MULTISTATE TAX COMMISSION

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Nexus Program Director's July 27, 2021 Update on Significant Nexus Law Developments Since April 20, 2021

See PowerPoint concerning states that have enacted economic nexus statutes or promulgated regulations or notices implementing economic nexus, as well as states that have enacted laws requiring marketplace facilitators/providers to collect sales/use tax on facilitated sales.

Rulings or Administrative Actions

California

Governor Newsom on June 11, 2021 rescinded (Executive Order N-07-21) his previously issued COVID-19 stay home order (Executive Order N-33-20), and the FTB thereafter issued a revised FAQ indicating that presence of a teleworker in California, after rescission of the stay home order, could be considered "doing business" in the state and defeat protection under P.L. 86-272 for the out-of-state employer corporation, depending on the teleworker's activities. *Checkpoint* State Tax Update (7/7/2021).

Indiana

Pursuant to the governor's directives, the Indiana Department of Revenue had previously stated that temporary relocation of workers to the state as a result of stay home orders would not be used by the Department as the basis for asserting tax nexus against the employer. However, the Department has announced that after June 30, 2021, workers remaining in the state after those stay home orders expired, could be used as a basis for nexus for employers.

Mississippi

Mississippi Department of Revenue has published guidance on "Peer to Peer Rentals" indicating that rental of cars, property, and accommodations are subject to sales tax and marketplace facilitators involved with these transactions are required to collect.

New Mexico

The New Mexico Taxation and Revenue Department has published FYI-200 to explain the destination sourcing rules for gross receipts tax that went into effect on July 1, 2021. The Department has adopted regulation § 3.2.1.20 NMAC on the gross

receipts of marketplace providers and marketplace sellers. Checkpoint, State Tax Updates (7/13/2021).

New York
Department of Taxation and Finance has proposed amendments to Article 9-A Business Corporation Franchise Tax Regulations to incorporate the changes made by the corporate tax reform legislation contained in the 2014–2015 and 2015–2016 enacted New York State Budgets, including corporate tax nexus provisions.

Philadelphia
The City of Philadelphia Department of Revenue published a June 16, 2021 notice stating that since the prior COVID 19 stay home orders have expired, workers returning to their offices in the city will once again be subject to the use and occupancy tax.

Rhode Island
The Rhode Island Division of Taxation has extended to July 17, 2021 an emergency regulation, 280-RICR-20-55-14, which provides withholding tax guidance for employers that have employees who are temporarily working remotely due to the coronavirus (COVID-19) pandemic. Under that regulation, nonresidents who commuted to work in Rhode Island prior to the pandemic but are now telecommuting from home outside the state due to COVID 19 will still be subject to Rhode Island income tax, and nonresident employers with workers telecommuting from Rhode Island due to the pandemic will not have to withhold employment taxes on those wages. *Checkpoint*, State Tax Update (6/14/21)

South Dakota
South Dakota Department of Revenue has published a bulletin dated May 2021 providing guidance regarding marketplace facilitators and sellers and implementation of the sales/use tax collection requirements on marketplace facilitators.

Tennessee
The Tennessee Department of Revenue published Letter Ruling #21-05, providing guidance in determining that a particular platform submitting the ruling request fit within the definition of "marketplace facilitator." In this instance, the platform did not handle the customer's money, so did not fit within Tennessee's definition.

Vermont

Vermont Department of Taxes published income tax guidance for remote workers, stating that income earned by nonresidents working in Vermont is subject to Vermont income tax, regardless of the pandemic, and regardless of whether the employer is located in or outside of Vermont. *Checkpoint*, State Tax Update (5/26/21)

Washington
Washington Department of Revenue published new section WAC 458-20-282 on June 2, 2021, providing specific sales/use tax administration guidance to marketplace facilitators.

Washington Department of Revenue issued Det. No. 19-0003, 40 WTD 093 (2021), upholding the B&O tax assessment against a marketplace seller, based on that seller having substantial nexus with the state by virtue of inventory located in the marketplace facilitator's distribution center in the state. The seller argued that it had given up owner ship rights over the inventory at the time it delivered the inventory to the marketplace facilitator outside the state. The Department determined otherwise, based on the contract between the seller and facilitator, whereby the seller had knowledge and consent that the facilitator moved the inventory in-state.

