



# Multistate Tax Nexus



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# Jack Schmoll

- 32 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



# Over Aggressive Position

- Paying sales tax out of own pocket because you failed to collect it
- Paying income tax to another state after statute has closed in home state
- Large penalties and high interest
- Uncomfortable communication with customers



# Overview

- Nexus in general
- Sales tax nexus
- Income tax nexus
  - Focus on PL 86-272 attacks by states
- Remote employees and nexus
- Practical examples

*Disclaimer – many things will not be discussed in this session as nexus is a very complex subject. This session will focus on the most current and relevant issues.*



# 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



# Sales Tax Nexus

- Physical presence nexus
- Economic presence nexus - Wayfair



# Sales Tax Nexus - Physical

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



# Economic – Variables

- Dollar thresholds
- Transaction thresholds
- Inclusion of marketplace and nontaxable sales
- Calendar v. rolling period
- Timing of collection responsibility (grace period)
  - Cross nexus thresholds on 9/1/2024 in GA & PA and collection begins:
    - 9/2/2024 in GA
    - 4/1/2025 in PA





# Sales Tax Nexus - Economic

- Keep an eye on these issues
  - Alabama cities and counties
  - Alaska cities and boroughs
  - Colorado cities and Denver County
  - Louisiana cities and parishes



# Income Tax – Nexus Overview

- Physical presence
- Economic presence
  - Factor presence
- PL 86-272



# Income Tax Nexus - Physical

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



# Factor Presence Examples

	<b>Sales</b>	<b>Wages</b>	<b>Property</b>	<b>Transactions</b>
Alabama	635,000*	64,000*	64,000*	n/a
California	735,019*	73,502*	73,502*	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
Maine	500,000	250,000	250,000	n/a
Massachusetts	500,000	n/a	n/a	n/a
Michigan	350,000	n/a	n/a	n/a
New Jersey	100,000	n/a	n/a	200
New York	1,283,000*	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	0	0	0	n/a

\*Adjusts annually



# Economic Nexus – Income Tax

- Additional states have statutes that allow for economic nexus without a specific threshold
- I keep expecting 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



# 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 v. PL 86-272

- Model legislation erodes protections
- Unprotected activities include:
  - Post sales assistance via chat or email
  - Website invites viewers to apply for non-sales positions
  - Remote fixes or upgrades of products
  - Extended warranties sold via business's website



# MTC v. PL 86-272 continued

- Unprotected activities include:
  - Streaming videos and/or music
  - Inventory at in marketplace warehouse in state
  - Placing cookies to gather information used for non-solicitation purposes (i.e. using to schedule production)



# CA, NJ, NY

- California TAM 2022-01 (2/14/22)
  - ACMA sued
  - Struck down by court, procedural issue
- New Jersey TB-108 – Effective 7/31/23
- New York 20 CRR-NY 1-2.10 – Effective **2015**
  - ACMA suing



# Remote Employees

- 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
- Appears to create nexus in virtually for all tax types
  - PL 86-272 may apply



# Remote Employees

- 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 and safe harbor
  - \$500,000/\$50,000/\$50,000
- Payroll taxes



# 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)**



# Practical example

- NC S-corp – sells bamboo mats
- \$150,000 of annual sales into Hawaii
- No employees or reps in Hawaii
- Inventory is located in NC and CA
- Post sale customer service via online chat
- Income tax nexus threshold is \$100,000
- Sales tax nexus threshold is \$100,000



# Practical example

- NC S-corp – sells track spikes
- \$175,000 of annual sales into New Jersey
- No employees or reps in New Jersey
- Inventory is located in NC and California
- Post sale customer service via online chat
- Income tax nexus threshold is \$100,000
- Sales tax nexus threshold is \$100,000





# Practical example

- NC S-corp – sells milk tanks
- \$250,000 of annual sales into Wisconsin
- Contract sales rep works from home in WI
- Employee salesperson works from home in WI
- Inventory is located in NC and California
- Post sale customer service via online chat
- No income tax nexus threshold
- Sales tax nexus threshold is \$100,000



# Practical example

- NC S-corp – sell tractor parts
- \$600,000 of annual sales into California
- No employees or reps in California
- FBA inventory in California
- Post sale customer service via online chat
- Income tax nexus threshold is \$735,019
- Sales tax nexus threshold is \$500,000



# Practical example

- NC S-corp – sells millwork
- \$500,000 of annual sales into South Carolina
- Accounting employee works from home in SC
- Inventory is located in NC
- Post sale customer service provided via online chat
- No income tax nexus threshold
- Sales tax nexus threshold is \$100,000



# Practical example

- NC S-corp – sells accounting services
- \$600,000 of annual sales into Tennessee
- No employees or reps in Tennessee
- Income tax nexus threshold is \$100,000
- Sales tax nexus threshold is \$100,000



# Thank You!



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# 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