



THE UTAH TAXPAYER

A PUBLICATION OF THE UTAH TAXPAYERS ASSOCIATION

Closing a Loophole in Utah Sales Tax Law Why the Colorado and Illinois Decisions Don't Apply to HB 384

Since the Supreme Court's 1992 opinion in Quill v. North Dakota, states and Congress have struggled to create a structure to capture sales taxes from in-state customers legally owed on transactions where the seller is located in out-of-state. Under Quill, states can only compel the seller to collect sales tax if the state has "nexus," or a physical presence in its state. Otherwise, the Supreme Court ruled, compelling the out-of-state (or remote) retailer to collect the sales tax interferes with interstate commerce, which runs afoul of the Commerce Clause.

While the Quill decision focused on catalog sales, the issue has become much broader as online shopping has become more common. As remote selling, particularly through online companies like Amazon, has grown, states have looked at several structures to collect the taxes on these transactions.

The most widespread effort to address the Quill decision has been the Streamlined Sales Tax project. Utah has been a founding member of the Streamlined Sales Tax project for nearly 12 years. We have worked tirelessly to address the very issues that the courts have ruled on in a fair and equitable solution. Some 26 states are now members of the Governing Board and have adopted uniform rules, definitions, procedures and simplification tools. All that is left is for Congress to pass legislation allowing the simplification to occur.



**Representative
Wayne Harper**

Fortunately, Congress is considering 3 bills that will enable states to more easily collect tax that is due and to relieve the burdens being place on business to comply with the intricate and costly tax codes in an efficient and much less costly manner. While not perfect, these bills go a long way to address the

Supreme Court's concerns expressed in Quill. Among other things, they allow for tax simplification and eliminate the inequitable tax advantage that remote retailers now enjoy over brick and mortar retailers.

A second structure designed to collect taxes on transactions with remote sellers is the "use tax." Utah and most states require taxpayers to pay "Use Tax" on transactions where the good is used in the state, but no sales tax was paid. That has been the law in Utah for many decades. Taxpayers should pay use tax when they file their income tax return, though very few do and most taxpayer do not even understand what it is.

In the past several years, states like Colorado, Illinois, New York and California have passed a third structure known as affiliate nexus bills, or "Amazon taxes." Amazon taxes compel remote sellers to collect sales tax when the seller has an affiliate or some other business relationship in the state. Unsurprisingly, some remote sellers have challenged these laws in court, arguing that they too violate the Commerce Clause.

Recently a federal court in Colorado and an Illinois state court struck down their respective Amazon Taxes. In these decisions, the courts argued, states

**MAY 2012
VOLUME 37**



My Corner: Finding Consensus to Fix the Restaurant Tax Page 2



34th Utah Taxes Now Conference Tentative Agenda

Page 3



A Penalty or a Tax? An Explanation of "Obamacare" Page 4



Growth in Municipal Broadband Struggles to Reach Users Page 5



Taxpayers Foundation Event with John Stossel a Success Page 6



Register for the Teed Off on Taxes Golf Tournament Page 6

ASSOCIATION STAFF

Howard Stephenson	President
Royce Van Tassell	Vice President
Chase Everton	Research Analyst
Sophie Mickelsen	Executive Assistant

EXECUTIVE COMMITTEE

John Ward	Chairman
James Hewlett	Vice Chair
Kent Stanger	Secretary
Mike Edmonds	Treasurer
Morris Jackson	Legislative Chair
Margo Provost	Immediate Past Chair
H. Val Hafen	At Large
Max Miller	At Large

may collect tax on transactions in their state, but may not force a company to collect the sales tax, just because they sell in that state via an affiliate or some other business relationship. The courts ruled that the Colorado and Illinois laws violated the Commerce Clause because these acts imposed a "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter."

