

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

## Federal Judge Rules That On-Line Book Retailer Does Not Have a Substantial Nexus with Louisiana Parish for Sales/Use Tax Collection Purposes

By

**William M. Backstrom, Jr.**

The federal district court for the Eastern District of Louisiana held that on-line book retailer, barnesandnoble.com, LLC (“Online”), did not have a substantial nexus with St. Tammany Parish, Louisiana (the “Parish”), as required by the dormant Commerce Clause, and was not required to collect and remit Parish sales/use taxes on its sales to customers in the Parish even though Online’s affiliate, Barnes & Noble Booksellers, Inc. (“Booksellers”), operated a store in the Parish. *St. Tammany Parish Tax Collector v. Barnesandnoble.com, LLC*, No. 05-5695 (E.D. La. Mar. 22, 2007).

Online is an internet retailer of books, movies, and music. It accepts orders from customers from across the country, including the Parish, and fills the orders through a national distribution system. Online has no physical presence in Louisiana except for the use of common carriers to deliver merchandise. Online did not maintain a mailing address or telephone number in Louisiana and had no employees or tangible property in Louisiana.

At various times during the taxable periods at issue, Barnes & Noble, Inc., owned, either directly or indirectly, 40%, 80%, and 100% of Online. In addition, Barnes & Noble, Inc., also owned 100% of Booksellers, which owned and operated retail stores throughout the United States, including one store in the Parish. Although Online and Booksellers were commonly owned, they did not share management, employees, offices, and other important elements of their businesses.

The Parish sued Online in Louisiana state court for sale/use taxes allegedly owed by Online for sales to customers in the Parish. Online removed the case to federal court on both diversity and federal question grounds. The Parish apparently did not contest the removal of the case to federal court.

The parties filed cross-motions for summary judgment. At the oral argument on the cross motions, the parties agreed to submit the issue for trial on the briefs and the stipulated record. Importantly, based on this agreement between the parties, the Court held that it would use “... the legal standard applicable at trial, not the summary judgment standard.”<sup>1</sup> Consequently, the Parish bore the burden of proof by a preponderance of the evidence. Ultimately, after an extensive analysis of the facts and law, the Court held that the Parish did not meet its burden of proof that Online had a substantial nexus with the Parish.

---

<sup>1</sup> *St. Tammany Parish Tax Collector v. Barnesandnoble.com, LLC*, No. 05-5695, slip op. at 3 (E.D. La. Mar. 22, 2007).

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

After a discussion of the substantial nexus requirements of the Commerce Clause, as articulated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992),<sup>2</sup> and an analysis of the decisions in *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), and *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987), as they relate to attributional nexus,<sup>3</sup> the Court addressed the Parish's argument "... that the physical presence of Booksellers' store in Mandeville should be attributed to Online because Booksellers allegedly acted on Online's behalf within the taxing jurisdiction."<sup>4</sup> St. Tammany Parish cited five aspects of the business relationship between Online and Booksellers to support its argument that a substantial nexus existed:

- A customer loyalty program run by Barnes & Noble, Inc. and from which Online derived revenues from annual membership fees
- A multi-retailer gift card program
- Online received commissions on merchandise ordered at Booksellers' retail stores, but shipped directly to the customer
- A cross-promotional advertising program
- Booksellers' stores gave preferential treatment to returns of merchandise purchased from Online.

The Court provided a detailed examination of each of the five characteristics.

With respect to the membership program, the Court noted that Online and several of its other affiliates participated in the customer loyalty program that was run by Barnes & Noble, Inc. Proceeds from the membership fees paid by customers were distributed on a *pro rata* basis according to the percentage overall discounts under the program awarded by each affiliate. Thus, Online did not receive revenue from sales made by Booksellers and *vice versa*. Neither company, however, made sales or took orders for the other company. Both companies advertised the program and all participants in the program shared all member names and e-mail addresses, which were used for direct marketing.

