INTERNET SALES TAXES FROM BORDERS TO AMAZON: HOW LONG BEFORE ALL OF YOUR PURCHASES ARE TAXED?

WALTER J. BAUDIER[1]

ABSTRACT

What so many internet consumers believe to be tax-free is actually subject to a state use tax. Faced with pressure from states that realize very little of the use tax owed, many online retailers, such as Wal-mart, "voluntarily" collect sales taxes from their customers. But a recent California Appeals Court decision, Borders Online v. State Board of Equalization, could mark a shift towards more prevalent, if not universal, taxation of internet retail.

INTRODUCTION

¶1 One would think that, with the expansion of online retail over the last ten years, a comprehensive and well-established system for collecting state sales taxes[2] on internet purchases would have emerged by now. However, legal, economic, and logistical barriers have deterred adoption of such a plan.

¶2 One major difficulty is that sales tax rates vary widely from state to state.[3] Even within a state, local jurisdictions often have the authority to impose additional sales and use taxes within a certain range of permissible rates.[4] To complicate matters even more, states—and sometimes even local

---

[1] J.D. candidate, 2007, Duke University School of Law; M.S. in Civil Engineering, 2003, Stanford University; B.S. in Computer Science, 2002, Stanford University. The author would like to thank Duke Law Professor Lawrence Zelenak for his helpful comments and suggestions.

[2] A sales tax is defined as "[a] tax imposed on the sale of goods and services." BLACK'S LAW DICTIONARY 1498-99 (8th ed. 2004). On the other hand, a use tax is "[a] tax imposed on the use of certain goods that are bought outside the taxing authority's jurisdiction." *Id* at 1499. For the purposes of this iBrief, the two terms are often used together when referring to a retailer's collecting a use tax from its out-of-state customers. From the perspective of the retailer, it is imposing a sales tax, but it is collecting the use tax owed by the consumer. This duty to collect is covered in greater detail in Section III.

[3] *See* Federation of Tax Administrators, *State Sales Tax Rates* (Jan. 1, 2005), http://www.taxadmin.org/fta/rate/sales.html.

[4] *See, e.g.,* Carole K. Strayhorn, *Window on State Government, Texas Taxes: Local Sales and Use Tax*, http://www.window.state.tx.us/taxinfo/local/city.html (last visited Dec. 20, 2005).

jurisdictions—have differing definitions of what is and is not subject to their sales and use taxes.[5] Imagine the logistical nightmare of forcing an online retailer to determine the applicable sales tax rates and tax classifications for every local jurisdiction of every state. The Supreme Court has recognized this difficulty, and has required that out-of-state sellers have a certain minimal association with a state in order for that state to constitutionally impose a collection obligation upon that vendor's sales.[6]

¶3 In May 2005, the California Court of Appeals, in *Borders Online, LLC v. State Board of Equalization*, narrowly construed the Supreme Court's constitutional requirements for taxation, holding that the online retailer had to collect sales taxes from its sales in California.[7] This iBrief argues that *Borders Online* achieved a desirable result. However, given the previous legal precedent, other courts might not reach the same result unless the Supreme Court updates its requirements for allowing state taxation of internet retailers. Some of the premises on which previous Supreme Court precedent rests are outdated; others were questionable even when the decisions were made. As e-commerce continues to expand,[8] courts in every state will increasingly face similar questions regarding the taxation of internet retail and will be constrained by precedent. Thus, the Supreme Court should revisit these issues, or, alternatively, Congress should adopt a national plan for taxation of internet and mail-order businesses.[9]

---

[5] *Compare* Mass. Dep't of Revenue, *A Guide to Sales and Use Tax*, 19, (2004) *with* N.Y. State Dep't of Tax. and Fin., *Sales Tax Clothing and Footwear Exemption Information*, http://www.tax.state.ny.us/sbc/st_exempt.htm (last visited Jan. 8, 2006).

[6] *See* Quill Corp. v. North Dakota, 504 U.S. 298, 307, 311 (1992) (discussing the constitutionality of applying the tax in reference to the Due Process and Commerce Clauses).

