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CASENOTE

BORDERS ONLINE, LLC V. STATE BOARD OF EQUALIZATION: IT'S TIME FOR CONGRESS TO WEIGH THE POSSIBILITIES OF THIS CALIFORNIA DECISION

RONNIE E. WEBB†

I. INTRODUCTION

Online sales tax has been a controversial issue since the birth of e-commerce.¹ A variety of evolving issues regarding the potential effect of an online sales tax include: consumer demand for buying online;² the resultant amount of tax dollars that the government loses each year;³ the difficulty of running an online company that is susceptible to taxation in over 7,500 tax jurisdictions across the country;⁴ and tax fairness for brick-and-mortar merchants competing against online companies.⁵

Tax law is complicated. It can create barriers to effective operation for companies of all sizes. A company that conducts business in more than one state needs to know if and when it is responsible for collecting and paying state sales and use tax on its retail sales. Accordingly, corporations need to know how state tax laws will affect them. Feeling secure

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1. Keith Regan, *States Renew Online Sales Tax Push*, E-Commerce Times, <http://www.ecommercetimes.com/story/45882.html> (Sept. 1, 2005).

2. *Id.*

3. Douglas MacMillan, *Online Sales Tax: Time to Pay Up*, E-Commerce Times, <http://www.ecommercetimes.com/story/51630.html> (July 9, 2006).

4. *Id.*

5. Laura Gordon-Murnane, *E-Commerce and Internet Taxation: Issues, Organizations, and Findings*, <http://www.infotoday.com/searcher/jun00/gordon-murnane.htm> (Vol. 8, No. 6, June 2000).

about its tax position is essential to a corporation for tax and corporate planning issues that arise, including whether the company can be competitive.⁶ Also, state tax laws that are overly aggressive could ultimately cause a loss of revenue to the state when brick-and-mortar businesses relocate out-of-state for tax reasons.⁷ These issues have led to court decisions that attempt to define the contours of a business' obligation to pay state sales and use taxes. In May of 2005, a California appellate court tackled the issue of online sales taxation by formulating some rules for taxing online companies. That case was *Borders Online, LLC v. State Board of Equalization*.⁸

The *Borders Online* decision represents an attempt by a court to define when an online company is responsible to a state for collecting sales and use tax.⁹ The case presented two major issues. The first was whether Borders Online, LLC ("Borders Online") was subject to California's use tax. To determine whether the use tax was applicable, the court analyzed whether Borders, Inc. ("Borders").¹⁰ acted as an agent of Borders Online and whether Borders was "selling" for purposes of California Revenue and Tax Code § 6203(c)(2).¹¹ The second issue was whether

6. *Cabela's Hopes to Take on L.L. Bean in Maine without Taxing Remote Sales*, Sales and Use Tax Monitor, <http://www.straffordpub.com/> (Oct. 15, 2006) (concerning outdoor gear retailer, Cabela's, which wants to expand its brick-and-mortar operations to Maine; a plan Cabela's would undertake only if, by evading a physical nexus with Maine, it would not be liable for sales tax on catalog and Internet sales in the state).

7. *Id.* If a retail location in Maine creates a nexus, and Cabela's becomes responsible to pay sales tax on Internet sales, it would give the retailer an unfair competitive advantage over its competitor, L.L. Bean. L.L. Bean, who has a nexus with the state, is required to pay sales tax on Internet sales in Maine.

8. *Borders Online, LLC v. State Bd. of Equalization*, 29 Cal. Rptr. 3d 176 (1st Dist. 2005).

9. A use tax applies to interstate sales for the buyer's privilege of using property that would otherwise not be subject to state sales tax. The cases use the terms "sales tax" and "use tax" interchangeably. See *Borders Online, LLC*, 29 Cal. Rptr. 3d at 181. Cal. Rev. & Tax. Code § 6201 requires a buyer of tangible, personal property to pay a use tax to the State of California on the storage, use, or other consumption of the property in the state. Cal. Rev. & Tax. Code § 6202 requires the retailer to collect the tax, even though the purchaser pays the tax. If a retailer fails to collect the tax, it becomes indebted to the state for the full amount owed, pursuant to Cal. Rev. & Tax. Code § 6204. The use tax was assessed against Borders Online, LLC, pursuant to Cal. Rev. & Tax. Code § 6203 (c)(2). The appeals court held that the brick-and-mortar Borders retail store located in California acted as Borders Online's affiliated agent by accepting returns under the vendor's return policy: therefore, Borders acted as Borders Online agent within the meaning of Cal. Rev. & Tax. Code § 6203 (c)(2).

10. Borders, Inc. owns Borders Stores. Borders Group, Inc. owns Borders, Inc. and Borders Online, LLC. Borders Online, Inc. was a Delaware company. Borders Online, LLC is the successor in interest of Borders Online, Inc. Despite that Borders Online, LLC is referred to as a "seller," it meets the statutory requirements of a "retailer" for purposes of the opinion because it is selling its merchandise as a retail seller.

11. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 182.

there was a sufficient connection between the state of California and Borders Online in order for the state to impose a use tax on Borders Online's goods without offending the commerce clause.

The Court of Appeal of California determined that Borders Online was subject to California's use tax because Borders acted under Borders Online's authority as its agent, pursuant to California Revenue and Tax Code § 6203(c)(2). The court also held Borders Online was subject to California's use tax because Borders Online met the definition of "selling" for purposes of California Revenue and Tax Code § 6203(c)(2).¹² Borders' stores allowed customers who purchased merchandise from Borders Online to return or exchange merchandise to their brick-and-mortar stores located in California. The court held that while the existence of an agency relationship is generally a question of fact, the undisputed evidence in *Borders Online* was susceptible to only one inference—that Borders was acting as an agent of Borders Online.¹³ Furthermore, providing refunds and exchanges to Borders Online's customers at Borders' stores constituted "selling" by Borders, as defined in Cal. Rev. & Tax. Code § 6203(c)(2).¹⁴ Consequently, the court ruled that a sufficient nexus existed between Borders Online and the state of California, and thus, that the State could impose a use tax in accordance with the commerce clause.¹⁵

12. *Id.* at 187-188.

13. *Id.* at 183.

14. *Id.* at 187.

15. *Id.* at 192. The commerce clause has been defined as a clause that, by its own force, creates an area of trade that is free from state interference. *Am. Trucking Assn., Inc. v. Scheiner, Sec., Dept. of Rev. of Penn.*, 483 U.S. 266 (1987). In *American Trucking Assn., Inc.*, American, the appellants, challenged the constitutionality of two Pennsylvania statutes that imposed lump-sum, annual taxes on the operation of trucks. *Id.* at 273. The U.S. Supreme Court concluded that the imposition of a flat tax for a privilege that was several times more valuable to a local business than to its out-of-state competitors was discriminatory, and thus offended the commerce clause. *Id.* at 296. The Court held that no state can discriminate against interstate commerce by enacting a tax which provides a competitive advantage to local business; and that a state may not tax a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the state. *Id.* The Court further held that "[a] state tax that favors in-state business over out-of-state business for no other reason than the location of its business is prohibited by the commerce clause." *Id.* at 286. Finally, the Court stated that "[w]hen the measure of a tax bears no relationship to the taxpayers' presence or activities in a state," a court may properly conclude that the state is imposing an undue burden on interstate commerce. *Id.* at 291.

Furthermore, the most recent Supreme Court decision to define and apply the commerce clause was *American Trucking Assocs., Inc. and USF Holland, Inc. v. Michigan Public Service Commn.*, 545 U.S. 429 (2005). In that case, the petitioners were a trucking company alleging that, because the State of Michigan imposed a \$100 flat, annual fee on interstate carriers, the state violated the commerce clause by imposing an unconstitutional burden on interstate commerce. *Id.* at 432. The Court agreed that state regulations that unjustifiably discriminate on their face against out-of-state entities are unconstitutional.

The *Borders Online* court determined that certain factors were determinative in reaching this conclusion.¹⁶ Borders' stores' receipts were sometimes printed with "Visit us online at www.Borders.com," the employees were encouraged by Borders to refer customers to Borders Online when the merchandise was not available in the store, and the return policy by Borders was designed to increase market share in California.¹⁷ These facts showed that Borders' stores acted as a representative of Borders Online, for the purpose of establishing and maintaining a market share in California, which created a sufficient nexus with California in order for California to properly impose a use tax on Borders Online.¹⁸

The *Borders Online* case clarified that when a store accepts returns for an online affiliate, the online affiliate will be responsible for collecting use tax, at least in California. At this time, however, case law remains ambiguous on the issue. Indeed, case law has a long period of development ahead before clear rules emerge for determining when an online company must collect use tax.