Online and Booksellers also participated in a multi-retailer gift card program, which mirrored the membership program. Gift cards were available and redeemable at Booksellers' stores and at Online's website, as well as at other participating retailers. Promotional materials used by the program participants advertised that the gift cards were redeemable at Online's website. A separate affiliate, Marketing Services (Minnesota) Corp., Inc. ("Marketing"), administered the gift card program. A participating company remitted the proceeds from sales of gift cards to Marketing in return for a fee. When a gift card was redeemed, Marketing paid the retailer the face value of the gift card. Thus, a participating retailer interacted only with Marketing and the customer in fulfilling its obligations under the program.

<sup>2</sup> Because the Court found that Online did not have a substantial nexus with the Parish for the purpose of satisfying the dormant Commerce Clause, the Court did not address the issue as to whether imposition of sales and use tax collection on the taxpayer would violate the Due Process Clause.

<sup>3</sup> The Court explained that attributional nexus "... arises when the presence of a person nor entity in the taxing jurisdiction is attributed to another entity for purposes of establishing nexus." *Barnesandnoble.com*, No. 05-5695, at 7.

<sup>4</sup> *Id.*

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

As with the membership program, a participating retailer in the gift card program derived revenue only from selling gift cards directly to customers or from accepting gift cards as payment for items purchased from the retailer. Participants did not derive revenue from sales made by other participating retailers.

During the periods at issue, when a Booksellers' store did not carry an item requested by a customer, the customer could place an order with a clerk at the retail store and have the item shipped to the store for pickup or directly to the customer. The retail store would "source" the requested items on a computer system that would locate the item among various wholesalers and distribution centers, including Booksellers' own warehouses and those of third parties. Booksellers' stores were not able to choose a particular source through the system. In some cases, the computer system sourced the order to Online's distribution centers, which then shipped the item directly to the customer or to the Booksellers' store. In these situations, Online would charge Booksellers a wholesale price plus a commission for the purchase and Booksellers would resell the item to the customer. Booksellers collected and remitted applicable state and local sales/use taxes on its sales.

With respect to cross-promotional advertising, the Court noted that Online's website provided a "store locator" to identify nearby locations and information about events taking place at Booksellers' retail stores. The only evidence presented by the Parish that Booksellers promoted Online during the relevant taxable periods was in connection with advertising the multi-retailer gift card and membership programs. According to testimony, store employees at Booksellers' store in the Parish would provide information about the website only if asked by a customer.

With respect to the return policy, Booksellers' stores accepted returns of merchandise carried by the stores regardless of where the merchandise was purchased. For example, a customer who had purchased an item from Online could return the item to a Booksellers' store and receive store credit upon showing a receipt for the amount paid to Online. Online advertised this return policy on its website. In contrast, customers who returned an item, but did not show a receipt from Online, received a store credit for the price of the item at the time in the Booksellers' store. Booksellers accepted returns from other book stores to encourage customer satisfaction, entice new customers and as a source of income. Testimony also showed that Booksellers' managers had discretion as to whether to give a full refund to a customer who presented a receipt from a retailer other than Booksellers or Online.

Beginning its nexus analysis and relying on substantial precedent from other jurisdictions,<sup>5</sup> the Court concluded that the relationship between Booksellers and Online did not create a substantial nexus for Online in the Parish. The Court concluded that the activities of Booksellers in the Parish on behalf of Online ". . . were

<sup>5</sup> The Court cited *SFA Folio Collections, Inc. v. Tracey*, 652 N.E.2d 693 (Ohio 1995); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn. 1991), cert. denied, 501 U.S. 1223 (1991); *Bloomington's By Mail Ltd. v. Pennsylvania*, 567 A.2d 773 (Pa. Commw. Ct. 1989), aff'd, 591 A.2d 1047 (Pa. 1991), cert. denied, 504 U.S. 955 (1992); and *Current, Inc. v. State Board of Equalization*, 29 Cal. Rptr. 2d 407 (Cal. Ct. App. 1994).

- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

not of the order of magnitude necessary to establish that Booksellers marketed Online's products on Online's behalf in the Parish."<sup>6</sup> The Court also noted that the existence of a close corporate relationship did not mean that Booksellers' physical presence could be imputed to Online. In essence, the Court concluded that the two entities should be respected as separate legal entities even though they were closely related.

The Court further analyzed the nature and extent of the activities performed by Booksellers on behalf of Online and concluded that they were ". . . insufficient to treat Booksellers as acting as a marketing presence for Online in the Parish."<sup>7</sup> Citing *SFA Folio Collections, Inc. v. Tracey*, *SFA Folio Collections, Inc. v. Bannon*, and *Bloomington's By Mail Ltd. v. Pennsylvania*, *supra*, the Court noted the significance of the fact that Booksellers had never taken or solicited orders on behalf of Online and did not provide facilities to place orders with Online. The Court also noted that the Parish had not demonstrated that participation in the gift and membership programs constituted a sufficient nexus upon which to base a tax collection obligation. The Court noted that neither program produced revenue to Online by virtue of sales made or orders taken by Booksellers at the retail store in the Parish. The Court also specifically noted that any benefit that Online may have derived from Booksellers' advertising of the programs was ". . . not sufficient to impute its presence to Online."<sup>8</sup>

The Parish also relied on the fact that Online received commissions from in-store sales in support of its nexus argument. The Court dismissed this argument and noted that ". . . it is clear from the evidence that Online is in fact one of many wholesalers, including its competitors, from whom Booksellers sources items that it does not have in stock, to be shipped to the store or directly to the customer."<sup>9</sup> The Court also noted that there was no evidence that Booksellers treated Online any differently from other third-party wholesalers in its computer-based sourcing system and that the evidence established that Booksellers treated this type of transaction as its own sale for which it collected and remitted applicable state and local sales/use taxes.

The Parish placed a great deal of weight on Booksellers' return policy, arguing that the policy was preferential to Online because Booksellers accepted Online's merchandise as if it were its own, but only gave store credit in the amount of the price of the item in Booksellers' store at the time for merchandise from other retailers. The Court agreed with the decisions of the Ohio and Pennsylvania courts referenced above in rejecting the argument that a preferential return policy established substantial nexus. The Court specifically noted that "[t]he policy of Booksellers to accept returns according to a slightly more generous policy than the one extended to other retailers is not comparable to an independent contractor making sales on behalf of the out-of-state retailer, such as was involved in *Scripto* and *Tyler Pipe*."<sup>10</sup> The Court also noted

<sup>6</sup> *Barnesandnoble.com*, No. 05-5695, at 13.

<sup>7</sup> *Id.* at 14.

<sup>8</sup> *Id.* at 15.

<sup>9</sup> *Id.* at 16.

<sup>10</sup> *Id.* at 17.



- ADMIRALTY & MARITIME
- ANTITRUST & TRADE REGULATION
- APPELLATE LITIGATION
- AVIATION
- BANKRUPTCY, RESTRUCTURING & CREDITORS-DEBTORS RIGHTS
- BUSINESS & COMMERCIAL LITIGATION
- CLASS ACTION DEFENSE
- COMMERCIAL LENDING & FINANCE
- CONSTRUCTION
- CORPORATE & SECURITIES
- EMPLOYEE BENEFITS, ERISA, & EXECUTIVE COMPENSATION
- ENERGY
- ENVIRONMENTAL & TOXIC TORTS
- GAMING
- GOVERNMENT RELATIONS
- HEALTH CARE
- INSURANCE, BANKING & FINANCIAL SERVICES
- INTELLECTUAL PROPERTY
- INTERNATIONAL
- LABOR & EMPLOYMENT
- MERGERS & ACQUISITIONS
- PRODUCTS LIABILITY
- PROFESSIONAL LIABILITY
- PROJECT DEVELOPMENT & FINANCE
- PUBLIC FINANCE
- REAL ESTATE: LAND USE, DEVELOPMENT & FINANCE
- TAX (INTERNATIONAL, FEDERAL AND STATE)
- TELECOMMUNICATIONS & UTILITIES
- TRUSTS, ESTATES & PERSONAL PLANNING
- VENTURE CAPITAL & EMERGING COMPANIES
- WHITE COLLAR CRIME

that it was not comparable to the level of sales or sales support activity undertaken by in-state agents in other cases that have found nexus.

