# The Law's Long Arm

## The Taxation of Electronic Commerce

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Congress recently renewed the Internet Tax Freedom Act (ITFA or Act).[1] This is widely misperceived as exempting electronic commerce from state and local sales and use taxation. In fact, the Act is narrower in scope and does not modify traditional legal principles for establishing taxing jurisdiction over a non-domiciliary Internet-based remote vendor. A taxing jurisdiction may impose sale and use tax liability, and/or collection and reporting obligations, on a remote vendor with respect to its e-commerce transactions with the state's consumers only if the vendor has a physical presence in the state—only if the vendor has *nexus* with the jurisdiction. Determining whether a remote vendor has nexus is substantially complicated because of the nature of e-commerce and the growing prevalence of both online–online and online–offline joint ventures.

Issues of nexus and e-commerce taxation have never been as important as they are now. Incremental growth of a remote vendor, internally or through joint ventures, threatens to expose it to substantial new tax liabilities and compliance obligations. This is particularly so because fiscal pressure makes states become more aggressive in seeking to tax e-commerce. Failure to correctly identify the point at which tax collection obligations arise in the nation's approximately 7,500 taxing jurisdictions also potentially subjects a remote vendor to substantial penalties and interest. The effect on even a successful remote vendor could be devastating. It is therefore important that Internet-based vendors and their legal advisers give significant attention to these often overlooked issues.

### Sales and Use Taxes: A Primer

States generally impose a sales tax on the retail sale of tangible personal property and certain services in the state. Whether imposed on the vendor itself or its customers, vendors typically collect the tax from its customers at the time of sale. To ensure their taxing schemes are comprehensive, nearly all states impose a complementary "use tax" that purports to reach out-of-state sales of tangible personal property to a state's residents for use, storage or consumption in the state. Use taxes are designed to prevent the erosion of the states' tax bases when their residents make purchases in other states. Taxing jurisdictions generally rely on individual self-assessment for collection of the tax. Because states could not possibly audit all residents for use tax purposes, they must rely on remote vendors to collect and remit use taxes.

This ultimately depends on establishing nexus with a remote vendor. In the absence of nexus, it is conservatively estimated that $26 billion in sales and use taxes will go uncollected by the states and their political subdivisions.[2]

### The Internet Tax Freedom Act

The ITFA is frequently misconceived as having suspended nexus rules regarding purchases made over the Internet, thereby freeing Internet sales from sales and use tax. However, the Act is substantially narrower in scope and only reaches certain Internet-related activities. The Act does not modify the duty of a remote vendor with nexus in a state from collecting sales and use tax on sales made to customers in that state. But what constitutes nexus is undefined in the Act. Thus, vendors must resort to general case law.

Separately, the Act provides that taxing jurisdictions may not: (1) impose taxes on Internet access, unless such taxes were generally imposed and actually collected prior to October 1, 1998; or (2) impose multiple or discriminatory taxes on electronic commerce. The Act's definition of Internet access service does not include telecommunications services.[3]

The Act's prohibition of multiple and discriminatory taxation potentially affects remote vendors. This prohibition prevents a taxing jurisdiction from imposing a duty to collect sales or use taxes on (1) a remote vendor that does not have nexus with the jurisdiction in which the customer resides, or (2) an Internet service provider (ISP) as an agent providing the remote vendor a means to conduct sales. In other words, if a taxing jurisdiction does not have nexus with a remote vendor itself, the state cannot then try to impose the vendor's obligations on its ISP.

Arizona has enacted a counterpart act. Effective July 18, 2000, the state does not impose its transactions privilege tax on fees paid to an ISP[4] (like the Act, the state does not include telecommunications services in its definition of Internet access). In addition, Arizona's cities, towns and special districts cannot impose their local taxes on Internet access fees.[5]

### Nexus as a Constitutional Principle

The Dormant Commerce Clause[6] is the principal restraint on a taxing jurisdiction's efforts to establish nexus with a remote vendor. In the seminal 1992 case of *Quill Corp. v. North Dakota*,[7] the U.S. Supreme Court reaffirmed the longstanding rule that a taxing jurisdiction may establish nexus with a remote vendor only if the vendor is physically present in the jurisdiction. Although it seemingly established a formal rule, *Quill* largely left open the crucial inquiry of what level of physical presence is required for a jurisdiction to establish nexus.

