



To:	Sales and Use Tax Nexus Model Statute Workgroup
From:	Roxanne Bland, MTC Counsel
Date:	May 20, 2013
Subject:	Model Sales and Use Tax Nexus Statute –Draft Policy Checklist

At its April 22, 2013 teleconference, the working group asked staff to illustrate the draft policy questions with state statutory language. Below are the policy questions with statutory and case law examples from several states.

POLICY QUESTIONS

1. How much or how little in-state activity will rise to the level of “establish[ing] and maintain[ing]” a market in a state so as to confer nexus on an out-of-state retailer?

Arizona Department of Revenue v. O’Connor, Cavanagh, Killingsworth and Beshears, P.A., 963 P.2d 279 (1998)

Arizona Department of Revenue brought action against O’Connor for use tax owed on a now-defunct out-of-state office furniture retailer arguing that the retailer had insufficient nexus with Arizona to impose the transaction privilege tax. The retailer had entered into a contract with O’Connor to build a substantial amount of custom office furniture. O’Connor was the retailer’s only client in Arizona. Finding that the matter was governed by *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, 483 U.S. 232 (1987), after an examination of the retailer’s activities, the court concluded that those activities were substantial and helped the retailer to establish and maintain its market in the state. “[F]or the purpose of establishing nexus, the volume of local activity is less significant than the nature of its function[.]”

2. Should the proposal specify that nexus is found in cases of an in-state person unrelated to the out-of-state retailer and with no formal agreement with the retailer, but who acts as a “*de facto* marketing and distribution” channel in the state for the retailer’s goods?

Georgia Code Annotated 48-8-2(8)(L):

A Dealer is a person who:

(L)(i) Makes sales of tangible personal property or services that are taxable under this chapter if any other person, other than a common carrier acting in its capacity as such, who has a

substantial nexus in this state:

(I) ...

(II) ...

(III) Conducts any other activities in this state that are significantly associated with the person's ability to establish and maintain a market in this state for the person's sales.

(ii) The presumption that a person described in this subparagraph qualifies as a dealer in this state may be rebutted by showing that the person does not have a physical presence in this state and that any in-state activities conducted on its behalf are not significantly associated with the person's ability to establish and maintain a market in this state[.]

Notice that the statute does not specify a legal relationship between the out-of-state-seller and the in-state person working on the out-of-state seller's behalf. This would address those situations where no formal relationship exists between the out-of-state seller and the in-state person who performs activities that help the seller establish and maintain a market in the taxing state. An example would be the teachers in the *Scholastic Book Club* cases from Tennessee and Connecticut, who had no formal relationship with the Scholastic, yet whose activities assisted Scholastic to establish and maintain a market in those states.

3. Should the proposal specify that third-party independent contractors soliciting within a state on behalf of an out-of-state retailer results in nexus with the state?

K.S. A. 79-3702(h)

79-3702(h)(1) "Retailer doing business in this state" or any like term, means:

79-3702(h)(1)(B) any retailer having an employee, independent contractor, agent, representative, salesperson, canvasser or solicitor operating in this state either permanently or temporarily, under the authority of the retailer or its subsidiary, for the purpose of selling...soliciting sales or the taking of orders for tangible personal property.

This is the statutory equivalent of the U.S. Supreme Court decision in *Scripto v. Carson*.

4. Should the proposal specify that the unitary business may be the basis for analyzing nexus?

K.S.A. 79-3702(h)(2) A retailer shall be presumed to be doing business in this state if:

79-3702(h)(2)(A) Both of the following conditions exist:

79-3702(h)(2)(A)(i) The retailer holds a substantial ownership interest in, or is owned in whole substantial part by, a retailer maintaining a sales location in Kansas; and

79-3702(h)(2)(A)(ii) the retailer sells the same or a substantially similar line of products as the related Kansas retailer and does so under the same or a substantially similar business name, or the Kansas facilities or Kansas employees of the related Kansas retailer are used to advertise, promote or facilitate sales by the retailer to consumers.

California Unitary Nexus Regulation 1684

A retailer is engaged in business in this state as defined in section 6203 of the Revenue and Taxation Code if:

(A) The retailer is a member of a commonly controlled group, as defined in Revenue and Taxation Code section 25105; and

(B) The retailer is a member of a combined reporting group, as defined in California Code of Regulations, title 18, section 25106.5, subdivision (b)(3), that includes another member of the retailer's commonly controlled group that, pursuant to an agreement with or in cooperation with the retailer, performs services in California in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer. For purposes of this paragraph:

(i) Services are performed in connection with tangible personal property to be sold by a retailer if the services help the retailer establish or maintain a California market for sales of tangible personal property; and

(ii) Services are performed in cooperation with a retailer if the retailer and the member of the retailer's commonly controlled group performing the services are working or acting together for a common purpose or benefit.

5. Should the proposal specify that nexus for an internet retailer arises if an in-state entity, through agreement with the internet retailer, solicits sales on behalf of the retailer?

N.Y.S. 1101 (b)(8)(vi)

(vi) For purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph, a person making sales of tangible personal property or services taxable under this article ("seller") shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise,

to the seller, if the cumulative gross receipts from sales by the seller to customers in the state who are referred to the seller by all residents with this type of an agreement with the seller is in excess of ten thousand dollars during the preceding four quarterly periods ending on the last day of February, May, August, and November. This presumption may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution during the four quarterly periods in question. Nothing in this subparagraph shall be construed to narrow the scope of the terms independent contractor or other representative for purposes of subclause (I) of clause (C) of subparagraph (i) of this paragraph.

6. Should the proposal specify that a non-affiliated entity, contracted to perform in-state warranty, “installation, maintenance or repair” services for products sold by an out-of-state retailer, gives rise to nexus in the taxing state?

South Dakota Codified Laws

10-45-2.9. Retailers having contractual relationship with entity for installation, maintenance, or repair of purchases

Any retailer making sales of tangible personal property to purchasers in this state by mail, telephone, the internet, or other media which has a contractual relationship with an entity to provide and perform installation, maintenance, or repair services for the retailer's purchasers within this state shall be included within the definition of retailer under the provisions of [§§ 10-45-2.5](#) to 10-45-2.9, inclusive.

During the April 22nd teleconference, a question was raised as to whether this section should include activities such as warehousing and drop shipping. Here is an example from Michigan as to what that provision might look like.

House Bill 4202, Amendment to MCL 205.51 to 205.78, General Sales and Use Tax, New Section 2B (Michigan)

(1) A person who sells tangible personal property to a customer in this state is presumed to be engaged in the business of making sales at retail in this state if an affiliated person . . . has a physical location in this state, conducts business activity in this state, or is otherwise subject to the tax under this Act or the Use Tax Act, 1937 PA 94, MCL 205.91 to 205.111, and that affiliated person, directly or indirectly, does any of the following:

(C) maintains an office, distribution facility, warehouse, storage place or similar place of business in his state to facilitate the delivery of tangible personal property sold by the seller to the seller's customers in the state.

(F) facilitates the sale of tangible personal property to customers in this state by allowing the seller's customers in this state to pick up or return tangible personal property sold by the

seller at an office, distribution facility, warehouse, storage place or similar place of business maintained by that affiliated person in this state.

7. Should the model statute contain rebuttable presumptions as to whether a taxpayer is doing business in the state?

See Policy Questions 2 and 5.