This case note begins with a history of the case law that serves as the basis for determining when e-commerce should be taxed, the facts that drove Borders Online to file suit against California State Board of Equalization, and an overview of states' responses to determine and enforce taxation of online purchases. Next, this case note articulates the issues presented in *Borders Online, LLC v. State Bd. of Equalization*, analyzes the court's ruling, and evaluates the court's analysis. This approach makes it possible to comprehend the meaning of *Borders Online*, and the impact of this decision on the taxation of e-commerce transactions. Finally, in light of how the *Borders Online* decision affected the taxation of e-commerce, this case note proposes that Congress create legislation that provides internet companies and states with clear guidelines for when an online business is required to charge state sales or use tax.

II. SUMMARY OF FACTS AND BACKGROUND

In the *Declaration of Independence*, the drafters wrote that govern-

Id. at 433. The Supreme Court has held unconstitutional state regulations that impose burdens on interstate trade that are "clearly excessive in relation to the putative local benefits," state taxes that facially discriminate against interested business and offer competitive advantages to local business, and state statutes that have the "inevitable effect [of] threaten[ing] the free movement of commerce by placing a financial barrier around the State." *Id.* The Court held that Michigan's neutral, flat fee did not violate the commerce clause because it did not violate the above principles, and Michigan did not attempt to tax an activity that took place outside of the state. *Id.* at 434.

16. *Id.*

17. *Id.*

18. *Id.* at 191.

ments derive “their just Powers from the Consent of the Governed.”¹⁹ That position is consistent with the powerful notion of ‘no taxation without representation.’ Yet, as humorist Gerald Barzan recognized, “Taxation with representation ain’t so hot either.”²⁰ Few Americans, including American companies, desire to pay more taxes. However, taxes are of indispensable value: they provide revenue to federal, state, and local governments to support services, infrastructure, and resources for the public good.²¹ Without a substantial nexus to a state, when a state taxes a company, that company in effect pays taxation without representation. The requirement that a company have a “substantial nexus” with a state in order for that state to charge it taxes is a well established element of the dormant commerce clause.²²

A. HISTORY OF CASE LAW LEADING TO THE *BORDERS ONLINE* DECISION

In the 1967 decision of *National Bellas Hess, Inc. v. Department of Revenue*, the United States Supreme Court set out a physical presence or ‘nexus’ requirement in order for out of state merchants or vendors to collect use tax from a consumer.²³ The Court held that a state could require a vendor or merchant to collect sales or use tax if the company had a physical presence in the state.²⁴ If a merchant or vendor did not have a physical presence, the state could not require the business to collect taxes because of the complexity of different state and local tax systems,

19. *Declaration of Independence* [¶ 2] (1776).

20. Internal Revenue Service, *Tax Quotes*, <http://www.irs.gov/newsroom/article/0,,id=110483,00.html> (accessed Oct. 14, 2006).

21. Gordon-Murnane, *supra* n. 5.

22. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 188. Pursuant to § 3 of the Commerce Clause, in order for a state to impose a use tax on the seller’s goods, there must be a sufficient connection between the state and the retailer. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 188. Such an imposition is constitutional only if an activity maintains a substantial nexus with the taxing state. *Id.* This prevents states from placing unnecessary burdens on interstate commerce. *Id.* In the context of online sales, the crucial factor governing the existence of a nexus is whether the activities of the retailer in the state are significantly associated with the taxpayers’ ability to establish and maintain a market in that state. *Id.* However, establishing a nexus is not the sole requirement: A local tax on interstate business by an out-of-state entity does not violate the Commerce Clause if: (1) the tax applies to an activity with a sufficient nexus with the taxing jurisdiction, (2) the tax is fairly apportioned, (3) the tax does not discriminate against interstate commerce, and (4) the tax fairly relates to the services which the taxing jurisdiction provides. *American Trucking Assn., Inc.*, 483 U.S. at 277.

23. *Natl. Bellas Hess, Inc. v. Dept. of Revenue*, 386 U.S. 753 (1967) (involving a scenario in which the Illinois Department of Revenue, pursuant to an Illinois statute, brought action to recover use tax and penalties against National Bellas Hess, a mail order house that mailed catalogs twice a year, but had no advertisements, sales outlets, representatives, telephone listings, or solicitors in Illinois, for merchandise it sold to Illinois customers).

24. *Id.* at 758.

which the court held created a burden on interstate commerce.²⁵ In order to define what creates a substantial nexus for tax purposes, the U. S. Supreme Court states that “[this] Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail.”²⁶ Indeed, in *Nelson v. Sears, Roebuck & Co.*, the Court contrasted this situation sharply with one where the seller had local retail outlets and pointed out that “those other concerns . . . are not receiving benefits from Iowa for which it has the power to exact a price.”²⁷ Likewise, in *Miller Brothers Co. v. Maryland.*, the Court held that Maryland’s attempt to tax a Delaware retailer who had no retail outlets or sales solicitors within Maryland was unconstitutional.²⁸ In *Miller Bros.*, the retailer reached Maryland residents by advertisements placed in newspapers, on the radio, and in circulars mailed four times a year.²⁹ Although the court did note that the retailer made substantial sales to Maryland customers, which were delivered to them by its own trucks and drivers.³⁰ Relying on the precedents in *Nelson* and *Miller Bros.*, the Court in *Bellas Hess* reasoned that:

In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it.³¹

25. *Id.* at 759-760. The Court articulated concern for the complexity of different state and local tax systems by stating:

Indeed, it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved. And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. For if Illinois can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes. The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National’s interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose a fair share of the cost of the local government.

26. *Id.* at 758.

27. 312 U.S. 359, 365 (1941).

28. 347 U.S. 340 (1954).

29. *Id.* at 341-342.

30. *Id.*

31. *Natl. Bellas Hess, Inc.*, 386 U.S. at 758.

A 1977 case from California involved an issue similar to *Borders Online*, though in relation to mail order sales. That case, which reached the U.S. Supreme Court, was *National Geographic Society v. California Board of Equalization*.³² In this decision, the Court found a sufficient nexus between the National Geographic Society, a magazine publisher, and the State of California since the magazine publisher maintained two offices in California that solicited advertising copy sales for the magazine.³³ The court held specifically that a sufficient nexus existed with California because: 1) the seller's two offices solicited advertising copy sales, which aggregated about one million dollars annually; 2) the out-of-state seller ran no risk of double taxation, since the consumer's identification as a resident of the taxing state is self-evident, and the out-of-state seller became liable for the tax only by failing or refusing to collect it; and 3) the out-of-state seller's two advertising offices had the advantage of the same municipal services, such as fire and police protection, as they would have had if their activities had included assistance to the mail order operations that generated the use tax.³⁴ On the other hand, the Court conceded that not every out-of-state seller is constitutionally liable for use tax payment on merchandise sold to residents of a state because the relevant constitutional test to establish the requisite nexus is *not* whether the duty to collect the tax relates to the seller's activities within the state.³⁵ Rather, the appropriate test is whether the facts demonstrate some definite link or minimum connection between the state and the person it intends to tax.³⁶ The California Supreme Court, in its previous decision, went a step further and concluded that "the slightest presence" of the seller within the state established a sufficient nexus.³⁷ The U.S. Supreme Court disagreed with the California Supreme Court's previous conclusion that the "slightest presence" of the seller in a state establishes a sufficient nexus stating:

[o]ur affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional nexus. Appellant's maintenance of two offices in the state and solicitation by employees assigned to those offices of advertising copy in the range of \$1 million annually establish a much more substantial presence than the expression 'slightest presence' connotes.³⁸

32. *Natl. Geographic Soc. v. Cal. Bd. of Equalization*, 430 U.S. 551 (1977).

33. *Id.* at 562

34. *Id.*

35. *Id.* at 561 (emphasis added).

36. *Id.* at 561 (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344 (1954)).

37. *Natl. Geographic Soc. v. State Bd. of Equalization*, 16 Cal.3d 637, 644 (1976); *Natl. Geographic Soc.*, 430 U.S. at 555.

38. *Id.* at 556.

The United States Supreme Court reaffirmed the "substantial nexus" requirement in the frequently cited decision, *Quill Corp. v. North Dakota*.³⁹ *Quill* followed the reasoning in the *Bellas Hess* decision that a vendor, whose only connection with customers in a taxing state is through shipping merchandise via a common carrier or the United States Postal Service, lacks the sufficient nexus to the taxing state required by the commerce clause.⁴⁰ Justice White's dissent, however, argued that the decision in *National Bellas Hess, Inc.* should have been overruled.⁴¹ Justice White quoted the Court's previous holding in *National Geographic* that:

[t]he requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate some definite link, some minimum connection, between (the State and) the person . . . it seeks to tax.⁴²

Justice White concluded that

though legal certainty promotes business confidence, the mail-order business has grown exponentially despite the long line of our post-*Bellas Hess* precedents that signaled the demise of the physical-presence requirement. Moreover, the Court's seeming but inadequate justification of encouraging settled expectations in fact connotes a substantive economic decision to favor out-of-state direct marketers to the detriment of other retailers. By justifying the *Bellas Hess* rule in terms of "the mail-order industry's dramatic growth over the last quarter century," the Court is effectively imposing its own economic preferences in deciding this case. The Court's invitation to Congress to legislate in this area signals that its preferences are not immutable, but its approach is different from past instances in which we have deferred to state legislatures when they enacted tax obligations on the States' shares of interstate commerce.⁴³

Justice White did, however, agree with the majority's position that Congress can and should address "whether, when, and to what extent the states may burden interstate mail-order concerns with a duty to collect use taxes."⁴⁴ The Court summarized the rationale behind the decision:

39. *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) (holding a North Dakota use tax on sales by a mail order corporation of Delaware, with no physical presence in North Dakota, did not violate the due process clause of the Constitution because the corporation had purposefully directed activities at residents of North Dakota, but such tax did violate the commerce clause of the Constitution).

