction.[10]

The *Quill* Industrial Complex

Following *Quill*, the states believed the only way to solve the remote seller tax collection problem was to persuade Congress to act. So, a number of states joined in an effort to uniformly simplify their sales and use tax definitions and sourcing rules, and to develop technology to relieve administrative and recordkeeping requirements.[11]

Today, in part as a result of this work, software providers offer sales and use tax programs capable of instantaneously determining the proper rate of tax, calculating the tax, integrating with seller accounting software and point-of-sale platforms, importing tax data systems, automatically generating reports, submitting reports electronically, managing exemption certificates, and creating and maintaining necessary audit trails.[12] The Streamlined Sales and Use Tax project webpage lists seven providers that have been certified to accurately provide these functions.[13] These (and other) providers offer tax-reporting services for taxes imposed in every state.

Believing not only that sufficient progress had been made, but also that the problem of non-collection was being worsened by the growth of e-commerce, states have been lobbying Congress for relief for over 15 years. Of all the proposed federal legislation that would allow states to impose a sales tax collection duty on remote sellers, only the Marketplace Fairness Act[14] ("MFA") has made much progress—and that was largely because of efforts by the bricks-and-mortar businesses.

The MFA passed the Senate on May 6, 2013, with substantial bipartisan support (69-27), but died in the House. Since then, the House Judiciary Committee has concluded that the MFA is not viable and has been split over possible alternatives.

The Colorado Maneuver

Because it could not require remote retailers to collect use tax, in 2010, Colorado sought to impose on those retailers certain notice and information reporting requirements, mandating that they provide tax notices to their customers in the state and report information about in-state sales to the state revenue department.[15] The Direct Marketing Association (DMA) challenged the requirements in federal court, relying heavily on *Quill* to assert discrimination and undue burden claims under the dormant Commerce Clause. The district court ruled in favor of the DMA, granting a permanent injunction against the reporting requirements,[16] and many predicted that the case was destined for the U.S. Supreme Court.

And so it was—but not the way most people expected. Federal courts hear few if any state tax matters because, in addition to comity, the federal Tax Injunction Act (28 U.S.C. § 134128 U.S.C. § 1341) removes their jurisdiction to hear cases that would "enjoin, suspend or restrain the assessment, levy or collection" of state taxes.

Colorado did not raise either comity or the TIA's jurisdictional bar in the federal district court, but the Tenth Circuit, on appeal, found that the TIA barred federal jurisdiction.[17] The DMA objected, petitioning the Supreme Court for relief, and it obliged, holding that the TIA did not apply to a challenge to Colorado's requirements since they clearly did not involve the assessment or levy of any tax, nor, most critically, did they involve tax *collection.*[18]

To everyone's surprise, Justice Kennedy (who had been on the Court when *Quill* was decided) wrote a concurring opinion, recognizing the problem Colorado and other states had long faced, expressing regret, and inviting the states to now bring a challenge to *Quill.*[19] As a result, some are seriously considering that option—but more on that in a moment.

So the matter was remanded to the Tenth Circuit, and on February 22, 2016, the circuit court ruled in favor of Colorado on the merits.[20] It based its decision in part on the Supreme Court's opinion on the TIA issue, which, in addition to having determined that Colorado's information reporting requirements were not tax "collection" under the TIA, had also explicitly characterized *Quill's* rule as applying to—-"tax *collection.*" As far as the Tenth Circuit was concerned, this greatly weakened the DMA's claims of discrimination and undue burden.[21]

More specifically, the Tenth Circuit held that the information reporting requirements did not facially discriminate against out-of-state retailers since, as a group, many out-of-state companies were subject to tax collection obligations rather than information reporting. Nor was it a company's geographic location that determined if it was subject to the information reporting requirements but, rather, whether it could be required, under *Quill*, to collect tax.[22]

The circuit court also concluded the information requirements were not discriminatory in their effect.[23] It rejected the DMA's claim that "any differential treatment" between in-state and out-of-state entities can establish unconstitutional discrimination. This would essentially involve treating the reporting requirements, improperly, as though they existed in absolute isolation.

