NEXUS

OVERVIEW

By Tom Johnson 08/30/2012

DEFINITION:

- "Nexus" is some definite link or minimum connection required to exist between the state/city and the person, property or transaction it seeks to tax.

- The United States Constitution limits the states' [cities'] right to tax through the <u>Due Process Clause</u> and the <u>Commerce Clause</u>

Due Process Clause:

- The Due Process Clause of the Fourteenth Amendment requires some definite link, some minimum connection between a state [city] and the person, property, or transaction it seeks to tax. The most minimal connections will satisfy this requirement. The connection need not include physical presence in the state.

Commerce Clause:

- The Commerce Clause of the Constitution (Article 1, Section 8, C13) gives to Congress the power to regulate commerce among the states. Therefore, a state [city] may not impermissibly affect interstate commerce without congressional authorization. Court cases have created four tests to determine interstate commerce.

FOUR TESTS:

1. The taxed activity has a substantial nexus to the taxing state [city].
2. The tax is fairly apportioned among states [cities].
3. The tax does not discriminate against interstate commerce.
4. The tax is fairly related to services provided by the taxing state [city].

TRANSACTION PRIVILEGE TAX or USE TAX?

- "Care Computer Systems Inc. v. Arizona DOR (1995)" In-state training & sold licensed software creates TPT nexus
- "Brown Furniture v. Illinois (1996)" Company owned delivery vehicles creates Use Tax nexus
- The tax commonly referred to as a "sales tax" is in reality two distinct taxes.

NEXUS THRESHOLDS

- USE TAX requires “minimal presence”
- PRIVILEGE (SALES) TAX requires “substantial nexus”

TRANSACTION PRIVILEGE TAX

- Employee present in the State for more than two days per year.
- Ownership or lease of real and/or personal property in the State (includes inventory).
- Maintenance of an office or place of business in the State.
- Delivery of merchandise into the State on vehicles owned or leased by the taxpayer.
- Independent contractors or other non-employee representatives present in the State for more than two days per year for the purpose of establishing and maintaining a market for the taxpayer.

ESTABLISHING / MAINTAINING A MARKET

Includes:

- Soliciting sales
- Making repairs
- Collecting delinquent accounts
- Delivering property sold to customers
- Installing products
- Conducting training for employees or representatives of the company or customers
- Resolving customer complaints
- Providing consulting services; soliciting, negotiating, or entering into franchising agreements.

USE TAX

Use Tax is a tax on any tangible personal property bought from an out-of-state vendor that is stored, used, or consumed in the state/city on which no tax was paid. The consumer is liable for the Use Tax, however the vendor is responsible for collecting and remitting the tax to the state/city as long as nexus is established.

National Activity

- Streamlined Sales Tax Project

  Trying to get legislation enacted

"The Main Street Fairness Act"

Would require vendors (in person, phone, mail, or Internet) to collect tax based on destination point.

NEXUS CASE LAW #1

- “General Trading v. Iowa (1944)” Sales Reps create sufficient nexus for Use Tax.
- “Scripto Inc. v. Carson - FL (1960)” Independent Sales Reps (jobbers) create sufficient nexus for Use Tax (continuous solicitation & company’s in-state activities).
- “National Bellas Hess v. Illinois DOR (1967)” Only Mail & Common Carrier Connection – create <u>no</u> nexus. Bright-Line Test created (seller must have a physical presence in the state to satisfy the Commerce Clause).
- “Standard Pressed Steel Co. v. Washington DOR (1975)” Single WA resident employee consulting with customer therein creates sufficient nexus for Use Tax.
- “Complete Auto Transit v. Brady (1977) MS” Transporting within the state using vendor’s vehicles creates TPT nexus.
- “National Geographic v. California Board of Equalization (1977)” Two offices in CA soliciting advertising create substantial nexus for Sales Tax (physical presence).
- “Tyler Pipe Industries v. Washington (1987)” In-State Reps create substantial nexus for TPT(establish & maintain a market in WA).
- “Bloomingdale’s By Mail, Ltd v. Pennsylvania (1989)”, “SFA Folio Collections, Inc. v. Tracy - OH(1991)”, and “Current, Inc. v. California Board of Equalization (1994)” All agree that separate and distinct entities owned by the same parent, alone, is <u>insufficient</u> to create nexus and a “preferential return policy” does <u>not</u> establish substantial nexus.
- “Quill Corp v. North Dakota (1992)” Only Mail & Common Carrier Connection does <u>not</u> create any nexus.

NEXUS CASE LAW #2

- "Orvis Mfg. Co. v. Tax Tribunal - NY (1995)" Reaffirmed Bright-Line Bellas Hess Rule (some physical presence in NY - more than slightest presence). Vendor's 134 trouble-shooting trips to NY in 3 years creates substantial nexus required by the Commerce Clause (establish & maintain a NY market).
- "Scholastic Book Clubs v. Kansas (1996)" Out-of-State Retailer that effectively uses KS teachers to sell books to KS students creates sales nexus.
- "Borders Online, LLC v. California Board of Equalization (2005)" Border's CA retail store acts as an "agent"/ "authorized representative" by accepting refunds of personal property sold by the out-of-state online internet retailer which creates Use Tax nexus (co's "agent" in the state).
- "State v. Dell Int'l, Inc. - LA (2006)" Foreign computer retailer who contracts with an in-state technical service provider to provide support services creates sales nexus.
- "Louisiana v. BarnesandNoble.com (2007)" Membership, gift card, and commission based programs with several other retailers and/or wholesalers (including BN.com) does not create substantial nexus.
- "Amazon.com LLC v. New York DOT&F (2009)" NY stature requires taxes be collected when a seller enters into a contract with a NY resident and pays a commission if the seller receives in excess of $10,000 from NY customers. Amazon's operating agreements only provide for its placement of links on associates' websites. The commission agreement provision creates a substantial nexus between the out-of-state seller and NY through a contract to pay commissions for referrals with a NY resident.

TPT Simplification Task Force

- Established in May through Executive Order
- 12 members
- Goal is to simplify code, alleviate taxpayer frustration, improve compliance, avoid redundancies
- Recommendations due December 31, 2012
- First meeting was July 23
- Established 3 working groups:
  - State and Local Standardization
  - Online Retail
  - Contracting

TPT Simplification Task Force

- Task Force and Working Group meetings alternate weekly
- Working Groups are establishing foundations and scope
- Last meeting currently scheduled on November 27
- Goal is to complete meetings and draft recommendations in late November

QUESTIONS

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