40. *Id.* at 311.

41. *Id.* at 331.

42. *Id.*

43. *Id.*

44. *Id.* at 317-318.

[A]lthough in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law. For these reasons, we disagree with the North Dakota Supreme Court's conclusion that the time has come to renounce the bright-line test of *Bellas Hess*. This aspect of our decision is made easier by the fact that the underlying issue is not only one that Congress may be better qualified to resolve, but also one that Congress has the ultimate power to resolve. No matter how we evaluate the burdens that use taxes impose on interstate commerce, Congress remains free to disagree with our conclusions. Indeed, in recent years Congress has considered legislation that would "overrule" the *Bellas Hess* rule. Its decision not to take action in this direction may, of course, have been dictated by respect for our holding in *Bellas Hess* that the Due Process Clause prohibits States from imposing such taxes, but today we have put that problem to rest.⁴⁵

B. FACTS IN THE *BORDERS ONLINE* CASE

Just as the mail-order business created opportunity, so has the invention of the Internet. The Internet has created opportunities for companies to efficiently market their products worldwide. It has created opportunities for consumers to shop and compare prices in a very efficient manner. It has created hope for states to increase their wealth via taxing Internet sales. Currently, however, states lose about \$20 billion each year to uncollected taxes from Internet sales.⁴⁶ In 1999, the state of California decided to rectify this shortfall.⁴⁷ Pursuant to its statutory authority to enforce the California Revenue and Tax Code, the California Board of Equalization advised Borders Online a Delaware company, that it was required to pay use tax on all its sales to California residents.⁴⁸

Borders Online sold more than \$1.5 million in merchandise to California consumers during the disputed period, from April 1, 1998 to September 30, 1999.⁴⁹ It sold books, book accessories, magazines, compact discs, videotapes, and other similar items over the Internet.⁵⁰ The company had no employees, property, leaseholds, or bank accounts in Cali-

45. *Id.* (internal citations omitted).

46. Douglas MacMillan, *Online Sales Tax: Time to Pay Up*, <http://www.ecommerce-times.com/story/51630.html> (July 9, 2006).

47. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 180.

48. *Id.*

49. *Id.* at 178.

50. *Id.* at 179.

fornia.⁵¹ Borders Online collected no use or sales tax from its California customers and paid no taxes to the state of California for its sales to California residents during the relevant tax period.⁵²

Borders operated Borders' retail stores throughout California and other states and its merchandise was comparable to Borders Online's merchandise.⁵³ The Borders' stores' printed receipts sometimes contained the phrase "visit us online at www.Borders.com," Borders' employees were encouraged to refer store customers to Borders Online, and Borders Online's Web site contained a link to Borders' store Web site, www.bordersstore.com.⁵⁴ Moreover, it was clearly posted on Borders Online's Web site that its customers could return items purchased online to any Borders' store within thirty days of the date the item was shipped.⁵⁵ Borders' stores returned those items to their own inventory and the stores did not charge Borders Online for accepting returns.⁵⁶

Corporate similarities existed as well. The same holding company owned both Borders Online and Borders.⁵⁷ Two people on Borders' board of directors were on Borders Online's board of directors.⁵⁸ Borders and Borders Online shared a similar logo and some financial and market data, but did not intermingle corporate assets.⁵⁹ The two companies filed their tax returns on the combined report basis.⁶⁰

In July of 1999, the California Board of Equalization ("Board") informed Borders Online that it was required to collect and remit use taxes on all sales to California residents because it had an affiliate, Borders, acting as its agent in California.⁶¹ According to the Board, Borders Online was a retailer pursuant to California Revenue & Tax Code § 6203(c)(2), which defines a retailer engaged in business in California as "[a]ny retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property."⁶² The Board held that Borders Online owed tax because Borders was "acting as an agent by accepting return merchandise on behalf of [Borders Online] as defined in [the company's] Web site re-

51. *Id.*

52. *Id.*

53. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 179.

54. *Id.*

55. *Id.*

56. *Id.* at 179-180.

57. *Id.* at 179.

58. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 179.

59. *Id.*

60. *Id.*

61. *Id.* at 180.

62. *Id.*

turn policy,” and thereby engaged in business in California.⁶³ The Board issued a notice of determination to Borders Online on January 27, 2000, for unpaid taxes, plus interest and penalties, and Borders Online filed a petition to the Board for redetermination, which was denied in a memorandum opinion.⁶⁴ In this opinion, the Board determined that Borders Online owed tax because Borders was Borders Online’s authorized representative in California for the purpose of accepting returns from Border Online’s California customers and the acceptance of returns constituted “selling” under California Revenue and Tax Code § 6203(c)(2).⁶⁵ The Board reasoned that Borders Online’s return policy was used to induce customers in California to make online purchases they normally would not make.⁶⁶ Thus, its return policy brought Borders Online within the definition of “selling” in section 6203.⁶⁷ The Board also determined that Borders Online had a sufficient physical presence in the state to satisfy the commerce clause of the United States Constitution.⁶⁸ Even though Borders Online removed its return policy from its Web site, the Board continued to consider Borders Online a retailer in California⁶⁹ and determined that Borders Online owed \$167,667.78 in taxes.⁷⁰ Borders Online paid the full amount and timely submitted a claim for refund, which the Board denied.⁷¹

Subsequently, Borders Online exhausted normal administrative remedies and filed a complaint in San Francisco Superior Court seeking a refund.⁷² Borders Online based its claim for a refund on the grounds that it was not a California retailer and was not required to pay tax under California state law.⁷³ Furthermore, Borders Online claimed that the commerce clause prohibited California from imposing taxes.⁷⁴ The San Francisco Superior Court granted summary judgment in favor of the Board, and held that: 1) Borders Online’s return policy caused it to be covered by California Revenue and Tax Code § 6203(c)(2); 2) the tax did not violate the commerce clause; and 3) there was a “substantial nexus”

63. *Id.*

64. *Id.* at 179; *In the Matter of the Petn. for Redetermination Under the Sales and Use Tax Law of: Borders Online, Inc.*, Cal. Tax. Rptr. (CCH) P 403-91 at p. 29,974.

65. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 179.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.* at 179-180. The court noted that the figure is based on California sales which increased each quarter during the disputed period of the second quarter of 1998 to the third quarter of 1999.

71. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 180.

72. *Id.*

73. *Id.*

74. *Id.*

between Borders Online and the State of California even though Borders Online did not post its return policy on its website during the disputed period.⁷⁵ Borders Online appealed to the Court of Appeal of California.⁷⁶

III. COURT'S DISPOSITION AND ANALYSIS

Borders Online was the first case since *Quill* that dealt with taxation of catalog sales, and the application of the commerce clause analysis to taxation of online sales.⁷⁷ Even though catalog sales are similar to internet sales, *Borders Online* was a chance for the court to look specifically at the complex issue of internet sales taxation.

A. WAS BORDERS ONLINE, LLC SUBJECT TO CALIFORNIA'S USE TAX?

The first issue the Court of Appeal of California decided was whether Borders Online was subject to California's use tax.⁷⁸ In deciding this issue, the court analyzed whether Borders acted under Borders Online's authority, as its agent, and whether Borders Online was "selling" for purposes of California Revenue and Tax Code § 6203(c)(2).⁷⁹ The court concluded that Borders Online was subject to California's use tax.⁸⁰

The court began its analysis by reviewing the California Tax Code ("Code").⁸¹ Pursuant to California Revenue and Tax Code § 6203,⁸² Cali-

75. *Id.*

76. *Id.* at 181.

77. *Quill Corp.*, 504 U.S. at 301-302.

78. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 181.

79. *Id.* at 182.

80. *Id.* at 187-188 (noting that the holding was based on the decision of two issues: first, the court concluded that Borders Inc. acted as Borders Online's agent, and second the court held that the activities of Borders Inc. constituted "selling" pursuant to the California Tax Code).

81. *Id.* at 181.

82. Cal. Rev. & Tax. Code § 6203 (2007).

§ 6203 STATES, IN PART:

(a) Except as provided by Sections 6292 and 6293, every retailer engaged in business in this state and making sales of tangible personal property for storage, use, or other consumption in this state, not exempted under Chapter 3.5 (commencing with Section 6271) or Chapter 4 (commencing with Section 6351), shall, at the time of making the sales or, if the storage, use, or other consumption of the tangible personal property is not then taxable hereunder, at the time the storage, use, or other consumption becomes taxable, collect the tax from the purchaser and give to the purchaser a receipt therefor in the manner and form prescribed by the board.