In *Quill*, the remote vendor was a Delaware corporation that sold approximately $1 million worth of office supplies through direct-mail advertising to approximately 3,000 customers in North Dakota. Except for the presence of software that it licensed to its customers, the vendor did not have any property in the state. All of its products were delivered in North Dakota by common carriers. The court held that delivery of goods through a common carrier alone did not constitute a physical presence.

In *National Geographic Soc'y v. California Board of Equalization*,[8] a case that predates *Quill*, the U.S. Supreme Court held that a remote vendor's "continuous presence" in the state, which consisted of two offices, was sufficient to establish nexus. Still, the Court rejected the lower court's ruling that the "slightest presence" in state was sufficient to establish nexus.

Against this backdrop from *Quill*—requiring a physical presence—to *National Geographic*—establishing that continuous presence is sufficient, but the slightest presence is not—there is great room for factual variation, inconsistency and confusion. South Carolina, for example, has established nexus with a remote vendor through the in-state presence of intangible property, such as accounts receivable and royalty agreements.[9] And New York interprets *Quill* as requiring only "demonstrably more than a 'slightest presence,'" and has found that as few as 12 sales-related visits by personnel of a remote vendor over three years is sufficient to establish nexus.[10] Still, some states have extended the common carrier exclusion of *Quill* and refused to find nexus where the remote vendor has only an attenuated presence in the state. In Tennessee, for instance, the presence of a credit-card issuer's direct-mail flyers and plastic credit cards together are not sufficient to establish nexus.[11]

Often enough, whether a state has nexus with a remote vendor depends on the number of trips the vendor's personnel make to the state and their duration. Unfortunately for vendors, each state has its own counting standards, which are often difficult to apply. For example, in *Dep't of Revenue v. Share Int'l, Inc.*,[12] the Florida Supreme Court did not find nexus with a remote vendor whose sole employee was present in-state for only three days a year at a sales conference. In Kansas, 11 four-hour visits by a remote vendor's technicians to assist customers in installing equipment was not sufficient to establish nexus.[13] However, when a vendor's presence in a state is longer in time and greater in collateral activities, courts are more likely to find a physical presence.

Generally, Internet-based remote vendors that deliver their tangible products via common carrier and have no physical presence in a taxing jurisdiction are exempt from sales and use tax liability and collection obligations.[14] Furthermore, it is unlikely that general nexus principles can be extended to reach the download of intangible property (such as electronically transmitted software) over the Internet, in what is essentially the exchange of electrical charges over copper wiring. But states have become more creative in trying to reach Internet-based remote vendors by attributing the physical presence of offline business partners to their online partners.

## E-Commerce Joint Ventures

Many online vendors have joint ventures with offline and other online businesses. In the online–offline context, these "bricks-and-clicks" relationships try to leverage the efficiencies of online partners (clicks) with the established business capabilities of offline partners (bricks). In the online–online context, these joint ventures seek to leverage the advantages of each online partner for the benefit of both. For instance, Amazon.com, among other established online businesses, has established an "affiliates program" that seeks to have smaller Web sites direct business to Amazon's various units (books, music, movies, etc.) by placing its icon on the smaller (likely specialty) Web site. In exchange, the smaller site gets a small portion of the revenue it generates for Amazon through the placement of the icon.

The emerging problem for remote vendors is their joint ventures may be great enough to expose them to claims of nexus with all states in which its joint venturer operates.[15] If nexus is successfully established between a taxing jurisdiction and the remote vendor, the vendor may lose a competitive advantage in its market sector and have to undertake new compliance functions.[16]

In an important but limited step, California, Texas and New York have established that a Web page's presence on a server of an ISP located in the state is not sufficient to establish nexus with the state. However, the larger emerging issue is the ability of states to establish nexus with remote vendors on the basis of attributional nexus—imputing the physical in-state presence of a joint venturer or strategic partner to a remote vendor. Taxing jurisdictions use two primary theories of attributional nexus: alter ego and agency. Although e-commerce-specific case law is scarce, the general case law developed to address an earlier age's marketing innovation—catalog merchandising—is directly analogous and instructive.

