



Personal Income Tax Division

PERSONAL INCOME TAX INFORMATION RELEASE – PERSONAL INCOME TAX –NEXUS STANDARDS

September, 2001

The purpose of this information release is to describe the standards the Department of Taxation will apply to determine whether a nonresident is subject to Ohio's personal income tax. A resident of this state is always subject to the personal income tax regardless of where the individual earns or receives income.¹ A nonresident is subject to Ohio's personal income tax if the nonresident has nexus with Ohio. This information release addresses the standards used to determine if a nonresident has nexus.² **The limitations and extent of this state's jurisdiction to impose tax is an evolving area and this information release is not intended to be an all encompassing or all inclusive description of this subject. This information release may be modified by changes in either federal or state laws or by decisions of the U.S. Supreme Court, the Ohio Supreme Court, the Ohio Courts of Appeals, or the Ohio Board of Tax Appeals.** This information release may also be modified and reissued to incorporate nexus guidelines that may be published from time-to-time by agencies such as the Multistate Tax Commission or to clarify the Department's position. Where no conflict exists between this information release and previously published positions relating to nexus taken by the Department, those positions will remain in effect.

ISSUES ADDRESSED

- I. What is the standard the Department of Taxation will use to determine whether an individual or estate is subject to Ohio's personal income tax?
- II. What is the standard the Department of Taxation will use to determine residency?
- III. What activities by a nonresident create nexus in Ohio?
- IV. Are there any "safe harbor" activities where nexus might exist but where the Department of Taxation will not currently require the filing of a return and the payment of the personal income tax?
- V. What is the impact of Public Law 86-272?

¹ If the resident is required to pay tax on such income in another state, a resident credit is available pursuant to R.C. 5747.05(B).

² The nexus standards described in this information release parallel the corporate franchise tax nexus standards described in Information Release CFT 2001-02 (available on the Department's website by visiting <http://www.state.oh.us/tax/> and clicking on "Business").

- VI. Are these standards prospective or retroactive?
- VII. When is this information release effective?
- VIII. What are the filing requirements for a nonresident subject to Ohio's taxing jurisdiction?
- IX. Once nexus is established, how long does the filing requirement last?
- X. Can a nonresident subject to these nexus guidelines request a Voluntary Disclosure Agreement?

DEFINITIONS

The following definitions apply to this information release:

- A. "Resident" means an individual who is a resident of this state as discussed in Issue II of this information release;
- B. "Nonresident" means an individual who is not a resident of this state for the entire tax year or an estate that is not a resident of this state;
- C. "Contact Period" means that the individual is (i) away overnight from the individual's abode located outside this state and (ii) while away overnight from that abode spends at least some portion, however minimal, of each of two consecutive days, beginning at any time on one day and ending at any time on the next day, in this state.
- D. "Day" means a calendar day or any portion thereof.

ISSUES DISCUSSED

I. What is the standard the Department of Taxation will use to determine whether an individual or estate is subject to Ohio's personal income tax?

Ohio law provides that an individual or estate is subject to the Ohio personal income tax under any set of circumstances allowed by the Constitution of the United States. Specifically, Ohio Revised Code (hereinafter "R.C.") 5747.02(A) sets forth the legal standard used by the Department of Taxation to determine whether an individual or estate is subject to Ohio's personal income tax. An individual or estate is subject to Ohio's personal income tax under any of the following circumstances:

- The individual or estate resides in this state, or
- The individual or estate earns or receives income in this state, or
- The individual or estate earns or receives Ohio-based lottery winnings, prizes, or awards, or
- The individual or estate otherwise has nexus with this state under the Constitution of the United States.

