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Analysis

Nexus and the States' Jurisdictional Right to Tax

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An issue for any corporation or other business entity operating in more than one state is determining the states in which it must file returns and pay income and or sales tax. It may also be subject to tax in other states in which its property, employees or other agents are physically present on a regular and systematic basis. A state has jurisdiction to tax a corporation or other business organized in another state only if the out-of-state corporations' contacts with the state are sufficient to create nexus. Nexus is defined as some link between the state and the corporation it seeks to tax. Different taxes may have differing threshold standards for establishing physical or economic nexus. Those standards are the outgrowth of judicial decisions that are accepted or modified because of legislative activity. [1]

Electronic commerce has radically changed the way people conduct business. The Internet has made it easier to start an enterprise, while lowering barriers to doing business simultaneously in multiple states. The borders that once defined state and local governments' jurisdiction are fading quickly as the globalization of e-commerce expands within and beyond their reach. How can state and local governments clearly know whether a company is doing business within their jurisdiction? How can a business enterprise know whether it is bound by the laws of multiple jurisdictions? Finally, how can trusted advisors help clients avoid the pitfalls and penalties of incorrect application of the law?

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RESTRICTION ON STATES' TAXING POWER

Historically states have asserted that any type of in-state business activity creates nexus for an out-of-state business. This approach reflects the reality that it is politically more appealing to collect taxes from an out-of-state business than to raise tax on in-state business interests. The desire of state and local governments to impose income, franchise, sales, use and other business taxes is counterbalanced by the Commerce and Due Process Clauses of the U.S. Constitution, both of which limit a state's ability to impose a tax obligation on an out-of-state corporation. In addition, Congress enacted two laws that have had great impact on limiting states power to impose tax on out-of-state corporations: Public Law (P.L.) 86-272 and the Internet Tax Freedom Act.

CONSTITUTION

Before a state can impose taxes on out-of-state business activities, it must be able to show a nexus between the businesses' activities and the state. Nexus between a business and a taxing state is a requirement under both the Commerce and Due Process Clauses of the U.S. Constitution. The Commerce Clause gives Congress the power *"to regulate interstate commerce among the States."* 2(A) The "substantial nexus" standard describes the Commerce Clause component, which protects interstate and foreign commerce as well as e-commerce. There must be a clear physical presence for the state to be able to impose taxes. The Due Process Clause states that no state, *"shall deprive any person of life, liberty or property, without due process of law."* 2(B) The Due Process Clause requires *"some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."* 2(C) This means the nexus requirement of the Due Process Clause can be satisfied even where the corporation has no physical presence in the taxing state, as long as the corporation has purposefully directed its activity at the state's economic market. Thus, the concept of "economic presence" has evolved from the courts interpretation of the Due Process Clause. This "economic presence" would be sufficient to create income tax nexus. This "economic nexus" standard has become the subject of litigation and state courts have issued differing rulings.

PUBLIC LAW 86-272

Congress enacted Public Law 86-272 on September 14, 1959 to provide multistate corporations with a limited safe harbor from the imposition of state income taxes. It applies only to net income tax. Therefore, it provides no protection against the imposition of a sales tax collection obligation, gross receipts taxes (i.e., Washington Business and Occupation Tax or Ohio Commercial Activity Tax) or state franchise taxes imposed on a base other than income (i.e., Pennsylvania Capital Stock Tax). The law prohibits a state from imposing net income taxes on multistate businesses if a company's only state activity is the solicitation of orders for tangible personal property, provided that the orders are approved and filled outside the state. However, the law does not protect activities such as leasing tangible personal property, selling services, selling or leasing real estate or selling or licensing intangibles. For state or local authorities to tax earnings in interstate commerce, taxing authorities must be able to show a clear link with the activities from which the earnings are generated. 1

INTERNET TAX FREEDOM ACT

Since the start of the Internet revolution, supporters of a tax-free cyberspace believe that taxation would hinder the growth of the Internet industry. Therefore, to help stimulate growth in the Internet industry, Congress passed the 'Internet Tax Freedom

Act' in 1998 which was signed by President Bill Clinton. In 2007, President George W. Bush signed an amendment that extended the moratorium to November 1, 2014. The Internet Tax Freedom Act prohibits "federal, state and local governments from taxing Internet access and from imposing discriminatory and multiple taxes on electronic commerce." [3] However, the Internet Tax Freedom Act and its subsequent amendments have not limited the taxing authorities ability to exercise an economic nexus standard as it relates to taxes on goods or services sold and purchased over the Internet.

