



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
- 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 (Online Merchant Guild v Hassell (PA))
- Tradeshows (depends)
- Certain contractors and agents
- Many other instate activities



FBA Inventory

- Online Merchants Guild v. Hassell, (September 2022) – PA Commonwealth Court
- PA activity limited to inventory at FBA warehouse
 - State argued physical presence
 - OMG argued no presence because no control
- Insufficient contacts with the state for sales or personal income tax



Marketplace pre-Wayfair

- Amazon Services, LLC v. Dep't of Revenue, (Feb. 14, 2023) - Court of Appeals, SC
- Amazon had physical presence in SC
- Meaningfully interaction with Amazon Services to consummate the sales
- “when two actors are both ‘engaged in the business of selling . . . it is the actor who is present at the point of sale and accepting money . . . who is responsible for the sales and use tax



Sales Tax - Economic Nexus

- South Dakota v. Wayfair, (6/21/2028) – SCOTUS
 - \$100,000 *or* 200 transactions
 - Physical presence no longer required
 - Physical presence still creates nexus
 - Does not just apply to online sellers
- Retroactivity is discouraged



Economic – Variables

- Dollar thresholds
- Transaction thresholds – 200 transaction dying
- 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



Retroactive Wayfair

- U.S. Auto Parts Network, Inc. v. Comm’r of Revenue, (12/22/22) - MA Supreme Judicial Court
 - Prior to Wayfair Massachusetts imposed so-called “cookie nexus”
 - Argued state can enforce Wayfair retroactively regardless of “cookie nexus”
 - Court determined
 - No retroactive enforcement
 - Apps and cookies not sufficient under Quill



OOMA

- OOMA, Inc. v. Oregon Dep't of Rev., (June 21, 2022) – Oregon Tax Court
- No established economic nexus threshold
- “Extensive virtual presence” not required
- “Sales in excess of South Dakota’s ‘thresholds could not have occurred unless the seller availed itself of the substantial privilege of carrying on business’ in the state.”



Sales Tax Nexus - Local

- Alabama cities and counties
- Alaska cities and boroughs
- Colorado cities and Denver County – contingent auditors
- Louisiana cities and parishes
- Chicago – Personal property lease transaction tax
- Sales v. Use



Home Rule Jurisdictions

- Wayfair LLC, v. City of Lakewood, (2022) – District Court, Jefferson County CO
 - Lakewood joined SUTS in 9/9/2022
 - Wayfair argued tax assessed for 5/18 – 5/21 is unconstitutional
 - Undue burden to file in all Colorado home rule cities



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

	Sales	Wages	Property	Transactions
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
- Expands list of unprotected activities:
 - 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
- Enforcing without policy, regulation, or statute



Remote Employees

- **Telebright Corporation, Inc. v. Director, Division of Taxation, (March 24, 2010)** - New Jersey Tax Court
 - 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 , (1987) (US Supreme Court)



Franchise Tax - Nexus

- Nexus
 - Tax on value of business
 - Sometimes tied to corporate registration
 - PL 86-272 does not apply
 - States can be very aggressive
 - Common to be subject to franchise tax but not Income



Gross Receipts/Margin Taxes - Nexus

- Ohio CAT
 - \$1M OH sales exclusion in 2024, \$3M starting in 2025
- 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



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 \$500,000
- Sales tax nexus threshold is \$100,000



Thank You!



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