Utah has not adopted Amazon Tax, but has chosen a different route, one that is more refined and focused. Utah's HB 384 (passed in the 2012 Legislative Session) focused on businesses and transactions that are already occurring in the state and which are taxable and the tax should be collected at the time of the sale. To be required to collect and remit the sales and use tax the following provisions must be met. First, there must be a

parent company or common ownership. Second, there must be a related company with a physical presence in Utah. Third, similar goods must be sold by the related company and by the dot.com company. Fourth, the goods must be used or consumed in Utah.

While HB 384 does not solve all of the issues inherent in collecting sales taxes from remote sellers, it does close a loophole in Utah law. No longer can a nominally remote seller claim not to have Utah nexus, even though a sister company with Utah nexus sells the same goods in Utah. Obviously the courts have not ruled on HB 384, but the bill had virtually no opposition during the Legislative Session. Hopefully this bill will point one way to close the tax gap between remote and brick and mortar retailers. After all, government policy shouldn't pick winners and losers in the marketplace.

My Corner: Finding Consensus to Fix the Restaurant Tax



**Association President
Howard Stephenson**

*This article appeared in the February 2011 issue of **The Utah Taxpayer**. Since then, your Taxpayers Association has learned that many county commissioners and council members did not vote on the following proposed solution. Your Taxpayers Association is currently in litigation with Utah's counties and thought it was important to remind readers of this proposed solution.*

Sometimes, consensus is the best way to solve a problem. And in the

case of your Taxpayers Association's efforts to fix the restaurant tax, I think we just might have consensus.

The Taxpayers Association has worked for years to fix the restaurant tax. As long time readers of *The Utah Taxpayer* will recall, the restaurant tax has two problems. First, it discriminates against the restaurant industry. Why should people who eat at restaurants pay this tax, while people who eat at convenience stores or grocery stores don't? Second, it applies a very high rate (a full one percent!) on a very narrow base (restaurant sales). Good tax policy demands the lowest possible rate applied to the broadest possible base.

Our legislative efforts to fix these problems have repeatedly been stymied, because none of our proposed solutions sufficiently addressed the concerns of the Utah Association of Counties. The Counties have outlined two requirements any legislative proposal on the restaurant tax must meet. First, the proposal must maintain the amount of funding the restaurant tax has provided. Second, the proposal has to create a distribution method that leaves the counties who impose the restaurant tax unharmed.

Addressing the Counties' first requirement isn't difficult. By estimating the amount of restaurant tax counties will collect in FY 2012, and the total taxable sales in FY 2012, it is relatively easy to set a tax rate for all taxable sales that will generate the same amount of "restaurant" tax. Our preliminary estimates suggest that a sales tax rate of .08 percent over all taxable sales (including

food) will generate the approximately \$34.1 million the current restaurant tax should create in FY 2012. Importantly, our proposal solution means the counties' "restaurant" tax revenue will continue to grow as the value of goods and services grows.

How the counties divide that \$34.1 million matters little to us.

Or should I say, it used to matter little to us. During the 2010 General Session, it became clear that a solution to the restaurant tax problem requires the counties to be active participants in the negotiations. So this year we are addressing the distribution question as well.

As we have evaluated the distribution question, we revisited the current distribution method. That method is very straightforward: each county keeps the restaurant taxes collected in their county.

Needless to say, any change altering how much each county receives fails the Counties' second requirement. Initially, we toyed with measuring the average annual percentage of restaurant tax revenues that each county received. Calculating that percentage isn't difficult, so why not just assign those percentages in statute?

The problem with that method is that Millard and Piute counties don't impose the tax today, but may decide to later. Imposing a fixed set of percentages would mean those counties would get no revenue, even if they impose the tax. Clearly, that solution can't work.

As we further considered the issue, we realized that the Tax Commission can use the distribution method in place today, whether or not the current restaurant tax exists. Knowing how much restaurant sales occur in each county, the Tax Commission can use the same formula to distribute the \$34.1 million to the counties. First, the Tax Commission calculates what proportion of the total restaurant sales occur in each county. Second, they multiply each of those shares by \$34.1 million in "restaurant" taxes collected statewide. That product must give each county the same amount of revenue as it would receive with the current distribution method.