## Nexus in Alter Ego Theory

In the context of nexus, alter ego theory is generally used by courts to attribute the formally separate activities of individuals to a business that derives commercial benefit from those activities. In the context of an e-commerce joint venture, general alter ego case law would have application where an offline joint venturer uses its outside sales representatives to market goods sold by the remote vendor.

In *Reader's Digest Assoc. v. Mahin*,[17] for instance, although the remote vendor did not have employees or property in the state of Illinois, its wholly owned subsidiary sold the remote vendor's merchandise door-to-door and sold advertising in its magazine on a contract basis. The parent-vendor also engaged in extensive in-state advertising on radio and television, and in local newspapers. In view of the extensive nature of these sales and marketing activities, and the fact that all lines of the remote vendor's business benefited from them, the court attributed the in-state presence of the sales force to the remote vendor, establishing its physical presence in the state. Although the case arose in the context of a parent–subsidiary relationship, the court focused instead on the extensive nature of the marketing activities.

Co-marketing activities are typically less extensive when an Internet-based remote vendor and offline business are not part of the same affiliated corporate group. However, less extensive marketing activities also may give rise to application of alter ego theory. In *Pearle Health Servs., Inc. v. Taylor*,[18] the physical presence of franchisees in a state were attributed to a remote vendor where it regularly sent representatives to the franchisees—not to solicit orders, but to ensure product quality and to display the vendor's new products. The court held that the sales activities provided a basis for the vendor's exploitation of the state's consumer market and was sufficient to establish nexus. Accordingly, the principle may have application where a remote vendor seeks to use an offline business partner's outside sales staff. This is common enough where the online remote vendor is encountering difficulty in establishing brand awareness and recognition through wholly online marketing activities.

## Nexus in Agency and Corporate Affiliation

Separation of business units into formally separate entities has been generally respected in the context of establishing nexus. *Bloomingdale's By Mail, Ltd. v. Commonwealth*[19] illustrates the point. There, neither the catalog unit nor the retail unit solicited or accepted orders for the other. In just two instances, the retail unit's stores accepted return merchandise from customers of the catalog unit. All other catalog orders were delivered by common carrier. Even though the units were jointly owned, the court respected their formal separation because the units conducted their operations separately.

Unlike the formal separation of business units, regardless of how an employment relationship is structured or characterized courts regularly attribute the activities of sales representatives to their employers. In *Scripto, Inc. v. Carson*,[20] the U.S. Supreme Court held that there is no constitutional significance between an employee and an independent contractor for purposes of establishing the physical presence of a vendor. Lower courts generally have extended this principle to encompass more innovatively structured marketing relationships,[21] and this line of cases has at least arguable application to affiliates programs and other innovative Internet marketing programs.

In *Scholastic Book Clubs, Inc. v. State*

*Board of Equalization*,[22] a remote vendor of books without physical property in the state sent its catalogs to teachers, who solicited orders from their students and collected payment. The teachers also received shipment of books from the vendor and distributed them to students. In exchange for these services from teachers, the vendor established a "premiums" program that allowed teachers to build up points that could be exchanged for personal or professional merchandise. The court attributed the activities of the teachers to the vendor, finding that the teachers essentially acted as distribution agents of the vendor, although they were not employees. In affiliates programs, the commercial relationship between online vendors is even clearer than in this case. This again highlights the wide and uncertain application of general case law in the e-commerce context.

One worrisome development for remote vendors is the recommendation of the Multistate Tax Commission, an advisory group of state revenue officials, that third-party warranty work on the vendor's goods be attributed to the remote vendor that contracts with the third party.[23] Arizona is a signatory of this recommendation. In effect, the rule, if adopted by the states, would attribute the physical presence of the third-party service provider to the remote venturer.

California has rejected this position where the remote vendor and third party performing the repair work do not have substantially similar ownership. But Illinois has established that the presence of an in-state sales manager, working solely from his personal residence, is alone sufficient to establish nexus with that manager's remote vendor employer.[24] If this position were widely adopted, it would threaten to expose remote vendors to nexus in every state from which an employee telecommutes, thus calling into question the viability of a new form of employment made possible by the Internet.

