



presents

Nexus Reviews: Uncovering State Sales or Income Tax Obligations

Designing an Effective Internal Process to Identify Potential Tax Exposures

A Live 110-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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Carla Yrjanson, Vice President of Tax Services, **Sabrix Inc.**, Lake Oswego, Ore.

Joseph Geiger, Senior Tax Consultant, **Amper Politziner & Mattiaant**, **Vertex Inc.**, Berwyn, Pa.

Gary Bingel, Director, State and Local Tax,, Bridgewater, N.J.

Tuesday, January 26, 2010

The conference begins at:

1 pm Eastern

12 pm Central

11 am Mountain

10 am Pacific

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Nexus Reviews: Uncovering State Sales or Income Tax Obligations Webinar

Jan. 28, 2010

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Today's Program

- Introduction To Nexus Concepts, slides 3 through 8 (*Joseph Geiger*)
- Common Nexus Pitfalls, slides 9 through 19 (*Gary Bingel*)
- Internal Nexus Reviews, slides 20 through 46 (*Carla Yrjanson and Rob Mandel*)
- Considering An Outside Advisory Firm For A Nexus Review, slides 47 through 51 (*Gary Bingel*)
- Nexus Trends, slides 52 through 62 (*Rob Mandel*)

Introduction To Nexus Concepts

Introduction To Nexus Concepts

- Legal concepts
 - Constitutional nexus
 - Due process
 - Commerce Clause
- Public Law 86-272

Introduction To Nexus Concepts (Cont.)

- Prominent court cases
 - *National Bellas Hess*
 - *Scripto*
 - *Complete Auto Transit*
 - *Quill*
 - *Geoffrey*

Introduction To Nexus Concepts (Cont.)

- Nexus policies in practice – sales tax
 - Delivering merchandise in-state
 - Independent contractors
 - Affiliate nexus
 - Advertising
 - Drop shipments

Introduction To Nexus Concepts (Cont.)

- Nexus policies in practice – income tax
 - Solicitation by company representatives
 - Economic nexus
 - Delivering merchandise in-state
 - *De minimis* rule

Introduction To Nexus Concepts (Cont.)

- Recent court cases and state actions
 - Amazon matter
 - Florida Department of Revenue advisement

Common Nexus Pitfalls

Nexus-Creating Activities

- Sellers of tangible personal property
 - Limited exclusion under P.L. 86-272 – discussed above
- Others (service companies, licensing companies, etc)
- Presence of property, payroll in a state
- Economic nexus

P.L. 86-272

- Very limited exception; only applies to income taxes
 - Inapplicable to net worth and to other business privilege-type taxes
 - WA B&O
 - OH CAT
 - PA CS/FT
- Companies often fail to truly understand the extent of their salespeople's activities

P.L. 86-272 (Cont.)

Common pitfall: Failing to properly educate salespeople re: the consequences of their actions

- Companies should have sales manuals that clearly lay out the roles and responsibilities of sales force
- Salespeople need to have procedures for dealing with nexus inquiries

Practical Application

Once outside of P.L. 86-272, any type of property or payroll within a state will likely create nexus

- Inventory
- Sales or service calls
- Anything that creates a market for your business in a state

Common Pitfalls

Lack of coordination with HR

- Hiring employees around the country (e.g., IT professionals)
- If tax department is not kept apprised of hiring practices, nexus can easily be created in numerous jurisdictions
 - While payroll amount in a particular jurisdiction may be minimal, receipts could be significant

Common Problem Area

Service companies with non-repetitive customer base

- What are you to do if your presence in a state is not consistent from year to year?
 - Continuous cycle of registration and withdrawal
 - Staying on radar screen and paying minimal assessments

Common Pitfalls (Cont.)

Failing to evaluate nexus for different taxes/different jurisdictions

- Exempt under P.L. 86-272, so assumed exempt for all taxes
- Economic nexus for income tax purposes, but lack of physical presence for sales tax purposes
- Differing nexus criteria for different types of entities (e.g., PA capital stock/franchise tax and disregarded entities)

Common Pitfalls (Cont.)

