



Nexus Issues & Awareness



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Jack Schmoll

- 30 years in state and local taxation
- 9 years with the Washington State Department of Revenue
- Started own firm in 2012
- Works with wide variety of businesses in NC and across the country and world
- Works with a large number of CPA firms assisting them with SALT issues
- Love to run



Overview

- Nexus in general
- Sales tax nexus
- Income tax nexus
- Telecommuting and nexus
- Gross receipts/margin tax nexus (time permitting)



Nexus

- The minimum connection a business needs to have with a state before the state can subject the business to its taxes
- Determined by:
 - US Constitution
 - US Supreme Court
 - Federal Statutes
 - State laws, statutes, rules, and cases



Due Process Clause

- Concerned with fairness of Government Activity
- Requires
 - Income tax is rationally related to services received (aka presence nexus)
 - Minimum connection (aka transactional nexus)
 - Purposeful availment



Due Process - Rationally Related

- The simple but controlling question is whether the state has given anything for which it can ask return

**Wisconsin v. J. C. Penney Co., 311 U.S. 435, 444
(1940)**



Commerce Clause

“Congress shall have the power...to regulate commerce...among the several states”

- Requires
 - No undue burden is placed on interstate commerce



Commerce Clause

- Complete Auto Transit v Brady (Mississippi) (1977) sets forth a four-pronged (Dormant) Commerce Clause test:
 - Substantial nexus - connection clear enough to impose a tax.
 - Nondiscrimination
 - Fair apportionment
 - Fair relationship to services provided by the state



Sales Tax Nexus

- Physical presence nexus
- Economic presence nexus
- Affiliate Nexus



Sales Tax Nexus - Physical

- Storefront not needed
- Delivery in own trucks
- Sales calls
- Remote employees
- Partners
- Certain contractors
- Leased property (as lessor or lessee)
- Tooling
- Inventory – FBA
- Many other instate activities



Sales Tax Nexus - Economic

- South Dakota v. Wayfair, Inc (2018)
 - \$100,000 or 200 transactions
- All states have adopted (MO effective 1/1/2023)



Economic – What's new?

- Missouri – 1/1/2023
- Colorado cities
- Alaska cities



Economic – Variables

- Dollar thresholds
- Transaction thresholds
- Inclusion of marketplace and nontaxable sales
- Calendar v. rolling period
- Timing of collection responsibility
- When marketplace collection began



Economic – Variables

- First cross nexus thresholds on 9/1/2022 in GA, MN, PA
- Collection must begin on
 - 9/2/2022 – GA
 - 11/1/2022 – MN
 - 4/1/2023 – PA



Remember Physical Nexus!

- Nexus can be created before threshold exceeded
 - Physical presence
- Fulfillment by Amazon can create broad nexus



Affiliate Nexus – Related Entity

- Attribute presence based on the activities of affiliates
 - Substantial common ownership
 - Similar name
 - Similar products
 - Agency
- Florida – If able to file consolidated federal return
- Click through nexus



Income Tax – Nexus Overview

- ‘Presence’
 - *Tyler Pipe*
 - *MBNA*
 - *Telebright*
- Factor presence
- PL 86-272



Income Tax Nexus - Physical

- Storefront not needed
- Delivery in own trucks
- Sales calls (see PL 86-272)
- Remote employees
- Partners
- Certain contractors
- Leased property (as lessor or lessee)
- Tooling
- Inventory – FBA
- Many other instate activities



Income Tax Nexus - Physical

- Trade shows
- Remote employees
- Many other instate activities



Contractors and Agents

- The crucial factor governing nexus is whether the activities performed in the state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in the state for the sales.

