



Sales & Use Tax Division

USE TAX INFORMATION RELEASE - SALES AND USE TAX – USE 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 an out-of-state seller is required to collect Ohio's use tax. This release only addresses the circumstances in which an out-of-state seller can be required to collect and remit Ohio's use tax from its customers in this state. This information release does not relieve any person of their use tax obligations as a consumer. **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.¹ 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 release may also be modified and reissued either 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 use tax 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 out-of-state seller is subject to Ohio's use tax collection responsibility?
- II. What activities by or on behalf of an out-of-state seller will create nexus in Ohio?
- III. Are there any safe harbor activities where nexus might exist but where the Department of Taxation will not require an out-of-state seller to collect and remit Ohio's use tax from its customers in this state?
- IV. Are these standards prospective or retroactive?
- V. When is this information release effective?
- VI. What are the use tax registration and filing requirements for an out-of-state seller subject to Ohio's taxing jurisdiction?

¹ The use tax nexus standards described in this information release are not identical to 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").

- VII. Once nexus is established, how long does the filing requirement last?
- VIII. Can an unregistered out-of-state seller subject to these nexus guidelines request a Voluntary Disclosure Agreement?
- IX. Can an out-of-state seller lacking nexus voluntarily register to collect and remit Ohio's use tax from its customers in this state?

DEFINITIONS

The following definitions are used in this information release:

- A. "Affiliated group" is defined in Ohio Revised Code (hereinafter "R.C.") 5739.01(B)(3)(e) and means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.
- B. "Use" means and includes the exercise of any right or power incidental to the ownership of the thing used. A thing is also "used" in Ohio if the consumer gives or otherwise distributes the thing, without charge, to recipients in this state.
- C. "Nexus" means substantial nexus as defined in R.C. 5741.01(I).
- D. "Day" means a calendar day or any portion thereof.

ISSUE DISCUSSION

I. What is the standard the Department of Taxation will use to determine whether an out-of-state seller is subject to Ohio's use tax collection responsibility?

Ohio law provides that the Department of Taxation can require an out-of-state seller to collect and remit Ohio use taxes under any set of circumstances allowed by Section 8 of Article I of the Constitution of the United States. Specifically, R.C. 5741.01(H) and (I) set forth the legal standard used by the Department of Taxation to determine whether an out-of-state seller is subject to Ohio use tax collection responsibilities. An out-of-state seller is subject to Ohio's use tax collection responsibility when the out-of-state seller engages in any of the following activities:

- A. The out-of-state seller maintains a place of business within this state, whether operated by employees or agents of the seller, by a member of an affiliated group of which the seller is a member, or by a franchisee using a trade name of the seller;
- B. The out-of-state seller regularly has employees, agents, representatives, solicitors, installers, repairpeople, salespeople, or other individuals in Ohio for the purpose of conducting its business;
- C. The out-of-state seller uses a person in this state for the purpose of receiving or processing orders of its goods or services;

- D. The out-of-state seller makes regular deliveries of tangible personal property into this state by means other than common carrier (For example, the out-of-state seller has goods delivered to this state in vehicles which the out-of-state seller owns, rents, leases, uses, or maintains or has goods delivered by another member of an affiliated group, of which the out-of-state seller is a part, acting as a representative of the out-of-state seller);
- E. Other than those safe harbor activities described in Issue III on pages 4-5 of this information release, the out-of-state seller is a member of an affiliated group of which at least one other member has nexus with this state;
- F. The out-of-state seller owns tangible personal property that is rented or leased to a consumer in this state, or offers tangible personal property, on approval, to consumers in this state;
- G. The out-of-state seller owns, rents, leases, maintains, or has the right to use and uses tangible personal or real property that is physically located in this state; or
- H. The out-of-state seller is registered with the secretary of state to do business in this state or is registered or licensed by any state agency, board, or commission to transact business in this state or to make sales to persons in this state.

