# Multistate Tax Update - August 20, 2015

David M. Kall | Thursday, August 20, 2015

**More states utilizing nexus laws to capture lost tax revenue**

## Background

In 1992, the Supreme Court decided ***Quill Corp. v. North Dakota***, holding that states cannot require out-of-state retailers to collect sales taxes on products they ship into those jurisdictions, absent some minimal contact or physical presence there. As Internet shopping becomes more prevalent, this rule has become increasingly burdensome on states seeking revenue.

*Quill* did not define what constitutes an adequate physical presence, and federal lawmakers have not taken decisive action. Consequently, states have started to clarify their nexus guidelines and define the circumstances under which out-of-state sellers will be subject to tax obligations.

The Sales Tax Institute explains that there are two types of nexus determinations. Click-through nexus refers to the requirement that an out-of-state seller meet a minimum sales threshold before being subject to tax obligations.

Affiliate nexus requires that a remote seller hold a substantial interest in an in-state retailer and that there be commonality with respect to the products sold, as well as the business names under which such products are sold, among other things.

Under the authority of the Due Process and Commerce clauses of the United States Constitution, both nexus determinations require a link between the state and the entity it wants to tax; the Commerce Clause requires a more “substantial presence” in the state, whereas the Due Process Clause only requires a minimum connection.

## Washington

Washington has no corporate or individual income tax, so it relies on other taxes to fund its public services. The main three funding taxes are the Business & Occupation (B & O) tax, retail sales tax, and the use tax.

In 2010, Washington adopted a physical presence law that specified when a business would have nexus-related tax responsibilities with the state. Also in 2010, it adopted an economic nexus classification for certain activities, such as those subject to the service and other activities and royalty B & O tax classifications, under which a firm need not maintain a physical presence in the state to have nexus, and therefore be subject to Washington tax laws.

Here are a few examples of nexus-creating activities:

- Soliciting sales in Washington through employees or other representatives
- Installing or assembling goods in Washington, either by employees or other representatives
- Maintaining a stock of goods in Washington
- Renting or leasing tangible personal property
- Providing services
- Constructing, installing, repairing, maintaining real property or tangible personal property in this state
- Making regular deliveries of goods into Washington using the taxpayer's own vehicles

In order to clarify the statutory guidelines for determining nexus, Washington's Governor Inslee signed **Engrossed Substitute Senate Bill 6138** on July 1, 2015.

The Washington Department of Revenue summarizes the legislation as follows:

- It expands economic nexus for B & O tax purposes to out-of-state businesses making wholesale sales in Washington taxable under the general Wholesaling classification and who exceed any of the applicable nexus thresholds
- It changes the time frame for determining whether a business has exceeded any of the economic nexus thresholds from the current tax year to the immediately preceding tax year
- It adopts "click-through" nexus for both retailing B & O tax and retail sales tax purposes. Under these provisions, remote sellers are presumed to have nexus with this state if they enter into agreements with Washington residents who, for a commission or other consideration, refer potential customers to the remote seller, such as by a link on a website, and generate more than $10,000 in gross receipts during the prior calendar year

> "A remote seller can rebut this presumption by proving, to the satisfaction of federal nexus requirements, that the resident with whom the remote seller has an agreement did not engage in any solicitation in the state on behalf of the remote seller.
> "

**Nevada**

Other states are also expanding their definitions of nexus. For example, Nevada recently passed **Assembly Bill 380**, which provides that a retailer that engages in certain specified activities is required to collect and remit sales and use taxes.

More specifically, Assembly Bill 380 creates a presumption that a retailer is required to impose, collect, and remit sales and use taxes if the retailer is:

1. Part of a controlled group of business entities that has a component member who has physical presence in Nevada; and
2. The component member with such physical presence engages in certain activities in Nevada that relate to the ability of the retailer to make retail sales to Nevada residents.

A retailer may rebut the presumption of affiliate nexus by providing proof that the component member with physical presence in Nevada did not engage in any activity in Nevada that was significantly associated with the retailer's ability to establish or maintain a market in Nevada for the retailer's products or services.

This provision was effective July 1, 2015.

As for click-through nexus in Nevada, a retailer is also required to impose, collect and remit sales and use taxes if:

1. It enters into an agreement with a Nevada resident, under which the resident receives certain consideration for referring potential customers to the retailer through a link on the resident's Internet website or otherwise; and
2. The cumulative gross receipts from sales by the retailer to customers in Nevada, through all such referrals, exceed $10,000 during the preceding four quarterly periods.

This, too, is rebuttable if the retailer provides proof that each resident with whom it has an agreement did not engage in any activity that was significantly associated with its ability to establish or maintain a market in Nevada for its products or services during the preceding four quarterly periods.

This provision takes effect Oct. 1, 2015.

### Tennessee

Effective July 1, 2015, Tennessee's **HB 644** addresses click-through nexus. In **Notice #15-12** explaining the additional nexus standard, the Tennessee Department of Revenue established that there is a rebuttable presumption of nexus for certain sellers when two conditions exist, triggering the resulting tax obligations.

Accordingly, "a dealer that makes sales of tangible personal property or services in Tennessee is presumed to have a substantial nexus with this state, and it is required to collect and remit sales and use tax on all of its taxable sales in Tennessee if both of the following conditions are met:

1. The dealer enters into an agreement or contract with one or more people located in Tennessee under which, for consideration, the person refers potential customers to the dealer, by link on an Internet website or other means.
2. The cumulative gross receipts from retail sales by the dealer to customers in Tennessee as a result of referrals to the dealer by all of the dealer's resident representatives under the type of agreement or contract described above total more than $10,000 during the preceding 12 months."

