MULTISTATE TAX COMMISSION

MINUTES

Sales & Use Tax Uniformity Subcommittee Meeting
Via Teleconference
Tuesday, May 15, 2012
12:00 Eastern Time

Name of Attendee	Affiliation	Name of Attendee	Affiliation
Associates	Minnesota	Wood Miller	Missouri
Rob Carter	Kentucky	Associates	New Mexico
Randy Tilley	Idaho	Shirley Sicilian Roxanne Bland Lila Disque	MTC
Bradley Heller	California Board of Equalization	Lili Crane	Wisconsin
Tripp Baltz	Bloomberg BNA	Amy Hamilton	State Tax Notes
Mark Dyckman	Illinois		

Wood Miller, Chair of the Uniformity Committee, welcomed everyone and explained that he would stand in for Richard Cram, Chair of the Sales & Use Tax Subcommittee. Mr. Miller opened the public comment session. No comments were received at that time. Mr. Miller then turned the proceedings over to Roxanne Bland, who summarized the current draft Associate Nexus Model Statute. She noted that it was included in the meeting materials and could be contrasted with California's AB 155. The draft was previously presented at the March meeting.

Mr. Miller then turned the proceedings over to Mr. Bradley Heller of the California Board of Equalization for discussion of California's new "New York-style" Associate Nexus Statute.

Mr. Heller first provided some background on AB 155. Under California's sales and use tax law, retailers must collect tax if they are engaged in business in the state. This includes three specific types of retailers: (1) those who maintain, occupy, or use an office within the state; (2) those who have a sales agent within the state; (3) and those who lease tangible property within the state. In 2011, California Governor Jerry Brown signed into law ABX1 28, the so-called "Affiliate Nexus Tax Law." ABX1 28 amended the definition of a "retailer engaged in business" to include anyone with substantial nexus, including retailers who received sales referrals from California-based online associates. However, very few retailers registered with the state. In response, California and Amazon.com collaborated on AB 155, which temporarily repeals and then reenacts ABX1 28, effective September 15, 2012, *if* no other streamline legislation is adopted by July 31, 2012. If new streamline legislation is adopted by July 31, 2012, reenactment of the statute will be delayed until January of 2013.

According to Mr. Heller, the substantive provisions of AB 155 are as follows: it will require a retailer to register to collect use taxes if the retailer is a member of a commonly controlled group or combined reporting group. By "controlled group," Mr. Heller refers to one that performs services in California in cooperation with the retailer in connection with tangible personal property. In general, affiliate nexus provisions require registration if there exists an agreement under which persons in the state directly or indirectly refer purchases to the retailer for a commission, by internet or otherwise. However, AB 155 includes three express caveats: (1) affiliate nexus provisions will not apply to advertising agreements unless they are conditioned on completed sales; (2) the provisions will not apply to agreements for internet advertising unless the person entering into the agreement also directly or indirectly solicits business on behalf of the retailer; (3) the provisions will not apply if the retailer did not engage in referral activities in California on behalf of the retailer.

AB 155 is to apply only when sales referred by the affiliate in question exceed $10,000 within the preceding 12 months *and* the retailer has cumulative sales of tangible personal property to purchasers in California of over $1 million within the preceding 12 months (note that under ABX1 28 the threshold was $500,000). According to Mr. Heller, AB 155 will chiefly apply in situations where there exists an agreement to refer customers to a retailer and someone operating under that agreement is soliciting business while actually present in California. The statute is similar to the MTC's draft associate nexus statute, but with the MTC draft and New York statute, an agreement with a resident to place a link on their website gives rise to a presumption that the remote seller is soliciting. California's statute contains no such presumption, and requires the state to show that there was a referral agreement and some solicitation within the state.

Mr. Heller then clarified some provisions of AB 155. "Solicitation" refers to actual engagement in activities traditionally considered soliciting customers while in-state. For California purposes, the affiliate nexus provisions are examples of substantial nexus. California incorporates the *Quill* physical presence test for substantial nexus; there is a rebuttable presumption that a retailer with physical presence in California must pay use tax. However, if the only contact with the state is through the internet, telephone, or e-mail, there is no nexus. The dollar threshold mentioned previously is applied at the end of each calendar quarter. Retailers may continue to pay commission to advertisers who do not solicit, since this will not establish affiliate nexus. Online advertising generated as a result of algorithmic functions (like those tied to Google searches) will not constitute a solicitation.

There will be a public hearing on the proposed changes to the regulation on May 30th. The amendments would become effective when the statute itself becomes effective.

Mr. Heller then yielded the floor to Mark Dyckman for a presentation on *Performance Marketing Association v. Illinois Department of Revenue* ("PMA").

In PMA, Illinois' affiliate nexus statute amended the portion of 35 ILCS 105/2 that defined "retailer maintaining a place of business in the state." After oral arguments, the Court ruled from the bench that the nexus statute was invalid on its face. The Court commented that it did not see sufficient nexus and that "the legislature did not complete the job."

The Court ordered the opposing parties to compose an order; when they were unable to agree on one, he released a very brief decision stating that the statute was unconstitutional on its face. However, Mr. Dyckman noted, if the state could show that in one instance the statute was valid, the state should win the case. Therefore, if Illinois could demonstrate that with respect to an in-state internet affiliate such as FatWallet the law was constitutional, the state could prevail. The Court did not address why the presence of a company based in Illinois offering rebates on internet purchases was not sufficient to amount to in-state solicitation.

In addition, PMA argued that the statute violated the Internet Tax Freedom Act; the Court agreed, but gave no analysis.

Shirley Sicilian asked whether the Illinois statute deviated from New York's similar statute in any significant way. Mr. Dyckman responded that the Court did not address it in the ruling, but that in oral arguments the state's position was that the relevant difference was New York's statute established a rebuttable presumption, and Illinois' did not.

Ms. Sicilian then asked about timing issues, and Mr. Dyckman replied that there is a 30-day time period for appeal, but that since the statute was invalidated on its face, the appeal will go directly to the Illinois Supreme Court. The Illinois Retailers' Association is considering submitting an amicus brief.

Mr. Miller then asked if anyone had any new business to address. There was no new business. The Sales & Use Tax Uniformity Subcommittee adjourned.