Legislation
Arkansas
The Arkansas Legislature enacted SB 484 to repeal the administratively adopted "convenience of the employer rule," providing that nonresidents would owe Arkansas individual income tax only salary that is attributable to work physically performed in Arkansas.

Connecticut
Connecticut Legislature enacted HB 6516, providing that nonresident workers working in Connecticut due to COVID 19 will not cause tax nexus for the out-of-state employer.

Georgia
Georgia Legislature enacted HB 317 amending the definition of "innkeeper" to include a marketplace facilitator with respect to collection and remittance of local lodging taxes.

Iowa

Iowa Legislature enacted S608, requiring pass-through entities to file composite returns on behalf of all nonresident owners, paying income or franchise tax at the maximum rate, effective 7/1/2021.

Louisiana
The Louisiana Legislature enacted SB 157, effective 1/1/2022, providing for an exemption from income tax for wages of nonresident workers performing work in the state for 25 days or less per year, if the worker's resident state provides a reciprocal exemption.

The Louisiana Legislature enacted HB 199, providing for a constitutional amendment (to be voted upon by the public in October) to establish a centralized commission to supervise administration and collection of local sales and use taxes (which are currently locally administered).

Maine
The Maine Legislature enacted H 891, effective 1/1/2022, adopting factor presence nexus for corporate income tax ($250,000 property, $250,000 payroll, or $500,000 sales, or 25% or more of any factor).

Cases
U.S. Supreme Court
Ford Motor Co. v. Montana Eighth Judicial District, Nos. 16-368 and 19-369 (March 25, 2021), involved 2 motor vehicle products liability cases brought against Ford, one in Montana, one in Minnesota, in which Ford vehicles purchased used outside of those states were involved. Ford moved to dismiss both cases for lack of personal jurisdiction, arguing that only if company had designed, manufactured, or sold in the State the particular vehicle involved in the accident should jurisdiction exist. The state courts ruled against Ford, and on certiorari, the U.S. Supreme Court affirmed, holding that Ford's extensive marketing efforts in selling vehicles in those states was sufficient connection between the injury claims and Ford to provide specific jurisdiction and satisfy due process concerns.

California
In *Matter of LA Hotel Investments #3 LLC and Matter of LA Hotel Investments #2 LLC*, the California Office of Tax Appeals (OTA) upheld the Franchise Tax Board's (FTB) denial of nonresident LLCs' minimum $800 annual franchise tax payment refund requests, determining that those LLCs were "doing business" in California, based on California Revenue and Taxation Code section 23101(b)(3), which provides that a

taxpayer will be considered "doing business" in the state if it's real property and tangible personal property in the state exceeds the lesser of $50,000 or 25 percent of the taxpayer's total real property and tangible personal property. The nonresident LLCs, as passive investors, owned interests of approximately 5% and 2% respectively in LLCs that were doing business in California (owning hotels), and the value of interests exceeded the $50,000 threshold. The nonresident LLCs attempted to rely on *Swart Enterprises*, in which a nonresident LLC passive investor owning a .2% interest in a pass-through entity doing business in California was held not to be "doing business" in the state, for purposes of the franchise tax. However, the OTA noted that section 23101(b)(3) was enacted after the time period at issue in *Swart Enterprises*.

In *Matter of Door Line, Inc.*, the California Office of Tax Appeals (OTA) upheld a use tax assessment against an out-of-state internet seller that sold garage doors and optional installation to California customers. The manufacturer delivered the garage doors to the customers and contracted with local subcontractors for the installation work. The internet seller failed to collect use tax from its California customers and also failed to self assess use tax on materials used in the installation contracts, arguing that it was not doing business in California and had no nexus. The OTA agreed with CDTFA that the internet seller was a general contractor for the garage door installation, with the local subcontractors acting on its behalf and providing physical presence. The internet seller also held a California use tax registration certificate that obligated the seller to collect use tax.

Idaho

The U.S. Supreme Court has denied the Idaho Tax Commission's petition for certiorari in *Noell Industries, Inc. v. Idaho Tax Commission*, 167 Idaho 367, 470 P.3d 1176 (2020), in which it determined lack of due process for the state to tax an apportioned share of the gain income from the sale by Noell Industries, Inc., a Virginia pass through entity and holding company, of its majority interest in Blackhawk, a Virginia limited liability company with active business operations in Idaho. The court held that the gain income was nonbusiness income allocable to Virginia and that Idaho could not tax its apportioned share of that gain, because Noell Industries, Inc., a holding company with no active operations, was not unitary with Blackhawk. The Commission argued in its amicus brief that the Idaho Supreme Court improperly applied the U.S. Supreme Court's unitary business principle in its ruling, and there are inconsistent determinations among the state courts on this issue, requiring resolution.