## Nexus in Arizona

Arizona imposes a 5.6 percent "transaction privilege tax" (often mistakenly called a sales tax) on the privilege of doing business in Arizona, and the tax is measured by the dollar volume of business a taxpayer does.[25] The tax is imposed on the vendor, not its customers, and the vendor is ultimately liable for it.[26] Despite this liability, the vendor can pass the tax burden to its customers.[27] Arizona also imposes a 5.6 percent complementary "excise," or use, tax on the "storage, use or consumption in [Arizona] of tangible personal property purchased from a retailer."[28] Arizona has not enacted a tax statute or promulgated any regulation that specifically addresses nexus for purposes of taxing e-commerce. But like many other taxing jurisdictions, Arizona generally establishes nexus through its definition of maintaining a business in the state.[29]

## Maintaining a Business in Arizona

Every remote vendor maintaining a business in Arizona that makes a sale to an Arizona customer of tangible personal property that will be stored, used or consumed in the state must collect and remit use tax on behalf of the customer.[30] Therefore, regardless of whether a remote vendor makes sales to Arizona customers using the Internet, a common carrier or the U.S. Postal Service, it has a duty under Arizona law to collect and remit the transaction tax if it maintains a business in the state. In fact, an Arizona customer is relieved from the responsibility of paying use tax on goods bought from a remote vendor if the vendor maintains a business in Arizona and, as a consequence of this contact, should have paid the state's transaction privilege tax on the sale.[31]

What constitutes maintaining a business in Arizona? Arizona's tax code broadly defines *business* to include all activities or acts, personal or corporate, engaged in or caused with the object of gain, benefit or advantage, either directly or indirectly, but not casual activities or sales.[32] Arizona's tax regulations provide that a vendor maintains a business in Arizona if, within the state, it operates from a "commercial location or point of distribution," solicits sales from a public place of business, or buys and sells tangible property.[33]

The tax regulations provide the following example of an out-of-state seller that maintains a business in Arizona and must remit the transfer privilege tax:

> An office equipment dealer maintains a sales office in Arizona, solicits business from customers in Arizona, and orders the equipment from its home office out of state. Although the seller maintains no stock of inventory in Arizona and the products are shipped directly to the purchaser, he is nevertheless considered to be engaging in business within the state for purposes of this regulation.[34]

The Arizona Department of Revenue (ADOR) has issued a brochure[35] that provides examples of activities that constitute maintaining a business in Arizona for purposes of nexus. Maintaining a business includes:

1. Having an employee in the state for more than two days per year
2. Owning or leasing real or personal property in Arizona
3. Maintaining an office or other place of business in Arizona
4. Delivering merchandise into Arizona using vehicles owned or leased by the out-of-state vendor
5. Having an independent contractor or other non-employee representative present in Arizona for more than two days per year for the purpose of establishing and maintaining a market for the taxpayer. Examples of establishing and maintaining a market include: (a) soliciting sales, (b) making repairs, (c) collecting delinquent accounts, (d) delivering property sold to customers, (e) installing products, (f) conducting training for employees or representatives of the company or customers, (g) resolving customer's complaints, (h) providing consulting services, or (i) soliciting, negotiating or entering into franchising agreements.

## Arizona Case Law for In-Bound Transactions

The state's appellate courts have explored the concept that merely establishing and maintaining a market in the state constitutes maintaining a business for purposes of creating nexus, thereby giving rise to the duty to collect and report tax on sales made to the state's residents.

In *Arizona Dep't of Revenue v. O'Connor*,[36] an Arizona customer, the law firm of O'Connor, Cavanagh, Anderson, Killingsworth & Beshears (O'Connor) purchased custom workstations from an out-of-state furniture manufacturer, Dunbar Furniture, Inc. The ADOR audited O'Connor and assessed it a use tax for the furniture it purchased from Dunbar. O'Connor challenged the assessment, arguing that, because Dunbar's activities in Arizona subjected it to the state's transaction privilege tax, Dunbar should have paid the tax. This would have the effect of exempting O'Connor from paying any corresponding use tax. The argument put the ADOR in the unusual position of arguing that a remote vendor did not have sufficient nexus with the state to warrant the imposition of a duty to remit the privilege tax. The ADOR's hearing officer affirmed the department's assessment.

O'Connor appealed to the State Board of Tax Appeals (SBTA), which reversed the ruling and held that O'Connor's purchases were exempt from use tax because Dunbar's activities in the state subjected it to the transaction privilege tax. The ADOR appealed this decision to the Arizona Tax Court, which reversed the SBTA and ruled in the department's favor. O'Connor appealed to the Court of Appeals, which decided in favor of the law firm.