[7] *See* Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176, 188 (Cal. Ct. App. 2005).

[8] *See* The Census Bureau of the Dep't of Commerce, *U.S. Census Bureau News: Quarterly Retail E-Commerce Sales: 3rd Quarter 2005* (Nov. 22, 2005), http://www.census.gov/mrts/www/data/html/05Q3.html [hereinafter Census Report 1]; *see* The Census Bureau of the Dep't of Commerce, *U.S. Census Bureau News: Quarterly Retail E-Commerce Sales: 3rd Quarter 2005* (Nov. 28, 2001), http://www.census.gov/mrts/www/data/pdf/01Q3.pdf [hereinafter Census Report 2].

[9] Internet and mail-order businesses are similar in that both types of businesses might lack a physical presence in a particular state where its customers reside. Therefore, the legal issues faced in both cases are the same, or very similar. *See* Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction,* 24 VA. TAX REV. 109, 120-21 (2004).

I. LEGAL HISTORY OF THE IMPOSITION OF SALES TAXES ON OUT-OF-STATE RETAILERS

A. National Bellas Hess, Inc. v. Department of Revenue of Illinois

¶4 While the Internet, as a relatively recent development, often poses new legal quandaries, the constitutional issues concerning taxation of out-of-state retailers first arose in *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, a 1967 Supreme Court case involving a mail-order business.[10] In *Bellas Hess*, the Supreme Court held that a "'seller whose only connection with customers in the State is by common carrier or the United States mail' lacked the requisite minimum contacts" necessary for that state to constitutionally require the seller to collect and remit the state's sales tax.[11] While *Bellas Hess* has been superseded, the same principles and reluctance to burden interstate trade survives today.

B. Quill Corp. v. North Dakota

¶5 Twenty-five years after *Bellas Hess*, the Supreme Court, in *Quill Corp. v. North Dakota*, refused to agree with the North Dakota Supreme Court's decision that "tremendous social, economic, commercial, and legal innovations" had rendered *Bellas Hess* obsolete.[12] In *Quill,* North Dakota filed an action to require Quill to pay sales tax on all its sales made to North Dakota customers.[13] Quill was a corporation that sold mail-order office supplies, but had no offices, warehouses, or other particular connection to North Dakota other than the sales it made to North Dakota residents through the mail or common carriers from out-of-state locations.[14]

¶6 The Court considered two constitutional barriers to a state's ability to impose sales taxes on out-of-state retailers: the Due Process Clause and the Commerce Clause.[15] First, the Court analyzed the Due Process Clause's requirement of "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[16] In regard to the Due Process Clause, the Court asserted that the same standard for determining *in rem* or *in personam* jurisdiction[17] set forth in *International*

---

[10] Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill., 386 U.S. 753, 754 (1967).
[11] *Quill Corp.,* 504 U.S. at 301 (quoting *Bellas Hess,* 386 U.S. at 758).
[12] *Id.* at 301.
[13] *Id.* at 303.
[14] *Id.* at 302.
[15] *Id.* at 307, 311.
[16] *Id.* at 306.
[17] *In rem* jurisdiction is a "court's power to adjudicate the rights to a given piece of property, including the power to seize and hold it." BLACK'S LAW DICTIONARY 869 (8th ed. 2004). *In personam* jurisdiction, or "personal jurisdiction" is "a court's power to bring a person into its adjudicative process;

Shoe Co. v. Washington and its progeny[18] was applicable in determining a state's ability to tax.[19] In the case of most mail-order retailers who, like Quill, "engaged in continuous and widespread solicitation" with the forum state, there exists sufficient minimum contacts.[20]