Massachusetts/New Hampshire

In *New Hampshire v. Massachusetts*, No. 154, Original, New Hampshire filed a motion in the U.S. Supreme Court for leave to file a complaint against Massachusetts to challenge the constitutionality of 830 Mass. Code Regs. 62.5A.3, a temporary rule promulgated by the Department of Revenue during the COVID 19 pandemic providing that nonresident workers who formerly commuted to work at Massachusetts employer locations but were working out-of-state for such employers due to COVID 19 stay home orders would still be required to pay Massachusetts income tax on the income from work performed out-of-state for such employers. A large number of amici briefs were filed in support of New Hampshire, in hopes that the Court would consider the "convenience of the employer" rule that other states have adopted on a permanent basis (New York). The Court declined to accept jurisdiction, however. The Massachusetts Department of Revenue has also announced that its temporary rule is being rescinded post-COVID.

New Jersey

In *Stanislaus Food Products Co. v. Division of Taxation*, the New Jersey Tax Court held that New Jersey's alternative minimum tax (AMT), which applied only to corporations that were protected from New Jersey's corporate business tax (CBT) under P.L. 86-272, was pre-empted by P.L. 86-272 because it essentially required those businesses to pay CBT. The AMT was a gross receipts tax that gave the taxpayer the option to pay the CBT to avoid it.

In *Procacci Brothers Sales Corp. v Division of Taxation*, Docket No. 015626-2014, the New Jersey Tax Court reversed the Division's assessment of corporation business tax (CBT). The taxpayer, an out-of-state wholesale produce distributor, delivered produce to New Jersey vendors in its own vehicles. The produce distributor would also take back produce rejected by the vendor at the time of delivery and on occasion later after delivery was accepted. Federal law required the produce distributor to take back produce rejected at the time of delivery. The court determined that because the produce distributor was required by law to take back produce rejected prior to acceptance, this activity was considered ancillary to solicitation. The court also determined that the incidents when the produce distributor took back produce after acceptance were de minimis, so the produce distributor was protected from CBT by P.L. 86-272.

New York

In *In re Lepage, et al.*, Docket Nos. 828035, 82036, 82037, 82038, New York Tax Appeals Tribunal (May 17, 2021), nonresident individuals who were owners of two corporations engaged in the multistate baking business (including business in New

York) that had elected S corp treatment for federal income tax purposes but not for New York tax purposes petitioned the New York Tax Appeals Tribunal to challenge their deficiencies for New York personal income tax on the gain from the sale of stock of the two corporations. The stock sales were treated as deemed sales of assets for federal income tax purposes under IRC § 338 (h) (10). The taxpayers claimed that the statutory mandatory New York S corp election did not apply, and there was a lack of contacts with New York, so the deficiencies violated due process, commerce clause and equal protection. The Division of Taxation determined that the two corporations were subject to statutory mandatory election of S corp treatment for New York income tax purposes, the stock sales should be treated as deemed asset sales for New York income tax purposes, and the apportioned share of the taxpayers' gain income was subject to personal income tax. The Administrative Law Judge upheld the Division of Taxation's position and held that the nexus of the two corporations with New York provided nexus for the S corp nonresident owners, dismissing the constitutional claims. The Tax Appeals Tribunal affirmed. In addressing the due process and commerce clause violation claims, the Tribunal focused not on the nonresident owners' contacts with New York, but with the two corporations' nexus with New York, stating:

> In order to justify the imposition of tax, the relevant inquiry is whether New York has given something for which it may impose a tax in return. Here, New York has satisfied this standard because it has accorded privileges and immunities that led to [the limited liability company's] which inured to the benefit of its shareholders, including petitioners.[1]

