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**Open Session
Nexus Director's Report**

**Nexus Committee Meeting
Santa Fe, New Mexico
July 29, 2008**

This report briefs members of the Nexus Committee on highlights of the activities, challenges, and achievements of the National Nexus Program in fiscal year 2008.

Minutes of March 2008 Meeting

Minutes of the March 13, 2008 open session Nexus Committee meeting will be found at the appendix following of this Nexus Director's Report. I emailed these to committee members on May 9, 2008. There have been no corrections.

Voluntary Disclosure Information Technology

Secure Email

The Commission has continued its development of a secure e-mail system for external communications, which was the subject of a report from Chris Lane, the Commission's network administrator, to the Nexus Committee at its March 2008 meeting. The Commission is deploying the Tumbleweed secure messaging system in carefully measured steps in order to facilitate acceptance and identify potential trouble areas. The Tumbleweed system does not require the recipient of a secure email to have software other than a web browser.

With secure communications the Commission will be able to send closed session agendas, reports on nexus compliance cases, and all other manner of confidential data to states by email without redacting identifying information. Such communications must now have identifying information redacted before sending by email, or their delivery must be limited to fax, physical delivery, or telephone. At present Thomas Shimkin is using the Tumbleweed system and all other Nexus staff will be added soon. We will ask states to try the system soon, with the idea that it will eventually be used for voluntary disclosure and compliance materials. Taxpayers may also be invited to start using it at an appropriate time.

The procedure for state personnel to use the system is this:

- State receives an email notice that a secure email is waiting for him and he clicks on the link provided
- The recipient is taken to the Commission's Tumbleweed computer system where he creates an account by entering his name and a password of his choice.

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- Using the e-mail software offered by the account, he retrieves his message and may do any of several other email-related activities, such as compose and send a reply.
- Due to a Tumbleweed glitch, the recipient may need to refresh his screen one or more times during this process. This glitch will be fixed shortly, likely before any state uses the system.
- After the first message retrieved, the recipient need only link to the account via a browser and enter his password (no user name) to retrieve additional messages.
- The recipient can initiate secure messages to Commission personnel using Tumbleweed by visiting the same account, entering his password, and using the account's email software to compose and send. The user may wish to keep a link to the account in his browser favorites or desktop.

Nexus Committee members will receive an email sometime after the July meeting, inviting participation in this system and reviewing these instructions. I anticipate that all materials in preparation for Nexus Committee meetings will eventually be distributed through this system.

I believe it is helpful to reflect on the advancement we have made with respect to secure electronic communication compared to only ten years ago, when Commission policy prohibited use of email in the voluntary disclosure program because of confidentiality concerns. The increased productivity in the voluntary disclosure program and elsewhere brought by electronic communication is remarkable.

Please see the appendix for information about using Tumbleweed secure email.

Database Renovation

In June the Multistate Tax Commission signed an agreement with Revenue Solutions, Inc. (RSI) to purchase a custom voluntary disclosure management software program to replace our current system, which was created by a former Commission staff member using Microsoft Access. It will retain substantially the same features as the existing system, delete a few and add a few, and be more stable and easy to service and further expand. It uses the latest Microsoft tools, such as SQL Server and .Net. This is Phase I of a two-phase project. A decision has not yet been made whether to proceed with Phase II.

Phase I will have the following benefits:

- Improved efficiency, security, and professionalism by moving the voluntary disclosure application from a PDF fill-in document to a dynamic, web-based application that customizes itself to present the user only relevant questions based on her earlier responses.

Customization of the application will lessen the burden on taxpayers of disuniformity in application requirements across states. And unlike the Word application we used until moving to PDF fill-in a few months ago, this format does not allow the taxpayer to change the wording of the questions, which reduces opportunity for an applicant to answer the question he prefers rather than the one asked.

The application page will automatically populate the Commission's system with the applicant's data, from which it will be sent via the Tumbleweed secure messaging system to the states.

- Practically no limit on accumulation of data. (The present system is reaching capacity.)
- Faster response time from the software, particularly in conjunction with the new server dedicated to this program that the Commission purchased, which will increase speed of voluntary disclosure processing. (Taxpayers want faster turn-around.)
- Access to professional assistance from RSI to immediately correct any problems, which reduces the risk of data loss and extended down time during which we cannot process voluntary disclosures. (The present system was designed in house by a person who is not an information technology professional and who recommends this upgrade to a more standard product.)
- Ability for RSI to make improvements on an on-going basis.

