MULTISTATE TAX COMMISSION

To:	Sales and Use Tax Subcommittee
From:	Roxanne Bland, MTC Counsel
Date:	February 22, 2013
Subject:	Associate Nexus Model Statute—Nexus Issue Paper

At its December 6, 2012 meeting, the Sales and Use Tax Subcommittee expanded the scope of this project to include model statutes or regulations addressing other nexus producing activities in addition to "associate" nexus. The subcommittee appointed a work group to address these issues. The subcommittee suggested that the work group should consider several pieces of statutory and case law to use as references in developing a model statute.

The workgroup met by teleconference on January 3, 2013. During that call, the workgroup recognized that if we are initiating additional models, it would be helpful to follow our regular process and begin with an educational phase. For that purpose, it would be helpful to have a background paper laying out the current nexus framework and identifying how each additional model would fit in to that framework.

Below is a summary of the current framework for analyzing nexus producing activity, a summary of key cases that illustrate nexus producing activity, and sample legislation for addressing the various types of nexus producing activity.

I. Summary of Current Framework for Analyzing Nexus Producing Activity

"Nexus" is the connection with a state that gives that state jurisdiction to tax. The phrase "jurisdiction to tax" implies limits on a state's taxing power. A tax will not be sustained if the state does not have jurisdiction over the person, property or transaction.[1] Limitations on state jurisdiction to tax may be found in the federal constitution. Federal statutes, state constitution and statutes, state regulations, and other state guidance may also limit a state's exercise of its jurisdiction to tax. The main federal constitutional limitations are the Due Process Clause and the Commerce Clause.

The Commerce Clause reserves for Congress the exclusive power "[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."[2] The Clause has long been held to contain a negative inference—the "dormant commerce clause"—

[1] Miller Bros. v. Maryland, 347 U.S. 340 (1954)
[2] U.S. Constitution, article I, § 8, cl. 3.

that limits state taxing authority even in the absence of explicit federal regulation.[3] The U.S. Supreme Court has held that the Dormant Commerce Clause prohibits discriminatory or burdensome state taxation of interstate commerce.[2]

The Due Process clause requires "certain minimum contacts with [the state] such that the maintenance of the suit [there] does not offend traditional notions of fair play and substantial justice."[3] This "minimum contacts" test is the basis for our modern due process clause taxation standard that a foreign corporation is subject to a state's taxing jurisdiction if it "purposefully avails" itself of the benefits of the state's economic market.[4]

In 1992 the U.S. Supreme Court articulated a distinction between the nexus requirement of the Due Process clause and the Commerce Clause,[5] stating that Due Process nexus concerns the fundamental fairness of the state's exercise of authority over the seller, while Dormant Commerce Clause nexus addresses structural concern for the effects of state jurisdiction on the national economy.[6] In *Quill*, the Court found that for use tax collection purposes, sales into a state satisfied Due Process nexus requirements, but sales alone were not sufficient to satisfy Commerce Clause nexus requirements where the seller's only other connection to the state was through the mail or common carrier. After *Quill*, the states have operated with the understanding that where a seller has a physical presence in a state, that seller's connection to the state exceeds the mail or common carrier, and satisfies the nexus requirements of the dormant Commerce Clause.

Of course, a corporation, unlike a natural person, has no physical presence of its own of any kind. "The corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, [citations omitted], it is clear that, unlike an individual, its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it."[7] In this sense, all corporate physical presence is "representational presence," and all corporate nexus is one form or another of "representational nexus."

For example, a corporation may be physically present through an employee,[8] an independent contractor,[9] a "click-through" associate,[10] or any other natural (physical) person with which the corporation has arranged to operate on its behalf. This is true whether or not the arrangement is evidenced by a legal contract. For example, school teachers have been found to

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[3] See, e.g., Quill Corp. v. North Dakota, 504 U.S. 298, 312-313 (1992).
[2] *Id.*
[3] International Shoe Co. v. State of Washington, 326 U.S. 310 (1945)
[4] Burger King Corp. v. Rudzewicz, 471 U.S. 462 (1985). The due process clause in the Fourteenth Amendment states, "nor shall any state deprive any person of life, liberty, or property, without due process of law." U.S. Constitutional amendment XIV, § 1
[5] Quill Corp. v. North Dakota, 504 U.S. 298 (1992).
[6] *Id.*
[7] International Shoe Co. v. State of Wash., 326 U.S. 310, 316-317 (1945)
[8] Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975)
[9] Scripto, Inc. v. Carson, 362 U.S. 207 (1960)
[10] Amazon.com, LLC v. New York State Dept. of Taxation and Finance, 913 N.Y.S.2d 129 (N.Y. App. Div. 1st Dep't 2010)

operate on behalf of a book seller even in the absence of a legal contract between the bookseller and the teacher.[11]

The corporation may also be physically present through an indirect arrangement. For example, a corporation A may contract with or own corporation B, and corporation B may then contract for physical property or with physical employees to perform some activity on behalf of corporation A. The corporations may be unaffiliated[12] or affiliated and possibly even unitary[13]. If the corporations are affiliated and unitary, then by definition the activities performed by employees engaged in the unitary business are performed on behalf of each corporation.