¶7 The second constitutional requirement for taxing a corporation arises from the Commerce Clause, or more specifically, from the dormant Commerce Clause.[21] The dormant Commerce Clause requires that the seller have a "substantial nexus" with the taxing State, a requirement distinct from the minimum contacts requirement under the Due Process Clause.[22] Whereas the purpose for the minimum contacts requirement is that an individual have "notice" or "fair warning," the purpose for the substantial nexus requirement is to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce."[23] Worthy of note is that the Court suggested that the sheer impracticality of forcing an out-of-state vendor to reconcile its sales with tax liabilities "imposed by the Nation's 6,000- plus taxing jurisdictions" would violate the spirit of the dormant Commerce Clause by entangling the vendor in a "virtual welter of complicated obligations."[24]

¶8 Further, the Court classified the substantial nexus test, first pronounced in *Bellas Hess*, as a bright-line rule.[25] "Bright-line rule[s] in the area of sales and use taxes encourage[] settled expectations, and in doing so,

---

jurisdiction over a defendant's personal rights, rather than merely over property interests." *Id* at 870.

[18] Int'l Shoe Co. v. Washington*,* 326 U.S. 310, 316 (1945) (holding that the relevant inquiry for judicial jurisdiction is "whether a defendant had minimum contacts with the jurisdiction such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice") (internal quotations omitted); *see also* Burger King Corp. v. Rudzewicz*,* 471 U.S. 462, 476 (1985) (holding that a corporation may be subject to the State's jurisdiction if it "purposefully directed" itself of the economic benefits of the forum State).

[19] *Quill,* 504 U.S. at 306.

[20] *See id.* at 308.

[21] *Id.* at 305. The dormant Commerce Clause derives from established constitutional doctrine that contends that Congress's power to regulate interstate commerce under the Commerce Clause, which is actually within the text of the Constitution, has a "negative sweep"; essentially meaning an unspoken prohibition against any individual state's discriminating against or unduly burdening interstate commerce. *Id.* at 309, 312.

[22] *Id.* at 312.

[23] *Id.* at 312-13.

[24] *Id.* at 313 n.6 (quoting Nat'l Bellas Hess, Inc. v. Dep't of Revenue of Ill.*,* 386 U.S. 753, 759-60 (1967)).

[25] *Id.* at 317.

foster[] investment by businesses and individuals."[26] The Court then attributed the "dramatic growth" of the mail-order industry to reliance, at least in part, on this bright-line rule.[27]

II. THE BORDERS ONLINE DECISION

¶9 After *Quill,* the law appeared settled, but new technological developments along with the Internet boom have posed new questions for courts relying on the *Quill* decision. *Borders Online, LLC v. State Board of Equalization* is a California Court of Appeals decision that concerned Borders Group, a company that had partitioned its "brick-and-mortar" stores and its internet retail division into separate legal entities, Borders Books and Music ("Books and Music") and Borders Online ("Online").[28] "Online neither collected tax from its California purchasers nor paid sales or use taxes to the [state] for its sales to California purchasers during the disputed period."[29] Borders Group presumably structured its brick-and -mortar and online divisions in this way to avoid the imposition of state sales taxes on most of its internet sales since an online retailer that lacks a physical presence, including warehouses and the like, in one state would generally be free from that state's taxation.[30]

¶10 Unfortunately for Online, it maintained a cross-promotional relationship with Books and Music, allowing returns and exchanges of internet purchases from Online at the physical locations of Books and Music.[31] The court deemed this sufficient, considering the other connections between Online and Books and Music, to create an agency relationship between the two entities in California.[32] Because the agency relationship was "significantly associated" with the internet sales, the court held that Online had a sufficient nexus with California to satisfy the requirements of the dormant Commerce Clause as set out in *Quill.*[33]

¶11 The *Borders Online* decision, although relatively straightforward in its analysis, potentially heralds the beginning of a series of more difficult

---

[26] *Id.* at 315.
[27] *Id.*
[28] Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176, 178 (Cal. Ct. App. 2005).
[29] *Id.* at 179.
[30] Andrew W. Swain & Nathaniel T. Trelease, *Taxing Time for theInternet?*,15-DEC. BUS. L. TODAY 11, 11 (Dec. 2005).
[31] *Borders Online,* 29 Cal. Rptr. 3d at 183.
[32] *Id.* at 187-88. The court also found a "cross-selling synergy [that] was maintained by the use of similar logos, by the link to Borders' website from Online's website, and by the sharing of some market and financial data." *Id.* at 190.
[33] *Id.* at 188.