Phase II, if implemented, will build on the first phase by further reducing disclosure processing time and giving taxpayers the ability to conduct activities directly in their voluntary disclosure accounts, including communication directly and anonymously with state voluntary disclosure personnel. The more we reduce processing time and give taxpayers control over the process, the more attractive the program will be to taxpayers, and the more compliance we will achieve.

Phase II can generally be thought of as moving away from the pre-computer model of customer service in which the customer is dependent on the vendor to perform all services, and toward a model in which the customer (taxpayer) has the information and the tools needed to perform many tasks himself if he chooses to do so. Banking provides a parallel – in 1975 one could access up to date account information and perform transactions only by visiting one's own bank branch Monday through Friday 9:00 to 3:00; today ATMs dispense cash, and internet connections provide account information and perform transactions anytime and almost anywhere.

If implemented, RSI will likely be the contractor for Phase II as well. RSI specializes in development of information technology for departments of revenue. It has successfully completed a number of large projects for Commission member states. Headquartered in Pembroke, Massachusetts, it has a production facility in California and staff in various locations throughout the country. Development is taking place partially on-site at the Commission's Washington, DC office and partially at the production facility.

Voluntary Disclosure Revenue

Revenue from the National Nexus Program's voluntary disclosure program continues to zig and zag its way along a pleasing upward trend. All amounts below include only payments for back liability that the Commission received and forwarded to the states. Insignificant amounts of incidental fees, interest or penalty may be included if received at the end of the voluntary disclosure process. They include absolutely no revenue resulting from anticipated future filings.

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In fiscal year 2008 (June 30, 2008 year end) the National Nexus Program:

- Executed contracts with 85 taxpayers, which resulted in 421 separate contracts with states
- Collected back tax of **\$16,540,388** (likely to rise slightly due to late-arriving data)
- Opened 71 new voluntary disclosure files, representing 620 potential state contracts.

The average taxpayer applied to just over five states.

In calendar year 2008 (January through June) the National Nexus Program:

- Executed contracts with 53 taxpayers, which resulted in 205 state contracts
- Collected back tax of **\$9,985,268** (likely to rise slightly due to late-arriving data)
- Opened 39 new voluntary disclosure files, representing 318 potential state contracts

For comparison purposes, the program collected the following amounts for these calendar years:

- CY 2007: **\$10.0 million**
- CY 2006: **\$14.2 million**
- CY 2005: **\$4.7 million**

Numbers are rounded.

For comparison purposes, the January – June period produced the following amounts of revenue in the indicated years:

- 2007: **\$3.5 million**
- 2006: **\$5.7 million**
- 2005: **\$3.0 million**
- 2004: **\$3.4 million**
- 2003: **\$4.5 million**
- 2002: **\$2.4 million**
- 2001: **\$1.3 million**

Numbers are rounded.

Comparing only numbers of applicants (*Files*), we are on track to approximately duplicate the number of Files opened in the previous calendar year:

- Jan. – June 2008: 32 Files opened
- Calendar year 2007: 68 Files opened.
- Calendar year 2006: 76 Files opened.
- Calendar year 2005: 74 Files opened.
- Calendar year 2004: 73 Files opened.
- Calendar year 2003: 75 Files opened
- Calendar year 2002: 45 Files opened
- Calendar year 2001: 48 Files opened

Voluntary Disclosure on Commission's website

The Commission's web site continues to be an important source of information for taxpayers about the multi-state voluntary disclosure program and the most common way applicants acquire an application form. We formerly offered applications in either Word or static PDF format. As spring 2008 we offer the application only as a fill-in PDF file. This prevents an applicant from changing the wording of a question, perhaps in a subtle way that, if not detected, would obfuscate important factual information.

The number of visitors to the Nexus pages of the Commission's website over the past year has been about 500 per month in May 2007 through December 2007 (range: 403 to 584) . It picked up to about 625 per month in January through March 2008. April 2008 had almost 1,100 visits. And May through June 2008 reverted to about 500 per month.

