

PRESENTATION

In Honor of National Nut Month We Present....



**Are You Nuts?!
Understanding Expanding
Affiliate Nexus Statutes**

**SALT Breakfast Briefing
October 22, 2013**

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EXPAND YOUR EXPECTATIONS™

Overview

- This is not “Click-Through”
- Background and history of “attributorial nexus”
- Recent case law
- The “new” affiliate nexus statutes
- Business planning or tax planning?
- Q & A



Polling Questions

- Has your company been the subject of an attributional nexus challenge?
- Is your company anticipating an attributional nexus challenge?



Background and History of “Attributional Nexus”

- *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960)
 - Independent contractors soliciting sales orders
 - *Quill*: “The furthest extension of that [state taxing] power . . .”
- *Standard Pressed Steel Co. v. Dept. of Revenue*, 419 U.S. 560 (1975)
 - Engineer-employee operating out of home office
- *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)
 - The “modern” dormant Commerce Clause test



Background and History of “Attributional Nexus”

- *National Geographic Society v. California St. Bd. of Equal.*, 430 U.S. 551 (1977)
 - Division/branch office engaged in unrelated business
- *Tyler Pipe Industries, Inc. v. Washington St. Dept. of Revenue*, 483 U.S. 232 (1987)
 - “. . . whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.”



Background and History – Affiliate Nexus Case Law

- Bricks-and-mortar retailers with mail-order affiliates
 - *SFA Folio Collections, Inc. v. Bannon*, 585 A. 2d 666 (Conn. 1991).
 - *SFA Folio Collections, Inc. v. Tracy*, 652 N.E. 2d 693 (Ohio 1995)
 - *Bloomington's By Mail, Ltd. v. Pennsylvania*, 567 A. 2d 773 (Pa. 1989)
- Common trademarks, merchandise, sharing market information, accepting returns, etc. were insufficient
- *Current, Inc. v. St. Bd. of Equalization*, 24 Cal. App. 4th 382 (1994)
 - Parent-subsidary relationship is insufficient
 - Lack of integrated operations and management
 - Alter ego and agency not established



The Recent Cases

- *Borders Online, LLC v. St. Bd. of Equalization*, 129 Cal. App. 4th 1179 (2005)
 - Affiliate nexus found to exist between in-state retailer and online retailer
 - Internet vendor had merchandise return policy via in-state retailer
 - “Cross-selling synergy” – bricks-and-mortar customer receipts had online retailer’s website address, customers referred to website, similar trademarks and logos
- *St. Tammany Parish v. Barnesandnoble.com, LLC*, 481 F. Supp. 2d 575 (E.D. La. 2007)
 - Affiliate nexus rejected
 - Online retailer may have derived a benefit, but bricks-and-mortar’s activities not tantamount to an in-state sales or marketing presence
- *New Mexico Tax’n and Revenue Dept. v. Barnesandnoble.com, LLC*, 303 P. 3d 824 (N.M. 2013)
 - Shared gift cards and customer loyalty program, return policy, exchange of customer e-mail addresses
 - Common trademark – “presented a single face to the public”



Other Cases

- *Harley-Davidson, Inc. v. Franchise Tax Board*, No. 37-2011-00100846 (San Diego County Super. Ct., May 1, 2013)
 - Affiliate loan origination and independent dealer network sufficient to attribute their physical presence to out-of-state securitization SPEs
 - *Western Acceptance Co. v. Dept. of Revenue*, 472 So. 2d 497 (Fla. Ct. App. 1985)
- *Arco Building Systems, Inc. v. Chumley*, 209 S.W. 3d 63 (Tenn. Ct. App. 2006)
 - In-state unrelated manufacturer



The Statutes

- Expanding states' tax reach
- Nexus presumptions - shift burden to taxpayer to prove state is limited by U.S. Constitution
 - The practical problem: deference and standards of review
- New York (2009) – common trademarks
- 2012 and 2013: Alabama; California; Georgia; Iowa; Kansas; Maine; Missouri; Texas; Utah; West Virginia
- Controversial factors used to establish the nexus presumption
 - Common trademarks
 - In-state licensee or franchisee
 - Similar product lines
 - Common business plans



Are These Statutes Nuts?!

Question and Answer Session