Dunbar had an office in Dallas, Texas, and a furniture factory in Indiana. It did not maintain a sales office, showroom, customer service office, ordering center or warehouse in Arizona. Dunbar never registered with the state as a foreign corporation doing business in Arizona or with the ADOR for a transaction privilege tax license. Prior to Dunbar's transactions with O'Connor, it did not own any real or personal property in Arizona. Dunbar's sales market in Arizona was limited, consisting of only one retail customer, O'Connor. However, it made 17 sales to O'Connor. Dunbar brought several prototype workstations into the state for O'Connor's approval, and it delivered furniture to the law firm using trucks that it had rented for that purpose. Dunbar's employees unloaded the trucks when they arrived at the law firm, and its subcontractor installed the furniture. Dunbar had negotiated the terms of the subcontract in Phoenix. Dunbar responded to warranty complaints by dispatching employees to O'Connor's offices to make repairs, and the employees sometimes worked there a week or more. Title to the furniture passed to O'Connor in Arizona upon delivery, and the risk of the property's loss passed after the law firm was satisfied with the furniture's installation.

The appellate court held that these activities established that Dunbar maintained a market in the state and thus created sufficient nexus to subject it to Arizona's transaction privilege tax. Dunbar had numerous employees and agents in the state performing work on its behalf and physically possessed property (e.g., the prototype workstations and the inventory before title passed to O'Connor). Dunbar performed its activities in the state to satisfy the contractual obligations between it and O'Connor and to solicit additional sales from the law firm. Because the court found nexus and the ADOR had expressly waived its challenge to O'Connor's argument that Dunbar's privilege-tax liability relieved O'Connor of a corresponding use-tax liability, the court voided the assessment.

In *Arizona Dep't of Revenue v. Care Computer Sys., Inc.*,[37] the Care Computer Systems, Inc. (Care), a Washington corporation, sold and licensed computer hardware and software to nursing homes in Arizona. All sales transactions were consummated by mail or fax, and product was mailed to customers with title passing in Washington (F.O.B. origin). Care did not have any offices in Arizona, and it did not base any employees, independent contractors or agents in the state. Despite this, the ADOR claimed that there existed sufficient nexus between Care's business activities and the state to permit the ADOR to subject Care to a duty to pay the transaction privilege tax. Care challenged the ADOR's tax assessment. The SBTA believed that Care did not have nexus with Arizona and vacated the assessment. However, the Arizona Tax Court disagreed and reinstated it. Relying on its earlier decision in *O'Connor*, the Arizona Court of Appeals upheld the tax court's decision.

Though Care had one Arizona customer, it entered into 180 transactions with that customer. Care maintained post-sale ownership of property in Arizona through its computer and software leases and licenses. It routinely sent employees into the state to conduct customer training. It permanently assigned to cover Arizona a sales representative who, in a seven-year period, took seven one- to two-day trips to Arizona to pursue sales opportunities. These trips resulted in additional sales. Because the court in *Care Computer* believed that Care's activity in Arizona equaled or exceeded Dunbar's activities in *O'Connor*, it held that Care had nexus with the state and was therefore subject to the transfer privilege tax.

Joint ventures may expose remote vendors to claims of nexus with all states in which its joint venturer operates.

Though *O'Connor* and *Care Computer* shed some light on the parameters of Arizona's nexus rules, they do not provide a clear description of the rules' boundaries. It is unknown how far Arizona's broad nexus requirements might extend. For example, it is clear from the two cases that a remote vendor's physical presence would require it to pay the transaction privilege tax associated with any sales consummated during a trade show. It is not clear, however, if a remote vendor that is either a catalog merchandiser or an Internet-based seller attends a trade show in Arizona and the purpose of its attendance is to gain an economic benefit in Arizona, whether its presence could create nexus and a tax liability for all its catalog or Internet-originated sales. Making trips into Arizona to pursue business opportunities is one of the elements identified by the appellate court in *Care Computer* that persuaded it that the out-of-state seller had nexus with the state.