The number of visits to the voluntary disclosure portion of the Nexus web pages followed a different pattern in part. Visits ranged from 67 to 101 in May 2007 through November 2007. Distinct from the Nexus pages pattern, they then fell considerably in December 2007 through March 2008 (range: 49 to 60). And following the pattern of the full Nexus pages, April 2008 was very popular, with visits rising to 150 before receding in May and June 2008.

Nexus Schools

The Multistate Tax Commission's Nexus School is a two day training event where students are taught state tax jurisdictional issues, or "nexus." Nexus Schools scheduled for 2008:

- Omaha, Nebraska - September 15-16, 2008
- Boise, Idaho - October 21-22, 2008

Contact Mr. Antonio Soto of the Commission's training staff for registration information or information about the benefits of hosting a nexus school.

Although Nexus staff routinely updates nexus school materials when developments require it, over the next year we will put the materials through a thorough review and revision to ensure that written materials distributed to students as part of this popular training course are fully up to date and presented in the most useful format. We will likely hire a law student to assist with this project part-time.

Voluntary Disclosure Guidelines

The voluntary disclosure guidelines project is an effort of states and Commission staff to develop a set of written guidelines to govern the voluntary disclosure process. The private sector has been invited to offer comments but has not yet done so. It is hoped that states will adopt these guidelines as their own with respect to multi-state voluntary disclosures (they would not affect a state's own voluntary disclosure program).

At its November 2007 meeting the Nexus Committee referred the guidelines to a drafting committee for further consideration. The drafting committee met three times and produced a draft that the committee marked up at its March 2008 meeting. I suggest that the Nexus committee resume its consideration of the document at §13 (formerly §14; re-numbered due to a deleted section) and continue to the end. Then, If time permits, the committee may want to entertain additional discussion and amendment of any portion of the document before the committee acts on it by approving, disapproving, or tabling it for later consideration. No

matter how much progress the committee makes, I recommend tabling it until at least the fall 2008 Nexus Committee meeting so that it will benefit from full consideration and input, particularly from the taxpayer community, from whom we have not yet heard.

Please find the marked-up draft from the March meeting in the Appendix. It is very important that committee members study this document in advance of the meeting and arrive prepared for mark up. The committee will be asked to approve this document, either at this meeting or another, as the rules to govern the multi-state voluntary disclosure program. This may affect a state's own procedures as applied to disclosures forwarded from the Commission (it would not affect a state's own voluntary disclosure program). It is important that committee members consult in advance with affected personnel in their states and bring their state's experience and views to the meeting.

A Few Nexus Developments

- Tax Analysts reported that a senior partner at Deloitte said on a web cast that he thinks companies will begin to use audit settlements to take down previously reported uncertain income tax positions and will increasingly use voluntary disclosures to settle audits.

Because they have already filed a return, taxpayers under audit are generally not eligible for voluntary disclosure. The comment nevertheless suggests that taxpayers are thinking about voluntary disclosure as a way to unwind aggressive income tax positions in the face of the Financial Accounting Standards Board (FASB) Interpretation No. 48 (FIN 48). FIN 48 sets forth rules with respect to accounting for uncertain income tax positions on financial statements. The complete text of FIN 48 is available at <http://www.fasb.org/pdf/fin%2048.pdf>.

- The "Amazon" issue has been taken up by at least two states.

New York approved S. 6807-C as Chapter 57, Laws of New York, 2008 (the 2008 – 2009 budget). Signed by Governor Paterson on April 23, it establishes a presumption that an out-of-state seller who has an agreement with a New York resident to refer potential customers for a commission, by an internet link or otherwise, is soliciting sales in the state through an independent contractor and thus subject to a use tax collection duty. The rule does not apply to sellers who sell less than \$10,000 in New York annually. The seller may rebut the presumption by showing that the independent contractor did not engage in any solicitation within the state during the previous year that would satisfy the nexus requirement of the U.S. Constitution. This law would seem to be aimed at Amazon's, and maybe other vendors', practice of entering into such agreements with New York residents while failing to collect use tax on sales into the state.

Amazon announced that it would comply with the law by June 1, as the law requires, and then it filed suit on April 25 in New York County Supreme Court (the state's trial-court level) alleging three violations of the U.S. Constitution:

- the Commerce Clause because Amazon has no substantial nexus;
- the Due Process Clause because the irrebuttable presumption of 'solicitation' is impermissibly vague; and
- the Equal Protection Clause because Amazon is singled out.