The specific type of arrangement - that is, whether the arrangement is an employment contract, a contract with an independent contractor, a click-through associate contract, or otherwise; and whether engaged in directly or indirectly through an affiliate - is not relevant. What is relevant is the nature and scope of the activity to be performed pursuant to the arrangement. In the case of activities carried out on behalf of the taxpayer by an unaffiliated entity, a question is also whether the activities that are carried out are significantly associated with the taxpayer's ability to establish and maintain its market in the state.[14]

II. Summary of Legislation and Key Cases that Illustrate Nexus Producing Activity

Due Process and Commerce Clause

National Bellas Hess, Inc. v. Department of Revenue of State of Ill., 386 U.S. 753 (1967)

Facts: National Bellas Hess was a mail order house that had its principle place of business in Missouri, and was licensed to do business in Missouri and Delaware. Its only contact with the state of Illinois was via mail or common carrier. National Bellas Hess sent catalogues, flyers, and ordered goods to customers within the state. The Illinois Department of Revenue classified National Bellas Hess as a "retailer maintaining a place of business in this State," and required the company to collect and pay Illinois use taxes on its sales into the state.

Held: The U.S. Supreme Court found that, for a state to collect use taxes, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." The Court noted a "sharp distinction ... between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." Since National Bellas Hess' only connection with customers in

[11] Scholastic Book Clubs, Inc. v. Farr, 373 S.W.3d 558 (Tenn. Ct. App. 2012)

[12] Dell Catalog Sales LP v. NM Taxation & Revenue Dept., 199 P.3d 863 (N.M. Ct. App. 2008) and State v. Dell Intern., Inc., 922 So.2d 1257 (La.App. 1 Cir. 2006). *But see*, Dell Catalog Sales, L.P. v. Commissioner of Revenue Services, 4834 A.2d 812 (Conn. Super. Ct. 2003)

[13] *Sears Roebuck v. Nelson*, 312 U.S. 359 (1941); In re Barnesandnoble.com LLC, 283 P.3d 298 (N.M. Ct. App. 2012) and Borders Online v. State Board of Equalization, 129 Cal.App. 4th 1179 (2005). But see *SFA Folio Collections, Inc. v. Tracy*, 652 N.E.2d 693 (Ohio, 1995)*SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 (Conn., 1991)

[14] Tyler Pipe v. Wash. Dept. of Rev., 483 U.S. 232 (1987)

the State was by common carrier or United States mail, the Court found the "minimum connection" requirement was not satisfied, and therefore Illinois could not require the company to collect and pay the Illinois use tax.

Quill Corp. v. North Dakota , 504 U.S. 298 (1992)

Facts: Quill was a Delaware office supplies corporation with offices and warehouses in Illinois, California, and Georgia. Its only contact with the state of North Dakota was through catalogs and flyers, advertisements in national periodicals, telephone calls, and delivery of orders via mail or common carrier. North Dakota imposed a use tax on Quill, and Quill protested, citing *National Bellas Hess*. The United States Supreme Court found that while a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause.

Held: The Court said that the Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,” and the “income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State.’ ” Here, the Court found that no physical presence was necessary. Quill had purposefully directed its activities at North Dakota residents; the magnitude of those contacts was more than sufficient for due process purposes; and the use tax was related to the benefits Quill received from access to the State. The Court therefore found that the Due Process Clause did not bar enforcement of that State's use tax against Quill. However, the Court found that the Commerce Clause imposed a “substantial nexus” requirement on the state's ability to tax out-of-state entities. The existence of customers alone did not create sufficient nexus under the Commerce Clause for North Dakota to impose a sales tax collection burden on Quill Corp. Therefore, although North Dakota was permitted to impose a use tax on Quill under the Due Process Clause, the company's contacts were insufficient to permit imposition of the tax under the Commerce Clause. Quill was not subject to North Dakota's use tax.

Nexus-Producing Activities

A. Property or Employees in a State

Kansas

K.S.A. 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, delivering, installing, assembling, servicing, repairing, soliciting sales or the taking of orders for tangible personal property.