questions regarding taxation of internet retail. The decision gives states a tool to reach previously unreachable online retailers, such as Borders or Barnes & Noble, in their current formations; that much is clear.[34] Less clear is the future of sales taxes of those corporations if they re-organize their business entities to not allow refunds and exchanges at their physical brick-and-mortar locations; and less clear is the future taxability of online stores, such as Amazon.com, with a physical location—basically a warehouse and headquarters—in only one state.[35] Seemingly, stores such as these still manage to escape tax liability after the *Borders Online* decision.[36] The question becomes even more complicated since stores such as Amazon.com often involve themselves in co-promotions with other retailers, many of which have a physical nexus within different states.[37] Would such co-promotions be enough to create a nexus between Amazon.com and these other states, rendering Amazon.com subject to their taxing authority?[38]

III. ECONOMIC AND LEGAL CONCERNS REGARDING INTERNET SALES

A. Tax-exempt Internet Purchases are Economically Undesirable

¶12 While e-commerce sales account for only about 2.2 percent of total sales in the United States[39] and the tax losses due to internet sales might seemingly be insignificant, analysts estimate that state and local governments lost $15.5 billion in taxes in 2004 and that losses will escalate to $21.5 billion in 2008.[40] State governments "rel[ied] on sales taxes for approximately one-third (33.8%) of their total tax revenue" in 2003.[41] Estimates project that the percentage of state tax revenues lost from such

---

[34] Swain and Trelease, *supra* note 30, at 17. Barnes and Noble is simply an example of another company similarly situated.
[35] *Id.*
[36] *Id.*
[37] *Id.*
[38] *See id.*
[39] Census Report 1, *supra* note 8, at 2 (stating calculation for the third quarter of 2005).
[40] DONALD BRUCE & WILLIAM F. FOX, STATE AND LOCAL SALES TAX REVENUE LOSSES FROM E-COMMERCE: ESTIMATES AS OF JULY 2004 (The University of Tennessee Center for Business and Economic Research), 4 (2004), http://cber.bus.utk.edu/ecomm/Ecom0704.pdf.
[41] Steven Maguire, *State and Local Sales and Use Taxes and Internet Commerce,* CRS Report for Congress 1 (Jan., 2005), *available at* http://www.ipmall.info/hosted_resources/crs/RL31252_050128.pdf.

"tax-free" internet sales will only grow as e-commerce continues to develop.[42]

¶13 As state tax revenues gradually erode with increasing percentages of consumers purchasing goods on the Internet,[43] states will be faced with difficult alternatives, such as raising their sales tax rates, to maintain the same level of revenue. However, a corresponding increase in sales tax rates would further disadvantage traditional brick-and-mortar stores and would constitute a tax preference for internet retailers, as consumers will be more likely to buy from internet stores as tax rates increase.

¶14 Other considerations also caution against states merely raising their sales tax rates to compensate for their revenue short fall. From an efficiency standpoint, where an efficient tax is defined as "one that does not significantly distort consumer behavior," this tax would be inefficient since it would encourage consumers to buy online rather than in traditional brick-and-mortar locations for tax considerations as opposed to quality or price considerations.[44] From an equity standpoint, the freedom from taxation for internet retailers is equally undesirable, as a sales tax is a regressive tax that more heavily burdens low-income taxpayers.[45] Assuming that higher income taxpayers have greater access to the Internet, which would allow them greater opportunity to circumvent the sales tax,[46] this situation is as inequitable as it is inefficient. Finally, such a scheme has a "differential effect among states," where states relying more heavily on sales taxes would lose a disproportionate amount of revenue compared to other states that rely more heavily on personal income taxes.[47]

