

McDermott, Will & Emery
New York, New York

MEMORANDUM

TO: MTC Working Group on Sales and Use Tax Nexus Guidelines DATE: May 20, 1997

FROM: Arthur R. Rosen

RE: Initial Thoughts

At our meeting on April 30, I and a number of other individuals from the private sector expressed our concern that attempting to achieve the apparent objective of the Guidelines project -- reaching a consensus as to how the U.S. Supreme Court will most likely decide the next state tax nexus case -- may not be the best use of the resources that are available. Rather than offering a legal opinion of the maximum constitutional jurisdiction possible, it might be more useful to attempt developing a model state statute that would balance the concerns of state revenue and administratability with the concerns of state economic development and tax compliance burdens, thereby ensuring that state governments can continue meeting their responsibilities and multistate businesses can continue making their all-important contribution to the American economy.

Specifically, state tax jurisdiction should be imposed whenever a business has established a business presence in a state through conscious, planned business activities there that are material and that contribute to the business' profitability more than to the profitability of in-state businesses. For example, occasional but regular visits to a state by a business' buyers (who are seeking raw materials or inventory, for example) or by a business' employees to attend training seminars should not result in an assertion of tax jurisdiction. Moreover, visits by salespersons who are in the state to sell the business' products and services should result in taxation only when such visits exceed a quantitative statutory threshold so American businesses need not continually guess at their tax status.

In any event, I believe that it is extremely important for us to consider the ramifications that this sales and use tax jurisdictional project will likely have on the administration of other state taxes.