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Illinois click-through nexus law unconstitutional

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In Brief

In a court order issued May 7, 2012, an Illinois circuit court rendered a recently enacted "click-through" nexus law unconstitutional. [*Performance Marketing Association, Inc. v. Hamer*, Ill. Cir. Ct., Dkt. No. 2011 CH 26333, (5/7/12)]

Background

Effective July 1, 2011, Illinois amended the definition of a "retailer maintaining a place of business in this State" for sales tax purposes to include "a retailer having a contract with a person located in this State under which the person, for a commission or other consideration based upon the sale of tangible personal property by the retailer, directly or indirectly refers potential customers to the retailer by a link on the person's Internet website." [P.A. 96-1544 (the "Act")] For a more detailed description of Illinois' "click-through" nexus law, please see our mySTO summary at the following [link](#).

The Performance Marketing Association filed a motion for summary judgment in circuit court on July 27, 2011, challenging provisions of the Act, alleging that the law violates the Commerce Clause and the Supremacy Clause of the U.S. Constitution.

Unconstitutional Under the Commerce Clause

The court found that the Act "fails the 'substantial nexus' requirement for state use tax collection and reporting obligations under the Commerce Clause" of the U.S. Constitution. The court held that this failure renders the provision "unenforceable."



Unconstitutional Under the Supremacy Clause

In addition, the court found that the Act is "preempted under the Supremacy Clause" of the U.S. Constitution "by virtue of the federal moratorium against discriminatory state taxes on electronic commerce." In so holding, the court relied on the Internet Tax Freedom Act, which prohibits a state from imposing "discriminatory taxes on electronic commerce."

PwC Observes

Michael Lovett, SALT Director with PwC in Chicago, offers the following observation.

The Department of Revenue has not yet indicated its next step regarding the Judge's Order. It could seek reconsideration back with the Circuit Court Judge, it could appeal the decision to the Illinois Appellate Court, or it could seek direct appeal to the Illinois Supreme Court. Since the court order did not enjoin the Department of Revenue from collecting the tax imposed by HB 3659, the Department may expect taxpayers to continue to collect and remit the tax to the state pending further reconsideration or appeal.

As for the Federal Internet Tax Freedom Act, keep in mind that Performance Marketing Association had originally filed suit in federal district court and then removed the matter and filed suit in Cook County Circuit Court. Although the Judge's Order stated that the Illinois law violated the Federal Internet Tax Freedom Act, it did not indicate how the Illinois tax was a "discriminatory tax on electronic commerce."

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