Also, since Colorado consumers legally owed tax regardless of whether the seller collected it or only reported information to the state, the DMA could not argue that the information reporting requirements put remote retailers at some competitive disadvantage. Moreover, the DMA had not shown that the remote sellers it represented were similarly situated with any comparison class of retailers for discrimination purposes. And finally, the DMA had also not shown the requirements imposed a discriminatory economic burden on remote vendors when compared with the burden imposed on collecting sellers.[24]

It should be noted that the court explicitly rejected Colorado's argument that the information reporting requirements could not be unconstitutional as long as remote sellers were given the option of reporting the tax. The possibility that a retailer protected by *Quill* might choose to give up that protection rather than comply with the reporting requirements did not make those requirements constitutional, said the court.[25]

But neither could the DMA ignore the comparable reporting requirements imposed on tax-collecting sellers. Rather, the DMA was required to show that the information reporting requirements imposed on remote sellers were more burdensome than the related tax-collection and reporting requirements imposed on in-state sellers. This, the DMA failed to do.[26]

As far as undue burden, the circuit court relied almost entirely on the Supreme Court's holding in *DMA III,* that the information reporting requirements were not the equivalent of tax collection and thus *Quill* was not controlling. And having determined *Quill* was not controlling, the court could not identify a valid reason to *sua sponte* extend its bright-line rule.[27]

In the same way Justice Kennedy's concurring opinion in *DMA III,* inviting the states to bring a challenge to *Quill,* has given ammunition to some who wish to pursue that course, similarly, a concurrence filed by Tenth Circuit Judge Gorsuch in *DMA IV* may provide support for those who are now wondering "what exactly *Quill* requires of us."[28] Answer-maybe not as much as we think.

Prompted by the DMA's arguments, Judge Gorsuch pondered the possibility that "many (all?) states can be expected to follow Colorado's lead" to enact information reporting requirements that would dilute the advantage remote sellers obtain under *Quill.* But he concluded that the Supreme Court, by reinforcing a rule they themselves admitted was "formalistic" and "artificial," had virtually "invited states to impose comparable duties" in response.[29]

Judge Gorsuch went on to explain: "In this way, *Quill* might be said to have attached a sort of expiration date for mail order and internet vendors' reliance interests . . . by perpetuating its rule for the time being while also encouraging states over time to find ways of achieving comparable results through different means. In this way too *Quill* is perhaps unusual but hardly unprecedented, for while some precedential islands manage to survive indefinitely even when surrounded by a sea of contrary law, a good many others disappear when reliance interests never form around them or erode over time. And *Quill* 's very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time."[30]

So, is it time to take a hard look at whether there are "ways of achieving comparable results through different means," as Judge Gorsuch puts it? Before we can answer that, we should address the obvious alternative—yet another battle.

War. What Is It Good For?

It's possible that the states will have no other choice but to, once again, engage in a contest before the Supreme Court over *Bellas Hess.* Whether the *DMA* case might end up being that contest is, in part, now in the hands of the plaintiff, and perhaps eventually the Court. Handicapping possible Supreme Court cases has become a sport. [31] Suffice it to say, while one or two cases a year may have better than even-odds of getting accepted, the rest are either much more likely to get denied, or they have no chance whatsoever.

The *DMA* case definitely does not fall into the first category. That doesn't mean the Court won't take it. But we can't count on it. And even if it does, it appears it could decide the merits without either overturning or even explicitly upholding *Quill.* Assuming the Court declines to grant certiorari (as we must), then there could certainly be challenges to other information reporting requirements adopted by other states in other circuits—but unlike the situation in the *DMA* case, it is less likely that those courts would grant injunctions while those challenges are undertaken.

What about creating a more direct challenge? As this article is being written, at least two states have now adopted provisions intended to do just that.[32] But even with, or especially with, a deliberate challenge, there is a lot that could go wrong.

For instance, a particular case with particular facts might be fully resolved on state law grounds without reaching constitutional issues. Or, too much cooperation on a test case could undermine its being viewed as a legitimate controversy. Or, specific facts may not turn out to be narrow enough to constitute a true direct challenge, leaving the case to be distinguished instead. Or, a remote seller in a particular case could decide, at any point, to simply comply rather than risk a loss. Even if the case is properly positioned, it may contain a fatal flaw, procedural or otherwise, that causes it to miss the mark.

Certainly, the odds are overwhelming that a state court hearing a direct challenge to *Quill* would rule in favor of the remote retailer. The reason this is important is because, as we've discussed, the odds are that the Supreme Court will simply not grant certiorari—which isn't supposed to mean anything from the standpoint of legal precedent, but would likely have a chilling effect on state efforts, nevertheless. Finally, even if the Court takes the case, it could conclude that Congress alone is qualified to set a different standard and so might, once again, uphold the *Bellas Hess* limitation.