Agency/affiliate nexus

- Not truly understanding your relationships with related entities, and/or states' positions re: agency nexus
 - E.g. Washington State B&O tax
 - Computer repair and maintenance contracts with third parties

Common Pitfalls (Cont.)

Mergers and acquisitions

- Need to evaluate new nexus rules and how new entities affect your business – especially if transaction was to integrate related business lines

Common Pitfalls (Cont.)

Failure to look at all lines of business

- Need to evaluate how various lines of business affect each other
- A relatively small/inconsequential line of business can have a major impact on overall line of business
 - E.g. backhauling
 - E.g. installation or training or troubleshooting

Internal Nexus Reviews

Internal Nexus Reviews

- Results from Q3 2009 nexus studies
- Goal of a nexus review and benefits
- Nexus review process
- Nexus questionnaire
- Sample questions
- Maintenance

Internal Nexus Reviews (Cont)



- Sabrix consolidated the results from nexus studies performed in Q3 2009 with companies ranging in size from \$3 million to \$170 million
 - 95% of companies underestimated their nexus footprint
 - 85% underestimated the number of states they needed to register in by more than 50%
 - Mid-sized companies with customers all over the country were most likely to underestimate and carried significantly more risk of audit exposure
 - Smaller companies also underestimated but had lower non-compliance risk

Internal Nexus Reviews (Cont.)

- Goal of an internal nexus review
 - Understand your tax reporting responsibility – in which state and local jurisdictions you are required to be registered, collecting tax, filing tax returns, and remitting tax
- Benefits of a nexus review
 - Reduce/eliminate surprises
 - Know your exposure before the tax auditor shows up
 - Take action to reduce exposure

Internal Nexus Reviews (Cont.)

Sales Details by State

Place an "X" in the box where the following statements are true .

For states where your company makes sales, please provide gross sales in whole dollars.

STATE	Solicit Sales	Perform Services	Other Activities	Gross Sales in \$	Describe the nature of your business activities.
Alabama					
Alaska					
Arizona					
Arkansas					
California					

Internal Nexus Reviews (Cont.)

- Sample property ownership questions – check the states with the following:
 - Lease tangible personal property
 - Repair shop/parts department
 - Purchasing office
 - Employment office
 - Warehouse
 - Meeting place for directors, officers, employees
 - Mobil stores
 - Real property or fixtures
 - Aircraft/automobiles/boats

Internal Nexus Reviews (Cont.)

- Sample employee-related questions – check the states with the following:
 - Have an employee residing in the state
 - Have non-resident employees working in the state
 - Employees, agents, representatives or independent contractors soliciting sales
 - File payroll tax returns
 - Employ professional service employees who maintain a home office in the state
 - Employ salespersons who maintain a home office in the state

Internal Nexus Reviews (Cont.)

- Sample service-related questions – check the states with the following:
 - Sell services into the state
 - Conduct training classes or seminars for customer personnel
 - Offer warranty contracts
 - Install or supervise the installation of products
 - Offer technical assistance after installation/sale
 - Offer on-site technical assistance
 - Offer/issue/honor maintenance contracts

Internal Nexus Reviews (Cont.)

- Sample delivery-related questions – check the states with the following:
 - Deliver products via company owned vehicles
 - Have third-party delivery
 - Have vehicles registered in the state
 - Have vehicles driven by employees

Internal Nexus Reviews (Cont.)

- Gathering the information
 - Determine who “has the answers”
 - It is unlikely that one department will have all of the answers
 - Some departments may be unaware that they have the answers

Internal Nexus Reviews (Cont.)

- Other considerations
 - Tailor the questionnaire to fit your business
 - Think like an auditor
 - Use state business activity questionnaires as a guide



Internal Nexus Reviews (Cont.)

- Maintenance of the internal nexus review is key
 - Keeping up with changing business activities is the key to reducing your nexus exposure
 - Keeping current with changing nexus laws is key



Internal Nexus Reviews (Cont.)