Sears Roebuck v. Nelson, 312 U.S. 359 (1941)

Facts: Sears Roebuck has several retail stores in Iowa and pays tax on sales made at those stores. It also pays tax on orders placed at those stores where shipment is made directly to the purchaser from one of its out of state branches. It does not pay tax on orders sent by purchasers to its out of state branch and filled by direct shipment through the mails or common carrier.

Held: Though Sears argued there is no local activity by it which generates or which relates to the mail orders here involved, these orders are still a part of its Iowa business. Since Iowa has extended to Sears that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Sears cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however these mail orders may be filled, Iowa may rightly assume that they are not unrelated to Sears's business in Iowa, and are a part of that business though none of Sears's agents in Iowa actually solicited or placed them. To include them in the global amount of benefits which Sears is receiving from its Iowa business is to conform to business facts.

International Shoe Co. v. State of Wash., 326 U.S. 310 (1945)

Facts: International Shoe Co. was incorporated in Delaware and had its principal place of business in Missouri. The company had a staff of 11-13 commission-based salesmen in the state of Washington. The salesmen were Washington residents, and they exhibited samples in motels, hotels, and other rented spaces. The state of Washington enacted a statute requiring in-state employers to pay what amounted to a "tax" into a state unemployment fund. However, International Shoe argued that its activities within the state were not sufficient to create an in-state "presence" for taxing purposes and that in its absence the state courts were without jurisdiction.

Held: The Court found that due process requires only that the company have certain minimum contacts with the state such that the maintenance of a lawsuit does not offend 'traditional notions of fair play and substantial justice.' The "presence" of a corporation within a state for purposes of taxation or maintenance of lawsuits against it can be manifested only by the activities of those who are authorized to act for the corporation.

The court found that International Shoe had sufficient contact with the state to give it an in-state "presence." Its sales activities were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which International Shoe received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights. Washington therefore had the constitutional power to collect the tax from International Shoe and to sue it in-state for its failure to pay.

Standard Pressed Steel Co. v. Washington Dept. of Revenue, 419 U.S. 560 (1975)

Facts: Standard Pressed Steel was a manufacturer of industrial and aerospace fasteners. It had its home office in Pennsylvania, one manufacturing plant there and another in California. Its principal customer in the state of Washington was the Boeing Company.

Standard Pressed Steel had one employee in Washington who was paid a salary and who operated out of his home near Seattle. The employee was an engineer whose primary duty was to consult with Boeing regarding its anticipated needs and requirements for aerospace fasteners and to follow up on any difficulties. He did not take orders from Boeing. He was assisted by a group of engineers who visited Boeing about three days every six weeks. The state of Washington imposed its business and occupation tax on Standard Pressed Steel's gross receipts resulting from its sales to Boeing. Standard Pressed Steel argued that imposition of the tax violated due process because the in-state activities were so "thin and inconsequential" that a tax would have no reasonable relation to the protection and benefits conferred by the taxing State. Therefore, the issue was "whether the state has given anything for which it can ask return."

Held: The Court found that the employee, who resided and worked full-time within the State, made possible the realization and continuance of valuable contractual relations between Standard Pressed Steel and Boeing. Therefore, the tax was permissible under due process, because the measure of the tax bore a relationship to the benefits conferred on the manufacturer by the State. In addition, the tax was permissible under the commerce clause, because there was no showing of multiple taxation on its interstate business and the tax was apportioned exactly to the activities taxed, all of which were intrastate.

National Geographic Soc'y v. Board of Equal., 430 U.S. 551 (1977)

Facts: Taxpayer is a nonprofit society headquartered in Washington, D.C., and made mail-order sales to residents in California. The society maintained two offices in California to solicit advertising for the society’s magazine. It performed no activities related to the taxpayer’s mail order sales. Taxpayer was assessed use tax on its sales made to California residents.

Held: California's imposition of the use-tax-collection liability on the Society's mail-order operation does not violate the Due Process Clause or the Commerce Clause since the Society's continuous presence in California in the two offices provides a sufficient nexus between the appellant and the State to justify imposition of the use-tax-collection liability. The out-of-state seller runs no risk of double taxation as the consumer's identification as a resident of the taxing State is obvious and the out of state seller becomes liable for the tax only by failing or refusing to collect it from the resident consumer. It is not material that there is no relationship between the appellant's sales activity in California and the two advertising offices, for without regard to the nature of the offices' activities, they had the advantage of the same municipal services as they would have had if their activities had included assistance to the mail-order operations.

B. Other Direct Arrangements with Individuals

(See Kansas, above)

1. Independent Contractors

Scripto, Inc. v. Carson, 362 U.S. 207 (1960)

Facts: Scripto was a Georgia-based corporation that sold mechanical pens and pencils that could be inscribed for advertising purposes. It had no property, employees, bank accounts or kept a stock of merchandise in the state. Ten independent contractors, all of whom were Florida residents, solicited sales on behalf of Scripto. All orders were forwarded to Georgia for payment and fulfillment.

