

2011

Online Retailers' Tax-Free Lunches

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Recommended Citation

George Mundstock, Online Retailers' Tax-Free Lunches, JOTWELL (September 15, 2011) (reviewing Michael Mazerov, Amazon's Arguments Against Collecting Sales Tax Do Not Withstand Scrutiny (2010)), <http://tax.jotwell.com/online-retailers-tax-free-lunches/>.

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Michael Mazerov, *Amazon's Arguments Against Collecting Sales Tax Do Not Withstand Scrutiny* (2010).



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The recent shuttering of Borders reminded us all of the huge competitive advantages that online merchants enjoy over brick-and-mortar retailers. Foremost among these advantages is the ability to exploit *Quill Corporation v. North Dakota*, 504 U.S. 298 (1992), and avoid collecting use tax on sales so as to achieve a practical 5 to 10% price advantage. *Quill* held that a state could require use tax collection only from a seller with a “physical presence” in the state. Michael Mazerov’s Amazon’s Arguments Against Collecting Sales Tax Do Not Withstand Scrutiny (2010) presents a complete analysis of the issues here. (An earlier version was published at 54 State Tax Notes 728 (2009).)

Mr. Mazerov carefully dissects all of the arguments against taxation using Amazon as a case study. He starts by looking at the argument that multistate tax collection would unduly burden interstate sellers. He points out that Amazon already collects tax in every state of the union but one for customers like Target. Amazon even collects value added taxes on foreign sales. Supporting U.S. states presumably would require only “the flip of a (software) switch.”

Amazon also argues that it would be unfair for it to pay tax to states that afford it no benefit. Mr. Mazerov describes how Amazon, through the artful use of subsidiaries and other techniques, does not collect tax even for many states where it has physical facilities and employees. And, more importantly, Amazon obviously benefits from the laws and government of every state in which it sells. In particular, Mr. Mazerov reminds us that Amazon is a book seller, so it certainly benefits from the education systems of market states.

Mr. Mazerov makes a particularly interesting point about how the current regime encourages perverse business location decisions. Amazon chose Washington State over California as its home so that it would not be required to collect California tax. In a *Quill* world, interstate sellers locate in small market states.

Now, states are pursuing interstate sellers by enacting so-called “Amazon” statutes, which give tax jurisdiction to the state if the seller has an “affiliate” in the state. (An affiliate is a business with a physical presence in the state that refers business to the multistate seller.) These statutes currently are being tested in the courts. Mr. Mazerov points out that Amazon statutes are some help here. But, they discourage using local affiliates. Amazon terminated its affiliates in California when the state enacted an Amazon statute. The best fix would be for the U.S. Congress finally to accept the Supreme Court’s invitation in *Quill* and legislate here. Borders’s bankruptcy shows what another 20 years of waiting will do.

Cite as: George Mundstock, *Online Retailers' Tax-Free Lunches*, JOTWELL (September 15, 2011) (reviewing Michael Mazerov, *Amazon's Arguments Against Collecting Sales Tax Do Not Withstand Scrutiny* (2010)), <http://tax.jotwell.com/online-retailers-tax-free-lunches/>.