As I said earlier, the .08 percent proposed tax and the \$34.1 million in restaurant taxes are estimates. When the Legislative Fiscal Analyst and the State Tax Commission finalize their estimates, these numbers may change up or down a little bit. But those changed estimates won't change the way this proposal meets the concerns of the Counties and the Taxpayers

Taking food out of the regular sales tax base violated the good tax policy of a broad base and a low rate. It's time to fix that

2012 Utah Taxes Now Conference

*Improving Utah's Economy,
by Improving Utah's Tax Structures*

34th Annual Conference on Taxes & Spending

Tuesday May 22, 2012 – 8:00 a.m. to 2:30 p.m.

Little America Hotel, 500 South Main Street, Salt Lake City, Utah

Moderated by Assn. President Howard Stephenson and Vice-President Royce Van Tassell

Sponsored by: Utah Taxpayers Association, Workers Compensation Fund and Chevron

TENTATIVE AGENDA



<p>7:30 Registration</p> <p>8:00 Welcome Jim Hewlett, Vice Chairman, Utah Taxpayers Association</p> <p>8:05 What do the Supreme Court's oral arguments on the Affordable Care Act portend for federal taxes? Attorney General Mark Shurtleff</p> <p>8:25 Tax Litigation Max Miller: Is the Restaurant Tax discriminatory? Randy Grimshaw: Who pays property taxes when a non-profit leases the property? Jerry Oldroyd (SB 112) Max Miller Larry Barusch: Contaminated Property & Property Value</p> <p>8:45 Dynamic Scoring of Fiscal Notes Ron Bigelow Jonathan Ball</p> <p>9:05 Transportation funding in a 40 mpg world: Local TBD Ken Bullock, Utah League of Cities and Towns Mark Bleazard, Legislative Fiscal Analyst</p> <p>Transportation funding in a 40mpg world: State Rep. Brad Daw Sen. Kevin Van Tassell Carlos Bracerias, UDOT</p> <p>9:35 SB 27: Refunding Erroneously Paid Sales Taxes David Crapo Marc Johnson, Utah State Tax Commission</p> <p>9:50 When are Digital Goods and Services Taxable Steve Young, HB 35 (2011) and HB 36 (2012) Scott Smith, Utah State Tax Commission</p> <p>10:00 Refreshment Break</p> <p>10:15 Property Taxes and Tax Shifts Sen. John Valentine: Property Taxes on Water (SB78) Sen. Luz Robles: Veterans Property Taxes (SB 116 & SJR 8) Sen. Scott Jenkins: Property Taxes on Open Space (SB 46)</p>	<p>10:35 Utah Continues to Lead the Nation Governor Gary Herbert</p> <p>10:55 Structure of Utah's Income Tax Rep. John Dougall: R&D Tax Credit (HB 365) Sen. John Valentine: Life Science & Technology Tax Credit (SB 23) Dr. Laura Nelson (SB 65) Royce Van Tassell (HB 101, HB 250 and HB 312)</p> <p>11:20 The Structure of Utah's Sales Tax and Distributing Local Sales Taxes Sen. Wayne Niederhauser: What is the Base-Remote Sellers (HB 384, HB 385 & HJR 14) Rep. David Butterfield: What is the Base – Sales Tax Exemptions? When Do You Pay? (HB 323)</p> <p>11:50 Legislative Round Up SB 129: Unemployment Insurance Tax from 9% to 7% HB 41: Raising personal property exemption to \$15,000 HJR 6: How should we spend/save severance taxes? HB 81: The only tax increase of the 2012 Session</p> <p>12:00 Luncheon: Grand Ballroom/Speaker/Awards Lifetime Service Award, Taxpayer Advocate of the Year Award, Profile In Courage Award, Excellence in Public Service Speaker: Congressman Jim Matheson (invited) and Mayor Mia Love (invited)</p> <p>1:30 Using Technology to Improve Student Achievement Sen. Howard Stephenson (SB 178, SB 290) Ken Grover, Salt Lake City School District Rep. Merlynn Newbold (HB 514) Sen. Wayne Niederhauser (SB 196) Sen. Jerry Stevenson (SB 248) Sen. Steve Urquhart (SB 284)</p> <p>1:50 Tying Teacher Compensation to Performance Robyn Bagley (SB 67) Sen. Aaron Osmond (SB 64)</p> <p>2:10 Miscellaneous Education Reforms Sen. Mark Madsen (SB 82) Rep. Keith Grover (HB 106, HB 350)</p>
---	--