Held: The Court ruled that nexus existed between Scripto and Florida. In this case, the "test is…the nature and extent of the activities of Scripto in Florida." First, the tax is a nondiscriminatory exaction for the use and enjoyment of property that has come into the state. Second, Scripto had ten salesmen[15] engaged in the local activity of continuously soliciting sales in Florida. That they were labeled independent contractors as opposed to employees was without constitutional significance.

Tyler Pipe v. Wash. Dept. of Rev., 483 U.S. 232 (1987)

Facts: Tyler Pipe was an out-of-state manufacturer who sold its goods inside Washington State. It had no property or payroll in the state. Solicitation was carried out by two executives who lived out of state, and one in-state independent contractor.

Held: The Court affirmed the finding of nexus between Washington and Tyler Pipe. The in-state contractor provided Tyler Pipe with critical information about the local market, and thus had a significant relationship with the corporation. "[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."

2. Associates

In New York, an in-state person entering into a business-referral agreement with an out-of-state vendor may give rise to nexus.

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.

Amazon.com, LLC v. New York State Dept. of Taxation and Finance, 913 N.Y.S.2d 129 (N.Y. App. Div. 1st Dep't 2010)

Facts: Amazon is an internet retailer based in Washington. It has no property or employees in New York. Overstock.com is an internet retailer based in Utah. It too, has no property or employees in New York. However, the two retailers entered into contracts with New York residents in which the resident placed the retailer's logo on its website, which if clicked, linked directly to the retailer's website. An individual earned a commission only if the customer clicked on the logo and subsequently made a purchase from the retailer. New York enacted a law that these types of transactions subjected an e-tailer to a duty to collect sales tax on New York purchases. Amazon and Overstock.com brought suit, alleging that the statute violated the Due Process Clause, and the Commerce Clause both on its face and as applied.

Held: The New York statute does not violate the Commerce Clause on its face. A statute will not survive a Commerce Clause facial challenge if there is no set of circumstances under which the statute would be valid. The statute imposes a tax collection obligation on an out-of-state vendor only where the vendor enters into a business-referral agreement with a New York State resident, and only when that resident receives a commission based on a sale in New York. Therefore, Amazon and Overstock.com had nexus with New York. Of equal importance to the requirement that the out-of-state vendor have an in-state presence is that there must be solicitation, not passive advertising. The Amazon Associates and Overstock.com Affiliate programs are not designed for the passive advertiser, but seek growth by reliance upon representatives who will look to solicit business. The obligations imposed by the state to collect the tax only arise when the paradigm shifts from advertising to solicitation. Here, there is a set of circumstances under which the statute would be valid, i.e., when a New York representative uses some form of proactive solicitation which results in a sale by Amazon, and a commission to the representative; and the representative has an in-state presence sufficient to satisfy the substantial nexus test.

Performance Marketing Association, Inc. v. Hamer, Director, Illinois Department of Revenue, Circuit Court of Cook County, Illinois County Department, Law Division, 2011 CH 26333, May 7, 2012, *on appeal,* Supreme Court of Illinois, case no. 114496

Facts: The facts in this case are very similar to that in Amazon. Illinois enacted 96-1544, which provides that an out-of-state retailer would have nexus with Illinois if it entered into a business referral agreement with an in-state resident, in which the resident would be paid a commission if a person clicked on the out of state retailer's logo on the resident's website and subsequently made a purchase from the out of state retailer.

Held: Without opinion, the Circuit Court of Cook County held that the law did not provide for substantial nexus for the out of state retailer; the unambiguous terms of the Act cannot reasonably be read in a way to preserve that Act's validity; and the Act runs afoul of the Internet Tax Freedom Act.

3. Non-contractual representatives

In Georgia, the following will cause an out-of-state vendor to have nexus in the state if an in-state person:

(i) …
(ii) …
(iii) <u>conducts any other activities in Georgia that are significantly associated with the out-of-state vendor's ability to establish and maintain an in-state market.</u>

(GA. CODE ANN. § 48-8-2(8)(L))

Notice in subclause iii there is no reference to a legal relationship between the out-of-state vendor and the in-state person. This may result in the outcome as in the following cases:

Scholastic Book Clubs, Inc. v. Commissioner of Revenue Services, 38 A.3d 1183 (Conn. 2012)

Facts: Scholastic Book Clubs, Inc. ("Scholastic") was a Missouri corporation with its principal place of business in Jefferson City, Missouri. Scholastic's only contact with Connecticut consisted of mailing catalogs monthly during the school year to classrooms at nursery, primary and secondary schools. Teachers who chose to participate in the program could then hand out flyers to their students and collect students' book orders. Connecticut imposed a sales and use tax on Scholastic based on its sales into the state, and Scholastic protested on commerce clause grounds, arguing that there was no "substantial nexus."

