

## Florida: Officials grapple with application of nexus laws in various contexts



David M. Kall | Tuesday, February 28, 2017

Last November, we published an [article](#) that explained a florist's dispute with the Florida Department of Revenue over taxability of the florist's sales, regardless of where the customers are located. In an appeal from its loss in the Florida Supreme Court, in [Florida Department of Revenue v. American Business USA Corp.](#), the florist sought review in the [U.S. Supreme Court](#). The Court yesterday denied the florist's [Petition for Writ of Certiorari](#).

Whether a seller or service provider has a sufficient connection with a state to be subject to certain taxes is under constant scrutiny throughout the country. In the case of the florist, the central question, as put forth in its cert petition, was whether a state can collect sales tax on out-of-state property ordered over the internet for out-of-state delivery when the florist only accepts the order and arranges the sale.

Sales and use taxes are not the only context in which there is a controversy of the presence of a tax-inducing nexus. Last month, the Florida Department of Revenue (Department) issued a [Technical Assistance Advisement](#) (TAA) for a reinsurer and its affiliates that concluded that the taxpayer does not have nexus with Florida, none of its affiliates has a regional home office in Florida, nor are the companies residents of Florida, so they do not have nexus either.

According to the facts provided by the taxpayer, it has no property or employees in Florida. It is not an approved reinsurer, nor is it registered with the Florida Office of Insurance Regulation. The taxpayer reinsures some policies, including those covering Florida risks, of its affiliates, and uses unrelated external reinsurers to set the pricing and terms of the coverage it provides for its affiliates.

The taxpayer's affiliate insurance companies operate in many states including Florida, but none of them are domiciled in Florida. A majority of the work performed by the affiliates is performed by personnel that are legally employed by the taxpayer, its parent company, and/or other affiliates, though most affiliates have their own legal employees as well. Some have located a majority of their non-management staff employees in their parent company's Florida location.

The affiliates perform a variety of functions at the Florida office location, including selling insurance, approving or rejecting coverage, issuing insurance, and acting as a service center for policy holders.

Fewer than 5 percent of the affiliate companies' underwriters are in Florida, and they work on Florida and non-Florida policies. Finally, this Florida office has a small budget for advertising, but national advertising, including radio, television, and billboard advertising, is handled outside Florida.

Looking to the relevant statutes and rules, the Department first acknowledged the authority to impose income taxes on corporations and other entities "for the privilege of conducting business, deriving income, or existing within Florida."

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In addition, the law provides that when an insurer is authorized to transact insurance or reinsurance in the state, “then it would appear that a sufficient connection with Florida exists (nexus). In addition, if an approved reinsurer reinsures policies from an insurer domiciled or commercially domiciled in Florida, nexus clearly exists.”

Here, however, the taxpayer “is not an approved reinsurer and is not registered with the Florida Office of Insurance Regulation.” Nor are the affiliates “domiciled or commercially domiciled in Florida.” For these reasons, the Department concluded, the taxpayer does not have nexus with Florida, and is not required to file a Florida corporate income tax return.

The Department further considered whether the Florida office location could be a regional home office and subject to taxation. Though the relevant authority contains no definition of a home office, the Department looked to related terms and definitions that it, and in its view the U.S. Supreme Court, have utilized. It concluded that none of the affiliates has a regional home office in Florida, or is a resident in Florida, so these entities did not have nexus with the state of Florida either.

The Department cautioned that its TAA was based solely on the facts and circumstances that the taxpayer provided, and that subsequent statutory or administrative rule changes, or judicial interpretations, could change its decision.

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