II. What activities by or on behalf of an out-of-state seller will create nexus in this state?

- A. Subject to the safe harbor activities listed in Issue III on pages 4-5 of this information release, an out-of-state seller has nexus in this state when the seller directly or through others acting on the seller's behalf is regularly present in this state conducting activities to establish or maintain the market for the out-of-state seller. Such others can be organizations or individuals who are agents, representatives, independent contractors, brokers or any person acting on behalf of the out-of-state seller. It is irrelevant whether or not such others reside in Ohio. Activities which create nexus, whether by the out-of-state seller or others acting on the seller's behalf, include, but are not limited to, the following:
 - 1. Soliciting sales (Provision L on page 5 below provides a special safe harbor that may apply to this activity);
 - 2. Delivering property sold to customers in this state;
 - 3. Installing or supervising installation in this state;
 - 4. Making repairs or providing maintenance or warranty service in this state;
 - 5. 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;

6. Investigating, handling, or otherwise providing assistance in this state to resolve customer complaints;
 7. Conducting training in this state (Provision J on page 5 below provides a special safe harbor that may apply to this activity);
 8. Soliciting, negotiating, or entering into franchising, licensing, or similar agreements; or
 9. Registering with the secretary of state to do business in this state or registering or licensing with any state agency, board, or commission to transact business in this state or to make sales to persons in this state.
- B. Lawyers, accountants, investment bankers, and other similar professionals that are not employees of the out-of-state seller or another member of an affiliated group of which the out-of-state seller is a member who in their professional capacity perform their customary services in this state for an out-of-state seller shall not be considered to be conducting activities to establish or maintain the market on behalf of the out-of-state seller. This provision only applies if the activity done on behalf of the out-of-state seller or another member of an affiliated group of which the seller is a part is not an activity listed in II.A, above.

III. Are there any safe harbor activities where nexus might exist but where the Department of Taxation will not require an out-of-state seller to collect and remit Ohio's use tax from its customers in this state?

If the out-of-state seller's **only** contacts with this state are limited to one or more of the contacts listed below, the Department of Taxation will not require the out-of-state seller to collect and remit Ohio's use tax from its customers in this state. Except for III.A. and B., below, these safe harbors are not mandated by statutory or case law; rather, these safe harbors are provided for purposes of administrative convenience.

- A. The out-of-state seller has an agency relationship with a person engaged in the business of telemarketing in this state that is engaged by the seller exclusively for the purpose of solicitation of customers in other states;
- B. The out-of-state seller has ownership of property that is located at the facility of a printer with which the seller has contracted for printing and that consists of the final printed product, property that becomes a part of the final printed product, or copy from which the final printed product is produced;
- C. The out-of-state seller has tangible personal property temporarily in this state for no more than seven days, which need not be consecutive, in a calendar year, and the seller has no more than \$25,000 in gross sales in this state in that same calendar year;

- D. The out-of-state seller grants a license to use software in this state, but only if the out-of-state seller and its agents, representatives, or any member of an affiliated group of which the seller is a part, do not provide, from or at a location in this state, any technical assistance or other support;
- E. The out-of-state seller maintains a website on a server or similar electronic equipment in this state, unless the equipment itself is owned, leased or rented by the out-of-state seller or any member of an affiliated group of which the seller is a part;
- F. The out-of-state seller conducts meetings in this state with suppliers of goods or services;
- G. The out-of-state seller conducts meetings in this state with government representatives in their official capacity;
- H. The out-of-state seller enters this state for the purposes of bringing or defending a lawsuit in a court of law in this state;
- I. The out-of-state seller attends meetings, retreats, seminars, conferences, schools or other training in this state sponsored by others;
- J. The out-of-state seller holds retreats, seminars, conferences, or other training in this state for its employees (but not board of director's meetings);
- K. The out-of-state seller holds recruiting or hiring events in this state;
- L. The out-of-state seller advertises in the state through various electronic or print media;
- M. The out-of-state seller rents customer lists to or from an entity located in this state;
- N. The out-of-state seller is a member of an affiliated group of which at least one other member has nexus with this state, and where the member with nexus does nothing to establish or maintain the market for the out-of-state seller;
- O. The out-of-state seller has no more than seven instances of nexus creating activities in this state in a calendar year, and the seller has no more than \$25,000 in gross sales in this state in that same calendar year;
- P. The out-of-state seller attends trade shows in this state as a consumer; or
- Q. The out-of-state seller participates in one or more trade shows in this state as an exhibitor provided that the out-of-state seller has no more than seven instances of nexus creating activities in this state in a calendar year and does not have gross sales in this state in excess of \$25,000 in that same calendar year.