A dealer may rebut the presumption by proving that the referring entity's activity did not substantially contribute to its market in Tennessee during the past year.

Notice #15-12 provides examples to help taxpayers determine whether the nexus obligation would apply to them.

### Michigan and Vermont

In March, Taxjar.com reported that later this year, Michigan and Vermont will be joining several other states that have already enacted click-through nexus laws. Those states are Arkansas, California, Connecticut, Georgia, Kansas, Maine, Minnesota, Missouri, New Jersey, New York, North Carolina, Pennsylvania, and Rhode Island.

The Michigan Department of Treasury's website alerts taxpayers that for transactions occurring on or after Oct. 1, 2015, an out-of-state seller may be required to remit sales or use tax on sales into Michigan. According to its Notice of New Sales and Use Tax Requirements for Out-of-State Sellers, click-through nexus is presumed under circumstances similar, though not exactly like, those described above.

Vermont's **HB 436** nexus law is scheduled to take effect Dec. 1, 2015. A Department of Taxes Statement provides that a remote vendor will be presumed to have Vermont nexus for purposes of collecting sales tax if it has agreements with residents to refer customers that led to sales in excess of $10,000 in the previous year.

Lawmakers passed HB 436 in 2011, which was designed to take effect after the attorney general makes a determination that 15 or more states have similar provisions.

### Alabama

Finally, Alabama has just enacted **HB 49**, which establishes a "factor presence nexus standard" for business activity for purposes of income tax.

HB 49 sets forth a "bright-line" nexus standard under which nonresident individuals and business entities organized outside of Alabama, that are doing business in Alabama, have substantial nexus and are subject to the applicable tax obligations.

Substantial nexus occurs when:

- The entity's property located in Alabama exceeds $50,000;
- The entity's Alabama payroll exceeds $50,000;
- The entity's sales in Alabama exceed $500,000; or

- At least 25 percent of the entity's total property, payroll or sales are within Alabama.

HB 49 is effective for tax years beginning after Dec. 31, 2014.

**Illinois: June and July storms trigger waiver of penalties and interest for late filings**

The Illinois Department of Revenue (IDOR) announced that it will waive penalties and interest for taxpayers who cannot file or pay on time as a result of June and July's violent storms, flooding, and tornadoes.

The waiver applies to payments or returns that were or will become due between June 22, 2015, and Dec. 31, 2015. This includes annual, monthly, and quarterly returns and payments that would have been due during that time period, along with estimated and accelerated payments.

Taxes affected include the following:

- Individual income taxes
- Business income taxes
- Withholding taxes
- Sales and use taxes
- Motor fuel and excise taxes
- Bingo, pull tabs, and charitable games taxes

International Fuel Tax Agreement filers are also entitled to excused delays. The IDOR asks paper-filing taxpayers to include, with their return, a brief written explanation of why they could not file timely. Taxpayers using MyTax Illinois should click "Claim Disaster Relief" under "Account Maintenance" in the applicable account/s.

**Connecticut: Tax appraiser may not evaluate property's interior without owner's permission or a warrant**

Earlier this month, in the case ***Reznik v. City of Milford***, a Connecticut court concluded that the taxing authority could not force homeowners to allow internal access to their home to conduct a property valuation.

The plaintiffs, the Rezniks, sought a reduction of the assessed value of their upscale waterfront property, as determined by the Milford tax assessor. The particular issue before the court was whether the tax appraiser could enter the taxpayers' property—not just the exterior, but the *inside* of the residence as well—for purposes of defending its valuation, absent the taxpayers' permission to do so.

Because the taxpayers refused to allow the tax assessor into their home, the city asked the court to compel such admittance. To defend their right to deny entry, the taxpayers relied on the statutory definition of what it means to "fully inspect" a structure, which contained plain language that conditioned the examination of the interior on "permission to enter such interior."

The taxpayers also claimed that there was no Connecticut law that permitted a tax assessor to forcibly enter the interior of a taxpayer's property to conduct a revaluation of it.

In turn, the city relied on authority that gives it permission to make a request to enter and inspect land when it is "reasonably probable" that evidence outside the record is required. Thus, the court considered whether it could "abrogate a legislative mandate that requires a taxpayer's consent to inspect the interior of his or her residence" in order to assess the property for tax purposes.

In its analysis, the court equated the city's desire to forcibly enter the taxpayers' home with an

unreasonable search of a person's home, which is barred by both the Connecticut Constitution and the Fourth Amendment of the Constitution of the United States, which establishes that "the people" shall be "secure in their persons, houses, papers…" from unreasonable searches.

In light of this prohibition, the court concluded, there is "no specific authority" for an assessor to enter a taxpayer's home without permission, or without a warrant; "a taxpayer is within his or her right to oppose an assessor's inspection of his or her home for assessment purposes."

This decision does not resolve the case. The taxpayers' effort to reduce the tax assessment will proceed, but without the valuation of the home's interior that the Milford tax assessor sought.

For additional information regarding these subjects, or any other multistate tax issues, please contact one of the attorneys listed below.

---

**David M. Kall**

Team member bio