II. What is the standard the Department of Taxation will use to determine residency?

- A. For estates, the residency of the decedent at the time of death becomes the residency of the estate;
- B. For an individual, residency is normally determined to be where the individual's place of abode is located and where the majority of the individual's time is spent;
- C. An individual is a nonresident of this state if all of the following requirements are met:³
 - 1. During the entire taxable year the individual had at least one abode outside of Ohio; and
 - 2. The individual spent no more than 120 contact periods in Ohio during the taxable year; and
 - 3. The individual submits a written statement, signed under penalties of perjury, declaring that (i) the individual was not domiciled in Ohio at any time during the taxable year and (ii) the individual had at least one place of abode outside Ohio during an entire taxable year. Should the individual provide such an affidavit of nonresidency, that person may be considered a nonresident for other purposes, such as receiving in-state tuition at public universities, voting, driving privileges, etc.;
- D. Individuals, such as members of the armed forces of the United States of America, are considered to be residents of Ohio if they hold themselves out as residents or enjoy the benefits that attend residency in this state.

III. What activities by a nonresident create nexus in Ohio?

- A. Subject to the reciprocity agreements discussed in safe harbor provision IV.B., a nonresident who earns wages or salary in this state has nexus with this state;
- B. The wage and salary income received by investors who own twenty percent or more of a pass-through entity having nexus with this state and are not excepted by the reciprocity agreement discussed in safe harbor provision IV.B.;
- C. A nonresident may otherwise have nexus with this state if the nonresident participates in a trade or business or has property in this state.⁴ Except for the

³ Even if an individual does not meet these criteria, the individual may still be able to demonstrate nonresidency.

⁴ A nonresident may also have nexus if the nonresident is a member or partner in a pass-through entity having nexus with this state. Nonresident members or partners of pass-through entities should refer to the Department's release on nexus standards for pass-through entities, Information Release PIT-2001-02 (available on the Department's website by visiting <http://www.state.oh.us/tax/> and clicking on "Business").

safe harbor activities listed in Issue IV. on pages 5-6 of this information release, a nonresident has nexus in this state when the nonresident directly or through others acting on behalf of the nonresident is regularly present in this state conducting activities to establish or maintain the market for the nonresident. Such others can be organizations or individuals who are agents, representatives, independent contractors, brokers or any person acting on behalf of the nonresident. It is irrelevant whether or not such others reside in Ohio. Activities which create nexus, whether by the nonresident or others acting on the nonresident's behalf, include, but are not limited to, the following:

1. Soliciting sales in this state, including all activities listed in Issue V. on pages 6-9 of this information release (Provision L on page 6 provides a special safe harbor that may apply to this activity);
2. Making repairs or providing maintenance or warranty service in this state;
3. Collecting current or delinquent accounts related to sales in this state through assignment or otherwise;
4. Transporting passengers or property for hire in or through this state;
5. Delivering goods or having goods delivered to this state in vehicles the nonresident owns, rents, leases, uses or maintains (Provision B on page 5 provides a special safe harbor that may apply to this activity);
6. Installing or supervising installation in this state;
7. Conducting training in this state;
8. Providing any kind of technical assistance or consulting service in this state including, but not limited to, engineering assistance, design service, quality control, product inspections, or similar services;
9. Investigating, handling, or otherwise providing assistance in this state to resolve customer complaints;
10. Having one or more employees or others acting on the nonresident's behalf in this state conducting business activity in this state;
11. Owning, renting, leasing, licensing, maintaining, or exercising the right to use any tangible personal property that is permanently or temporarily located in this state (Provision B on page 5 provides a special safe harbor that may apply to this activity);
12. Owning, renting, leasing, licensing, maintaining, or exercising the right to use any real property located in this state;
13. Employing individuals who, for the benefit of the employer, own, rent, lease, use or maintain an office or other establishment in this state;

14. Having agents, representatives, independent contractors, brokers or others who own, rent, lease, use or maintain an office or other establishment in this state if this property (i) is used in the representation of the nonresident in this state and (ii) is significantly associated with the nonresident's ability to establish and maintain a market in this state; or
 15. Having a direct or indirect ownership interest in a pass-through entity having nexus with this state.
- D. Lawyers, accountants, investment bankers, and other similar professionals that are not employees of the nonresident and who in their professional capacity perform their customary services in this state for a nonresident shall not be considered to be conducting activities to establish or maintain the market on behalf of the nonresident. This provision only applies if the activity done on behalf of the nonresident is not an activity listed in III.D. It is important to note that these professionals do have nexus themselves even though their activities may not create nexus for the nonresident.

