REPORT #864

TAX SECTION

New York State Bar Association

REQUEST FOR GUIDANCE ON THE
APPLICATION OF NEW YORK'S SALES AND USE TAXES
TO OUT-OF-STATE VENDORS

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TAX SECTION
New York State Bar Association

February 20, 1996

FEDERAL EXPRESS

The Honorable Michael H. Urbach
Commissioner
Department of Taxation and Finance
W.A. Harriman Campus, Building 9
Albany, New York 12227

Re: New York Sales Tax Nexus to Out-of-State Vendors

Dear Commissioner Urbach:

I am pleased to enclose a report of the Tax Section discussing the need for guidance on the application of New York's sales and use taxes to out-of-state vendors. The report was prepared by our Committee on Multistate Tax Issues.

The report reflects our concerns that the nexus standards expressed by the United States Supreme Court in Quill and the New York Court of Appeals in Orvis have generated and will continue to generate substantial uncertainty and controversy, as out-of-state vendors struggle to understand the factors that create nexus, and to satisfy their tax collection responsibilities. We believe that federal legislation presents the best avenue for rationalizing and 15 resolving the tax collection duties of out-of-state vendors, but the enactment of federal legislation currently seems doubtful.

We therefore urge that New York State address the current uncertainty by promulgating guidance that will advise vendors of the Department's interpretation of the “physical presence” requirement. In doing so, we suggest that the Department seek input from a broad range of vendors in different kinds of businesses, so that the guidance can be formulated that will be broadly useful. We believe such guidance will be helpful to the State, by encouraging compliance, and helpful to the business community as well, by fostering a better understanding of vendors' tax collection responsibilities. We do not minimize the size of this undertaking, but we believe it is very important that New York provide vendors with clear and comprehensive guidance, so that they can plan for and fulfill their tax collection responsibilities on a timely basis. And, while we recognize this Administration's commitment to reducing State regulation, we believe the nexus question is an area in which the State has a particular obligation to provide guidance. Out-of-state vendors are potentially required to collect taxes as agents for New York; in such role they are especially entitled to understand what is expected of them.

The report summarizes some of the recent litigation in this area, illustrating the variety of fact patterns that arise, and the confusion that stems from differing state court interpretations of nexus issues. The report then analyzes certain aspects of the “Nexus Guidelines” promulgated in 1994 by the Multistate Tax Commission, and offers comments on specific issues presented by those Guidelines.

As always, the Tax Section is happy to work with your Department on formulating nexus guidelines. We look forward to the opportunity to work with you.

Very truly yours,

Carolyn Joy Lee
Chair

cc: Hon. Joseph Bruno
Senate Majority Leader
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Hon. Martin Connor
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REQUEST FOR GUIDANCE ON THE APPLICATION OF NEW YORK'S SALES AND USE TAXES TO OUT-OF-STATE VENDORS[1]

INTRODUCTION

States that impose a sales tax invariably impose a Compensating use tax in order to ensure that residents who Purchase goods in or from another state will pay the equivalent of a sales tax on the purchase in the state of residence.[2] The use tax is generally equal to the rate of sales tax in the purchaser's state of residence minus the sales tax, if any, paid at the time of sale.[3]

Sales taxes are generally collected from purchasers and remitted to the taxing state by retailers to whom the taxing state has sufficient nexus to permit a constitutional assertion of state jurisdiction over the vendor.[4] By contrast, use tax is

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[1] This Report was prepared by the New York State Bar Association Tax Section's Committee on Multistate Tax Issues, Robert E. Brown and Paul R. Comeau, Co-Chairs. The principal authors of the report are Robert E. Brown and Robert G. Nassau. Helpful comments were received from Robert Plautz, Peter v.Z. Cobb, Maria T. Jones, Robert J. Levinsohn and Carolyn Joy Lee.

[2] Forty-six states now impose a sales tax. In New York State, the Sales and Compensating Use Tax is contained in Article 28, Chapter 60 of the Consolidated Laws (Sections 1101-1148 of the New York State Tax Law).