STATE INTERPRETATION

A number of states have taken the position that an out-of-state business has nexus because an affiliated or related corporation is present in the taxing state. A business is "physically present" if "a division or other business segment of an out-of-state business [is physically present in the taxing state], regardless of whether the in-state corporate division or business segment performs activities related to the out-of-state business' sales activities." No court, however, has ever found "substantial nexus" because of affiliate nexus.

For example, in Current, Inc. v. State Board of Equalization [5(D)], the taxpayer was a subsidiary of Deluxe Corporation. Deluxe maintained significant physical presence in California, the taxpayer itself was a Delaware mail-order corporation, which maintained all of its employees and facilities in Colorado. The court rejected the argument that the corporate affiliation between the taxpayer and Deluxe created "substantial nexus."

The court based its decision on the fact that the taxpayer and Deluxe did not have integrated operations, and management was organized and operated as separate entities, and was neither the alter ego nor agent of the other. [2(D)]

EVOLUTION OF NEXUS – JUDICIAL LAW

The term and standard for "nexus" has changed and evolved due to various U.S. Supreme Court and State Courts rulings that have surrounded companies conducting business directly and indirectly within a state. Judicial interpretations of both the Commerce and Due Process Clauses have shaped the nexus requirement standards for anyone conducting business within the United States. These standards represent guidelines for taxing jurisdictions to determine whether a foreign (out-of-state) corporation is actively conducting business within the state's borders.

The first change came with the U.S. Supreme Court ruling in National Bellas Hess v. State of Illinois. [4(A)] The Court concluded that the taxpayer must have some physical presence in the taxing authority, before the corporation is subject to taxation. The Court ruled that a physical presence is an essential prerequisite to establishing nexus at least for sales tax purposes. With this ruling came the "bright-line" rule that no "substantial nexus" exists unless there is a physical presence within the state. The connection between the state and the foreign corporation must be more than just the transactions of using mail or common carrier services to connect them to state residents.

Another important case was the Court decision in Complete Auto Transit Inc. v. Brady. [4(B)] The Court issued the four-prong test that set the standard that can be used to determine the constitutionality of state taxation: *1)* substantial nexus, *2)* fair apportionment, *3)* no discrimination against the non-resident or foreign taxpayer, *4)* a fair relationship between the services provided by the state and the activity the state seeks to tax. [2(A),(D)] This case ruling also surrounded the Commerce Clause as it related to "substantial nexus"

and established a standard for state and local governments to apply to determine whether a business could be subject to taxes. In general, a foreign corporation must have a "taxable presence" in a state before the state can require the foreign corporation to collect and remit sales and use tax. The nexus standards require that "sufficient contact" must exist with the state. In Quill Corp. v. North Dakota (504 US 298 (1992)) the Court clarified that *"the Due Process Clause requires only that the corporation have "minimum contact" with the taxing state."* 2(c)(e) The Court held that for imposing a sales or use tax collection obligation the taxpayer needs to have a physical presence in the state. This will satisfy the Commerce Clause.

In the Quill decision 4(c), Quill Corp. was an out-of-state mail-order office equipment vendor that solicited sales through a catalogue to potential customers in North Dakota. North Dakota charged that Quill should be applying a use tax to the goods it sold in the state. The North Dakota Supreme Court held that by selling its product to North Dakota customers, Quill established an economic presence in North Dakota, which created nexus for sales tax purposes. However, the U.S. Supreme Court ruled in favor of Quill, saying that the business had no physical presence and that North Dakota could not tax Quill simply because it had customers within the state.

After the Quill case ruling, many state courts ruled in favor of the concept of economic presence as sufficient for a state to impose tax on a foreign corporation. Below is a chronological order of some of these state rulings, *1)* Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.C. 1993); *2)* Orvis Co. v. Tax Appeals Tribunal, 654 NE2d 95 4 (1995); and *3)* Amazon.com LLC v. New York State Department of Taxation and Finance (N.Y. Sup. Ct. No. 601247 2008) 5(c). In these rulings all of the state courts reaffirmed that the foreign corporation need not have a physical presence in the state for the state to impose tax on the foreign corporation, as long as the foreign corporation *"purposefully* avails itself of the benefits of an economic market within the state." 2(a)(d)

STATE COURTS AFFIRM STATE POWER TO TAX

Geoffrey Inc., like Quill, had no physical presence with South Carolina. 5(a) Geoffrey, a foreign corporation, executed a license agreement with its subsidiary Toys R Us, located in South Carolina, which gave them the right to use the "Toys R Us" trade name. Geoffrey received royalty fees from Toys R Us stores located in South Carolina in exchange for services. On its South Carolina tax return, Toys R Us deducted the royalty fee payments. Thus, the South Carolina Tax Commission required that Geoffrey pay income tax and business license fees, because the company was actively doing business within the state. However, Geoffrey's argument was that it did not have sufficient nexus within South Carolina and that the royalty income was derived from intangible means, and thus not taxable.