But if states do not accept Justice Kennedy's "invitation," then what? To answer that question, we first have to acknowledge that it's no longer 1992.

If You Can't Beat 'Em, Join 'Em

In 2010, the Boston Consulting Group determined that Internet commerce accounted for 4.7% of all U.S. economic activity, exceeding the contributions of the federal government (4.3 %).[33] If considered its own separate industry, Internet commerce would be larger than America's education, construction, or agricultural sectors.[34]

According to a 2014 online retail sales forecast from Forrester Research Inc., United States e-retail sales (that is, consumer sales) are expected to grow from $263 billion in 2013 to $414 billion in 2018, a compound annual growth rate of 9.5%.[35] The dollar growth from the actual 2013 figure of $263 billion to the forecast $414 billion for 2018 is 57.4 %.[36] Contrast these online sales amounts with the amount of annual mail order sales in 1992—which was around $180 billion.[37]

Of course, it is technology that enables Internet retailers to be so successful. Because of that technology, Internet retailers require minimal downtime, and can remain open 24 hours a day, year round. Retail websites are a natural extension of the social networking community, since large online retailers generally offer customers the opportunity to post comments and see reviews on every aspect of a product.[38] Online shopping also offers easy price comparison—an ability that has overlapped into the real world: Amazon now offers a price-checking app that allows shoppers to scan a product at the mall and purchase it online.[39]

In the world of online sales, information is currency; online sellers habitually track purchasers' activities in order to target their marketing. Internet retailers collect and purchase an incredible range of information:

According to one commentator, "[Stores collect] demographic information like your age, whether you are married and have kids, which part of town you live in, how long it takes you to drive to the store, your estimated salary, whether you've moved recently, what credit cards you carry in your wallet and what Web sites you visit . . . data about your ethnicity, job history, the magazines you read, if you've ever declared bankruptcy or got divorced, the year you bought (or lost) your house, where you went to college, what kinds of topics you talk about online, whether you prefer certain brands of coffee, paper towels, cereal or applesauce, your political leanings, reading habits, charitable giving and the number of cars you own."[40]

This same technology clearly enables the simple capture and reporting of basic sales and customer data needed to determine use tax owed on remote purchases. And, as noted above, the software also exists that would determine taxes based on that information. But while information may be "currency," it doesn't pay the tax. If states can't collect from remote sellers, where will states obtain payment?

Fortifying a Faulty Strategy

As it happens, opponents of the states' efforts to overturn *Quill* often argue that states do have an alternative—collecting tax directly from their in-state consumers. Most states do have consumer self-reporting requirements, but compliance with such requirements is low. States have had to come up with ways to simplify use tax reporting, given that many consumers are unaware of their obligation and have failed to keep records of their purchases.[41]

California eases the burden on consumers by allowing them either to report use tax based on their actual purchases or by calculating tax using a "look-up table" based on their income.[42] This approach, taken by a number of other states as well, is further simplified by reporting information and instructions.[43] Some data shows that states with look-up tables for reporting use tax have a higher "participation" rate (that is, a higher percentage of taxpayers reporting some amount of tax) but a slightly lower per return amount.[44] In any case, compliance rates are uneven.[45]

These consumer self-reporting mechanisms have not been subjected to legal challenges, nor does it appear that they are likely to be, but they do have two distinct limitations. First, if a resident reports no use tax, it may be because she has determined that she does not owe any tax, or it may be that she is simply disregarding her reporting obligation. To determine which is the case, the state would have to audit her.

Auditing any significant percentage of resident consumers, however, would be impossible. But the second and perhaps more important limitation is that it is not clear how the state could possibly verify that additional tax is due, even with an audit, given that most individuals do not regularly keep records of all purchases so that the tax owed can be verified.

As a result, many have concluded that self-reporting won't work. But maybe the more accurate conclusion is that it won't work by itself.

Fashioning a New Collection Mechanism

While no one method by itself is likely to equal (or replace) seller-collection as the mechanism to enforce sales and use taxes, it's possible that a combination of methods could go a long way toward bridging the gap. What makes this approach viable is both the electronic information technology that facilitates remote sales and also captures and maintains information on those sales, and software that exists or could be modified to create systems specifically for this purpose.

Together, these elements could be used to provide purchasers with the records they need and the information about taxes owed so that they can pay the taxes due. They would also support the other ordinary features of an enforcement system including audit and even, possibly, withholding.