IV. Are there any “safe harbor” activities where nexus might exist but where the Department of Taxation will not currently require the filing of a return and the payment of the personal income tax?

If the nonresident's **only** contacts with this state are limited to the contacts listed below, the Department of Taxation will not require the filing of a return and the payment of the personal income tax. Except for IV.A., these safe harbors are not mandated by statutory or case law; rather, these safe harbors are provided for the purposes of administrative convenience.

- A. The nonresident has property or representatives on the premises of a commercial printer in this state. R.C. 5733.09(D)(2)(a)-(c) sets forth the details of this statutory exemption;
- B. Residents of Kentucky, Indiana, Michigan, Pennsylvania and West Virginia who earn wage or salary income in Ohio have nexus with this state but are subject to the reciprocity agreements existing between those states and Ohio. Pursuant to those agreements, the wages and salary income of such individuals are subject to tax in the individual's state of residence (However, the wage and salary income received by investors who own twenty percent or more of a pass-through entity having nexus with this state are not covered by these reciprocity agreements);
- C. The nonresident has tangible personal property temporarily in this state for no more than seven days, which need not be consecutive, in a calendar year;
- D. The nonresident owns or uses in this state intangible property, but the use of such property in this state does not develop, maintain or enlarge the marketplace for the nonresident;

- E. The nonresident grants a license to use software in this state, but only if the nonresident and its agents or representatives do not provide from or at a location in this state any technical assistance or other support;
- F. The nonresident maintains a website on a server or similar electronic equipment in this state, unless the equipment itself is owned, leased or rented by the nonresident;
- G. The nonresident conducts meetings in this state with suppliers of goods or services;
- H. The nonresident conducts meetings in this state with government representatives in their official capacity;
- I. The nonresident enters this state for the purposes of bringing or defending a lawsuit in a court of law in this state;
- J. The nonresident has employees or others acting on the nonresident's behalf attend meetings, retreats, seminars, conferences, schools or other training in this state sponsored by others;
- K. The nonresident holds for the benefit of its employees retreats, seminars, conferences or other training in this state;
- L. The nonresident holds recruiting or hiring events in this state;
- M. The nonresident advertises in this state through various electronic or print media;
- N. The nonresident rents customer lists to or from an entity located in this state;
- O. The nonresident has a presence in this state for no more than seven days, which need not be consecutive, in a calendar year and the nonresident's activities in Ohio generate no more than \$2,500 in gross income in that same calendar year;
- P. The nonresident participates in one or more trade shows in this state as an exhibitor provided that the nonresident does not have employees present in this state for more than seven days in a calendar year and the nonresident's activities in Ohio generate no more than \$2,500 in gross income in that same calendar year; or
- Q. The nonresident attends trade shows in this state as a consumer.

V. What is the impact of Public Law 86-272?

Public Law 86-272, 15 U.S.C. 381-384, restricts a state from imposing a tax on or measured by income derived within the state's borders if the only business activity of the nonresident within the state consists of the solicitation of orders for sale

of **tangible personal property**. This restriction is limited to orders sent outside the state for acceptance or rejection and, if accepted, filled by shipment or delivery from a point outside the state.

P.L. 86-272 does not prohibit this state from asserting that a nonresident has nexus. In fact, implicit in the application of P.L. 86-272 is that a nonresident has nexus. **P.L. 86-272 merely prohibits the imposition of the Ohio personal income tax in those situations listed in (A) below.**

Listed below are protected activities (those that are ancillary to the solicitation of sales) and unprotected activities (those that go beyond the solicitation of sales). Ohio follows, and these lists are generally drawn from, the *Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272*. This Statement can be found on the Multistate Tax Commission's website at <http://www.mtc.gov/news&vws/Regs102000.pdf>.