The South Carolina Supreme Court decision addressed what is described as an economic relationship and not so much a physical presence issue that would have satisfied the Commerce Clause. Under the Due Process Clause, only "minimum contacts" are required with the jurisdiction to create or establish a benefit from an economic market within the state. Thus, in Geoffrey, the South Carolina Supreme Court stated "…that any corporation that regularly exploits the markets of a state should be subject to its jurisdiction to impose an income tax even though not physically present" and that the presence of intangible property alone is sufficient to establish nexus. 2(a)(d) Also, the South Carolina Supreme Court stated that

Geoffrey had "purposefully directed its activity at the South Carolina's economic market by licensing intangibles for use in South Carolina and receiving income in exchange for their use." [6] As a result of its actions, Geoffrey created nexus and the state can impose income tax and business tax on the company activity.

In the case of Orvis Co., the New York State Court of Appeals found in favor of the Tax Appeals Tribunal that required the company to collect sales and use tax. Orvis Corporation, like Quill, had no physical presence within the state. However, in the Orvis Corporation case, its sales personnel visited their clients' wholesale and retail stores within New York State. Thus, occasional visits to the state were held to satisfy the Commerce and Due Process Clauses. This activity by Orvis' sales personnel created a direct solicitation of all its mail order and wholesale customers. This ruling addressed economic nexus based on an out-of-state corporation whose activities are similar to Orvis. New York's Court of Appeals also indicated that while physical presence is required, it need not be more than the "slightest presence." [5(b)]

STATE JURISDICTIONAL RIGHT

States have always had the freedom to determine what transactions are taxable, the rate of tax to apply on sales of services performed within its borders, or whether to tax internet service transactions as long as they did not violate the Constitution or any federal laws. Taxpayers operating directly or indirectly within a state's or locality's borders may be subject to its taxing authority. In general, the standard for doing business includes: location of real or personal property; location of employees; where and how sales are solicited; and where the revenue source is generated.

Once nexus has been determined to exist, the "foreign" corporation must comply with all the state statutes and regulations, including registration; paying income taxes; and collecting and remitting taxes due to the state where applicable.

Based on many of the judicial rulings, states are clearly exercising their rights to impose tax on foreign corporations conducting business within their borders. These states are finding creative ways of enacting laws and policies which will generate revenue. In times of fiscal crisis, where there are large budget deficits, state and local governments are even more diligent in developing innovative tax provisions. States have cleverly begun passing laws which incorporate an economic nexus standard in order to ensure that those foreign corporations operating within the state's borders are being taxed.

STATE DEFENSE TO E-COMMERCE

New York State is evaluating its old laws and enacting new laws that would effectively generate revenue specifically from out-of-state businesses that may not have a physical presence within the state, but have some type of consistent activities that would create nexus. For example, the New York State Department of Taxation and Finance issued a Sales Tax Memorandum — "Requirement to Register as a Sales Tax Vendor for Out-of-State Companies Soliciting Sales Through Representative" (TSB-M-07(6)(S)) that states *"… if an out-of-state business solicits sales by paying any sort of fee to an in-state person or entity associated with a "click-through" from the in-state person or entity's website, or otherwise, the in-state person is considered a "sales agent" of the out-of-state business."* [7] The memorandum deals with soliciting sales and paying a fee to New York residents or New York based corporations for referral via the *"click-through"* method used online. This memorandum was withdrawn shortly after it was issued. The 2008 budget included

legislation amending New York's definition of a vendor required to collect sales tax to include a nexus standard similar to that standard described in the memorandum.

Thus, New York State has sought to establish a *"definite link and minimum contact"* which satisfies the Due Process Clause and the economic nexus standard with any entity under the new tax law called the Commission-Agent Provision. For the Commerce Clause to be satisfied, the sales transactions must have a "substantial nexus," fair apportionment, no discrimination, and be fair to all.