Register for the "Utah Taxes Now" Conference by visiting www.utahtaxpayers.org or contacting Sophie at sophie@utahtaxpayers.org or (801) 972-8814. CLE and CPE credit will be available.

Association.

As elegant and apparently workable as this solution appears, your Taxpayers Association still faces many hurdles in passing this proposal. Foremost among those hurdles is this: our proposal only works if the Legislature agrees to put the full sales tax back on food. That will be no small feat, but there is growing agreement that food should be taxed at the same rate as the rest of the sales tax base.

Taking food out of the regular sales tax base violated the good tax policy of a broad base and a low rate. It's time to fix that problem. And while we're at it, I think we can fix the restaurant tax too.

A Penalty or a Tax?

An Explanation of "Obamacare"

Guest Commentary by

John Swallow, Utah's Deputy Attorney General



**Deputy Attorney General
John Swallow**

After President Obama signed the "Affordable Care Act," more commonly known as Obamacare, Utah and 25 other states filed suit to stop it from being implemented. We argued its requirement that every American purchase health insurance violates the U.S. Constitution. Our case has now wended its way through the courts, and the U.S. Supreme Court will rule on our suite sometime in June.

In 2009, before passage of the now

infamous Obamacare Law, which requires that nearly every American be covered by government-defined minimum requirements of health insurance starting January 1, 2014 or else pay a "penalty," President Obama emphatically stated that the "penalty" in his bill was just that - a penalty, not a tax. Most Americans do not understand why there needs to be a distinction, but a little known law passed back in the 1860s (the Anti-Injunction Act) protects the federal government from legal challenges to its taxing power.

The bottom line is that if the Supreme Court rules that the consequence of not buying minimum coverage of health insurance is a "tax" rather than a "penalty," the federal courts will not have jurisdiction or the ability to consider the 26 state (including Utah) constitutional challenge to the individual mandate, and the case will likely be dismissed. For that reason, the United States Supreme Court determined to hear oral arguments on that point on the first day of the Obamacare hearings.

The 1867 Anti-Injunction Act stipulates that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person." This legal protection enjoyed by the government created a hurdle in the Court's consideration of the challenge to the individual mandate in the Affordable Care Act (Obamacare). If paying the "penalty" for failing to purchase health insurance coverage is a tax, then citizens would be barred from filing suit until they paid that tax and were seeking a refund. On the other hand, if the Court finds an assessment is not a tax, the barrier to suit will be removed, and the constitutional challenge to the individual mandate could move forward.

Part of the confusion is that the Obamacare law is not perfectly clear regarding the penalty/ tax issue. On one hand, statements by the President and members of Congress and the language of the bill ordered that a penalty would be assessed for those who do not have minimum coverage by a certain date and that the mandate and penalty were based under the Commerce Clause found in Article I Section 8 of

Budget Hearings Scheduled for May-June

Your Taxpayers Association annually audits the budgets of Utah's 41 school districts and 40 largest cities to monitor and offer support during the budget process.

As part of the budget process, Utah cities and school districts will be holding budget hearings throughout May and June. Those that propose tax increases will hold additional Truth In Taxation hearings later in the summer to present their proposals to local taxpayers. Your Taxpayers Association will closely monitor, evaluate and consult with local government officials throughout this process and keep you up-to-date on local developments.

Visit www.utahtaxpayers.org to see calendars of budget and Truth In Taxation hearings in your community. In addition, visit Utah's public notice website <http://www.utah.gov/pmn/index.html> to sign up for email notices of local hearings.