(b) As respects leases constituting sales of tangible personal property, the tax shall be collected from the lessee at the time amounts are paid by the lessee under the lease.

(c) "Retailer engaged in business in this state" as used in this section and Section 6202 means and includes any of the following:

ifornia imposes a use tax “on the storage, use, or other consumption in this state of tangible personal property purchased from any retailer. . . for storage, use, or other consumption in this state.”⁸³ California places the burden on the retailer to collect the tax. If the retailer fails to collect a tax that is due under the Code, the retailer, not the consumer, becomes indebted to the state for the amount owed.⁸⁴

Both parties agreed that section 6203(c)(2) governed the *Borders Online* case.⁸⁵ However, the parties disagreed over whether the statute applied to Borders Online.⁸⁶ The statute requires a “representative” or “agent” of the retailer to have a physical presence in California.⁸⁷ Additionally, the statute requires the agent to act “under the authority of” the retailer for the purpose of “selling” personal property.⁸⁸ Borders Online conceded that it was a “retailer” under the statute.⁸⁹

1. *Did Borders Act as an Agent of Borders Online?*

In deciding whether Borders Online was required to collect use tax under the Code, the court first had to decide whether Borders acted under Borders Online’s authority as its agent.⁹⁰ The trial court analyzed three facts to answer this question.⁹¹ First, Borders’ stores in California accepted returns and provided exchanges, store credits, or refunds to consumers.⁹² Second, Borders’ stores encouraged its store employees to refer customers to Borders Online.⁹³ Third, the sentence “Visit us online at www.Borders.com” was sometimes printed on receipts from Borders.⁹⁴ The website, however, was for Borders Online and not the Borders’ retail

(1) Any retailer maintaining, occupying, or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business.

(2) Any retailer having any representative, agent, salesperson, canvasser, independent contractor, or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering, installing, assembling, or the taking of orders for any tangible personal property.

83. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 182 n. 3 (quoting Cal. Rev. & Tax Code §6203(a) (Lexis 2007)).

84. *Id.* at 182.

85. *Id.*; Cal. Rev. & Tax Code §6203(c) (Lexis 2007) (defining retailer as “engaged in business in this state”).

86. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 182.

87. *Id.* at 180; Cal. Rev. & Tax Code §6203(c)(2) (Lexis 2007).

88. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 180; Cal. Rev. & Tax Code §6203(c)(2) (Lexis 2007).

89. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 182.

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.*

stores.⁹⁵ The trial court concluded that these facts were sufficient to create an agency relationship between Borders, Inc. and Borders Online, LLC.⁹⁶

The Court of Appeal of California held that the trial court was correct in its decision.⁹⁷ Reviewing on appeal the trial court's decision to grant summary judgment, the court acknowledged that whether or not an agency relationship existed was usually a question of fact, normally surviving summary judgment motions.⁹⁸ However, the court acknowledged that summary judgment may still be granted on this question of fact if only a single inference can be drawn from the facts.⁹⁹ The court concluded the only inference from the facts was that Borders was Borders Online's agent.¹⁰⁰ For example, Borders Online disclosed on its website that Borders' stores were authorized to accept returns on purchases made online.¹⁰¹ The court reasoned that when Borders' stores accepted the merchandise purchased from Borders Online in exchange for a refund, exchange, or store credit, Borders' stores, and therefore Borders became Borders Online's agent or representative.¹⁰²

In its appeal, Borders Online raised several issues on the question of agency. First, it claimed that the trial court was incorrect in finding that Borders was Borders Online's agent because it failed to apply California's "four factor test."¹⁰³ According to the test, an agency relationship existed only if: "1) the agent has power to alter legal relationships of the principal; 2) the agent acted as the fiduciary of the principal; 3) the principal can control the agent; and 4) the agent consents to act as the principal's agent."¹⁰⁴

In response to Borders Online's argument, the court noted that courts normally do consider the four factors when determining agency relationships.¹⁰⁵ However, the court also noted that there is no actual "bright line" four factor test that the court must use.¹⁰⁶ Borders Online cited to many cases applying this test, however, the court recognized that these cases presented different factual situations and the courts did not

95. *Id.* at 183.

96. *Id.* at 182.

97. *Id.* at 186-187.

98. *Id.* at 182.

99. *Id.* (citing *Violette v. Shoup*, 16 Cal. App. 4th 611, 619 (1st Dist. 1993)).

100. *Id.*

101. *Id.* at 183.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

always consider all four factors.¹⁰⁷ Moreover, the court noted that “Online likewise relies on cases in its analysis of the fiduciary duty ‘factor’ that do not reference such a four-factor test. Most of these cases were not decided in the context of determining agency and thus are inapposite.”¹⁰⁸ Therefore, the court of appeal concluded the trial court did not err in disregarding the four factor test.¹⁰⁹

Borders Online also claimed it had no control over Borders’ actions to implement the return policy because there was no written agreement between the parties.¹¹⁰ Rejecting this claim, the court held that the agency relationship may be implied based on the conduct of the parties and the circumstances of the relationship.¹¹¹ Furthermore, agency may be created by ratification.¹¹² Therefore, Borders Online’s claim that it had no subjective belief of the agency relationship was immaterial because the conduct of Borders in accepting the merchandise was enough to create an agency relationship.¹¹³ Thus, the court concluded that Borders, Inc. acted as Borders Online, LLC’s agent pursuant to California Revenue and Tax Code § 6203(c)(2).¹¹⁴

2. *Did Borders’ Actions Constitute “Selling”?*

After concluding that Borders was Borders Online’s agent, the court considered the second sub-issue required to determine whether Borders Online owed use tax: whether Borders was “selling” for purposes of the California Revenue and Tax Code § 6203(c)(2).¹¹⁵ The State Board of

107. *Id.* (citing *Michelson v. Hamada*, 29 Cal. App. 4th 1566, 1580 (2nd Dist. 1994)) (finding written agreements regarding billing and collection services created agency relationship between two doctors); *Violette*, *supra* n. 99, at 620 (finding no agency relationship created between social acquaintances merely because one made suggestion to another); *St. Paul Ins. Co. v. Indus. Underwriters Ins. Co.*, 214 Cal. App. 3d 117, 123 (5th Dist. 1989) (finding no agency relationship created when driver took car for a test drive); *Alvarez v. Felker Mfg. Co.*, 230 Cal. App. 2d 987, 999-1000 (1st Dist. 1964) (finding relationship at issue was that of buyer-seller).

108. *Id.* at 183 n. 5. (citing *Comm. on Children’s TV, Inc. v. Gen. Foods Corp.*, 35 Cal.3d 197, 222 (Cal. 1983) (holding buyer and seller not ordinarily in fiduciary relationship); *Estate of Sanders*, 40 Cal.3d 607, 616-617 (Cal. 1985) (holding executor of estate has fiduciary relationship with people who have interest in estate); *Barbara A. v. John G.*, 145 Cal. App. 3d 369, 382 (1st Dist. 1983) (deciding whether attorney who impregnates client was acting as a fiduciary in personal relations with client); *Am. Airlines, Inc. v. Sheppard, Mullin, Richter & Hampton*, 96 Cal. App. 4th 1017, 1034-1035 (2nd Dist. 2002) (finding attorney violated fiduciary relationship by acting contrary to client’s interests).

109. *Id.* at 183.

110. *Id.* at 184.

111. *Id.* (citing *Scholastic v. State Bd. of Equalization*, 207 Cal. App. 3d 734, 736-738 (1st Dist. 1989)).

112. *Id.* (citing *Scholastic*, 207 Cal. App. 3d at 736-738).

113. *Id.*

114. *Id.*

115. *Id.* at 185.

Equalization argued successfully at the trial court level that Borders Online engaged in "selling," as defined by the code, because it accepted returns and exchanges on behalf of Borders Online's customers.¹¹⁶

In their arguments, Borders Online and the State Board of Equalization offered separate definitions of the term "selling."¹¹⁷ Borders Online asserted that the term should be narrowly defined to mean "making a sales transaction."¹¹⁸ Borders Online argued that at the very least, a sale would only exist if an order was taken and the product was delivered to the customer.¹¹⁹ Conversely, the Board reasoned:

When out-of-state retailers that make offers of sale to potential customers in California authorize in-state representatives to take returns, these retailers acknowledge that the taking of returns is an integral part of their selling efforts. Such an acknowledgement comports with common sense because the provision of the convenient and trustworthy return procedures can be crucial to an out-of-state retailer's ability to make sales. This is especially evident in the realm of e-commerce.¹²⁰

Deferring to the administrative agency charged with enforcing the statute,¹²¹ the court looked to the thoroughness of the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all the factors which gave the agency the power to persuade.¹²² As a result of its analysis, the court found persuasive the Board's interpretation of the term "selling."¹²³

Using the state agency's definition, the court held that Borders Online was "selling" for purposes of the code and found Borders Online's return policy induced sales.¹²⁴ The court reasoned that Borders Online created an avenue for returning merchandise to a local retailer and motivated consumers to purchase from Borders Online rather than purchase from another online retailer with no presence in California.¹²⁵ Although the Board of Equalization had the burden to prove Borders Online's return policy was implemented to sell goods in California, the Board contended, and the court agreed, that it was not required to prove the consumer's motives, only Borders Online's intent to increase its sales by implementing the policy.¹²⁶ Since the only logical inference was that the

116. *Id.*; Cal. Rev. & Tax Code §6203 (c)(2) (Lexis 2007).

117. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 185.

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.* (citing *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1 (1998)).

122. *Id.* at 185-86 (citing *Yamaha Corp. of Am. v. State Bd. of Equalization*, 19 Cal. 4th 1, 14-15 (1998) (quoting *Skidmore v. Swift & Co.* 323 U.S. 134, 140 (1944))).

123. *Id.* at 186.

124. *Id.*

125. *Id.*

126. *Id.* (citing Cal. Rev. & Tax Code § 6203(c)(2) (Lexis 2007)).

policy was created to maximize sales, not to maximize returns, the Board of Equalization succeeded in proving its prima facie case.¹²⁷ The burden, thereafter, shifted to Borders Online to present evidence to the contrary, which it failed to do.¹²⁸ Instead, Borders Online argued that the definition of “selling” determined by the Board was overly broad and incorrectly encompassed Borders Online’s actions.¹²⁹

Ultimately, the facts showed that Borders’ and Borders Online’s intent was to increase sales.¹³⁰ Documents presented in discovery described Borders Online as an “extension” of Borders’ stores and explained the need for cross-selling to increase sales.¹³¹ These documents further explained that Borders’ stores needed to refer customers to Borders Online or lose market share to competitors such as Amazon.com or Barnes & Noble’s online store at www.barnesandnoble.com.¹³² Even though only 5% of customers who visited the site actually made a purchase, the document asserted that 100% of the visitors would see the logo and would keep the Borders brand in their mind, thereby increasing Borders’ overall market share.¹³³ The court concluded that Borders Online’s policy promoted attractiveness, convenience, and trustworthiness, which was integral to its sales and should be considered “selling” pursuant to California Revenue and Tax Code § 6203(c)(2).¹³⁴

B. WAS CALIFORNIA’S USE TAX CONSTITUTIONAL?

Once the court determined that Borders Online was subject to California’s use tax pursuant to the Code, it next considered whether the tax was constitutional pursuant to the commerce clause.¹³⁵ Considerations involving the commerce clause require the court to determine whether there was a sufficient connection between the state of California and Borders Online in order for the state to impose a tax on Borders Online’s sales.¹³⁶ Ultimately, the court concluded there was a sufficient nexus.¹³⁷

The basic premise of the commerce clause, as it relates to sales use taxation, requires a sufficient connection between a state and retailer in

127. *Id.*

128. *Id.*

129. *Id.* at 187.

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 188.

136. *Id.* (citing *Scripto v. Carson*, 362 U.S. 207, 210-211 (1960)).

137. *Id.* at 191.

order for the state to impose a use tax on the seller's goods.¹³⁸ The California Court of Appeal looked to the previous U.S. Supreme Court decision in *Quill* as the standard for what creates a sufficient nexus.¹³⁹

The California Court of Appeal concluded that the *Quill* decision confirmed the "bright-line" rule articulated in the previous *National Bellas Hess* decision and determined that a use tax was not permissible when a seller merely delivered merchandise to a state via a common carrier or United States Postal Service.¹⁴⁰ The court also recognized that while those decisions set a standard that required a retailer to have a minimum physical presence in the state; a retailer's mere physical presence was not enough to meet such a standard.¹⁴¹ The California Court of Appeal noted that the Supreme Court in *Quill* determined that the commerce clause, not the due process clause, was the controlling law that determined physical presence.¹⁴² Mindful of the standards set forth by the Supreme Court, the court held that the crucial factor governing the nexus between a retailer and a state seeking to impose a use tax was whether the retailer's activities performed in the state were significantly associated with the retailer's ability to establish and maintain a market for its products in that state and not, as Borders Online argued, actually conducting sales transactions in the state.¹⁴³ Borders Online argued that Borders did not actually conduct sales transactions on behalf of Borders Online, and that Borders acceptance of returns did not significantly increase its ability to establish and maintain a market for its products in California.¹⁴⁴

Applying the reasoning in *Quill*, the Court of Appeal of California looked to the facts in the *Borders Online* case and held that Borders, as the agent of Borders Online, performed activities that were significantly associated with Borders Online's ability to establish and maintain a market for its products in California.¹⁴⁵ The California court analyzed the totality of the activities undertaken by Borders to maintain a successful market for its products.¹⁴⁶ In its analysis, it looked to several cases.¹⁴⁷ The first case involved a retailer who had a single employee in a state,

138. *Id.* at 188.

139. *Id.*; *Quill Corp.*, 504 U.S. at 312-313.

140. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 188 (citing *Quill Corp.*, 504 U.S. at 301-302 (quoting *Natl. Bellas Hess*, 386 U.S. at 758)).

141. *Id.* (citing *Quill Corp.*, 504 U.S. at 301).

142. *Id.*

143. *Id.* (quoting *Tyler Pipe Indus. v. Dept. of Revenue*, 483 U.S. 232, 250 (1987)).

144. *Id.*

145. *Id.* at 188.

146. *Id.*

147. *Id.* at 189 (citing *Scripto v. Carson*, 362 U.S. 207 (1960); *Tyler Pipe Indus. v. Dept. of Revenue*, 483 U.S. 232 (1987); *Scholastic Book Clubs, Inc. v. State Bd. of Equalization*, 255 Cal. Rptr. 77 (1989)).

who solicited no sales, but consulted with the retailer regarding its anticipated needs and requirements to maintain a successful market share.¹⁴⁸ In that case, the Supreme Court held that the single employee created the necessary nexus.¹⁴⁹ In another case, a seller entered a state occasionally to deliver merchandise and install its product.¹⁵⁰ The occasional, but more than slight, connection with the state created a sufficient nexus with the state.¹⁵¹ In yet another case, a seller had a salesman in a state two days a year.¹⁵² The salesman also provided approximately 20 days of training in the state per year to his customers.¹⁵³ That court held the salesman's in-state activity was enough to create a sufficient nexus.¹⁵⁴

In contrast, isolated and sporadic connections with a state have been held not to be enough.¹⁵⁵ The court looked to several cases where the seller's connection with the state did not create a sufficient nexus.¹⁵⁶ In the first case, a seller sent technicians into the taxing state, for a total of about 11 hours per year, to perform electronic wiring for its product.¹⁵⁷ Another case involved a seller that sold its product at a seminar located in Florida.¹⁵⁸ Most of the individuals that attended the seminar, which lasted three days, lived outside of Florida.¹⁵⁹

Choosing a more flexible approach, the court looked to *Orvis Co. v. Tax Tribunal*, a New York decision.¹⁶⁰ *Orvis* only required a demonstration of more than a "slightest presence" to determine the nexus requirements.¹⁶¹ The New York Court of Appeals reasoned that "the *quid pro quo* for state taxation could be found in the benefits and protections the state confers in providing for a stable and secure legal-economic environment for mail-order vendor's substantial marketing efforts aimed at the

148. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 189 (citing *Standard Steel Co. v. Wash. Revenue Dept.*, 419 U.S. 560 (1975)).

149. *Id.*

150. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 189 (citing *Town Crier, Inc. v. Va. Dept. of Revenue*, 733 N.E.2d 780 (Ill. App. 1st Dist. 2000)).

151. *Id.*

152. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 189 (citing *Dept. of Revenue v. Care Computer Sys.*, 4 P.3d 469 (Ariz. Ct. App. 2000)).

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 189 (citing *In re Appeal of InterCard, Inc.*, 14 P.3d 1111 (Kan. 2000)).

158. *Id.* (citing *Dept. of Revenue v. Share Intl., Inc.*, 676 So. 2d 1362 (Fla. 1996)).

159. *Id.*

160. *Id.* at 190.

161. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 190 (quoting *Orvis Co., Inc. v. Tax Appeals Tribunal*, 654 N.E.2d 954, 958 (N.Y. 1995)).

taxing state.”¹⁶² The California Court of Appeal in *Borders Online* agreed that the *Orvis* standard better represented the legal environment we live in, especially given technology in the 21st century.¹⁶³ Using the *Orvis* standard, the *Borders* court concluded that there is no requirement that an out-of-state seller’s in-state agent make sales transactions to satisfy the substantial nexus requirement of the commerce clause.¹⁶⁴

As such, the court held that the facts in *Borders Online* clearly established a nexus.¹⁶⁵ *Borders Online*’s return policy was designed to build a market in California because *Borders*’ efforts went beyond accepting returns.¹⁶⁶ *Borders*’ receipts were used to advertise *Borders Online*.¹⁶⁷ The companies were involved in cross selling strategies to increase market share.¹⁶⁸ Both companies used similar logos and shared market and financial data to help increase sales.¹⁶⁹ Whether *Borders*’ activities created minimal local sales was not considered an important factor.¹⁷⁰ Furthermore, whether all of the facts existed or not during the entire disputed period did not alter the court’s constitutional analysis.¹⁷¹ The facts of the *Borders Online* case, in aggregate, were enough for the court to determine that *Borders Online* established a sufficient nexus with the state of California and the Board’s requirement that *Borders Online* pay use tax did not violate the commerce clause of the United States Constitution.¹⁷²

In sum, the court decided that *Borders* acted as *Borders Online*’s agent in California.¹⁷³ *Borders*’ activities supported the “selling” requirement pursuant to California Revenue and Tax Code § 6203(c)(2).¹⁷⁴ Furthermore, the California use tax was constitutional because *Borders Online* had the necessary nexus with the state of California as required by the commerce clause.¹⁷⁵ Therefore *Borders Online* was subject to California use tax on its sales to California residents.¹⁷⁶

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 191.

166. *Id.* at 190.

167. *Id.*

168. *Id.*

169. *Id.*

170. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 191.

171. *Id.* at 192.

172. *Id.*

173. *Id.* at 183.

174. *Id.* at 187, 188.

175. *Id.* at 192.

176. *Id.*

IV. STATES' RESPONSES TO THE BORDERS ONLINE CASE

States have tried to apply the court's ruling in the *Borders Online* case to determine when a company has a substantial nexus in the state.¹⁷⁷ For example, in January of 2006, the State of Illinois Department of Revenue released a Private Letter Ruling to an online company that sells shoes.¹⁷⁸ The taxpayer, a new, wholly owned subsidiary of the parent company, wanted to form another subsidiary for the purpose of selling shoes online.¹⁷⁹ The second subsidiary was formed to compete with only online companies and would have no brick and mortar locations.¹⁸⁰ The headquarters for the second subsidiary were in California; it did not have any physical presence in Illinois, did not have employees or independent contractors in Illinois, and did not perform any other in-state activities that would rise to the level of a nexus creating activity for sales or use tax purposes.¹⁸¹ Shipments were originated outside Illinois and were delivered by a common carrier.¹⁸² The parent company owns many sister companies, which own private label clothing retailers that have a physical presence in Illinois.¹⁸³ The parent company also has a physical presence in Illinois.¹⁸⁴ The sister stores sell clothing and shoes in their brick and mortar stores and on the Internet.¹⁸⁵ A small portion of the sales from the second subsidiary are expected to be based on the subsidiary's wholesale purchase from the sister companies.¹⁸⁶ Since they are different companies, the second subsidiary's inventory will be assigned different SKU numbers that identify the merchandise.¹⁸⁷ This subsidiary will only allow returns to its Ohio warehouse. Neither the

177. Maryann Gall and Laura Kulwicki, *Affiliate Nexus-What's New?*, *Journal of State Taxation*, (Sept.-Oct. 2006), http://tax.cchgroup.com/FocusOnTax/2006-09/affiliate_nexus_update_JST.pdf (reporting that some states, such as Illinois and Massachusetts, in private letter rulings, looked to the following factors to determine if a sufficient nexus is created: 1) Use of common logos and tradenames; 2) Sale of common merchandise; 3) Use of private label or branded credit cards; 4) Links between affiliates' Web sites; 5) Shared service and space, so long as done on arm's-length basis; 6) Credit card reward programs that award points based on purchases and which may be used to purchase merchandise through all affiliated selling channels, when managed separately through an unaffiliated third party; 7) Gift certificates or gift cards that may be purchased and redeemed at all affiliated selling channels; and 8) Catalogs in stores, if used for merchandise education or reference and not to directly solicit sales for the catalog affiliate).

178. Priv. Ltr. Rul. ST 06-0073-GIL (April 19, 2006).

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. Priv. Ltr. Rul. ST 06-0073-GIL (April 19, 2006).

186. *Id.*

187. *Id.*

sister companies nor the parent company will be allowed to accept returns on behalf of the second subsidiary; however, this subsidiary will have a call center located in Ohio and it will share the call center with its sister companies.¹⁸⁸ The subsidiary will also share its technology infrastructure (hardware and software) that is located in Ohio and California with the sister companies; however, the second subsidiary and the sister companies will not have any online functions common between them.¹⁸⁹ Since there is some connection, via its sister companies, parent company, and customers, the subsidiary asked for a private letter ruling indicating that a parent company in Illinois does not create a sales or use nexus for the new subsidiary.¹⁹⁰ In its request, the taxpayer analyzed the following areas: 1) Overview of the constitutional restrictions including physical presence and what constitutes a physical nexus under the *Quill* decision; 2) General principles of agency; 3) Illinois Sales Tax law; and 4) Specific activities of its new subsidiary including ownership by a common parent, sale of sister company's merchandise on its website, use of sister company's private label cards, link from sister company's website, e-mails by its sister company directing customers to the new company's website, placement of stuffers in shipping boxes advertising private label credit cards, purchase of administrative services from the new subsidiary's parent company, sharing call center space with the sister company, and maintaining a similar technical infrastructure.¹⁹¹ The Department of Revenue analyzed ten separate scenarios posed by the company, and tried to give a comprehensive answer to each question.¹⁹² The Issues raised in the General Information Letter were:

Will any of the following relationships or activities between the sister companies and the subsidiary create sufficient nexus to require the subsidiary to register and collect sale or use tax on shipments to customers in your state?

1. Will the nexus of the sister companies be attributed to the subsidiary merely due to ownership by a common parent company; 2. By itself, will the fact that the subsidiary will buy at wholesale from the sister companies' merchandise and resell it on the website create sales or use nexus for the subsidiary in your state; 3. Will the fact that customers can use the private label cards of the sister companies at the subsidiary's website create sales or use tax nexus by itself; 4. Will the link from the sister companies [sic] website to the website of the subsidiary alone create nexus in your state; 5. If the subsidiary pays the sister company to send out emails to their customers directing them to the subsidiary's website, will that activity by itself create sales or use tax nexus for the

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

192. Priv. Ltr. Rul. ST 06-0073-GIL (April 19, 2006).

subsidiary in your state; 6. Will the subsidiary's placement of stuffers in the shipping boxes that advertise the sister companies' private label credit cards create sales or use tax nexus by itself; 7. By itself, will the fact that the subsidiary purchases certain administrative services from a parent company that supplies the same types of services to the sister companies create sales or use tax nexus in your state; 8. By itself, will sharing space with the sister companies within a call center that is not located in your state create sales or use tax nexus; 9. Will having a similar technical infrastructure system, which includes the order management system, the warehouse management system, the marketing database and other systems, as the sister companies create sales or use nexus by itself; 10. Will all of the activities above, taken together and viewed as a whole, create sales/use tax nexus for the subsidiary?¹⁹³

Ultimately, the Department of Revenue concluded that because of the complexity of the Illinois State Tax Code, and because determinations regarding nexus are very fact specific, a Private Letter Ruling is not very effective in addressing a company's tax concerns as it relates to online taxation.¹⁹⁴

193. *Id.*

194. *Id.* The Department of Revenue responded:

Determinations regarding nexus are very fact specific and cannot be addressed in the context of a General Information Letter. The Department has found that the best manner to determine nexus is for a Department auditor to examine all relevant facts and information. The following guidelines, however, may be useful to you in determining whether your company would be considered 'a retailer maintaining a place of business in Illinois' subject to Use Tax collection obligations. An 'Illinois Retailer' is one who either accepts purchase orders in the State of Illinois or maintains an inventory in Illinois and fills Illinois orders from that inventory. The Illinois Retailer is then liable for Retailers' Occupation Tax on gross receipts from sales and must collect the corresponding Use Tax incurred by the purchasers. Another type of retailer is the retailer maintaining a place of business in Illinois. The definition of a 'retailer maintaining a place of business in Illinois' is described in 86 Ill. Adm. Code 150.201(i). This type of retailer is required to register with the State as an Illinois Use Tax collector. See 86 Ill. Adm. Code 150.801. The retailer must collect and remit Use Tax to the State on behalf of the retailer's Illinois customers even though the retailer does not incur any Retailers' Occupation Tax liability. The United States Supreme Court in *Quill Corp. v. North Dakota*, 112 S.Ct. 1904 (1992), set forth the current guidelines for determining what nexus requirements must be met before a person is properly subject to a state's tax laws. The Supreme Court has set out a 2-prong test for nexus. The first prong is whether the Due Process Clause is satisfied. Due process will be satisfied if the person or entity purposely avails itself or himself of the benefits of an economic market in a forum state. *Quill* at 1910. The second prong of the Supreme Court's nexus test requires that, if due process requirements have been satisfied, the person or entity must have physical presence in the forum state to satisfy the Commerce Clause. A physical presence is not limited to an office or other physical building. Under Illinois law, it also includes the presence of any agent or representative of the seller. The representative need not be a sales representative. Any type of physical presence in the State of Illinois, including the vendor's delivery and installation of his product on a repetitive basis, will trigger Use Tax collection responsibilities. Please refer to *Brown's Furniture, Inc. v. Wagner*, 171 Ill.2d 410, (1996). The final type of retailer is the out-of-State retailer that does not have sufficient nexus with Illinois to be