The Commission-Agent Provision, (enacted as part of the 2008 New York State budget), requires an out-of-state retailer to collect and remit sales and use taxes if they have a commission agreement with an in-state resident based on the referral of customers provided that the resident earns more than $10,000 in revenues from New York State residents. The new law forces big name online retailers to collect sales tax if they maintain affiliate networks in New York State.

New York State has designed an e-commerce law that now gives it the power to impose taxes on Internet e-businesses that do not have a physical presence within New York State. This new law puts internet businesses on notice that they have created an indirect presence within the state by having contractual sales associates who are domiciled in New York State. The question now is whether New York State's innovative approach to applying the Due Process and the Commerce Clause concept of nexus has violated the U.S. Constitution.

AMAZON.COM AND OVERSTOCK.COM

Amazon.com and Overstock.com have filed lawsuits with the New York State Supreme Court to challenge the constitutionality of the New York State tax law. 5(c) The companies argued that they do not have a physical presence in New York. "*And their Associate's Program, for Web site owners where Amazon and Overstock ads are placed does not meet the nexus requirement standard of the Commerce Clause."* 7 Both companies' arguments were focused on the concept of substantial nexus (a physical presence). However, the New York State law was designed to ensure that a "foreign" corporation with an economic benefit derived in New York State would be responsible for collecting and submitting sales tax to the New York State taxing authority.

On January 12, 2009, the New York State Supreme Court ruled in favor of the New York State Department of Taxation and Finance. The Court addressed the issue of "economic nexus" in this case. Although Amazon has no physical presence in New York State, Amazon had an economic benefit by generating income from New York State residents with its affiliate program through the Internet. The New York State Supreme Court ruling stated, "the Commission-Agreement Provision does not broadly tax any and all Internet sales to New York consumers." "It requires a substantial nexus between an out-of-state seller and New York through a contract to pay commissions for referrals with a New York resident along with realization of more than $10,000 of revenue from New York sales earned through the arrangement." 7 The impact of the new law has been felt as numerous retailers have discontinued their associate programs in their entirety, made them available only to non New York residents, or required the associates to certify to them that they are not New York residents to continue their affiliations.

Other states are currently evaluating what New York State has done and are working toward adopting legislation similar to New York State's law. California, Connecticut, Hawaii, Illinois, Minnesota, North Carolina,

Tennessee and Wisconsin are considering following New York's lead in adopting an "Amazon nexus" law that requires out-of-state businesses to collect taxes, for the state if they have at least $10,000 in contracts with in-state affiliates.[8] Both California and Hawaii's state legislatures passed legislation similar to New York State's, however, the governors of both these states vetoed the legislation.

CONCLUSION

Large corporations or other business entities with customers nationwide have nexus in each state in which the company has offices and other facilities, accompanied by resident employees. Some states have adopted a "doing business" standard for determining whether in-state activities create nexus for income tax purposes. A more difficult issue is determining in which, if any, state's economic markets the company has nexus. Many state tax codes are still based on the premise that a sales transaction involves two parties, a seller and a buyer. Modern transactions could involve far more than two parties. State tax codes have not kept up with the evolution of commercial transactions.

Laws similar to the *"Amazon Tax"* essentially expand the long arm of a state's jurisdictional power beyond its borders. More and more out-of-state (foreign) corporations or other business entities are becoming obligated to collect and submit sales and uses taxes for goods sold via the internet; and at the same time becoming liable for state income taxes. As the borders continue to fade, states will become increasingly aggressive about enacting laws to generate additional revenues within their borders. The question is just how far this will go. If a "foreign" corporation is required to collect and submit sales tax in every state and local jurisdiction within the United States, how costly will this become to large and small businesses? Will this create double taxation between states? Multiple taxes on the same transactions or services in the same or different tax jurisdiction are normally prohibited among the states.

SUPPLEMENTAL INFORMATION: CURRENT LAWS OF OTHER STATES FOR DETERMINING NEXUS

CALIFORNIA: Tax is imposed on every corporation doing business within the limits of the state by engaging in any transaction for the purpose of financial or pecuniary gain or profit. Activities that do not require physical presence, such as transactions involving intangibles or services, are not subject to P.L. 86-272 protection. Beginning with 2011 taxable year, tax will be imposed if: *1)* taxpayer is organized or commercially domiciled in the state; *2)* the taxpayer's sales in the state, including sales by agents or independent contractors, exceed the lesser of $500,000 or 25% of taxpayer's total sales; *3)* taxpayer's property in the state exceeds the lesser of $50,000 or 25% of the taxpayer's total property; or *4)* taxpayer's compensation paid in the state, exceeds the lesser of $50,000 or 25% of the total compensation paid by the taxpayer. Sales, property, and payroll thresholds adjusted will be annually for inflation.