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- The California State Board of Equalization held an informational hearing at which Amazon presented its views regarding its referral program. Amazon's representative maintained that the program is "performance-based advertising" and not solicitation of sales. The Board took no action on the issue.

**Nexus Committee Minutes
Tucson, Arizona
March 13, 2008
9:30 a.m. – Noon MST**

Italicized text indicates a significant vote, committee action, follow up item, or request by a committee member.

Public Session

I. Welcome and Introductions.

Chairman Lennie Collins (NC) convened the meeting. The following persons attended all or part:

NAME	AFFILIATION	NAME	AFFILIATION
1. Chris Sherlock	AL	Antonio Soto (T)	MTC
2. Christy Vandevender (T)	AL	Diane Simon-Queen (T)	MTC
3. Ken Ditmer	AK	Jeff Silver	MTC
4. Danny Walker (T)	AR	Lennie Collins	NC
5. Tamra Fucci (T)	AZ	Darrell Engen	ND
6. Todd Lard	COST	Mary Loftsgard	ND
7. Beth Cooley	COST	Lee Evans (T)	NJ
8. John Kutsukos	CT	Charles Langston	NM
9. Joe Thomas	CT	David M Fergeson	NM
10. Charles Wilson	DC	Rebecca Abbo	NM
11. Nancy Tucker	DC	Janielle Lipscomb	OR
12. Anita DeGumbia	GA	Eric Smith	OR
13. Reva Tisdale	ID	John Rogers (T)	SC
14. Randy Tilley	ID	Denice Houlette (T)	SD
15. John Pydyszewski	J & J	Brandon Seibel	SD
16. Mike Boekhaus	KS	Joan Cagle (T)	TN
17. Peggy McKinley	LA	Hermi Nañez	TX
18. Debbie Underwood	LA	Shelley Robinson (T)	UT
19. Keith Getschel	MN	Mike Christensen (T)	UT
20. Lee Baerlocher	MT	Craig Sandberg	UT
21. Eugene Walborn	MT	Rod Marrelli	UT
22. Thomas Shimkin	MTC	Michael Grundhoffer	WA
23. Ted Jutras	MTC	Rick DeBano	WI
24. Mike Bontrager	MTC	Craig Griffith	WV
25. Steve Yang	MTC	Shanda Rice (T)	WY
26. Ken Beier	MTC		

“(T)” after a name means that the person attended by telephone.

II. Public Comment Period:

There were no comments from the public.

III. Review of Agenda & Minutes

The committee approved the open-session minutes of the November 2007 meeting as amended to note the attendance of Chairman Joe Thomas.

The committee approved the agenda.

IV. Voluntary Disclosure Program – Financial Update

Nexus Director Thomas Shimkin (MTC) presented the committee with an update on the financial results of the voluntary disclosure program. In the fourth quarter of 2007 the Commission executed eighty-five contracts and collected \$3.17 million in revenue on behalf of member states, he said. For calendar year 2007 Mr. Shimkin told the committee that the Commission had executed four hundred thirty-seven contracts and collected revenue of \$9.98 million. Mr. Shimkin stated that the trend over the past four years is upward, despite short-term volatility in the most recent quarter and year.

Mary Loftsgard (ND) requested a breakdown of revenue by tax type in reports. Mr. Shimkin explained that when complete the Commission's renovated software to manage voluntary disclosures will permit production of such reports.

V. Voluntary Compliance Program

Mr. Shimkin presented information about the Voluntary Compliance Program. The program involved 23 states and produced over \$21 million in combined tax revenue for the participating states. Thirty-six of the approximately 7,200 individuals and entities that the Commission contacted came forward. The program ended in October. All states now have their lists of "invited participants." States may choose to make further inquiry of those taxpayers invited to participate who declined.

VI. Nexus School

Antonio Soto (MTC) announced that the next Nexus School will be held on April 8-9, 2008 in Baltimore, Maryland. The Commission plans to hold a Nexus School in Omaha, Nebraska September 15 - 16, and one in Boise, Idaho October 21-22, 2008.