¶15 Interestingly enough, although states might not have the authority to collect sales taxes from internet-based retailers, they do have the authority to collect a corresponding use tax from consumers who purchase goods online.[48] However, collection of these use taxes has been virtually unenforceable and is done only at the volition of the taxpayer.[49] Some states, including New York and North Carolina, have succeeded to some degree in collecting these use taxes by including a mandatory use tax

---

[42] *See, e.g.,* Bruce & Fox, *supra* note 40, at 4.
[43] Maguire, *supra* note 41, at 5.
[44] *Id.* at 6-7.
[45] *Id.* at 7.
[46] *Id.*
[47] *Id.*
[48] Bradley W. Joondeph, *Rethinking the Role of the Dormant Commerce Clause in State Tax Jurisdiction,* 24 VA. TAX REV. 109, 110-11 (2004) (noting that states can levy use taxes on items purchased, but that the only effective way of collecting it is to have sellers collect it at the point of sale). For more information on sales and use taxes, see *supra* note 2.
[49] *Id.*

declaration on their state income tax forms.[50] As a result, a taxpayer paying no use tax must declare under penalty of perjury that he or she made no purchases subject to a use tax.[51]

B. Legal Concerns

¶16 The Internet Tax Freedom Act,[52] by its name, implies that internet retailers are not subject to sales taxes. However, the statute, enacted in 1998, imposes a moratorium until 2007 on collecting taxes on numerous internet-related services and on discriminatory taxation of e-commerce.[53] Neither of these moratoriums applies to traditional imposition of sales taxes on e-commerce.[54]

¶17 *Quill* reaffirmed the Due Process Clause requirement of minimum contacts, but in almost any case of internet retail, the retailer will have the requisite minimum contacts with a taxing State simply because that company has sought to do business there.[55] Therefore, the only impediment in front of ubiquitous taxation of internet retail is the dormant Commerce Clause requirement of substantial nexus.[56]

¶18 As previously suggested, the substantial nexus requirement, which at least one court has extended to corporations such as Borders Online and Barnes & Noble,[57] still might not reach other internet stores such as Amazon.com.[58] But the presence of recent technological developments suggests that *Quill* could now be overturned or simply no longer applies.

¶19 In *Quill*, the Court premised much of its application of the law on the fact that it would be logistically frustrating and counterproductive to force corporations to account for differences in the now over 7500 taxing jurisdictions.[59] In 1992, before the popularity of the Internet and before the ability to keep track of purchases and taxes via software requiring little

---

[50] New York State Dep't of Taxation and Finance, *Combined Instructions for Forms IT-150 and IT-201,* 65 (2005), *available at* http://www.tax.state.ny.us/pdf/2005/inc/it150_201i_65_73.pdf.
[51] *Id.*
[52] Internet Tax Freedom Act §§ 1101, 1103, 47 U.S.C.A. § 151 (West 2001).
[53] *Id.* § 1101(a).
[54] *Id.*
[55] Quill Corp. v. North Dakota*,* 504 U.S. 298, 308 (1992).
[56] *Id.* at 313.
[57] Borders Online, LLC v. State Bd. of Equalization, 29 Cal. Rptr. 3d 176, 183 (Cal. Ct. App. 2005).
[58] Swain and Trelease, *supra* note 30, at 17.
[59] *See Quill*, 504 U.S. at 313 n.6; *see also* Sean P. Nehill, *The Tax Man Cometh? An Argument for the Taxation of Online Purchases,* 13 COMMLAW CONSPECTUS 193, 208 (2004) (indicating that the 6000- plus taxing jurisdictions cited in *Quill* has now increased to 7500- plus taxing jurisdictions).

effort by the retailer, this assumption was much more persuasive than it is today. Development of software to track changes and differences in taxing jurisdictions[60] and to easily apply the applicable rate to goods would nullify the Court's assumption. The development and use of Turbo Tax is an example, to a smaller degree, of computer software's use in alleviating the complexities of not only the federal income tax, but also state income taxes.[61] With similar software designed to simplify collection of state sales taxes, there is little reason to believe that imposition of sales tax by destination states would impose such a burden on interstate commerce as to render that taxation unconstitutional.