Held: The Connecticut Supreme Court found that the teachers acted as Scholastic's representatives, even though there was no agreement compelling teachers to serve as agents or sellers of Scholastic's products and teachers received no direct compensation from Scholastic. By taking students' book orders, delivering ordered books, and resolving all complaints and problems arising following book deliveries, the teachers served as the only means through which Scholastic communicated with its customers. The teachers' activities within the state on Scholastic's behalf created substantial nexus under the Commerce

Clause sufficient to justify imposition of sales or use taxes on Scholastic for its book sales in the state.

Scholastic Book Clubs, Inc. v. Farr, 373 S.W.3d 558 (Tenn. Ct. App. 2012)

Facts: Scholastic Book Clubs, Inc. ("Scholastic") was a Missouri corporation with its principal place of business in Jefferson City, Missouri. Scholastic's only contact with Tennessee consisted of mailing catalogs monthly during the school year to classrooms at nursery, primary and secondary schools. Teachers who chose to participate in the program could then hand out flyers to their students and collect students' book orders. Tennessee imposed a sales and use tax on Scholastic based on its sales into the state, and Scholastic protested on commerce clause grounds, arguing that there was no "substantial nexus."

Held: The Court of Appeals of Tennessee noted that under *Quill*, a safe harbor from a State's ability to assess sales and use taxes exists under the Commerce Clause “for vendors ‘whose only connection with customers in the [taxing] State is by common carrier or the United States mail.” However, Scholastic was not a vendor whose only connection with customers in Tennessee was by common carrier or by mail. Scholastic utilized Tennessee schools and teachers to facilitate sales to school children in Tennessee, and the teachers created “a de facto marketing and distribution mechanism.” It sent its marketing materials and order forms to teachers and schools who were often funded by state and local governments. Under these facts, the Court found that Scholastic's connections with Tennessee's schools and teachers established a “substantial nexus” sufficient to justify the imposition of Tennessee's sales and use tax under the Commerce Clause.

C. Indirect Arrangements Through Other Business Entities

1. 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.

Borders Online v. State Board of Equalization, 129 Cal.App. 4th1179 (2005)

Facts: Borders Online sold books, book accessories, magazines, compact discs, videotapes, and similar tangible goods over the Internet to customers, including customers in California. It did not own or lease property in California during the disputed period and did not have any employees or bank accounts in the state. Borders Online employees located outside California received and processed all orders placed through Borders Online's website, Borders.com.

Borders Online was wholly owned by Borders Group, Inc. Borders Group, Inc., also owns Borders, which, in turn, owns Borders stores. Numerous Borders stores are located throughout California and in other states. Borders stores sell merchandise that is comparable to the goods sold by Online over the Internet. Receipts at Borders stores sometimes contained the phrase "Visit us online at www.Borders.com." Although Borders stores did not have facilities to assist customers wishing to place orders with Online, Borders's employees were encouraged to refer customers to Online. Visitors to Borders Online's website could access a "link" to Borders's website, www.bordersstores.com, which provided advertising and promotional information for Borders stores, including a list of store locations. Two people who served on Borders Online's board of directors also served on Borders's three-person board of directors during the disputed period. All but two of the nine people who served as officers of Borders Online during the disputed period, also served as officers of Borders at some point during the disputed period. Borders and Online shared a similar logo. They also shared some financial and market data but did not intermingle their corporate assets. Borders and Borders Online filed their tax returns on the combined report basis.

Held: Borders Online was subject to California's use tax because Borders acted as Borders Online's agent. Borders Online's return policy was part of its strategy to build a market in California. Moreover, Borders's efforts on Border Online's behalf were not limited to accepting returns from—and providing exchanges and credit card refunds to—Online customers. Borders's receipts were sometimes imprinted with "Visit us online at www.Borders.com," and Borders's employees were encouraged to refer customers to Borders Online to find merchandise not available at Borders stores. The cross-selling synergy was also maintained by the use of similar logos, by the link to Borders' website from Border Online's website, and by the sharing of some market and financial data between the two entities. Borders Online generated more than $1.5 million in sales in California in 18 months. These facts amply support the conclusion that Borders Online had a representative with a physical presence in the State and the representative's activities were significantly associated with Border Online's ability to establish and maintain a market in the state for the sales.