Tyler Pipe Industries v Washington Department of Revenue 483 US 232,250 (1987) (US Supreme Court)



Remote Employee

- Telebright Corporation, Inc. v. Director, Division of Taxation (New Jersey Tax Court, No. 011066-2008, March 24, 2010)
 - Continuous contact by business with New Jersey
 - Presence of company laptop
 - Doing business at the location where employees are expected to report for work and carryout assignments



Remote Employee

- Covid exceptions have expired
- Guidance is minimal
- Remote worker v employee home
 - Occasionally works from home
- PL 86-272
- States like Colorado with bright line nexus
 - \$500,000/\$50,000/\$50,000
- Payroll taxes



Economic Nexus - Income Tax

- Steager v MBNA America Bank, 640 SE 2d 226 (2006) (WV Supreme Court)
 - Court focused on benefits received by MBNA
 - Banking and credit laws
 - Access to state courts
 - Evolution of electronic commerce allowed substantial presence without physical presence
 - Did not violate commerce clause



Factor Presence

- Multistate Tax Commission factor presence
 - \$50,000 payroll
 - \$50,000 property
 - \$500,000 sales
 - 25% of any factor



Factor Presence Examples

	Sales	Wages	Property	Transactions
Alabama *	\$ 500,000	\$ 50,000	\$ 50,000	n/a
California	\$ 583,867	\$ 58,387	\$ 58,387	n/a
Colorado	\$ 500,000	\$ 50,000	\$ 50,000	n/a
Connecticut	\$ 500,000	n/a	n/a	n/a
Hawaii	\$ 100,000	n/a	n/a	200
Massachusetts	\$ 500,000	n/a	n/a	n/a
Michigan	\$ 350,000	n/a	n/a	n/a
New York	\$ 1,000,000	n/a	n/a	n/a
Pennsylvania	\$ 500,000	n/a	n/a	n/a
Tennessee *	\$ 500,000	\$ 50,000	\$ 50,000	n/a
Virginia	Zero	Zero	Zero	n/a

* Applies to franchise tax as well.



Economic Nexus – Income Tax

- Additional states have statutes that allow for economic nexus without a specific threshold
- Expect more states to adopt thresholds
- PL 86-272 beats economic nexus



Income Tax – PL 86-272

- Public Law 86-272
 - Limited to sellers of *tangible personal property*
 - Instate activities are limited to solicitation
 - Limited to *income taxes*
 - Cannot maintain instate inventory
 - States vary regarding delivery in own trucks
- MTC model language
- California TAM 2022-01 (2/14/22)



Protected Activities (sampling)

- Soliciting orders
- Carrying samples
- Providing automobiles to sales personnel for their use in conducting protected activities
- Passing orders, inquiries, and complaints on to the home office
- Maintaining an in-home office for a salesperson (not public)



Unprotected Activities (sampling)

- Approving or accepting orders
- Making repairs
- Collecting delinquent accounts
- Installation (even if by a third party)
- Training non-sales personnel
- Providing technical assistance
- Inventory in fulfillment warehouse or on consignment



MTC & California v. PL 86-272

- Model legislation erodes protections
- California TAM 2022-01 (2/14/2022)
- Unprotected activities include:
 - Regular post sales assistance via chat or email
 - Website that invites viewers to apply for non-sales positions
 - Placing cookies on viewers computers to gather information used for non-solicitation purposes
 - Remote fixes or upgrades of products



MTC & California v. PL 86-272

- Protected activities include:
 - Placing a static FAQ on your website
 - Placing “cookies” on customer computers for purposes ancillary to solicitation – tracking items in carts, customer information
 - Website that allows customers to search for items, read



Franchise Tax - Nexus

- Nexus
 - PL 86-272 does not apply
 - Common to be subject to franchise tax but not Income
 - States can be very aggressive - KY



Gross Receipts/Margin Taxes - Nexus

- Ohio CAT
 - \$500K sales or \$50K property \$50K payroll in OH
- Texas Gross Margins
 - \$500,000 of TX sales
- Washington B&O
 - \$100,000 of WA sales
- Oregon
 - \$750,000 of OR sales
- Nevada and Delaware
 - Physical presence



Thank You!



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