Entity	Tax Increase	Date & Time
Cedar City	No	May 23 at 5:30PM
Midvale City	No	June 19 at 7:00PM
Ogden City	No	June 5 at 6:00PM
Provo City	No	June 5 at 7:00PM
Roy City	No	June 6 at 6:00PM
Salt Lake City	No	June 5 at 6:30PM
Sandy City	No	May 22 at 7:00PM
Springville City	No	June 5 at 7:00PM
Syracuse City	No	TBD
Davis SD	No	June 19 at 6:00PM
Logan SD	TBD	June 18 at 6:00PM
N. Summit SD	No	TBD
Ogden SD	No	June 14 at 5:00PM
Orem	Yes	June 12 at 6:00PM

34th Annual "Utah Taxes Now" Conference

Your Taxpayers Association will be hosting its annual "Utah Taxes Now" Conference on **Tuesday, May 22, 2012** at the Little America Hotel. Leaders from the Utah House of Representatives and Senate, the Governor's office, policy experts and community leaders will cover a broad range of tax issues, including current tax litigation, the restaurant tax, education reform and federal and state tax alignment. ***CLE and CPE credit will be available.***

Teed Off On Taxes Golf Tournament

Join the Utah Taxpayers Association for their annual "Teed Off On Taxes" Golf Tournament on **Thursday, June 14, 2012** at the Eaglewood Golf Course in North Salt Lake. Sponsorship opportunities are available.

Register for the "Utah Taxes Now" Conference and "Teed Off On Taxes" Golf Tournament by visiting www.utahtaxpayers.org or contacting Chase Everton at chase@utahtaxpayers.org or (801) 972-8814.

the Constitution - not under the taxing power. On the other hand, under the terms of the bill, the penalty would be collected under the Tax Code. Thus, the method of collection seemed to indicate that it might be a tax and not a penalty.

At the briefing stage and also at the hearings, the 26 states focused on comparison of the purpose of a tax, which is to generate revenues for government functions, versus the purpose of a penalty, which is to encourage performance. As the arguments progressed, it became clear that the Justices understood that Congress likely did not intend for the Obamacare penalty to be a tax because in the scenario that all citizens purchase insurance as required by the law, no revenue would be raised, as no penalties would be assessed. Conversely, the purpose of a penalty is to encourage a certain behavior, or, in other words, to encourage Americans to purchase health insurance - whether they intend to use it or not. The goal of this penalty is to encourage healthy Americans to buy a product they would likely not use in order to offset the costs to insurance companies of covering everybody, some of whom, prior to the law, would not

have been eligible for insurance due to pre-existing health conditions. Thus, the penalty was intended not to raise revenue for the government, but to balance out the insurance pool with both healthy and unhealthy individuals.

From my perspective on the front row of the Supreme Court gallery, going into the hearings, the 26 states were unsure whether the Supreme Court Justices would focus on the substantive argument about whether the intent of the penalty was to encourage people to buy insurance or to raise revenues or if they would focus on the technical issue of how the penalty would be collected under the Tax Code. It became clear that the Justices were focused on the substance, and the 26 States were able to breathe a collective sigh of relief that the Court is likely to rule that because compliance with the mandate is encouraged by a penalty - not a tax - the Anti-Injunction Act does not apply and that the Court can move forward and rule on the constitutionality of the individual mandate under the Commerce Clause.

Growth in Municipal Broadband Struggles to Reach Users

A new report by the National Taxpayers Union (NTU) notes that municipal broadband networks are an unnecessary drain on taxpayers. Despite the perceived need to increase access to broadband networks, the majority of Americans already have access to broadband networks. In 2000 just 8 million Americans had access to a broadband network. By 2009 that number swelled to 200 million. The authors note that this growth is almost entirely attributable to private companies, not government. But, as the graph below suggests, the government has been involved in the expansion of broadband networks. Since 1997, municipal broadband projects have skyrocketed from 2 to 108 in 2011. Despite this growth in municipal broadband networks, NTU estimates taxpayer-funded broadband serve less