¶20 Without an undue burden on interstate commerce, the remaining question becomes whether the imposition of a sales tax on out-of-state retailers is unconstitutional because states would be overreaching their authority by projecting their powers into another state and violating the Due Process Clause.[62] By analogy to *International Shoe*, however, since those retailers would have some minimum contacts with the forum state, it is not inapposite to subject those corporations to taxation for sales and shipments terminating in the taxing state.[63]

¶21 Thus, although the policy concerns of *Quill* were relevant at the time of the decision, there is reason to believe that the "tremendous social, economic, commercial, and legal innovations"[64] that resulted from the expansion of internet use have rendered the holding in *Quill* somewhat obsolete.

IV. POTENTIAL SOLUTIONS

A. A Simple Flat Tax

¶22 While some internet retailers have begun voluntarily collecting sales taxes,[65] a farther reaching plan might require Congressional action. Some small business owners propose a single nationwide flat tax on sales

---

[60] *See* Streamlined Sales Tax Project, *Technology* http://www.streamlinedsalestax.org/registration%20systems.htm [hereinafter SSTP]. The Streamlined Sales Tax Project is discussed in greater detail in the following section.

[61] For further information, see Turbo Tax Deluxe 2005, http://turbotax.intuit.com/commerce/catalog/product.jhtml?prodId=prod0000000000007994803 (last visited Jan. 8, 2006).

[62] *See* Joondeph, *supra* note 48, at 129.

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

[64] *See Quill*, 504 U.S. at 308 (quoting Heitkamp v. Quill Corp., 470 N.W. 2d 203, 208 (1991)).

[65] Nehill, *supra* note 59, at 208.

collectible by the state where the goods are used.[66] Such a solution is appealing for its simplicity and ease of use, but is ill-conceived because it would significantly undermine the taxing powers of individual states. For various reasons, different states wish to promote certain activities and often do so through tax incentives. The ability to do this would be significantly diminished if such a tax were imposed. Further, such a plan might be unconstitutional for violating federalism concerns, as the federal government would be usurping traditional state roles.

¶23 From an efficiency standpoint, the flat tax is more desirable than the absence of a tax, but there still remains at least some concern that the imposition of the tax will distort consumer behavior. This is because a flat tax would still encourage consumers in states with higher taxes than the flat rate to shop online for their goods. Conversely, in states with tax rates lower than the flat tax, the flat tax would have the reverse effect of encouraging consumers to shop within their state for their goods. From an equity standpoint, the flat tax would still burden lower income taxpayers as they might not have access to the Internet and would be unable to "shop around" for better tax rates.

B. The Streamlined Sales Tax Project: a Desirable Solution?

¶24 A better solution would leave current taxing jurisdictions in place and leave the taxing power vested in the individual states. A new proposal called the Streamlined Sales Tax Project ("SSTP") is endeavoring to develop computer software which would automatically calculate taxes for any given jurisdiction, thereby eliminating much of the burden on retailers' crossing multiple states' boundaries.[67] Some states have voluntarily elected to participate in the SSTP, and Congress has proposed bills, none of which have been passed, to nationalize the program.[68]

¶25 The SSTP, while somewhat successful, has encountered resistance for three major reasons. First, some argue that the SSTP would impede the development of e-commerce and should be forestalled until a later date.[69]

---

[66] Business Know-How, *Small Business Owners' Comments on Internet Sales Taxes* http://www.businessknowhow.com/money/internetvstax2.htm (last visited Jan. 8, 2006).

[67] SSTP, *supra* note 60. The SSTP is a multi-state project endeavoring to simplify administration of sales taxes across the states. Streamlined Sales Tax Project, About the Project, http://www.streamlinedsalestax.org/oprules.html (last visited Jan. 8, 2006). Forty-three states and the District of Columbia are participating in this project. Streamlined Sales Tax Project, Participating States, http://www.streamlinedsalestax.org/participatingstates.html (last visited Jan. 8, 2006).