- Interpreting the results of a nexus review
- Determining what action to take on the results

Internal Nexus Reviews (Cont.)

- Interpreting the results of a nexus review
 - Identify states with nexus
 - Confirm no exceptions available
 - Confirm Public Law 86-272 application
 - *De minimis* contact
 - No tax liability

Internal Nexus Reviews (Cont.)

- Confirm no exceptions available (Cont.)
 - Confirm Public Law 86-272 application
 - Public Law 86-272 is a federal law. It provides that the mere solicitation of sales of tangible personal property in a state does not create income tax nexus, when the property is delivered from outside the state.
 - It applies only to solicitation of sales for tangible personal property; it does not apply to solicitation of sales of services
 - It does not apply to sales tax or gross receipts-based taxes such as those in Michigan, Ohio, Texas and Washington
 - Delivery in company owned vehicles may also be protected in some states, due to the states' differing interpretation of the law

Internal Nexus Reviews (Cont.)

- Confirm no exceptions available (Cont.)
 - *De minimis* contact
 - According to the U.S. Supreme Court in *Wrigley*, a trivial contact with the state, even if not ancillary to solicitation, is not sufficient to cause a non-domiciliary seller of tangible personal property to lose the protection afforded by Public Law 86–272
 - According to MTC practice statement under Public Law 86-272, any in-state activity conducted on a regular or systematic basis or pursuant to a company policy will not normally be considered to be trivial

Internal Nexus Reviews (Cont.)

- Confirm no exceptions available (Cont.)
 - No tax liability
 - Service company in greater cost of performance state
 - Greater cost of performance means sales are sourced to a state based on where the greatest costs of providing the service occur, if the service is performed in more than one state.
 - Company may wish to file \$0 tax due returns, to begin statute of limitations

Internal Nexus Reviews (Cont.)

- Quantify exposure
 - State “lookback” periods
 - Estimation of sales and income tax exposure

Internal Nexus Reviews (Cont.)

- Quantify exposure (Cont.)
 - Identify state “lookback” periods
 - State law generally provides no statute of limitations for required returns that were never filed. However, administrative practices of states’ revenue departments usually limit the number of years to which the states will look back for collection
 - Use period of when state discovers company, not period where company approaches state to enter into voluntary disclosure agreements (VDAs)
 - The general rule states follow is 10 years

Internal Nexus Reviews (Cont.)

- Quantify exposure
 - Estimation of sales tax exposure
 - Multiply yearly sales by state, by the state sales tax rate; then multiply the result by the lookback period

Internal Nexus Reviews (Cont.)

- Quantify exposure (Cont.)
 - Estimation of income tax exposure
 - Multiply federal income tax liability by an estimated state apportionment figure, based on a ratio of the amount of in-state property, payroll and sales over out-of-state property, payroll and sales (or, use the appropriate state formula, i.e. sales only). Multiply the result by the number of years in the lookback period

Internal Nexus Reviews (Cont.)

- Determination of action to take
 - No action
 - State registration
 - Voluntary disclosure agreement (VDA)

Internal Nexus Reviews (Cont.)

- Determination of action to take (Cont.)
 - No action: Companies generally choose this option when exposure is small and nexus issues are arguable
 - Advantages
 - No company expense
 - Disadvantages
 - Large potential liability due to number of years, interest and penalties
 - Because no statute of limitations for non-filed income tax returns, under Fin 48 a company may have to maintain indefinite reserves for income tax nexus

Internal Nexus Reviews (Cont.)

- Determination of action to take (Cont.)
 - State registration: Companies generally choose to begin filing prospectively in states where 10% to 20% of its total estimated exposure exist.
 - Advantages
 - No large “up-front” costs
 - Disadvantages
 - On-going compliance burden
 - State could still hold company liable for periods prior to initial filing, if it desired

Internal Nexus Reviews (Cont.)