## Practical Considerations

Internet-based vendors are expanding rapidly, entering into new sales, marketing, supplier and distribution relationships with offline businesses nationwide. However, often small consideration is given to the impact those relationships will have on the ability of the vendor to avoid sales and use tax collection obligations, or liability for those taxes, in thousands of taxing jurisdictions. A remote vendor (or a local vendor that seeks to sell its goods over the Internet to other states) can take several practical steps to ensure minimum disruption of its business and financial operations from a later adverse ruling that sales and use tax collection obligations were applicable but not discharged.

**Gather Information.** At a minimum, someone within the vendor's organization should have responsibility for systematically collecting the relevant information. This should include identification of all state and local jurisdictions in which the vendor sells its products, as well as the vendor's offline and online suppliers, distributors, joint venturers, strategic partners, and agents, and their physical locations and operations.

**Legal Analysis.** Counsel should analyze the state of the law in all, or at least the major, taxing jurisdictions within which a remote operates or into which it sends it products. This analysis should center on these questions: How aggressive is the jurisdiction in establishing nexus with remote vendors? Does the jurisdiction impose collection obligations on vendors or rely on self-assessment by individual consumers? How likely are the vendor's customers to self-assess and report? How likely is there to be an audit?

Other questions include: If the vendor fails to collect and remit sales and use tax, what are the applicable penalties and interest charges? Does the jurisdiction allow the vendor to go back and collect sales and use tax from customers if it is later determined that the vendor should have done so? How will an adverse determination by one or several jurisdictions affect the client's financing or future merger prospects? Should these issues be disclosed during due diligence in a major corporate transaction?

**Competitive Analysis.** As part of its overall strategic planning, a remote vendor should factor into its competitive analysis the issues of sales and use tax collection and liability. Among the questions that should be asked are: How central is exemption from sales and use tax to the success of the business? Does it make sense to have closer ties to online and offline joint venturers than to avoid closer relationships because of tax concerns?

The remote vendor also should ask: If sales and use tax exemption are central to the success of the business, is there a way to restructure its operations and joint ventures to avoid establishing nexus with all or most jurisdictions outside the vendor's home jurisdiction? If a vendor has nexus in a state, does it make sense to pull out of the state entirely and not do business there? Is it feasible to leave a state where the vendor has physical presence, and then re-enter the state solely through electronic means?

## Conclusion

There are at least two major ironies in this field of law. First, the U.S. Supreme Court's failure to establish a single, uniform standard for establishing nexus may foster the economic Balkanization that its Dormant Commerce Clause jurisprudence has long sought to thwart. Thousands of taxing jurisdictions are bound to establish radically different nexus standards and collection rules, with the likely result that remote vendors will recoil from interstate commerce.

Second, just as technology, primarily the Internet, added new confusion to this area of the law, emerging technology-based alternatives eventually may help remote vendors address some of the bewildering array of compliance obligations, even if the technology cannot answer the foremost question of whether the remote vendor has nexus in the first instance.

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## endnotes

1. Pub. L. No. 105-277 (H.R. 4328), 122 Stat. 2681 (originally enacted Oct. 21, 1998); H.R. 1552, 107th Cong. (2001) (renewal). *See also Internet Tax Ban Extended,* WASH. POST (Nov. 16, 2001), at E02.
2. *See Internet Tax Ban Extended, supra* note 1.
3. ITFA, § 1101(e)(3)(D). The moratorium's application likely does not extend to a jurisdiction's taxation of fees paid to service providers providing high-speed access (e.g., digital subscriber line) or other access to an ISP, as these services generally are characterized as telecommunications services that occur in intrastate rather than in interstate commerce.
4. Ariz. Rev. Stat. § 42-5064.A.2.
5. *Id.* § 42-6004.A.9.
6. U.S. Const. art. I, § 8, cl. 3.
7. 504 U.S. 298 (1992), *reaffirming National Bellas Hess, Inc. v. Dept. of Rev. of Illinois,* 386 U.S. 753 (1967).
8. *National Geographic Soc'y v. California Board of Equalization*, 430 U.S. 551 (1977).