V. AUTHOR'S ANALYSIS

As the foregoing discussion indicated, a major problem for online companies is that states have not achieved uniformity in their tax laws. States that address nexus requirements in their individual state tax codes look to many factors, such as the company's ownership, common names, trademarks, goodwill, and return policies.¹⁹⁵ As a result, the practical boundaries of determining when an online company might be taxed in a given state are unclear.¹⁹⁶ To combat this issue, several state government groups have organized a program, designed to create uniformity of online tax collecting, called the Streamlined Sales Tax Project ("SSTP").¹⁹⁷ However, until Congress acts and requires uniformity by the states, a voluntary project will not solve the problem, but instead create another level of confusion for online businesses.¹⁹⁸

The *Borders Online* decision is the court's initial, bold move into the arena of issues involving Internet sales taxation.¹⁹⁹ The decision applied the *Quill* approach to the facts of an online-based company's policies to determine when an online company is responsible for collecting use tax.²⁰⁰ The decision clarified that a company, which has an agent in a state, has a sufficient nexus with that state to be taxed, even if the agent is incorporated as a separate entity.²⁰¹ This decision has made online companies that have a brick-and-mortar counterpart realize that there is a risk of being taxed in the state of the brick-and-mortar location. However, the *Borders Online* decision analyzed only one specific scenario.²⁰² Therefore, it has caused confusion, lack of direction, and insecurity among the online companies that differ from the *Borders Online, LLC* and *Borders, Inc.* type of relationship.

There is a fine line in establishing a sufficient nexus with a state.²⁰³ The *Borders Online* court looked to several past cases to conclude that

required to submit to Illinois tax laws. A retailer in this situation does not incur Retailers' Occupation Tax on sales into Illinois and is not required to collect Use Tax on behalf of its Illinois customers. However, the retailer's Illinois customers will still incur Use Tax liability on the purchase of the goods and have a duty to self-assess and remit their Use Tax liability directly to the State.

195. Gall & Kulwicki, *supra* n. 187.

196. *Id.*

197. The Streamlined Sales Tax Project was developed in March 2000 by the Streamlined Sales Tax Governing Board, Inc., <http://www.streamlinedsalestax.org> (accessed October 15, 2006).

198. This sentence represents the author's opinion.

199. Matther Vadum, *California Online Bookstore Tax Case May Have Ripple Effect*, *The Bond Buyer*, 7 Vol. 352 (June 15, 2005).

200. *Id.*; *Quill Corp.*, 504 U.S. at 304-7.

201. *Quill Corp.*, 504 U.S. at 304-07.

202. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 189.

203. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 189.

Borders Online had a nexus with California.²⁰⁴ One analysis the court used looked to how much time a company was associated with the state and several examples differed by only days.²⁰⁵ Furthermore, the decision left it unclear whether many other fact scenarios would create a sufficient nexus with a state.²⁰⁶ For example, would training customers in a state create a sufficient nexus? What if most of the employees at the training were from out of state? Other than an online company and a sister company jointly creating a policy to increase sales in the state where the sister company is located, what other circumstances can create a sufficient nexus with that state? Is it enough for two companies to use similar trademarks? What about selling gift cards in the physical store to use for internet purchases? Furthermore, if a company can determine, based on one state's law, what creates a sufficient nexus in that state, will those same circumstances create a nexus in other states? As such, the decision failed to address several important questions.²⁰⁷

On the other hand, the *Borders Online* decision was useful to some extent for online companies.²⁰⁸ The decision confirmed the importance of a company's sufficient nexus to the state where it sells merchandise.²⁰⁹ It also confirmed that many major retailers in the United States must charge tax on internet sales because their physical presence nationwide constitutes a "sufficient nexus" with a particular state.²¹⁰

Under the circumstances, the court succeeded in defining the most optimal rule possible.²¹¹ Relying on the *Orvis* case, the court formulated a "more than slight presence" standard.²¹² Applying a flexible standard, the court concluded that forming a nexus did not require a company to make sales transactions in the state.²¹³ Now, with the creation of this flexible standard, Congress has guidance for setting uniform legislation.²¹⁴ Congress can use the "more than slight presence" standard from *Borders Online* to address the challenge of internet sales taxation.²¹⁵ Without Congresses' intervention, disparities and the related unfairness will persist.

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 176.

208. *Id.* at 176.

209. *Id.* at 192.

210. *Id.*

211. *Id.*

212. *Id.* at 190 (citing *Orvis Co., Inc. v. Tax Appeals Tribunal*, 654 N.E.2d 954 (N.Y. 1995)).

213. *Id.*

214. *Id.*

215. *Id.*

After the *Borders Online* decision, varying fact scenarios came before the courts in several states, but no single factor alone could establish a nexus between a retailer and the state seeking to impose a use tax.²¹⁶ States evaluated the following factors: (1) use of common logos and trade names; sale of common merchandise; (2) use of private label or branded credit cards; links between affiliates' Web sites; (3) shared services and space that results from an arm's length transaction; (4) credit card rewards programs for website purchases; and (5) gift certificates and gift cards for sale and use at all affiliated selling channels.²¹⁷ Some states allow a brick and mortar store to initiate return policies that allow its customers to return catalog or online purchases, as long as the customers have the same privilege to return merchandise on the same terms purchased from other, non-affiliated retailers.²¹⁸ The rules, however, differ depending on the state.²¹⁹

Throughout the United States, laws that define when a seller is required to pay use tax lack uniformity. As a result, online companies remain uncertain about the circumstances that require them to charge a use tax. Even when an online company believes it should charge a use tax in a particular state, compliance with the state laws and procedures becomes very difficult. Furthermore, because most online companies charge for shipping a product, from a total cost standpoint, imposing an additional tax on consumers could make the online company less competitive than its brick-and-mortar competitors. These problems could cause an online company to fail, and even discourage new online companies from starting a business at all. Technological development is now at a point where Congress must intervene and create a uniform structure of online sales taxation.

A. THE STREAMLINED SALES TAX PROGRAM

To combat the need for clarity, several states united to develop the Streamlined Sales Tax Program ("SSTP").²²⁰ The SSTP is an effort to simplify and modernize both sales and use tax.²²¹ It is intended to make use tax uniform, and therefore easier to collect.²²² The SSTP proposes a change from a source-based to a destination-based method of determin-

216. Gall & Kulwicki, *supra* n. 187.

217. *Id.*

218. *Id.*

219. *Id.*

220. The Streamlined Sales Tax Project was developed in March 2000 by the Streamlined Sales Tax Governing Board, Inc. (available at <http://www.streamlinedsalestax.org>).

221. Martha Dorsey, *V-3 Streamlined Sales Tax Program*, Kansas Legislator Briefing Book, <http://skyways.lib.ks.us/ksleg/KLRD/Publications/2007Briefs/V-2StreamlinedSalesTax.pdf> (last accessed September 16, 2007).

222. *Id.*

ing sales tax.²²³ The goals of the initiative are to generate uniform definitions with tax laws, simplify rate calculations, create an administration of local taxes on the state level, establish uniform audit procedures, shift the burden of tax avoidance to the purchaser, and require states to assume the responsibility of funding a portion of the technology.²²⁴ However, the SSTP is a voluntary program.²²⁵ As of September 2005, only twenty states were members; this excludes thirty states and the District of Columbia from the program.²²⁶ Most of the non-member states created their own rules to determine when an online company must charge sales or use tax.²²⁷

Essentially, the SSTP is an attempt by states to circumvent the nexus requirement by making the tax destination-based instead of source-based.²²⁸ Supporters of SSTP hope that, as a result, online retailers will be more receptive to the idea of charging the tax to its consumers.²²⁹ Major retailers, such as Wal-Mart, Best Buy and Target support the initiative and already collect sales tax in those states where they are physically present.²³⁰

The project is fortunate to have the support of major retailers because, for such retailers, the program's benefits overwhelmingly outweigh its disadvantages. Major retailers already have a competitive advantage over online sellers without nationwide market presence because they have name recognition on their side. A consumer's ability to purchase from a company he already knows and trusts may outweigh the drawback of paying tax on the purchase. The use of a destination-based system for taxing internet transactions will only help the big players. It would require all online retailers to collect tax, which has the effect of eliminating a major advantage for a smaller seller in a market with major retailers.