[68] Nehill, *supra* note 59, at 208-09.

[69] *Id.* at 214.

Second, the SSTP, in its current iteration, would require simplification of the tax laws across many local and state jurisdictions.[70] And third, critics argue that small businesses would be at a severe disadvantage, as the SSTP software could cost as much as $25,000.[71]

¶26 Although these are valid concerns, Congress could mitigate, if not eliminate, them by enacting the SSTP into law with a few additional provisions for the development of SSTP software.[72] No convincing arguments have been advanced regarding why sales tax laws would need to be simplified, or at least why they would need to be greatly simplified. Although it would require a more labor-intensive procedure, software developers could develop a computer program to monitor and track all changes in sales tax laws, maintaining the current complexity of the 7500-plus taxing jurisdictions.[73] This would obviate the previously stated need for simplifying tax laws.[74] Congress could allocate federal funds in hiring a consultant to develop and maintain such a program and could then make the program available to the public. While there are no current cost estimates for the unsimplified version of this system, the additional tax revenue collected as a result of the adoption of the SSTP would more than offset any additional cost in developing and maintaining this software; and widespread, if not universal, adoption of this technology following a Congressional mandate would drive down the cost to each user. Further, Congress's subsidizing such a program follows a similar policy as is evidenced in the Internet Tax Freedom Act: to aid in developing uses for the Internet.[75]

¶27 Congressional funding of this program would also serve as a concession to small business owners who fear the prohibitive costs of the SSTP. The program could easily be designed to work as a "plug-in" to a variety of internet shopping baskets. Since any internet retailer must have some form of "checkout" system in place for completing transactions, it would not be overly burdensome to force those retailers to incorporate the "plug-in" into their scheme. While full compatibility with all systems

---

[70] *Id.* at 207.
[71] *Id.* at 217.
[72] While it is certainly conceivable that a solely state-driven initiative could accomplish the same goals, Congressional action might be necessary to achieve these goals in a more timely and efficient manner since not all of the states have joined in the SSTP endeavor. And for the economic reasons stated in Section III, there is a definite benefit to expediently enacting such a program.
[73] While no technical implementation details are offered, the author, as a computer scientist, knows this to be true.
[74] *See* Nehill, *supra* note 59, at 214.
[75] *See* Internet Tax Freedom Act §§ 1101, 1103, 47 U.S.C.A. § 151 (West 2001).

might be difficult to achieve, compatibility problems, on balance, do not create costs or problems nearly as great as the inequities or inefficiencies of the alternatives: the lack of a tax or a flat tax.

¶28 If the SSTP could maintain the current complexities in state sales tax schemes and deliver it to all internet retailers at low, or no, cost, then two of the major objections to the SSTP disappear. The only remaining one is the fear of impeding e-commerce. Given the expansion of e-commerce in the last five years,[76] that fear is mostly unjustifiable, especially since some retailers, such as Wal-Mart, Target, and Toys "R" Us, have already begun voluntarily collecting sales taxes and have been largely unaffected.[77] A small impediment, such as the SSTP, to the already developed and presently expanding state of e-commerce will have little or no effect on its further development. Balancing this fear with the countervailing economic inefficiency and inequity inherent in a system of tax-exempt internet purchases indicates that the benefits of a modified version of the SSTP would far outweigh any negative consequences.

CONCLUSION

¶29 From a policy standpoint, the court in *Borders Online* reached the correct result, but was constrained in doing so by precedent established for mail-order businesses. To achieve a more desirable outcome in all cases of internet retailers, courts should narrowly interpret restrictions on state taxation of out-of-state businesses in the context of internet retailers. Alternatively, Congress should adopt a more comprehensive internet sales tax program, addressing the difficulties that will become increasingly common with the expansion of e-commerce. The Streamlined Sales Tax Project, or a modified version thereof, is such a program that would alleviate many of the problems raised in taxation of internet businesses.

---

[76] *See* Census Report 1 and Census Report 2, *supra* note 8.
[77] Nehill, *supra* note 59, at 208.