VII. Tumbleweed Secure Messenger

Chris Lane (MTC) gave a PowerPoint presentation on the Tumbleweed Secure Messenger software that the MTC will deploy as part of the Secure Communications Plan. Mr. Lane said that all Commission committees and divisions will likely find a use for the software. Among other capabilities, it will track notification of e-mail delivery and analyze e-mail content to identify confidential information and automatically encrypt and protect it. The user will need no special software.

VIII. Voluntary Disclosure Information System

Mr. Shimkin spoke about the National Nexus Program's project to improve its voluntary disclosure software. The project has two phases. The first seeks to replace the current database and application that MTC staff uses for handling voluntary disclosure cases while also expanding on the application's capabilities.

Mr. Shimkin explained that the current software was designed by a now-former Commission staff member in Microsoft Access 2000, a platform which has been extended beyond its capacity as the number of voluntary disclosures has grown. He said that the Commission does not have the resources to maintain and further develop this software. The Commission is currently reviewing bids for the first phase of the project, which will migrate voluntary disclosure records into a software program that can be well supported, plus make some design improvements that will allow improved management and reporting functions and speedier processing in the short term.

Mr. Shimkin asked for committee input regarding the second phase of the project. He noted that no firm plans have been made to go forward with the second phase. The second phase, if undertaken, would create a web-based interface allowing states, taxpayers, and MTC staff to login to secure, individual accounts. Taxpayers would be able to apply for voluntary disclosure, review contracts, track the status of their cases, and securely and anonymously communicate directly with states or MTC staff through this web application. State employees would be able to review and track all cases related to their state, as well as communicate directly and securely with taxpayers and MTC staff.

Rod Marrelli (UT) asked whether the project would increase dues. Mr. Shimkin responded that it would not.

Mr. Collins asked whether the Technology Committee reviewed vendor proposals for Phase I and II or for Phase I only. Mr. Jutras (MTC) responded that the proceedings were focused on bids for Phase I. He said that vendors had been asked to submit only very general estimates of cost for Phase II.

IX. Written Voluntary Disclosure Guidelines

Mr. Shimkin presented a revised draft of written guidelines for the Voluntary Disclosure Program. [Since the November meeting the following Committee members served on a drafting committee to modify the first draft: Shelley Robinson (UT); Hermi Nañez (TX); Rod Marrelli (UT); Christy Vandevender (AL); Danny Walker (AR); Keith Getschel (MN); Deborah Underwood (LA); Kathy Oline (WA); and Michael Gorczycki (NJ); Thomas Shimkin (MTC); and Michelle Lewis (MTC).]

Nexus Committee members made the following comments and suggestions:

- §4: Joe Thomas (CT) asked whether the document would bind the states. Mr. Shimkin responded that states would be asked to apply the policies in the Guidelines only with respect to voluntary disclosures originating with the Commission.
- §4: *Janielle Lipscomb (OR) suggested that the language “do not necessarily apply” be changed to “do not apply.”* After some discussion the Committee agreed. The text would read: “These procedures do not necessarily apply to a state’s single-state voluntary disclosure program.”
- §5: Ms. Tisdale noted that a reference to §13.1 should be corrected to instead reference §15.1
- §6: After a discussion initiated by Hermi Nañez (TX), *the Committee voted unanimously to strike §6.* This section requires the Commission to accept disclosure applications without regard to the amount of tax estimated to be due.

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- §10: *After discussion, the committee consensus was to keep this section as is except with respect to a collected fiduciary tax, in which case money mistakenly given to the Commission will be forwarded to the state. §10 allows a taxpayer who mistakenly sends the Commission a return or payment to require the Commission to return the return or payment without notice to the state. [This section has become §9 due to striking former §6]*
- §14: *Ms. Tisdale stated her view that “suspend” an audit should be changed to, “not begin” an audit. The text would be revised thus:*

“Protection from audit means that, upon receipt of notice per §15.2, NNP and participating states shall ~~suspend~~ not begin with respect to a taxpayer so protected, all inquiry, audit and other enforcement activity (except criminal enforcement activity) with respect to that taxpayer and the type of tax at issue, pending that taxpayer’s timely and proper completion of its MVD.”