In re Barnesandnoble.com LLC, 283 P.3d 298 (N.M. Ct. App. 2012)[16]

Barnesandnoble.com LLC was a limited liability company organized under the laws of the State of Delaware. It was a subsidiary of Barnes & Noble, Inc., and maintained its own offices separate from those occupied by other Barnes & Noble corporations.

Barnesandnoble.com sold books online, and did not have any physical presence, agents, or employees in New Mexico. Its sister subsidiary, Booksellers, operated physical bookstores within the state of New Mexico. Both entities sold Barnes & Noble gift cards, which could be redeemed either in-store or online. Both also sold memberships to a loyalty program that entitled customers to discounts at Booksellers' physical stores and online. Customers could return their online purchases for store credit at the physical location.

The New Mexico Taxation and Revenue Department issued an audit assessment to Barnesandnoble.com for gross receipts tax and interest. Barnesandnoble.com protested that it lacked nexus with the state and couldn't be subject to the gross receipts tax.

On appeal, the court held that substantial nexus existed because Barnesandnoble.com's use of shared trademarks, logos, and marketing created and established a market in the state. Booksellers's operation of the three local stores strengthened the goodwill behind the Barnes & Noble trademarks and facilitated sales in the state. Barnesandnoble.com was therefore subject to New Mexico's taxing jurisdiction.

SFA Folio Collections, Inc. v. Tracy, 652 N.E.2d 693 (Ohio, 1995)

Facts: SFA Folio Collections, Inc. ("Folio") was a New York corporation, and a wholly owned subsidiary of Saks & Company ("Saks"), also a New York corporation. Folio sold clothes and accessories by direct mail. Folio mailed its catalogs to its customers, and the customers placed orders by telephone, mail, or fax. Another Saks subsidiary, Saks Fifth Avenue of Ohio, Inc. ("Saks-Ohio"), sold merchandise from physical locations in Ohio. Saks-Ohio accepted merchandise returns on Folio's behalf and made Folio's catalogues available in the stores. The Ohio Tax Commissioner assessed Folio use tax on its sales of merchandise to Ohio residents. Folio argued the taxed activity lacked substantial nexus with Ohio because Folio had no physical presence in Ohio.

Held: The Supreme Court of Ohio found that, despite Saks-Ohio's activities in the state, Folio did not have sufficient nexus to be required to collect use tax. It found that Folio's selling activity did not have substantial nexus with Ohio because Folio had no physical presence in Ohio and because Saks-Ohio, the in-state affiliate, did not own or operate an in-state place of business for Folio. As to Saks-Ohio accepting Folio's returns and distributing Folio's catalogs, the court found those contacts might provide minimal connection under

[16] Currently on appeal to the New Mexico Supreme Court.

due process standards but did not create substantial nexus. Despite the activities of its sister corporation, Folio could not be subject to Ohio's use tax.

SFA Folio Collections, Inc. v. Bannon, 585 A.2d 666 (Conn., 1991)

Facts: SFA Folio Collections, Inc. (“Folio”) was a New York corporation, and a wholly owned subsidiary of Saks & Company (“Saks”), also a New York corporation. Saks also owned Saks-Stamford, a separate corporation that operated a retail store in Stamford, Connecticut. Folio and all Saks Fifth Avenue retail stores, including Saks-Stamford, shared sales and financial data and profit and loss statements, but were separately managed. Folio distributed mail order catalogs and flyers to Connecticut residents and received orders by mail or telephone. Customers could use their Saks & Company charge card when making purchases from Folio, as well as when buying items at Saks-Stamford. Folio often included advertising for Folio in the form of “bill inserts” in the charge card bill received by the customer from Saks & Company, and it also made catalogues available to Saks-Stamford stores. Folio referred its customers to its New York office for customer assistance, merchandise return or exchange, and other services.The commissioner claimed that, because Folio was part of a larger enterprise of affiliated corporations, Folio should be deemed to share the nexus Saks-Stamford had with Connecticut. In justifying the imposition of sales and use tax, the commissioner stated that “[t]he unitary nexus established from [Folio's] shared corporate name, logo, etc., with Saks Fifth Avenue-Stamford, Inc. is the basis of our position.”

Held: The Supreme Court of Connecticut found that on its own Folio did not have sufficient nexus with the state to be subject to taxation. It found that Folio and Saks-Stamford were separate corporate entities and had not been held out as a single entity. Folio therefore did not share Saks-Stamford's nexus with Connecticut and could not be subject to Connecticut's sales and use tax.

2. Non-Affiliates

S.D.C.L. 10-45-2.9. (South Dakota) 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 <u>which has a contractual relationship with an entity to provide and perform installation, maintenance, or repair services for the retailer's purchasers</u> 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.

