

MTC Public Participation Working Group on Sales and Use Tax Nexus Guideline
Minutes of Task Force I Teleconference
Tuesday, July 15, 1997, 1:00pm-2:30pm (Eastern)

Identified Teleconference Participants:

Bill Brady- Task Force Co-Leader	Paull Mines
Bill Lunka- Task Force Co-Leader	David Levine
Gary Anderson	Larry O’Nan
David Bauer	Art Rosen
René Y. Blocker (Reporter)	John Sagaser
Merle Buff	Robert Schemenauer
Alan Friedman (Facilitator)	June Summers Haas
Jeff Friedman	Joe Thomas
Kendall Houghton	Dale Vettel
Margaret Kent	

No comments were made during the public comment.

Issue 1: Whether the “purposeful availment” due process standard for *in personam* jurisdiction properly applies to sales and use tax jurisdiction?

Consensus: The Task Force confirmed the consensus that the term *de minimis* should be removed from section II.A.3.a. and replaced with the “fairness and substantial justice” language contained in sections II.A.3.b. and II.A.3.c.

Issue 2: How does the “regular and systematic solicitation” standard relate to the “purposeful availment” standard?

The group continued the discussion of whether regular and systematic solicitation is a subset of the purposeful availment standard and of whether both standards should be set forth in the guideline.

A question was raised regarding the reason for distinguishing between nexus for a particular market only and nexus for all business done in a State. In response it was noted that a State court’s *in personam* jurisdiction is limited to claims arising out of the specific activity occurring in the State and that the purposeful availment due process nexus standard was drafted to parallel *in personam* jurisdiction principles, thus the market-only limitation has been reflected in the guideline. Several participants agreed with fully analogizing the due process nexus standards with *in personam* jurisdiction.

A suggestion was made to eliminate “regular and systematic solicitation” because the purposeful availment standard is sufficient. It was noted that if regular and systematic were eliminated, the market-specific nexus limitation would survive while the general nexus standard would not. The issue was raised about the

possibility of dropping the market-specific limitation and one participant pointed to language in *National Geographic* that seems to lend support to that proposition: "... the relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect and pay the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection, between [the State and] the person ... it seeks to tax.'"

Another suggestion was made to combine regular and systematic solicitation with purposeful availment. The Task Force ultimately reached a consensus to define regular and systematic solicitation (II.A.3.c.) as a form of purposeful availment and to remove the market specific language contained in II.A.3.b. pending additional analysis of the language.¹

Also, consideration will be given to including several examples in the due process portion of the nexus guideline.

Issue 3: How is the concept of "*de minimis*" properly to be applied, including the burden of proof issue?

One of the major issues remains to be whether *de minimis* is an appropriate standard in the sales and use tax area. One participant suggested that there are two parts to *de minimis* that are inherent in *Quill*: a) the more than slightest presence concept (which may include a consideration of whether the contention that a particular activity establishes nexus passes the "straight-face" test); and b) the concept of something less than conscious submission to State's jurisdiction. These concepts do not endorse the notion that substantial physical presence is required to establish substantial nexus.

The suggestion was made that *Quill* requires substantial physical presence because the Court noted that the diskettes in the State did not establish substantial nexus. (Additionally, the question was raised regarding whether the Court considered the existence of the diskettes to be intangible property in the form of licensing of software or tangible property in the form of physical diskettes.) Although the dispute continues between the States and the business community about defining substantial nexus to mean substantial physical presence, there seemed to be some agreement that only two categories should exist, not three – either substantial nexus and not substantial nexus, substantial nexus and slightest presence or substantial nexus and *de minimis* (which equals slightest presence), or perhaps some other alternative.

¹ The suggestion is to remove the **bold** text of the Section II.A.3.b.:

The out-of-state business purposefully avails itself of the benefits of an economic market in the taxing State, either on its own or through a representative, and the magnitude of the contacts satisfies notions of fairness and substantial justice in imposing a use tax collection duty, **provided, the use tax collected pertains to the business occurring in economic market of the taxing State ...**

The group agreed that attempts will be made to clarify the *de minimis* concept, perhaps by defining it to mean slightest presence instead of using the term "trivial." (Section II.D.1.) Also, an effort will be made to formulate the business perspective on the substantial physical presence concept.

The Sales and Use Tax Nexus Public Participation Working Group is scheduled to meet Tuesday, August 5, 1997 from 1:30pm-5:00pm in Whitefish, Montana. It is expected that the Task Forces will report the progress of their teleconferences at that time.