The Court concluded its nexus analysis by noting that Booksellers initiated the return policy to generate goodwill and to serve the convenience of its customers. The Court noted that *Borders Online v. State Board of Equalization*, 129 Cal. App. 4th 1179 (Cal. Ct. App. 2005), is the only case to rely on a comparable return policy to find nexus and that the court in that case "... implied that a [return] policy based on such considerations would not be indicative of the requisite nexus."<sup>11</sup>

Considering all the evidence presented by the Parish, the Court concluded that a substantial nexus did not exist upon which to base tax collection liability. This case represents another important development in the never-ending "substantial nexus" saga. The successful removal of the case to federal court is by itself an important development. Although a study of federal court jurisdiction is far beyond the scope of this article, taxpayers that find themselves as defendants in a suit by a Louisiana local tax collecting authority for the collection of Louisiana local sales/use taxes should carefully consider the merits and benefits of removing the matter to federal court. A reading of Judge Vance's opinion provides a thorough and thoughtful analysis of the Commerce Clause nexus issue as it relates to online retailers and may provide helpful support for other taxpayers that are dragged into Louisiana courts by local taxing authorities.

---

<sup>11</sup> *Id.* at 18.

ADMIRALTY & MARITIME

ANTITRUST & TRADE REGULATION

APPELLATE LITIGATION

AVIATION

BANKRUPTCY, RESTRUCTURING &  
CREDITORS-DEBTORS RIGHTS

BUSINESS & COMMERCIAL LITIGATION

CLASS ACTION DEFENSE

COMMERCIAL LENDING & FINANCE

CONSTRUCTION

CORPORATE & SECURITIES

EMPLOYEE BENEFITS, ERISA, &  
EXECUTIVE COMPENSATION

ENERGY

ENVIRONMENTAL & TOXIC TORTS

GAMING

GOVERNMENT RELATIONS

HEALTH CARE

INSURANCE, BANKING & FINANCIAL  
SERVICES

INTELLECTUAL PROPERTY

INTERNATIONAL

LABOR & EMPLOYMENT

MERGERS & ACQUISITIONS

PRODUCTS LIABILITY

PROFESSIONAL LIABILITY

PROJECT DEVELOPMENT & FINANCE

PUBLIC FINANCE

REAL ESTATE: LAND USE,  
DEVELOPMENT & FINANCE

TAX (INTERNATIONAL,  
FEDERAL AND STATE)

TELECOMMUNICATIONS & UTILITIES

TRUSTS, ESTATES &  
PERSONAL PLANNING

VENTURE CAPITAL &  
EMERGING COMPANIES

WHITE COLLAR CRIME

*Remember that these legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual circumstances. For further information regarding these issues, contact:*

William M. Backstrom, Jr.  
Jones Walker  
201 St. Charles Avenue, Suite 5100  
New Orleans, LA 70170-5100  
Telephone: 504.582.8228  
Email: [bbackstrom@joneswalker.com](mailto:bbackstrom@joneswalker.com)

### Tax (International, Federal, State, & Local)

Backstrom, Jr., William M.	Lagarde, Brandon A.
Belter, Sarah B.	Mauldin, B. Michael
Benjamin, J., Edward B.	Nunes, III, Louis S.
Blackman, IV, John C.	Ramelli, Rudolph R.
Casey, Robert R.	Trostorff, Alex P.
Katz, Jonathan R.	

To subscribe to other E\*Zines, visit [www.joneswalker.com/news/ezine.asp](http://www.joneswalker.com/news/ezine.asp)