- Determination of action to take (Cont.)
 - Voluntary disclosure agreements (VDA)
 - Entering into a VDA with a state usually involves the reduction or waiver of penalties, and occasionally interest, in exchange for a company coming forward to pay taxes due
 - Companies generally choose to enter into VDAs in the states where 80% to 100% of their estimated exposure exists
 - Many times, this exposure is concentrated in a few select states, and the remaining 0% to 20% is spread out among the remaining nexus states

Internal Nexus Reviews (Cont.)

- Determination of action to take (Cont.)
 - VDAs
 - Advantages
 - Limits number of lookback years to three or four
 - Most states remove penalties
 - Some states waive interest
 - Provides certainty; allows company to remove Fin 48 reserves
 - Disadvantages
 - Up-front costs
 - Ongoing compliance burden
 - MTC program allows MTC to work with many states at once, but risks of sharing of information. MTC works on behalf of states, not taxpayers

Internal Nexus Reviews (Cont.)

- Determination of action to take (Cont.)
 - VDAs
 - Independence issues
 - Under Sarbanes-Oxley, a company auditor can't act as a client advocate
 - Some commentators argue that some states' VDA programs are automatic, and therefore advocacy is removed from the process
 - Companies may need to hire a separate accounting firm to assist with VDAs or utilize the Multistate Tax Commission's nexus program

Considering An Outside Advisory Firm For A Nexus Review

Limiting Scope

Since each state/tax may need to be evaluated separately, nexus reviews can easily become very costly. Ways to limit scope include:

- Limiting states to those with most potential liability (based on sales or some other methodology)
- Use of reasonable assumptions (e.g., assume if P.L. 86-272 exceeded for income taxes, assume nexus for sales tax)
- Information-gathering by company (e.g., sales manuals, sales analysis, etc.)

Purpose Of Nexus Study

Nexus studies can be performed for various reasons

- FIN 48
- Internal analysis
- Due diligence
- Exposure analysis/remediation
- Planning

By having a clear understanding of the purpose of the nexus study, you can avoid unnecessary work. Expectations should be clearly communicated

Pricing

Each state/line of business/tax type may need to be analyzed separately, and thus may need to be considered a separate analysis. Business complexity adds to overall analysis and associated costs

- You get what you pay for
- Risk adversity: What level of risk can you live with?
- The most important factor is having a clear understanding of the facts (business model, contracts, etc.)

Whom Should You Use?

Potential options include:

- Internal resources
- Accountants
- Attorneys

Considerations include:

- Need for confidentiality (*Textron*, etc.)
- Need for expertise
- Budgets
- Familiarity with your business

Nexus Trends

Nexus Trends

- Trends in nexus theories and enforcement
 - Economic nexus
 - Attributional or agency nexus
 - Flash nexus
 - Uncertainty of nexus standards
 - States' level of aggressiveness
 - Legislation of nexus standards by Congress

Nexus Trends (Cont.)

- Economic nexus
 - Economic nexus is the theory that nexus is created when a company with no physical presence in the state derives income from customers in the state
 - It has developed because some state courts have interpreted that the physical presence requirement articulated in the 1992 U.S. Supreme Court decision in *Quill* only applies to sales/use tax and not income tax

Nexus Trends (Cont.)

- Economic nexus (Cont.)
 - The case that originally brought attention to economic nexus was *Geoffrey, Inc. v. South Carolina Tax Commissioner*. The South Carolina Supreme Court held that a trademark holding company that licensed its intangibles for use in South Carolina had nexus for income tax purposes
 - More recently, the West Virginia Supreme Court held in *MBNA* that a credit card company had income tax nexus because of its in-state customers. However, in *J.C. Penney Natl. Bank*, a Tennessee appeals court held there was no income tax nexus for a credit card company without physical presence in the state

Nexus Trends (Cont.)

- Economic nexus (Cont.)
 - To date, the U.S. Supreme Court has declined to review any state economic nexus case
 - Some commentators believe it is unsettled whether economic nexus for income tax is constitutional
 - Other commentators believe that the refusal to review the cases is a nod of approval for states to assert economic nexus
 - Additional commentators observe that the refusal to review should be interpreted as a signal for Congress to legislate a nexus standard rather than create a judicial standard

Nexus Trends (Cont.)