- A. Subject to the safe harbor provisions listed on pages 5-6, the following activities conducted in this state by the nonresident create nexus; however, P.L. 86-272 protects such activities with respect to the sale of tangible personal property from the imposition of the personal income tax:
1. Soliciting orders for sales by advertising;
 2. Soliciting orders by an employee or representative of the nonresident, so long as the individual does not, for the benefit of the nonresident, maintain or use any office or other place of business in the state other than an "in-home" office as described in Issue V(B)(18) on page 9 of this information release;
 3. Carrying samples and promotional materials only for display or distribution without charge or other consideration;
 4. Furnishing and setting up display racks and advising customers on the display of the nonresident's products without charge or other consideration;
 5. Providing automobiles to sales personnel for their use in conducting protected activities;
 6. Passing orders, inquiries and complaints on to the home office;
 7. Missionary sales activities; i.e., the solicitation of indirect customers for the nonresident's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers is protected if such solicitation activities are otherwise immune;
 8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order;
 9. Checking of customers' inventories, without a charge therefore, for re-order (but not for other purposes, such as quality control);
 10. Maintaining a sample or display room for no more than twenty-one days, which need not be consecutive, at any one location within this state during the taxable year;
 11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel;
 12. Mediating customer complaints when the purpose is solely for improving the relationship between the sales personnel and the customer and facilitating requests for orders; or
 13. Owning, leasing, using or maintaining (i) personal property for use in the employee's or representative's "in-home" office, as described in Issue V(B)(18) on page 9 of this information release, and/or (ii) an automobile that is solely limited to the conducting of protected activities. For example, the use of personal property such as a cellular telephone, facsimile machine, copier, personal computer and computer software will not subject the nonresident to the net income basis franchise tax so long as the use of these items is limited to the carrying on of protected solicitation.
- B. Any of the following activities conducted in this state by the nonresident are **not** protected under P.L. 86-272 and the nonresident will be subject to the personal income tax:

1. Making repairs or providing maintenance or service to the property sold or to be sold;
2. Collecting current or delinquent accounts through assignment or otherwise;
3. Investigating credit worthiness;
4. Installing or supervising installation;
5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation;
6. Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders of tangible personal property;
7. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is for improving the relationship between the sales personnel and the customer and facilitating requests for orders;
8. Approving or accepting orders;
9. Repossessing property;
10. Securing deposits on sales;
11. Picking up or replacing damaged or returned property;
12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation;
13. Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel;
14. Maintaining a sample or display room in excess of twenty-one days at any one location within the state during the taxable year;
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value;
16. Owning, leasing, using or maintaining facilities or property in this state, including, but not limited to, the following:
 - (a) a repair shop;
 - (b) a parts department;
 - (c) any kind of office other than an in-home office as described as permitted under Issue V(A)(2) on page 7 and V(B)(18) on page 9 of this information release;
 - (d) a warehouse;
 - (e) a meeting place for directors, officers, or employees;
 - (f) a stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation;
 - (g) a telephone answering service that is publicly attributed to the nonresident or to employees or agents of the nonresident in their representative status;
 - (h) mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles; or
 - (i) real property or fixtures to real property of any kind;
17. Consigning a stock of goods or other tangible personal property for sale to any person, including an independent contractor;
18. Maintaining in this state, by any employee or other representative of the nonresident, an office or place of business of any kind, other than an in-home office located within the residence of the employee or representative. The maintenance of any office or other place of business in this state that does not strictly qualify as an "in-home" office as described below shall, by itself, cause the loss of protection under P.L. 86-272. For these purposes it is not relevant whether the nonresident pays directly, indirectly, or not at all for the cost of maintaining such an in-home office. In order to qualify as a protected in-home office, the following criteria apply:
 - (a) the office cannot be publicly attributed to the nonresident or to the employee or representative of the nonresident in an employee or representative capacity;
 - (b) the use of such office must be limited to soliciting and receiving orders from customers, for transmitting such orders outside the state for acceptance or rejection by the nonresident, or for such other activities protected under P.L. 86-272 or under Issue V(A) on pages 7-8 of this information release;
 - (c) the office cannot be identified in a telephone listing or other public listing within this state as a specific address for the nonresident or for an employee or representative of the nonresident in such capacity;
 - (d) as an exception to the above, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the nonresident shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the nonresident or its employee or representative;
19. Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee in this state; or

20. Conducting any activity not listed in Issue IV(A) on pages 7-8 of this information release which is not entirely ancillary to requests for orders, even if such activity helps to increase sales.