[3] See Sections 1110 and 1118(7) of the New York Tax Law.

[4] Some taxpayers have direct pay arrangements that allow them to pay sales tax on their purchases directly to the taxing state.

generally remitted to the taxing state by the purchaser. In an audit of a business, the discovery of use tax obligations is relatively easy. In the case of individual consumers, however, the collection of use tax from the purchaser often is inefficient and not particularly cost effective[5] and appears also to present political problems as many consumers do not realize that they are subject to the use tax. As a practical matter, therefore, in order to collect use tax on a broad base of consumer purchases, a state must be able to require the vendor to collect the tax from the purchaser and remit it to the taxing state.

The Due Process Clause of the Fourteenth Amendment of the United State Constitution and the Commerce Clause (Article I, Section 8) of the Constitution are constitutional barriers to the power of a state to require out-of-state sellers to collect and remit use tax for the state. The United State Supreme Court held, in Quill Corporation v. North Dakota,[6] that a vendor has established nexus for sales and use tax purposes under the Due Process Clause if it has purposefully directed its economic activities to the residents of the state. However, the Court also held, affirming its 1967 holding in National Bellas Hess, Inc. v. Department of Revenue of Illinois,[7] that the economic presence that is sufficient to satisfy Due Process nexus is not

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[5] See Comments of former New York State Tax Commissioner, Roderick Chu, cited in Comments on Proposed Interstate Sales and Use Taxation Act of 1986, New York State Bar Association, Tax Section, May 31, 1986.

[6] 504 U.S. 298 (1992).

[7] 386 U.S. 753 (1967).

necessarily sufficient under the Commerce Clause, which requires "substantial nexus" for a vendor to be required to collect and remit use tax. The Quill Court upheld the "bright-line" test for Commerce Clause nexus articulated in Bellas Hess on the grounds of stare decisis, and because of "structural concerns about the effects of state regulation on the national economy,"[8] even though the court acknowledged that the result might be different if Bellas Hess were decided today.[9] The Court stated that its decision in Quill continued the safe harbor exemption from use tax collection for vendors "whose only connection with customers in the [taxing] state is by common carrier or the United States mail."[10]

Because Quill was based on a "negative" or "dormant" Commerce Clause analysis, the Court in Quill acknowledged that Congress could alter the scope of Commerce Clause nexus so as to subject out-of-state vendors to sales and use tax collection responsibilities.[11] Legislation has been proposed in Congress to extend sales and use tax collection responsibility to out-of-state vendors. The Tax Section has issued a Report commenting on certain of the legislative proposals, and on this issue generally.[12] In general, we favor the enactment of federal legislation extending sales and use tax collection

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8 Quill at 312.

9 Id., at 311.

10 Id. at 311.

11 Imposing sales and use tax responsibilities on out-of state vendors would, in all events, continue to require that nexus be established under the Due Process Clause.

12 Report on "Proposed Consumer and Main Street Protection Act of 1995. Formerly the Tax Fairness for Main Street Business Bill (Sales Tax on Out-of-State Vendors)", New York State Bar Association Tax Section, April 5, 1995.

responsibilities to out-of-state vendors, although we have noted a number of technical and procedural issues raised by the recent legislative proposals.

While federal legislation presents the best approach to rationalizing and resolving the tax collection duties of out-of-state vendors, such legislation is also highly charged politically, and has uncertain prospects for enactment. It therefore seems that the Quill test of nexus will remain in place for some time. We believe that, as predicted by Justice White in his dissent in Quill,[13] the parameters of the supposedly "bright line" test retained by Quill will "be tested to their fullest in our courts," generating substantial amounts of litigation involving countless different factual situations. It is inevitable that this litigation will result in inconsistent and irreconcilable decisions, and that the process of developing the law through litigation will increase both uncertainty and the cost of compliance for out-of-state vendors.