9. *Geoffrey, Inc. v. South Carolina Tax Comm.*, 437 S.E.2d 13 (S.C. 1993). *See also Kmart Properties, Inc. v. Taxation & Revenue Dep't of N.M.*, No. 21,140 (N.M. Ct. App. Nov. 27, 2001).
10. *Orvis Co., Inc. v. Tax Appeals Tribunal,* 612 N.Y.S.2d 503 (App. Div. 1994) (12 visits by remote vendors' personnel over three years sufficient for nexus); *Vermont Information Processing, Inc. v. Tax Appeals Tribunal,* 615 N.Y.S.2d 99 (App. Div. 1994) (40 visits over three years sufficient for nexus).
11. *J.C. Penney Natl. Bank v. Johnson,* 19 S.W.3d. 831 (Tenn. 1999).
12. *Dept. of Revenue v. Share International, Inc.*, 676 So.2d 1372 (Fla. 1996).
13. *In re Appeal of Intercard, Inc.,* 14 P.3d 1111 (Kan. 2000).
14. One complication may arise from the activities of some states to require the carrier itself either to collect the tax from the seller or pay the tax itself on goods it delivers. This is known commonly as "drop-shipment nexus." *See, e.g.,* Cal. Rev. & Tax. Code § 6007. The constitutionality of this form of tax collection obligation is uncertain.
15. This may be so even where not all of the activities of the offline partner are employed in its relationship with its online partner. *See National Geographic Soc'y*, 430 U.S. at 560. It may not be possible, in the context of a bricks-and-clicks relationship, to segregate those activities of an offline partner that a remote vendor wants to associate with and those it does not.
16. This combination of factors is so powerful that Amazon.com, a leading online seller of books, music, video recordings and other products, has filed suit against Barnes & Noble, a leading offline seller of similar merchandise, in an effort to have the retail outlets of Barnes & Noble attributed to its online unit, BN.com. If the lawsuit is successful, BN.com would lose is effective exemption from sales and use tax collection in all the states in which Barnes & Noble operates retail outlets.
17. 255 N.E.2d 458 (Ill. 1970).
18. 799 S.W.2d 655 (Tenn. 1990).
19. 567 A.2d 773 (Pa. Commw. Ct. 1989). *See also SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991).
20. 362 U.S. 207 (1960).
21. *See Comm'r of Revenue v. Jafra Cosemtics, Inc.*, 742 N.E.2d 54 (Mass. 2001) (remote vendor's in-state sales force, with no power to bind company, is sufficient to establish nexus); *Maryland Comptroller of the Treasury v. Furnitureland South, Inc.*, Maryland Cir. Ct., C-97-37872, Aug. 13, 1999 (remote vendor's use of delivery company that collected payment, made repairs to goods and returned damaged goods sufficient for nexus); New York Dept. of Taxation and Finance, TSB-A-01(8)S, Feb. 27, 2001 (remote vendor's use of manufacturing representative in-state sufficient to establish nexus).
22. 207 Cal. 3d 734 (Ct. App. 1989).
23. *See* MTC Nexus Program Bulletin 95-1 (Dec. 20, 1995).
24. Illinois Dept. of Revenue, Letter Ruling No. ST 01-0052-GIL (Mar. 2, 2001).
25. Ariz. Rev. Stat. § 42-5008(A), (C); Ariz. Admin. Code § 15-5-2002.
26. Ariz. Rev. Stat. §§ 42-5001(8), 42-5010(1).
27. *See, e.g.*, Private Taxpayer Ruling 95-010, Ariz. DOR (October 12, 1995).
28. Ariz. Rev. Stat. § 42-5155(A), (C); Ariz. Admin. Code § 15-5-2306.
29. Many cities impose their own local sales and use taxes. The state collects these taxes on behalf of some cities, called "program cities." Most of the larger cities, however, are "non-program" cities and collect their own local privilege tax (and have their own nexus rules).
30. Ariz. Rev. Stat. § 42-5160; Ariz. Admin. Code § 15-5-2307.
31. *Id.* §§ 42-5155.F., 42-5159.A.1, 42-5160; *see also Arizona Dep't of Revenue v. Care Computer Sys., Inc.*, 4 P.3d 469, 474-475 (Ariz. Ct. App. 2000).
32. Ariz. Rev. Stat. § 42-5001.1.
33. Ariz. Admin. Code § 15-5-2307.
34. *Id.*
35. *Nexus in Arizona* (ADOR Publication) (accessible at www.revenue.state.as.us/brochure/nexus.htm).
36. 963 P.2d 279 (Ariz. Ct. App. 1997).
37. 4 P.3d 469 (Ariz. Ct. App. 2000).