IV. Are these standards prospective or retroactive?

This information release applies nexus standards established by the U.S. Supreme Court from 1939 to the present. 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 Issue III on pages 4-5 of this information release, for all open cases and years.

V. When is this information release effective?

Some of the limitations enumerated in Issue III on pages 4-5 of this information release may not be mandated by Ohio law or U.S. Supreme Court cases. Thus, while Ohio may have a basis for asserting nexus in these instances, beginning September 1, 2001 the Department of Taxation will not assert nexus if a taxpayer's contacts are limited to those safe harbor activities described in Issue III on pages 4-5 of this information release. 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.

VI. What are the use tax registration and filing requirements for an out-of-state seller subject to Ohio's taxing jurisdiction?

An out-of-state seller which falls within this state's taxing jurisdiction, and makes taxable sales, will be required to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax. Information about registration and permits can be obtained by calling 1-888-405-4039, or from the Department's website by visiting <http://www.state.oh.us/tax/> and clicking on "Business."

The duty to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax commences with the month that includes the day of the contact that establishes a regular presence and applies prospectively from that date.

Example

On May 4th, 2002, an out-of-state seller first enters Ohio to engage in nexus-creating activities that are protected by the safe harbor provisions in Issue III. On September 8th, 2002, the out-of-state seller's activities exceed the safe harbor provisions in Issue III. The out-of-state seller would be required to obtain a seller's use tax permit, collect tax on taxable sales made to consumers in this state, and file returns and remit the appropriate tax beginning on September 8th, 2002, and would include all sales made for the entire month of September 2002.

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

When an out-of-state seller no longer has nexus creating contacts, the out-of-state seller may cancel its registration and stop collecting and remitting use tax on its sales in this state. However, if the out-of-state seller reestablishes nexus by engaging in any nexus creating contacts within twelve months of its registration cancellation, the Department of Taxation will presume that the new contact remains part of a regular presence in this state. Thus, the out-of-state seller continued to have nexus during the interim period. The out-of-state seller will be required to reinstate its registration and pay tax on all its sales in this state during the interim period, and continue collecting tax on a prospective basis.

Example

An out-of-state seller has had nexus with this state because it maintains a sales office, and has sales representatives in this state. On June 15th, 2002, the out-of-state seller closes its office in this state and ceases sending salespersons into this state. Consequently, the out-of-state seller cancels its registration effective June 15th, 2002. Finding that its Ohio sales have been seriously harmed by the out-of-state seller's lack of presence, the out-of-state seller begins sending representatives back into this state on December 1st, 2002. The Department of Taxation will presume that the December 1st, 2002, contacts remain part of a regular presence within this state. The out-of-state seller's registration will be reinstated and the out-of-state seller will be required to pay tax on all its sales into this state for the period June 15th to December 1st, 2002, as well as collect Ohio use tax on its sales in this state on a going-forward basis.

VIII. Can an unregistered out-of-state seller subject to these nexus guidelines request a Voluntary Disclosure Agreement?

An out-of-state seller with a filing responsibility under these nexus guidelines but not yet registered with 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/business_sales_tax_voluntary_disclosure.html or by calling the Sales and Use Tax division at 1-614-466-4810.

IX. Can an out-of-state seller lacking nexus voluntarily register to collect and remit Ohio's use tax from its customers in this state?

An out-of-state seller lacking nexus may enter into an agreement to collect use tax on its sales made to customers in this state. This agreement may provide that the out-of-state seller is not obliged to pay other Ohio taxes merely because it entered into the agreement. Nonetheless, even though the out-of-state seller may cancel its registration at any time, the out-of-state seller remains subject to audit for the periods during which the seller was registered or was collecting tax.

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).