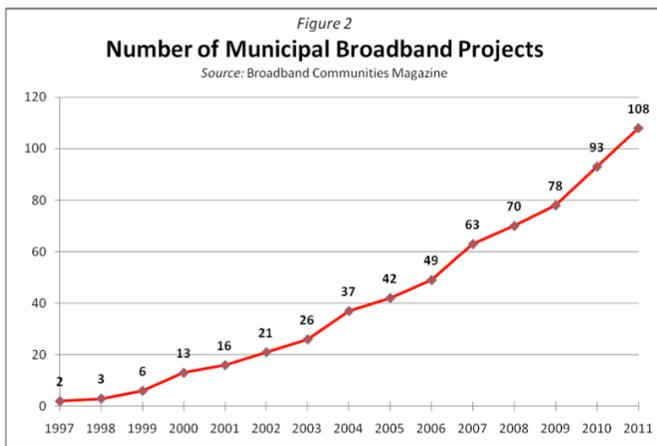
than 5% of the 200 million Americans with broadband access.

When looked at through the lens of households, 94.6 percent have access to broadband networks. The remaining 5 percent do not, mostly because it is cost prohibitive. It would cost approximately \$56,000 per household and total as much as \$23 billion to reach the current households without broadband access.

The report cites one of Utah's own municipal broadband networks as the "award-worthy effort of Orwellian acronym development, the Utah Telecommunication Open Infrastructure Agency" (UTOPIA). As readers of *The Utah Taxpayer* may recall, UTOPIA is a consortium of 11 cities and towns in Utah, which hundreds of millions in taxpayers hard-earned money has been committed towards a broadband network. From NTU's analysis, the nearby chart illustrates UTOPIA's debt showing frightening debts that taxpayers are on the hook for.

The extreme debt levels taken on by municipalities have further consequences, the report finds. In the last 30 years, 259 government entities have declared bankruptcy; most of them were cities or municipal utilities. Here in Utah, UTOPIA's total debt last year totaled \$201.5 million, an increase of over \$100 million since 2005. In 2005, the debt was \$85 million.

Echoing what your Taxpayers Association has advocated for years, the report says that municipal broadband networks are not a public good and only compete with the private sector when flush with taxpayer money. In fact, the NTU report shows that there is \$4 trillion worth of municipal bonds already in existence. Your Taxpayers Association echoes the NTU sentiment that local government officials should focus on streamlining and easing tax burdens.



Source: National Taxpayers Union

Get Updates in Real Time!
Follow us on Twitter or Like us on Facebook



@UtahTaxpayers



www.facebook.com/utahtaxpayers

Stossel Explains Why Government Fails, but Individuals Succeed

Your Utah Taxpayers Foundation held a fundraiser on April 18 with John Stossel of the Fox Business Network. The event was held at the Grand America Hotel in Salt Lake City. Mr. Stossel recently published a new book titled, *No They Can't: Why Government Fails But Individuals Succeed*. During his presentation, Mr. Stossel explained why government intervention causes the price of goods to skyrocket, quality of products to decline and education scores to remain stagnant for much of the past 40 years despite increases in funding.



John Stossel of the Fox Business Network



“TEED OFF ON TAXES” GOLF TOURNAMENT June 14, 2012, 8:00a.m to 1:00p.m. Eaglewood Golf Course, North Salt Lake

Teed Off Sponsor (\$900): *Golf foursome and an advertised hole sponsorship at the golf tournament.*

Golfers 1 _____ 2. _____ 3. _____ 4. _____

Hole Sponsor (\$500): *Advertised hole sponsorship at the golf tournament.*

Individual Golfer (\$125): *We'll pair you with a foursome.*

If you have sponsored a foursome and wish the Taxpayers Association to arrange for a state legislator, tax commissioner or elected official to be one of the foursome, please check box. We will be responsible to report this as a gift to an elected official.

Name: _____ **Company:** _____

Phone: _____ **Email:** _____

Reserve Your Space Now by faxing to (801) 973-2324.

Mail check to Utah Taxpayers Association, 656 East 11400 South, Suite R, Draper, Utah 84020