CONNECTICUT[9]: Out of state corporations, which have no physical presence in the state (i.e. no property or payroll in the state), are not liable for the business tax. This applies to members and partners in partnerships, and shareholders i S corporations, who would not be subject to personal income tax if they derive no income from sources within or connected to Connecticut. With evolving court cases, legislation has established "economic nexus" as a basis for determining if an out of state entity or nonresident is subject to business or personal income tax. This change is effective for taxable years

beginning on or after January 1, 2009. The legislation subjects a company to the corporation business tax, if instead of a physical presence, it has a "substantial economic presence" in Connecticut, and if it purposefully directs business towards the state or derives income from sources in the state. A company's purpose will be determined by such measures as the frequency, quantity, and systematic nature of its economic contact with the state.

FLORIDA: Tax is imposed on corporations and other entities for the privilege of conducting business, deriving income, existing within the state, or actively engaging in any transaction in the state for the purpose of financial gain, regardless of whether carried on in intrastate, interstate, or foreign commerce. Activities that do not require physical presence; such as transactions involving intangibles or services, are construed as conducting business in the state.

MASSACHUSETTS: Tax is imposed on all corporations qualified to do business, actually doing business, or owning property or otherwise exercising their charters within the Commonwealth. Activities that do not require physical presence, such as transactions involving intangibles or services, are not subject to P.L. 86-272 protection.

An economic nexus standard applies to financial institutions. See, "Capital One Bank v. Commissioner of Revenue" (holding Quill physical presence test is limited to sales and use taxes and finding that out-of-state banks had established substantial nexus to satisfy Commerce Clause by deriving substantial economic gain from in-state economic market, infrastructure, and resources).

MICHIGAN: Single Business Tax (SBT) is imposed on taxpayers with business activity in the state for the privilege of doing business in the state. Taxable business activity includes the sale or rental of intangible property, made or engaged in within the state, whether in intrastate, interstate, or foreign commerce, with the object of gain, benefit, or advantage, whether direct or indirect, to the taxpayer or to others. Physical presence need not be substantial for purposes of SBT tax to satisfy Quill, but it must be demonstrably more than a "slightest presence" and it may be manifested by the conduct of economic activities in the state performed by the vendor's personnel or on its behalf.

Effective for tax years after 2007, Michigan Business Tax (MBT) was imposed on every taxpayer with business activity in the state, unless prohibited by P.L. 86-272. Taxable business activity includes the same activities as in prior tax years. In addition to business income tax, modified gross receipts tax is imposed on taxpayers that:

- Have physical presence in the state for more than 1 day; or
- Actively solicit sales in the state and have $350,000 or more of gross receipts attributable to state sources. "Actively solicit" is purposeful solicitation of persons within the state including, but not limited to:
  - the use of mail, telephone, and e-mail;
  - advertising, including print, radio, internet, television, and other media; and
  - maintenance of an internet site over or through which sales transactions occur.

NEW JERSEY: Tax is imposed on every corporation for the privilege of having or exercising its franchise in the state, deriving receipts from sources within the state, engaging in contacts within the state, or doing business, employing or owning capital or property, or maintaining an office, in the state. Activities that do

not require physical presence, such as transactions involving intangibles, are not immune from taxation. See Lanco v. Director, Division of Taxation, cert. denied U.S. Supreme Court Dkt. 06-1236, June 18, 2007 (corporation's physical presence was not necessary in the state to satisfy substantial nexus under Commerce Clause because Quill bright-line physical presence test does not apply to taxes other than sales and use taxes).

NEW YORK: Tax is imposed on every corporation for privilege of doing business, employing capital, owning or leasing property, or maintaining an office in the state. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss. (Refer to State Defense of E Commerce)

TEXAS: Imposes a Franchise Tax, (also known as Margin Tax), on each corporation that does business in the state or that is chartered in the state. The laws were recently revised to specify that Public Law 86-272 does not apply, and activities involving intangibles are not immune from taxation.

See, Rylander v. Bandag Licensing Corporation (mere possession of certificate of authority to do business and licensing of patents in the state is not sufficient to satisfy the Commerce Clause substantial nexus requirement for purposes of the prior franchise tax because activities did not meet Quill physical presence standard).

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