New York City

In *In re Goldman Sachs Petershill Fund Offshore Holding (Delaware) Corp.*, No. TAT(H)16-9(GC), the New York City Tax Appeals Tribunal (March 12, 2021) affirmed an earlier decision by the ALJ upholding the City's general corporation tax assessment against a foreign corporation (Goldman Sachs Petershill), which owned an interest in a limited partnership that owned a minority interest in Claren Road Asset Management, LLC (Claren), an investment management company that did business in New York City during the relevant time period. Goldman Sachs Petershill carried on no activities in New York City, had no presence there, and was not unitary with and did not participate in the management of Claren. The interest in Claren was later sold for a large capital gain. The City Commissioner of Finance thereafter issued a notice of determination to Goldman Sachs Petershill, assessing general corporation tax on the apportioned share of that gain, and Goldman Sachs Petershill petitioned for relief,

[1] Quoting *Matter of Shell Gas* (New York Tax Appeals Tribunal, September 23, 2010).

arguing that it had no nexus with the City and was not unitary with Claren. The Tribunal upheld the assessment, determining that the privileges and immunities afforded by NYC to Claren inured to the benefit of the owners.

North Carolina
In *Quad Graphics v. Department of Revenue*, the Special Superior Court reversed the Office of Administrative Hearings and the Department's sales tax assessment against an out-of-state direct mail printer selling direct mail that was mailed via USPS to North Carolina recipients. The direct mail printer and customer had an agreement providing that title to the direct mail passed to the customer upon the printer's delivery of the direct mail to USPS, which was outside the state. The direct mail printer also had sales representatives located in North Carolina. The sourcing statute sourced the transaction to the delivery location of the direct mail, North Carolina. Relying on *McLeod v. JE Dilworth Co*., 322 U.S. 327 (1944) (finding unconstitutional Arkansas' attempt to enforce its sales tax against a Tennessee seller delivering merchandise via common carrier to customers in Arkansas, determining that the sale occurred out-of-state at the location where the merchandise was transferred to the common carrier), the court held that North Carolina's sales tax assessment was unconstitutional as well, determining that the sales transaction took place out-of-state at the location where the direct mail was deposited with the USPS, despite the North Carolina sourcing statute sourcing the transaction to North Carolina.

Pennsylvania
In *Online Merchants Guild v. Hasell*, No. 1: 21-CV-369, U.S. District Court for the Middle District of Pennsylvania, per its memorandum order filed May 28, 2021, the court abstained under comity from hearing the Guild's claims of due process, commerce clause, and Internet Tax Freedom Act violations due to Pennsylvania Department of Revenue's temporary voluntary disclosure program aimed at getting Amazon FBA sellers with inventory nexus in Pennsylvania to come forward and pay back sales/use taxes owed, and seeking preliminary injunction against program, although the court found the Guild's claims to be ripe. The Guild has since filed their claims in Pennsylvania Commonwealth Court. The Department also agreed to extend the voluntary disclosure program. "Amazon Sellers' Suit Prompts Pennsylvania to Extend Tax Amnesty," Tripp Baltz and Michael Bologna, *Bloomberg Law News* (6/14/21).

Amnesties
New Jersey

The Division of Taxation is offering companies identified as included in a combined group filing in 2019 (when New Jersey adopted combined filing) and indicating nexus with New Jersey, but failing to file separate returns in New Jersey for prior years, the ability to come forward from June 15, 2021 to October 15, 2021, register and file those prior year returns and pay the tax with a limited lookback period. Checkpoint, State Tax Updates (6/7/2021).

Pennsylvania
Department of Revenue has established a temporary 90-day voluntary disclosure program (first published on its website approximately 2/10/2021) for unregistered retailers with inventory in Pennsylvania, providing waiver of penalties and a limited lookback period for payment of back taxes commencing January 1, 2019. This program has been extended as a result of the following litigation: *Online Merchants Guild v. Hasell*, No. 1: 21-CV-369, U.S. District Court for the Middle District of Pennsylvania.

U.S. Congress
Senators Thune (SD) and Brown (OH) introduced in April 2021 the "Remote and Mobile Worker Relief Act of 2021" in the U.S. Senate, providing that nonresident workers cannot be taxed by the state for work performed in the state for 30 days or less per year. This bill is similar to those introduced in previous years.

The Mobile Workforce State Income Tax Simplification Act of 2021 (H.R. 429) was introduced in the U.S. House of Representatives. Similar bills have been introduced in the past several Congresses. *Check point State Tax Day* - Corporate, Personal Income Taxes: Mobile Workforce Bill Introduced in U.S. House (Mar. 18, 2021).

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