The committee postponed further consideration of the proposed guidelines until its July 2008 meeting to ensure that it attended to all agenda items before adjournment. Mr. Shimkin said that he would *incorporate committee comments* and distribute a revised version well in advance of the July meeting. The consensus of the committee was to *further study the marked up draft and to attend the July meeting prepared to continue the markup.*

Mr. Shimkin solicited input from a representative of COST, who commented that he is waiting for feedback from COST members, and that he will provide a written statement in advance of the summer meeting. Mr. Marrelli asked whether COST members need or want guidelines. The representative replied that he would confirm with his members but that his initial view is that they do want written guidelines.

X. New Business

There was no new business.

XI. Closed Session

--- The committee entered closed session. ---

--- The committee returned to public session. ---

After a vote, the Committee expressed its preference that the winter 2009 committee meeting be held in Charleston, South Carolina, with eleven members voting for that city. The second and third highest vote-getters respectively were San Diego, California (8 votes) and Savannah, Georgia (6 votes).

XII. Adjournment

Trend Shows Firms Seeking State Audits, Audit Settlement of FIN 48 Issues

by Thomas Jaworski

Companies are increasingly seeking out audit settlements with state tax officials in order to "take down" many of their previously reported uncertain tax positions under FIN 48, a partner at Deloitte said April 28.

Date: Apr. 30, 2008

Full Text Published by **taxanalysts**[®]

Companies are increasingly seeking out audit settlements with state tax officials in order to "take down" many of their previously reported uncertain tax positions under Financial Accounting Standards Board Interpretation No. 48, "Accounting for Uncertainty in Income Taxes," a partner at Deloitte said April 28.

During a web cast hosted by Deloitte on state tax accounting issues, senior partner Jerry Gattegno said he thinks companies will also begin to use voluntary disclosure agreements (VDAs) to promptly settle a state tax audit and may begin to voluntarily suggest that they be audited for a particular tax issue.

Companies can also use VDAs to limit the number of years under which they are under exposure in a particular state, he said.

Gattegno said some companies are implementing other proactive restructuring techniques to reduce future liabilities reported under FIN 48, such as producing thorough transfer pricing documentation.

Settling the Issues With Closing Agreements, Dialogue on the Merits

During the web cast, a poll question asked participants to choose which scenario best presents an "effectively settled" state tax issue if the state tax authority had full knowledge of all relevant information. In response, more than 64 percent of the participants said an "effectively settled" state tax issue meant: a closing agreement for the year under audit was signed; an understanding on the technical merits of the tax issue was reached between the tax officials and taxpayers; or both options.

According to Gattegno a closing agreement is certainly acceptable, but another option -- tax officials conducted a thorough examination, but didn't raise the specific tax issue -- isn't "automatically a problem [in the effectively settled analysis]." Ultimately, not enough facts were presented in the question to lead to the conclusion that any of the options were right or wrong, he said.

Using 'Widely Understood' Practices to Close Lookback Periods

Among the other "vexing FIN 48 issues" in the multistate tax area, Gattegno discussed how a company determines the amount of open years for which a FIN 48 reserve must be provided when a company operates under a state administrative practice that doesn't require it to file a tax return and when a related statute of limitations never began.

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Companies are required to provide a reserve for every open year unless the states in which they are responsible for taxes maintain "widely understood" administrative practices that limit "open lookback period[s]," Gattegno said, noting that currently, there are about 12 states that have practices in place that limit or clarify the lookback period for open tax years.

Companies that have a widely understood practice available may still have to provide a reserve for a limited amount of years during the measurement phase of FIN 48, he said.

As for the differing views on what constitutes a "widely understood" practice, Gattegno said Deloitte's position has always been to stay open to varying state administrative practices. While informal FASB guidance has stated that the U.S. Supreme Court is the "Court of Last Resort" in state tax issues, FASB literature has also noted that there is no need for the Supreme Court to hear every state tax issue, he said.

Tax Analysts Document Number: Doc 2008-9453
Tax Analysts Electronic Citation: 2008 STT 84-1

California BOE Examines Amazon Nexus Issues

by Lenny Goldberg

The California State Board of Equalization held an informational hearing as part of its meeting on July 8 to hear from Amazon.com about recent events in both New York and Texas and to explore tax issues, especially sales taxes; the board also considered the ongoing issue of how to value personal property in the biopharmaceutical industry.