States might reasonably conclude that having sellers report information to both the consumer and the tax agency will, by itself, increase compliance. It has been demonstrated that where imposing a withholding or collection obligation is not feasible, imposing an information reporting obligation by itself will still increase tax compliance by the party required to pay the tax. [46]

The IRS has estimated that the net misreporting percentage, defined as the net misreported amount as a ratio of the true amount, is 8% for amounts subject to substantial information reporting alone, as opposed to 56% for income where no withholding or information reporting is required. [47] And, where the taxpayer must rely on the third-party information to voluntarily comply (that is, to self-assess), this information reporting obligation is not merely helpful, but is *essential* for tax collection.

But states might also be able to replace seller-collection with another common tax withholding and payment mechanism that many already have in place—employer withholding on wage income. While it might not be intuitive that employers would be in a position to withhold amounts to cover individual employees' use taxes, there would be no difficulty in them doing so provided the amount of tax owed can be reasonably estimated (which is how income tax withholding also works, after all), and systems are in place to capture information reported. It could even be done at the employee's option, in the same way that employees sometimes use withholding to cover estimated taxes they expect to owe on non-wage income.

So how might all this work? A state could require remote sellers who make more than a threshold amount of consumer sales into the state to report total sales in general taxable categories by purchaser name and address. Name and address information could be matched against the states' taxpayer databases and confirmed. Taxes could then be determined and notices sent to in-state purchasers.

So, for example, assume an in-state purchaser makes $1,000 of remote taxable purchases in a particular quarter. If the state imposes a 6% tax rate at the location of the purchaser's address, the state could send the purchaser a notice of $60 due. The purchaser could respond by contesting the amount (for which she could get information, if necessary, directly from the remote seller), by simply paying it, or by checking a box authorizing the state to contact her employer so that the tax would be included in wage-withholding over the quarter.

States might also provide for ongoing withholding on an estimated basis, to be automatically matched with information received from remote sellers. So a purchaser who regularly makes $500 in taxable remote purchases each quarter, might have an additional amount withheld and paid by her employer for an annual period. When she files her annual return, she would then obtain a refund or make an additional payment in the same way income taxes are "trued-up."

States would need to ensure that systems are in place that would make this approach functional, but those systems might be useful in the long term for performing audits and obtaining information necessary for other tax compliance purposes-including the enforcement of taxes on foreign sales or enforcement of taxes on digital goods sold entirely electronically. States would also need to put in place provisions to address claims taxpayers might have under the First Amendment, to protect their privacy and ensure that information remains secure and confidential.

War Is Over (If You Want It)

Is such an approach viable? Perhaps the question is better asked this way—if the resources spent recently trying to convince Congress to act had been spent instead on development of this information-based approach, would the solution already be in hand? Granted, it's not a perfect solution. But then, what is?

[1] 386 U.S. 753 (1967) (which was, in turn, an attempt to overturn *Miller Brothers Co. v. Maryland,* 347 U.S. 340 (1954)).

[2] For a discussion of the theory of whether Congress could have acted to authorize, nationally, a state tax related enforcement mechanism in the face of a due process bar on the states, see cases involving the federal PACT Act, including: *Gordon v. Holder*, 721 F.3d 638 (D.C. Cir. 2013) and *Red Earth LLC v. United States*, 657 F.3d 138 (2d Cir. 2011) (concluding that Congress may not be able to act); but see also *Musser's Inc. v. United States*, 1 F. Supp. 3d 308 (E.D. Pa. 2014) (concluding that a federal requirement to comply with state law is not subject to the same jurisdictional limits to which a state regulation would be subject).

[3] *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316-317 (1945).

[4] *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985).

[5] *Asahi v.Superior Court*, 480 U.S. 102 (1987).

[6] The item purchased was a pepperoni pizza with mushrooms and extra cheese from Pizza Hut. Kayla Webley, *A Brief History of Online Shopping,* TIME.com, July 16, 2010, http://content.time.com/time/business/article/0,8599,2004089,00.html (last visited May 15, 2015).

[7] *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

[8] *Id.* at 313 n. 6.

[9] *Id.* at 317.

[10] *Id.* at 318.

[11] See *About Us: The Streamlined Sales Tax Governing Board* (last visited April 12, 2016), http://www.streamlinedsalestax.org/index.php?page=About-Us.

[12] From the Wisconsin Dep't of Revenue Third-Party Sales and Use Tax Software Approved Vendor List, https://www.revenue.wi.gov/eserv/file/third.html (last visited March 30, 2016).

[13] See *Certified Service Providers,* http://www.streamlinedsalestax.org/index.php?page=Certified-Service-Providers (last visited April 12, 2016).

