

# MTC SALES/USE TAX NEXUS PUBLIC PARTICIPATION WORKING GROUP

## Phase II Drafting Committee's Preliminary List of Topics for Consideration by the Public Participation Working Group

The Phase II drafting committee has had initial meetings to begin to create topics for presentation to the working group. The following list is a preliminary topic list intended as a demonstration of initial progress on the Phase II project. The following list is not by any means exhaustive, but includes a variety of practical procedural and policy-oriented measures that might be considered by the Public Participation Working Group as means toward (a) lessening tensions between taxpayers and tax administrators over sales and use tax nexus disputes, and (b) increasing the level of voluntary use tax collection and remittance by taxpayers, without resort to such nexus disputes. The Phase II Drafting Committee envisions that each State participating in Phase II will have the option to select items (policies or procedures) from the final project document that will form that State's own approach toward sales and use tax nexus. Thus, the list below may contain suggestions that will not gain uniform support among the participating States (or among taxpayers), but which may be desirable from the standpoint of one or more States.

It should be understood that work will continue on the Phase I document ("Second Initial Public Participation Working Group Draft of the Constitutional Nexus Guideline for Application of a State's Sales and Use Tax to an Out-of-State Business", dated September 1997), separately from work on this Phase II project.

The list of topics suggested for consideration by the PPWG at this time consists of the following:

- Enumeration of a list of in-state temporary or occasional contacts that will not be viewed as creating nexus for the out-of-state business, *possibly including but not necessarily limited to:*
  - (1) meeting with specified business advisors and professionals;
  - (2) meeting with in-state suppliers of goods or services;
  - (3) meeting with government representatives in-state;
  - (4) holding recruiting/hiring events;
  - (5) advertising in-state through various media;
  - (6) using in-state companies to print promotional items (e.g., catalogs, demo software discs) and accompanying visits to the printing location;
  - (7) using in-state companies to provide manufacturing services and accompanying visits to the manufacturing location;
  - (8) attendance, participation at, taking orders at trade shows;
  - (9) rental to/from in-state entity of customer lists;

(10) shipping out-of-state company's unfinished product to unrelated in-state party for processing/temporary storage of goods prior to shipment of goods out of state;  
(11) attendance at occasional meetings (*e.g.*, Board meetings, retreats);  
(12) presence of a Web site in-state;  
etc.

- Address the distinction between common carriers and contract carriers, which can occur by reference to : (1) actual activities provided by each (*e.g.*, if activities of either do not exceed delivery, perhaps even in own trucks); (2) a functional equivalency test (*e.g.*, are services undifferentiated, whatever they happen to be?); or (3) a checklist of permitted activities. Phase I's Task Force 3 addressed this question in some detail.
- Establishment of a minimum threshold of gross receipts from sales of goods or services delivered or provided to persons residing in the State, below which the out-of-state business's contacts are presumed to fall within a protected zone (whether or not the contacts are presumed to constitute protected activities).
- Establishment of an advance rulings procedure designed to answer taxpayer's nexus questions in situations where a State's adopted nexus approach (including its adoption of Phase I or II document components) does not provide a clear answer to the out-of-state business concerning its sales/use tax obligations. The procedure could do a number of things, including: (1) timely grant determinations regarding nexus upon review of a particular scenario; and (2) inform an in-state vendor as to whether its provision of goods and services to an out-of-state business would create nexus or not for its out-of-state business customers (*i.e.*, the wholesaler would secure the nexus determination on behalf of a class of retailers).
- Identify indirect property interests that are not deemed to create nexus (*e.g.*, security interests, financing leases, etc.).
- Application of the DMA-negotiated agreement, so that all out-of-state business that qualified under the agreement can participate in the incentives toward voluntary collection of use tax
- A use tax collection agreement, whereby an out-of-state business could agree to provide the customer information required by a State in order for the State to impose and collect its use tax directly on in-state residents, in exchange for relief from any assertion of use tax-related liability arising from the sales in question against the out-of-state business.
- Establishment of evidentiary standards (*e.g.*, for establishing "purposeful availment" or "regular and systematic solicitation" or "*de minimis*" presence), burdens of proof (including shifts in same) and presumptions where nexus disputes are pursued in a traditional forum.

- Establishment of a policy that affiliate nexus will not be asserted if the sole basis is common ownership/control; likewise establishment of a policy that a unitary relationship with another affiliate will not be asserted as grounds for sales/use tax nexus.
- Establishment of temporary presence standards; *i.e.*, how long can an employee/independent contractor/agent/representative be in-state without establishing nexus for the out-of-state business, when that individual's contacts are not otherwise protected under this document?
- Addressing how long nexus lasts, once it is established.
- Statement that economic presence nexus theory will not be pursued by the state. A subset of this policy is that the presence of intangibles situated in the state will not create nexus. Alternative statement that economic presence nexus theory if established in the state by statute, regulation, or judicial law will be applied on a prospective basis only.
- Addressing the ramifications that goods once sold in tangible form may in the future be sold in intangible form. (*See* topic above.) In this regard, establishment of a policy that the sale, rental or licensing of digital products to end-users will not create nexus.
- Establishing when nexus will not result for the lessor of mobile property when the lessee moves the property into a particular State.
- Addressing when a sale occurs within a State; reference might be had to UCC principles, or other concepts (transfer of title, possession, risk of loss, location of last event, customer's location).

The Phase II Drafting Committee views its role solely as that of a facilitating body for the MTC Public Participation Working Group; neither the Committee nor its individual members express any view on the advisability or feasibility of the above topics/suggestions. The Drafting Committee welcomes all input concerning additional topics that should be considered by the PPWG; please contact Alan Friedman, Kaye Caldwell, June Summers Haas or Kendall Houghton with your suggestions or comments.

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