- Attributional or agency nexus
 - A non-employee acting as an agent or affiliate may create nexus for a company
 - Examples to watch for include
 - New York’s “Amazon” law for affiliates that provide links on the affiliate Web sites to Internet retailers’ Web sites
 - Warranty repair contractors
 - Bricks-and-mortar retailer with a related Internet seller

Nexus Trends (Cont.)

- Flash nexus
 - In the course of shipment, title is transferred at a given point in transit where neither the seller nor buyer has operations causing a physical presence in the state
 - Very little guidance or law on flash nexus at this point
 - States asserting flash nexus may grow if greater acceptance of economic nexus

Nexus Trends (Cont.)

- Uncertainty of nexus standards
 - Supreme Court did not grant review of *Geoffrey*, *Lanco* or *MBNA* state economic nexus decisions

Nexus Trends (Cont.)

- States' level of aggressiveness
 - Budget crises
 - Emboldened by current level of uncertainty
 - Increased level of awareness because of FIN 48

Nexus Trends (Cont.)

- Legislation of nexus standards
 - Some observers report that the U.S. Supreme Court's refusal to grant *certiorari* in economic nexus is a signal to the U.S. Congress to legislate a nexus standard under Congress' power to regulate commerce between the states

Nexus Trends (Cont.)

- Legislation of nexus standards (Cont.)
 - Congress has introduced the Business Activity Tax Simplification Act of 2009 (HR1083). It would provide a physical presence standard for income tax. It is currently in committee
 - The Business Activity Tax Simplification Act of 2008 (HR5267) previously died in committee

111TH CONGRESS
1ST SESSION

H. R. 1083

To regulate certain State taxation of interstate commerce, and for other purposes.

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IN THE HOUSE OF REPRESENTATIVES

FEBRUARY 13, 2009

Mr. BOUCHER (for himself, Mr. GOODLATTE, Mr. DAVIS of Alabama, Mrs. BACHMANN, Ms. HERSETH SANDLIN, Mr. JONES, Mr. SCOTT of Virginia, Mr. JORDAN of Ohio, Mr. WEINER, Mr. PENCE, and Mr. WILSON of South Carolina) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To regulate certain State taxation of interstate commerce, and for other purposes.

1

Be it enacted by the Senate and House of Representa2
tives of the United States of America in Congress assembled,

3

SECTION 1. SHORT TITLE.

4

This Act may be cited as the “Business Activity Tax

5

Simplification Act of 2009”.

6

SEC. 2. MODERNIZATION OF PUBLIC LAW 86–272.

7

(a) SOLICITATIONS WITH RESPECT TO SALES AND

8

TRANSACTIONS OF OTHER THAN TANGIBLE PERSONAL

9

PROPERTY.—Section 101 of the Act entitled “An Act re

1
lating to the power of the States to impose net income
2
taxes on income derived from interstate commerce, and
3
authorizing studies by congressional committees of mat4
ters pertaining thereto”, approved September 14, 1959
(15 U.S.C. 381 et seq.), is amended—

6
(1) in section (a), by striking “either, or both,”
7
and inserting “any one or more”;

8
(2) in subsection (a)(1), by striking “by such
9
person” and all that follows and inserting “(which
are sent outside the State for approval or rejection)
11
or customers by such person, or his representative,
12
in such State for sales or transactions, which are—

13
“(A) in the case of tangible personal prop14
erty, filled by shipment or delivery from a point
outside the State; and

16
“(B) in the case of all other forms of prop17
erty, services, and other transactions, fulfilled
18
or distributed from a point outside the State;”;

19
(3) in subsection (a)(2), by striking the period
at the end and inserting a semicolon;

21
(4) in subsection (a), by adding at the end the

22
following new paragraphs:

23
“(3) the furnishing of information to customers
24
or affiliates in such State, or the coverage of events
or other gathering of information in such State by

1
such person, or his representative, which information
2
is used or disseminated from a point outside the
3
State; and

4
“(4) those business activities directly related to
such person’s potential or actual purchase of goods
6
or services within the State if the final decision to
7
purchase is made outside the State.”;

8
(5) by striking subsection (c) and inserting the
9
following new subsection:

“(c) For purposes of subsection (a) of this section,
11
a person shall not be considered to have engaged in busi12
ness activities within a State during any taxable year
13
merely—

14
“(1) by reason of sales or transactions in such
State, the solicitation of orders for sales or trans16
actions in such State, the furnishing of information
17
to customers or affiliates in such State, or the cov18
erage of events or other gathering of information in
19
such State, on behalf of such person by one or more
independent contractors;

21
“(2) by reason of the maintenance of an office
22
in such State by one or more independent contrac23
tors whose activities on behalf of such person in
24
such State consist solely of making sales or fulfilling
transactions, soliciting order for sales or trans

1
 actions, the furnishing of information to customers
 2
 or affiliates, or the coverage of events or other gathering of information; or

4
 “(3) by reason of the furnishing of information
 to an independent contractor by such person ancillary to the solicitation of orders or transactions by
 7
 the independent contractor on behalf of such person.”; and

9
 (6) in subsection (d)(1)—

(A) by inserting “or fulfilling transactions,” after “selling”; and

12
 (B) by striking “the sale of, tangible personal property” and inserting “a sale or transaction, furnishing information, or covering events, or otherwise gathering information”.

16
(b) APPLICATION OF PROHIBITIONS TO OTHER BUSINESS ACTIVITY TAXES.—Title I of the Act entitled “An
 18

Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of

21
 matters pertaining thereto”, approved September 14,
 22
 1959 (15 U.S.C. 381 et seq.), is amended by adding at
 23
 the end the following:

24
 “SEC. 105. For taxable periods beginning on or after
 January 1, 2010, the prohibitions of section 101 that

1
2 apply with respect to net income taxes shall also apply
3 with respect to each other business activity tax, as defined
4 in section 3(g) of the Business Activity Tax Simplification
5 Act of 2009. A State or political subdivision thereof may
6 not assess or collect any tax which by reason of this sec
7 tion the State or political subdivision may not impose.”.

8 (c) EFFECTIVE DATE.—The amendments made by
9 this section shall apply with respect to the imposition, as
10 sessment, and collection of taxes for taxable periods begin
11 ning on or after January 1, 2010.

12 SEC. 3. MINIMUM JURISDICTIONAL STANDARD FOR STATE
13 AND LOCAL NET INCOME TAXES AND OTHER
14 BUSINESS ACTIVITY TAXES.

15 (a) IN GENERAL.—No taxing authority of a State
16 shall have power to impose, assess, or collect a net income
17 tax or other business activity tax on any person relating
18 to such person’s activities in interstate commerce unless
19 such person has a physical presence in the State during
20 the taxable period with respect to which the tax is im
21 posed.

22 (b) REQUIREMENTS FOR PHYSICAL PRESENCE.—

23 (1) IN GENERAL.—For purposes of subsection

24 (a), a person has a physical presence in a State only
if such person’s business activities in the State in

1
clude any of the following during such person's tax2
able year:

3

(A) Being an individual physically in the

4

State, or assigning one or more employees to be
in the State.

6

(B) Using the services of an agent (exclud7
ing an employee) to establish or maintain the

8

market in the State, if such agent does not per9
form business services in the State for any
other person during such taxable year.

11

(C) The leasing or owning of tangible per12
sonal property or of real property in the State.

13

(2) DE MINIMIS PHYSICAL PRESENCE.—For

14

purposes of this section, the term "physical presence"
shall not include—

16

(A) presence in a State for less than 15

17

days in a taxable year (or a greater number of

18

days if provided by State law); or

19

(B) presence in a State to conduct limited
or transient business activity.