Dell Catalog Sales, L.P. v. Commissioner of Revenue Services, 4834 A.2d 812 (Conn. Super. Ct. 2003)

Dell Catalog Sales, a Texas limited partnership, coordinated sales of personal computers exclusively from Texas. It solicited orders through national media advertising and by sending catalogs to prospective customers nationwide, including customers in Connecticut.

Customers placed orders by contacting Dell Catalog Sales directly in Round Rock, Texas, through the Internet or by telephone, facsimile, mail or e-mail. Dell's customers were given the opportunity to purchase, through Dell Catalog Sales, a service contract to be performed by BancTec USA, Inc. (BancTec), a Delaware corporation with its principal place of business in Dallas, Texas. If a customer had a computer problem that could not be resolved by telephone, BancTec could perform on-site service calls.The Connecticut Commissioner of Revenue Services argued that BancTec acted as a representative of Dell Catalog Sales, and Dell was therefore subject to sales and use taxation based on BancTec's contact with the state.

Held: The court noted that "BancTec served an important need of Dell Catalog Sales to service the Dell customers in Connecticut." However, there was no evidence as to the frequency of service calls in the state. Since BancNet received only a small portion of the service charge for the contract, the court concluded that the BancTec had likely made too few in-state service visits to create "sufficient, substantive physical presence" in the state of Connecticut. Dell was therefore not subject to taxation in the state.

Dell Catalog Sales LP v. NM Taxation & Revenue Dept., 199 P.3d 863 (N.M. Ct. App. 2008)

Facts: Dell Catalog Sales, a Texas limited partnership, coordinated sales of personal computers exclusively from Texas. It solicited orders through national media advertising and by sending catalogs to prospective customers nationwide. Customers placed orders by contacting Dell Catalog Sales directly in Round Rock, Texas, through the Internet or by telephone, facsimile, mail or e-mail. Dell's customers were given the opportunity to purchase, through Dell Catalog Sales, a service contract to be performed by BancTec USA, Inc. (BancTec), a Delaware corporation with its principal place of business in Dallas, Texas. If a customer had a computer problem that could not be resolved by telephone, BancTec could perform on-site service calls. The New Mexico Taxation and Revenue Department imposed the state's gross receipts tax and compensating tax on Dell. Dell argued that the taxes could not apply based on their lack of contact with the state.

Held: On appeal, the court found that BancTec established substantial nexus with the state and that BancTec's activities were significantly associated with Dell's ability to establish and maintain a market for its computer products. The record established that Dell dispatched BancTec technicians on 1,273 service calls and installation visits to New Mexico customers during the audit period. BancTec's extensive contact with the state gave rise to nexus for Dell and subjected Dell to taxation within the state.

State v. Dell Intern., Inc., 922 So.2d 1257 (La.App. 1 Cir. 2006)

Facts: Dell Catalog Sales, a Texas limited partnership, coordinated sales of personal computers exclusively from Texas. It solicited orders through national media advertising and by sending catalogs to prospective customers nationwide. Customers placed orders by contacting Dell Catalog Sales directly in Round Rock, Texas, through the Internet or by telephone, facsimile, mail or e-mail. Dell's customers were given the opportunity to purchase, through Dell Catalog Sales, a service contract to be performed by BancTec USA, Inc. (BancTec), a Delaware corporation with its principal place of business in Dallas, Texas. If a customer had a computer problem that could not be resolved by telephone, BancTec could perform on-site service calls. The Louisiana Department of Revenue filed suit against Dell seeking unpaid use tax. The Department of Revenue alleged that Dell had established a physical presence in Louisiana by providing repairs and services on products sold to Louisiana customers through the use of “agents, employees and/or independent contractors” in Louisiana. Dell denied that it had a physical presence in Louisiana. With regard to BancTec and the repair services it provides in Louisiana, Dell claimed that BancTec was not its agent, but rather an independent company that performed computer repairs nationwide pursuant to contracts between itself (BancTec) and the customers, and was not acting “on behalf of” Dell.

Held: The Court of Appeals found that BancTec acted on behalf of Dell, and its activities in the state created substantial nexus. BancTec's services helped Dell establish and maintain a market in the state because it helped the company compete with local businesses. Dell used the on-site service availability as part of its advertising and guaranteed those services to its customers. In addition, BancTec had substantial physical contact with the state: it was dispatched by Dell and performed more than 30,000 service calls for customers in Louisiana. Dell was therefore subject to Louisiana's taxing jurisdiction based on BancTec's in-state activities.