Date: Jul. 11, 2008

Full Text Published by **taxanalysts**[®]

The California State Board of Equalization held an informational hearing as part of its meeting on July 8 to hear from Amazon.com about New York's new nexus law and a nexus question about an Amazon distribution center in Texas. Although no action was taken, the board explored tax issues with Amazon and other supporters and opponents of Amazon's position.

Richard Prem, Amazon's vice president for indirect taxes and tax reporting, described the benefits Amazon offers for small businesses, including the opportunities provided in the associates programs; nexus issues regarding the programs have been at issue in New York and have been raised in California. He described the program as "performance-based advertising," whereby a click-through and a purchase leads to payment, which does not create nexus. Prem also described Amazon as a technology company that fulfills orders for businesses such as Target and that has a "tax engine" that provides sales tax software to 5,000 sellers. He argued that the rebuttable presumption in New York's nexus law created a compliance burden and that Amazon would sue under the test of *Quill v. North Dakota*. Board members raised a number of issues about Amazon's associates program and Amazon's relationship with its associates.

In response, a representative of the Northern California Independent Booksellers' Association (this author) argued that the associates program consisted of representatives and organizations in the state, selling under contract and for a commission; that "undue burden" under *Quill* was not a problem because of Amazon's sales tax software; and that the board should follow New York insofar as the sales and use tax was in any case due and payable and the only litigation issue was the point of collection. Representatives of the California Taxpayers' Association and the Chamber of Commerce opposed that suggestion, saying it would lead to litigation and could harm in-state businesses.

Board legal staff said that because California has no long-arm statute, so because the Amazon associates program was a "click-through," it did not generate nexus. Activities undertaken to direct people to the Web site and the orders were not at Amazon's direction, which they would have to be to be covered by California statute, Amazon says. Legal staff said that with a long-arm statute such as that sought in the State Legislature (AB 1840), there might be several changes in California's approach to nexus issues like those raised regarding the Amazon Associates program. Board members took the discussion under advisement.

The board also considered the ongoing issue of how to value personal property in the biopharmaceutical industry. Staff, assessors, and industry representatives have been trying to determine valuation factors regarding how assessors should depreciate, index, and trend the value of personal property. While there has been substantial agreement, staff and industry continue to disagree on whether values can be trended over time on a regular basis. The board moved to uphold the staff position, which would allow valuation to be subject to trending factors in the industry.

This is an excerpt from S. 6807-C, New York's 2008-2009 budget bill. It requires certain remote vendors who receive referrals from in-state persons to collect use tax and establishes a temporary amnesty program for certain remote vendors. The governor signed it into law on April 23, 2008 as Chapter 57, Laws of New York, 2008.

PART OO-1

Section 1. Paragraph 8 of subdivision (b) of section 1101 of the tax law is amended by adding a new subparagraph (vi) to read as follows:

(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.

Section 2. For sales tax quarterly periods commencing before June 1, 2008, the commissioner of taxation and finance may not determine tax, or related interest or penalty, pursuant to section 1138 of the tax law, required to be collected but for this section by a person meeting the following conditions, against that person: (a) on the effective date of this act, the person (1) is presumed to be a vendor by reason of section one of this act; (2) is a vendor solely by reason of activities described in subclause (I) of clause (C) of subparagraph (i) of paragraph (8) of subdivision (b) of section 1101 of the tax law but without regard to whether the person is a vendor under clause (A) of subparagraph (i) of paragraph (8) of subdivision (b) of such section; (3) is not registered as a vendor pursuant to section 1134 of the tax law, was not registered at any time in the nine months prior to that effective date, and was not

registered as a vendor at the time of making the sale for which the person failed to collect sales tax; and (b) the person registers as a vendor pursuant to section 1134 of the tax law and commences to collect sales tax by June 1, 2008. Nothing in this section precludes the commissioner of taxation and finance from determining, pursuant to section 1138 of the tax law, sales and use tax, interest, and penalties against a person not meeting the conditions set forth in the preceding sentence.

Section 3. This act shall take effect immediately and shall apply to sales made, uses occurring, and services rendered on or after the date this act shall have become a law in accordance with applicable transition provisions in sections 1106 and 1217 of the tax law and without regard as to the date the seller and the resident entered into the agreement described in section one of this act. Provided, however, that the term "the preceding four quarterly periods ending on the last day of February, May, August, and November" as used in section one of this act may include quarterly periods commencing prior to the effective date of this act.