21

(c) TAXABLE PERIODS NOT CONSISTING OF A

22

YEAR.—If the taxable period for which the tax is imposed

23

is not a year, then any requirements expressed in days

24

for establishing physical presence under this Act shall be
adjusted pro rata accordingly.

1
(d) MINIMUM JURISDICTIONAL STANDARD.—This
2
section provides for minimum jurisdictional standards and
3
shall not be construed to modify, affect, or supersede the
4
authority of a State or any other provision of Federal law
allowing persons to conduct greater activities without the
6
imposition of tax jurisdiction.

7
(e) EXCEPTIONS.—

8
(1) DOMESTIC BUSINESS ENTITIES AND INDIVIDUALS DOMICILED IN, OR RESIDENTS OF, THE
9
STATE.—Subsection (a) does not apply with respect

11
to—

12
(A) a person (other than an individual)
13
that is incorporated or formed under the laws
14
of the State (or domiciled in the State) in which
the tax is imposed; or

16
(B) an individual who is domiciled in, or a
17
resident of, the State in which the tax is im-
18
posed.

19
(2) TAXATION OF PARTNERS AND SIMILAR PERSONS.—This section shall not be construed to modify

21
or affect any State business activity tax liability of
22
an owner or beneficiary of an entity that is a part-
23
nership, an S corporation (as defined in section
24
1361 of the Internal Revenue Code of 1986), a limited
liability company (classified as a partnership for

1
Federal income tax purposes), a trust, an estate, or
2
any other similar entity, if the entity has a physical
3
presence in the State in which the tax is imposed.

4
(3) PRESERVATION OF AUTHORITY.—This section
shall not be construed to modify, affect, or su6
persede the authority of a State to bring an enforce7
ment action against a person or entity that may be
8
engaged in an illegal activity, a sham transaction, or
9
any perceived or actual abuse in its business activities
if such enforcement action does not modify, af11
fect, or supersede the operation of any provision of
12
this section or of any other Federal law.

13
(f) RULE OF CONSTRUCTION.—This section shall not
14
be construed to modify, affect, or supersede the operation
of title I of the Act entitled “‘An Act relating to the power
16
of the States to impose net income taxes on income derived
17
from interstate commerce, and authorizing studies by con18
gressional committees of matters pertaining thereto’”, ap19
proved September 14, 1959 (15 U.S.C. 381 et seq.).

(g) DEFINITIONS, ETC.—For purposes of this section:

21
(1) NET INCOME TAX.—The term “‘net income
22
tax’” has the meaning given that term for the pur23
poses of the Act entitled “‘An Act relating to the
24
power of the States to impose net income taxes on
income derived from interstate commerce, and au

1
2 authorizing studies by congressional committees of
3 matters pertaining thereto”, approved September
4 14, 1959 (15 U.S.C. 381 et seq.).

5 (2) OTHER BUSINESS ACTIVITY TAX.—

6 (A) IN GENERAL.—The term “other busi
7 ness activity tax” means any tax in the nature
8 of a net income tax or tax measured by the
9 amount of, or economic results of, business or
10 related activity conducted in the State.

11 (B) EXCLUSION.—The term “other busi
12 ness activity tax” does not include a sales tax,
13 a use tax, or a similar transaction tax, imposed
14 on the sale or acquisition of goods or services,
15 whether or not denominated a tax imposed on
16 the privilege of doing business.

17 (3) PERSON.—The term “person” has the
18 meaning given such term by section 1 of title 1 of
19 the United States Code.

20 (4) STATE.—The term “State” means any of
21 the several States, the District of Columbia, or any
22 territory or possession of the United States, or any
23 political subdivision of any of the foregoing.

24 (5) TANGIBLE PERSONAL PROPERTY.—For pur
poses of subsection (b)(1)(C), the leasing or owning

1
of tangible personal property does not include the
2
leasing or licensing of computer software.

3
(h) EFFECTIVE DATE.—This section shall apply with
4
respect to taxable periods beginning on or after January
5
1, 2009.

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