[14] S. 336/S. 743/H.R. 684, introduced in the 113th Congress and reintroduced in the Senate in the 114th Congress (S. 698).

[15] Colo. Rev. Stat. § 39-21-112(3.5)(c)(I).

[16] *Direct Mktg. Ass'n v. Huber*, No. 10-CV-01546-REB-CBS, 2012 WL 1079175 (D. Colo. Mar. 30, 2012), rev'd sub nom. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016).

[17] *Direct Mktg. Ass'n v. Brohl*, 735 F.3d 904 (10th Cir. 2013), rev'd, 135 S. Ct. 1124, 191 L. Ed. 2d 97 (2015).

[18] *Direct Mktg. Ass'n v. Brohl (DMA III),* 135 S. Ct. 1124 , 191 L. Ed. 2d 97 (2015).

[19] *Id.* at 1134-35.

[20] *Direct Mktg. Ass'n v. Brohl (DMA IV),* 814 F.3d 1129 (10th Cir. 2016).

[21] *Id.* at 1139.

[22] *Id.* at 1141.

[23] *Id.* at 1141-42.

[24] *Id.* at 1142-44.

[25] *Id.* at 1144.

[26] *Id.* at 1144-45.

[27] *Id.* at 1145-46.

[28] *Id.* at 1147-48.

[29] *Id.* at 1151.

[30] *Id.*

[31] There is even something called "Fantasy SCOTUS." See https://fantasyscotus.lexpredict.com.

[32] See Ala. Admin. Code R. 810-6-2-.90.0; South Dakota Senate Bill 106 (signed into law Mar. 22, 2016, effective May 1, 2016).

[33] Annalyn Censky, *Internet accounts for 4.7% of U.S. economy,* March 19, 2012, http://money.cnn.com/2012/03/19/news/economy/internet_economy/ (last visited May 12, 2015).

[34] *Id.*

[35] Allison Enright, *U.S. online retail sales will grow 57% by 2018,* May 12, 2014, https://www.internetretailer.com/2014/05/12/us-online-retail-sales-will-grow-57-2018> (last visited May 13, 2015).

[36] *Id.*

[37] *Quill* at 329 (White, J., concurring in part and dissenting in part).

[38] Matthew Townsend, *Millennials Shunning Malls Speeds Web Shopping Revolution,* June 25, 2014, http://www.bloomberg.com/news/articles/2014-06-25/millennials-shunning-malls-speeds-web-shopping-revolution (last visited May 15, 2015).

[39] About the Amazon Price Check App, http://www.amazon.com/gp/help/customer/display.html?nodeId=200777320 (last visited May 15, 2015).

[40] Charles Duhigg, *How Companies Learn Your Secrets,* The New York Times Magazine, Feb. 16, 2012, http://www.nytimes.com/2012/02/19/magazine/shopping-habits.html (last visited Feb. 5, 2016).

[41] Kathy M. Kristof, *Bought it out of state? You may owe "use tax,"* Los Angeles Times, Mar. 18, 2007, http://articles.latimes.com/2007/mar/18/business/fi-perfin18 (last visited February 5, 2016).

[42] *See* California Board of Equalization Use Tax Liability chart, https://www.boe.ca.gov/info/use_tax_table.html (last visited Feb. 5, 2016).

[43] *See* current Instructions for Form 540, California Resident Income Tax Return, https://www.ftb.ca.gov/forms/2015/15_540ins.pdf (last visited Feb. 5, 2016).

[44] *See* Nina Manzi, *Use Tax Collection on Income Tax Returns,* 65 State Tax Notes 23 (July 2, 2012).

[45] *See* California Legislative Analyst's Office, *Understanding California's Sales Tax,* May 5, 2015 ("Due to data limitations, it is difficult to estimate the 'tax gap'-the difference between taxes owed and taxes paid. Recent estimates indicate that California's use tax gap could be $1 billion or more.") http://www.lao.ca.gov/reports/2015/finance/sales-tax/understanding-sales-tax-050615.aspx (last visited Feb. 5, 2016).

[46] *See* Internal Revenue Service Tax Gap for Tax Year 2006-Overview, Jan. 6, 2012, http://www.irs.gov/pub/newsroom/overview_tax_gap_2006.pdf (last visited May 18, 2015).

[47] *See*IR-2012-4 (2012), http://www.irs.gov/uac/The-Tax-Gap (last visited Oct. 22, 2014).