VI. Are these standards prospective or retroactive?

This information release applies nexus standards established by the U.S. Supreme Court. Decisions of the U.S. Supreme Court are the controlling interpretation of federal law and generally will be given full retroactive effect to all cases and years still open. Accordingly, the Department of Taxation will enforce the standards described within this information release, with the exception of the safe harbor activities enumerated in Issues III. and V(A) on pages 7-8, for all open cases and years.

VII. When is this information release effective?

Some of the limitations enumerated in Issues IV. and V(A) on pages 5-8 may not be mandated by Ohio law or U.S. Supreme Court cases. Thus, while Ohio may have a basis for requiring the filing of a return and payment of the personal income tax in these instances, beginning September 1, 2001 the Department of Taxation will not require the filing of a return and payment of the personal income tax if a taxpayer's contacts are limited to those safe harbor activities described in Issues IV. and V(A) on pages 5-8. The Department of Taxation reserves the right to modify and reissue this information release in order to reflect judicial decisions or to clarify the Department's position.

VIII. What are the registration and filing requirements for a nonresident subject to this state's taxing jurisdiction?

A nonresident which falls within this state's taxing jurisdiction will be required to file returns and pay the appropriate tax. Information about taxpayer obligations under the personal income tax is available by calling 1-888-405-4039, or from the Department's website by visiting <http://www.state.oh.us/tax/> and clicking on "Individual."

The taxable year of a nonresident that becomes subject to this state's taxing jurisdiction begins on the first day in which the nonresident engages in nexus-creating activities. Thus, the duty to file returns and pay the personal income tax commences with the day of the first nexus-creating contact and applies prospectively from that date regardless of the fact that more contacts are needed to establish a regular presence.

Example

On May 4th, 2002, a nonresident with a calendar year end first enters Ohio to engage in nexus-creating activities protected by the safe harbor provisions in Issue IV. In that same calendar year, the nonresident's activities exceed the safe harbor

provisions in Issue IV. The nonresident must file a personal income tax report for taxable year 2002 and remit the personal income tax based on taxable year 2002.⁵

⁵ The nonresident may be entitled to calculate the nonresident credit for income not earned or received in Ohio.

IX. Once nexus is established, how long does the filing requirement last?

When a nonresident no longer has nexus creating contacts, the nonresident will not be responsible for the personal income tax after the date nexus ceased to exist. However, if the nonresident reestablishes nexus by engaging in any nexus creating contacts within twelve months of its last nexus creating contact, the Department of Taxation will presume that the new contact remains part of a regular presence in this state. Thus, the nonresident continued to have nexus during the interim period. The nonresident will be required to pay the personal income tax on all its income earned or received in this state during the interim period.

Example

A nonresident has had nexus with Ohio because it maintains a sales office and has sales representatives in Ohio. On June 15th, 2002, the nonresident closes its Ohio office and ceases sending sales representatives into Ohio. Consequently, the nonresident legally withdraws from this state effective June 15th, 2002. Finding that its Ohio sales have been seriously harmed by its lack of presence in Ohio, the nonresident begins sending representatives into Ohio performing unprotected nexus-creating activities on December 1st, 2002. The Department of Taxation will presume that the December 1st, 2002 contacts remain part of a regular presence within Ohio. The nonresident must file the personal income tax return and pay the personal income tax for the entire 2002 taxable year.⁶

X. Can an unregistered nonresident subject to these nexus guidelines request a Voluntary Disclosure Agreement?

A nonresident with a filing responsibility under these nexus guidelines not yet registered or contacted by the Department of Taxation with respect to audit or criminal investigation is eligible to request a Voluntary Disclosure Agreement (VDA). The VDA guidelines are available on the Department's website by visiting <http://www.state.oh.us/tax/> and clicking on "Business" or by calling the Personal Income Tax Division at 1-614-433-7603.

If you have any questions regarding this matter, please call 1-888-405-4039 (Ohio Relay Services for the Hearing or Speech Impaired: 1-800-750-0750).

⁶The nonresident may be entitled to calculate the nonresident credit for income not earned or received in Ohio.