Moreover, the SSTP does not solve the problem of tax collection. As *Borders Online* demonstrated, a destination-based tax that requires an online company to collect use tax without a physical presence is unconstitutional.²³¹ Accordingly, the SSTP holds the consumer liable, rather

223. *Id.*

224. *Id.*

225. *Id.*

226. Ken Dey, *Cabela's Tax Ruling Raises Eyebrows; Sales Tax Exemption Gets Scrutiny in Idaho, Other States*, Idaho Statesman 1 (Sept. 12, 2006).

227. Gall & Kulwicki, *supra* n.187.

228. Dey, *supra* n. 237.

229. *Id.*; see also Beverly A. Carroll, *Online Sales Tax Changes Planned*, Chattanooga Times and Free Press (Nov. 26, 2006) (noting that, like many state legislatures that do not support the effort, Rep. McCormick of Tennessee has some concerns)

230. Dey, *supra* n. 237.

231. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 192.

than the retailer.²³² However, administration of the program suffers if some retailers collect the tax and others do not. Furthermore, if some states join the initiative and others do not, the lack of uniformity throughout the United States will remain.

Despite the good intentions of the SSTP's drafters, it does not solve the central problem because it disregards the nexus requirement and the program is only voluntary. Understandably, states want to implement the SSTP. It would allow states to encourage companies to collect tax despite the lack of a legal obligation to collect them which will increase tax revenue for the states. However, the SSTP does not fully resolve the major issues of internet taxation, uniformity, constitutionality, and competitive fairness.

B. CONGRESS NEEDS TO ACT

In order to establish uniformity and fairness, Congress should create legislation that defines when a state can require an internet company to collect sales and use tax from its online sales. It is necessary to have a clear method of determining what constitutes a sufficient nexus between a state and an online retailer. Legislation using the "more than slight presence" standard, would help states, companies, and even future courts to determine when a company should charge use tax.²³³ Congress should define a "more than slight" standard to require something more than a *de minimus* connection. The goal of the standard should be to create a rule that gives internet companies without a physical presence in a state, or without circumstances that equate to a physical presence, a greater likelihood than a retailer with a brick and mortar presence in that state, or with enough activity in that state to benefit from state services, that they will not need to charge use or sales tax. The standard should require a sufficient nexus with the taxing state, so that once the company's in-state activities rise to the level at which it receives services from the state, there is, in essence, a *quid pro quo* relationship.

Congressional legislation would yield several benefits. First, it would raise tax revenue without adding or raising taxes. Second, it would make companies more competitive. Third, legislation would create uniformity while regulating commerce among the states, pursuant to the commerce clause.

States' tax revenues would increase because companies that are certain about when to collect taxes will more likely collect taxes, while companies that are uncertain will most likely not collect taxes. Furthermore, entrepreneurs that have been deterred from opening online businesses because of complex tax rules and regulations will be more

232. Dorsey, *supra* n.232.

233. *Id.*

likely to start an internet company. In addition to creating increased sales, which will lead to more state tax revenue, this is important to Congress because all of this can be done without raising taxes and satisfy Congress' perpetual goal "to raise revenue without appearing to raise taxes."²³⁴ Congressional legislation will not increase taxes, but it will define when internet companies should pay existing taxes to the state. Furthermore, legislation that leads to increased sales also increases profits. Increased profits lead to increased income tax revenue on both the state and federal level. Again, all of the increased revenue is achievable without raising taxes.

Legislation could also make companies more competitive. Smaller, online companies would be able to compete with retail stores that have the advantage of not charging shipping costs. A small online company might charge shipping, but the charges may be offset if it did not have to charge sales tax. Smaller online companies not required to charge sales tax would be able to compete with major retailers that charge use tax for online purchases. These major retailers allow customers to shop on the internet as well as in the store, thereby maintaining an advantage over small, online companies.²³⁵ Major retailers do not benefit as much from a tax-free internet sale because they already have name recognition. Therefore, online companies without a recognizable retail name would have a competitive edge; tax-free sales to create a market for their company.

In addition to raising tax revenues and creating competitive fairness, congressional legislation would create uniformity. It is imperative to have one set of rules that applies to all online companies. This uniformity could lead to a single tax form that is applicable in all fifty states for online retailers to report sales when necessary. Moreover, a uniform set of rules would make auditing and compliance much easier. Internal auditors would only need to determine whether a company's circumstances create the required nexus to any state. That knowledge will increase compliance because companies that know when they must collect use taxes are more likely to collect. Alternatively, a company that is unsure whether it is required to collect use tax in a state might not collect. Under a uniform system, as a company grows and expands into other states, the company can easily determine when it must add sales tax for that state. These basic rules and procedures comply with the commerce clause because such simple rules do not inhibit interstate commerce.

234. Rob Wells, *Panel Plans Ways to Narrow Tax Gap*, Wall Street Journal D2 (Oct. 25, 2006).

235. Dey, *supra* n. 237.

VII. THE LEGISLATIVE SOLUTION: A WEIGHTED FACTOR ANALYSIS

Congress' goal should be to create uniformity in this body of law so that companies can be substantially certain when their actions and circumstances create a nexus with any state. Every state would be responsible for determining whether a company creates a nexus, using the same, uniform approach. A sensible approach would be a weighted factor analysis. This is possible by giving weight, in the form of percentage points, to each factor that states have found relevant in analyzing whether a sufficient nexus exists. The states have found the following list of factors to be relevant: (1) use of common logos and trade names; (2) sale of common merchandise; (3) use of private label or branded credit cards; (4) links between affiliates' Web sites; (5) shared services and space that results from an arm's length transaction; (6) credit card rewards programs for online purchases; and (7) gift certificates and gift cards for sale and use at all affiliated selling channels. Congress can expand this list to include other factors that it deems relevant. Each factor should represent points that reflect its weight in creating a nexus. Efficiency requires a percentage point structure that lends weight to a factor based on its importance to the sufficient nexus equation.

Assume, for instance, that Congress sets up an analysis in which 100 points creates a nexus. The *Borders Online* decision makes clear that an online company with an in-state agent that accepts returns on behalf of the on-line company has a sufficient nexus with the state. Therefore, a full 100 points could be allocated to a scenario where a brick and mortar agent accepts returns on behalf of its online company affiliate. The result would be that such a company would always be required to collect state use tax.

The point system could be effective for circumstances that by themselves do not create a nexus, but which create a nexus when other circumstances are added. For example, assume that sharing a similar trademark is worth twenty points, sharing common merchandise is forty points, and sharing links between affiliate web sites is fifty points. By itself, sharing a similar trademark does not create a nexus. The combination of sharing common merchandise and sharing links between affiliate web sites totals ninety points, but also does not create a nexus. However, a company that combines the above three factors would have 110 points. If 100 points of weighted circumstances create a sufficient nexus, then the three factors here create a sufficient nexus with the state. A point system allows Congress to give weight to factors that are currently proposed in state legislation, and any other factors it deems important. It enables Congress, the branch of the government charged with the duty to regulate interstate commerce, to determine what cir-

cumstances, or combination thereof, create a sufficient nexus with a state.

VIII. CONCLUSION

The *Borders Online* decision did much more than determine that accepting returns at a subsidiary located in a state creates a sufficient nexus with that state, and therefore, requires the online subsidiary to collect use tax on sales.²³⁶ It created a standard and perhaps optimistically, some guidance for Congress to creating legislation for the taxation of e-commerce transactions.

Some states united in an attempt to solve the problem by creating the SSTP. The SSTP is a taxing system that would avoid the problem of determining where a sufficient nexus exists. However, as explained, this program is not the solution to the problem. In an attempt to create uniformity, states created a new system of destination-based taxation. Moreover, the SSTP disregards of the constitutional issues surrounding internet taxation. It does promise increased revenue to the states, but at the expense of the consumer and most internet companies. Furthermore, the SSTP is a voluntary program. Unless all fifty states and the District of Columbia join the program, the U.S. will not achieve the uniformity necessary for internet companies to flourish. This problem is not one for the states to resolve. Instead, it is Congress that must act.

Using the 'more than slight presence' standard from *Borders Online*, Congress should enact legislation that guides online companies in deciding when to charge sales or use tax on its internet sales.²³⁷ Legislation would create tax revenue for both federal and state governments without increasing taxes, as well as create competitive fairness and uniformity, while promoting interstate commerce. Without legislation, the *Borders Online* standard contributes to the uncertainty. *Borders Online* should be a guide for Congress to eliminate that uncertainty. Pursuant to its commerce clause power, Congress should enact legislation that gives weight to certain important circumstances already legislated by the states. Even though a single circumstance may not create a nexus, a point system that accounts for these important circumstances would create clear direction for states and online companies to follow. As times change, so must the laws. E-commerce will only continue to develop. Congress must act now to promote the healthy growth of E-commerce transactions.

236. *Borders Online, LLC*, 29 Cal. Rptr. 3d at 191.

237. *Id.* at 191-192.