MTC ASSOCIATE NEXUS MODEL STATUTE

DRAFT 2/22/2013

MTC Sales and Use Tax Subcommittee
For Discussion Purposes Only

(1) A person who ~~sells tangible personal property or services~~engages in a sale or use taxable under this Act ~~to~~ with a purchaser in this state ("seller"), shall be presumed to have a presence sufficient for the state to require compliance with ~~[cite state sales and use tax statute]~~this Act, through the in-state activities of a resident of this state, if the seller enters into an agreement, directly or indirectly, with the resident under which the resident, for a commission or other consideration based on completed sales, directly or indirectly refers potential ~~customers~~purchasers, whether by a link on an internet website or otherwise, to the seller, and if during the preceding 12 months the cumulative gross receipts from sales by the seller to ~~customers~~ purchasers in the state who are referred to the seller by all residents with which seller has this type of an agreement is in excess of $ [recommend: $10,000]~~.~~ [optional: and the cumulative gross receipts from sales by the seller to all ~~customers~~ purchasers in the state is in excess of $[recommend: $500,000]]. 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 same preceding 12 months. An agreement under which a seller purchases advertisements from a resident of this state is not an agreement described in this section unless the advertisement revenue paid to the resident consists of commissions or other consideration that is based upon sales of tangible personal property or services. Nothing in this section shall limit or reduce this state's authority under other sections of this Act, agency regulations, or the United States Constitution, to require compliance with [cite state sales and use tax statute]. This Act shall become effective as of the date of enactment. For purposes of this section, the calculation of "cumulative gross receipts" for the preceding 12 months ~~includes~~ does not preclude receipts from sales made during the 12-month period before the effective date of this act.

(2) A. A person who sells tangible personal property or services taxable under this Act to a purchaser in this state ("seller"), shall be presumed to have a presence sufficient for the state to require compliance with [cite state sales and use tax statute]if both of the following apply:

(1) the seller and an in-state business maintaining one or more location within this State are related parties; and

(2) the seller and the in-state business use an identical or substantially similar name, tradename, trademark or goodwill to develop, promote, or maintain sales, or the in-state business provides services to, or that inure to the benefit of, the out-of-state business related to developing, promoting, or maintaining the in-state market.

B. Two entities are related parties under this subsection if they meet any one of the following tests:

(1) both entities are component members of the same controlled group of corporations under section 1563 of the Internal Revenue Code[1];

(2) one entity is a related taxpayer to the other entity under the provisions of section 267 of the Internal Revenue Code[2];

(3) one entity is a corporation and the other entity and any party, for which section 318 of the Internal Revenue Code[3] requires an attribution of ownership of stock from that party to the entity, own directly, indirectly, beneficially, or constructively at least 50 percent of the value of the outstanding stock of the corporation; or

(4) one or both entities is a limited liability company, partnership, estate, or trust, none of which is treated as a corporation for federal income tax purposes, and such limited liability company, partnership, estate, or trust and its members, partners or beneficiaries own in the aggregate directly, indirectly, beneficially, or constructively at least 50 percent of the profits, capital, stock, or value of the other entity or both entities.

[1] http://www.law.cornell.edu/uscode/text/26/1563
[2] http://codes.lp.findlaw.com/uscode/26/A/1/B/IX/267
[3] http://www.law.cornell.edu/uscode/text/26/318

Severability
If any of the provisions of this Act are found invalid by a court of competent jurisdiction, the invalid portion of the statute shall be severed without affecting the remaining provisions of this Act.

Definitions

Resident

Any individual who maintains a permanent place of abode in this state is a resident. Permanent place of abode is a dwelling place maintained by a person, or by another for him, whether or not owned by such person, on other than a temporary or transient basis. The dwelling may be a home, apartment or flat; a room including a room at a hotel, motel, boarding house or club; a room at a residence hall operated by an educational, charitable or other institution; housing provided by the Armed Forces of the United States, whether such housing is located on or off a military base or reservation; or a trailer, mobile home, houseboat or any other premises.

Any corporation incorporated under the laws of [insert your state]; and any corporation, association, partnership, or other pass-through entity, or other entity that maintains a place of business in the State, or otherwise has nexus in the State for purposes of this act, is a resident.

Seller

A seller includes, but is not limited to, an entity, including a pass-through entity, affiliated with a seller within the meaning of Section 1504 of the Internal Revenue Code.[4]

Regulation

If the written agreement between the seller and the resident specifies that the resident may not engage in solicitation, then this presumption may be rebutted for any prior 12 month period by providing to the [Department] a copy of the agreement signed by both parties and a statement signed by the resident attesting that he or she did not in fact engage in any solicitation during that 12 month period.

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[4] Section 1504 (26 U.S.C. §1504) defines an affiliated group.
http://www.law.cornell.edu/uscode/text/26/1504