RECOMMENDATION

We acknowledge that compliance with the many different sales tax laws around the country can be

[13] Quill, at 331 (White, J. dissenting).

complex,[14] and out-of-state vendors frequently assert that such compliance would be costly.[15] We also believe, however, that for many vendors the burdens of uncertainty, the risks of subsequent audit assessments, and the difficulty of competing in an arena where tax collection responsibilities are not uniformly interpreted, also raise serious problems. For these vendors, not knowing a state's interpretation of the physical presence test means that an out-of-state vendor must either obtain individual tax advice as to its particular obligations in each state where it has customers, or make an ill-informed choice between collecting use tax currently (with whatever competitive disadvantage that entails) or risking a sales tax assessment later (when pricing margins may not have accounted for the cost of paying customers' use taxes).

Moreover, the role of the out-of-state vendor is to collect taxes for the state. We believe that states have a

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[14] Debby Koopman, investor relations officer of the country's largest catalog direct market, Spiegel, has correctly observed that states have different rules and exemptions."For example, "she says, "some states like Massachusetts and Connecticut exclude clothing . . . sales up to a certain amount, say $75.00. Other states have one rate for shoes that are classed as clothing and another for shoes that are classed as athletic equipment." Nathan Newman, "How State and Local Government Finances are Becoming Road Kill on the Information Superhighway, "Center for Community Economic Research, University of California at Berkely (August, 1995). New York's interpretation of its sales tax reflects some masterful hairsplitting: some marshmallows are considered nontaxable "food" and some are considered taxable "candy" depending on their size; honey roasted peanuts are candy (TSB-A-93(25)(S); salted peanuts are food. "TWIX™" are classified as candy if they are advertised, sold and marketed as candy, but they are food if they are advertised, sold and marketed as cookies. (TSB-A-93(38)(S)). Commenting on the nexus created in thirty-four new states when Spiegel acquired retailers Honeybee and Eddie Bauer, Ms. Koopman remarked "You really do need a lot of computing power" to comply with the varying use tax laws.

[15] We do not have any means to evaluate the incremental costs of compliance with multistate sales and use tax laws, and this report expresses no comment on that issue.

Special obligation to provide these vendors with as much advance information as possible, so that out-of-state vendors can be apprised of the state's interpretation of their use tax collection responsibilities.

We strongly urge that the New York State Department of Taxation and Finance (the "Department") promulgate guidance describing the Department's analysis of Quill and Orvis,[16] and outlining factors that are relevant in determining a vendor's obligation to collect use tax. Such guidance should cover a wide range of common fact patterns, so that vendors will be apprised of the Department's interpretation of their collection responsibilities. We believe such guidance will be helpful both to New York State, in encouraging compliance, and to the business community, by alerting them in advance to the Department's positions.

In formulating guidance defining out-of-state vendors' sales tax nexus we suggest that the Department solicit input from a variety of vendors with different kinds of businesses, behavior patterns and issues. This will help sensitize the analysis to emerging issues, flesh out areas where the assertion of nexus might have unexpected consequences,[17] and result in guidance that is broadly useful. We do not underestimate the size of this task,

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[16] Orvis Co. v. Tax Appeals Tribunal, 86 N.Y. 2d 165, 1995 N.Y. Lexis 1140 (1995), cert. den. in companion case Vermont Info. Processing Inc. v. Comm'r, 95-506, U.S. Supreme Court (November 27, 1995).

[17] To take an example that has been mentioned recently, if New York State concludes that a vendor has nexus by reason of owning catalogs printed by in-state printers for distribution to the out-of-state vendors' customers, that may discourage the use of printers located in New York.

but we believe it is very important that New York State respond to the current uncertainties in a comprehensive manner.

The balance of this Report examines the parameters for the adoption of nexus guidelines under Quill and Orvis. The Report analyzes certain recent cases, and comments on the Multistate Tax Commission's draft “Nexus Guidelines for Application of a Taxing State's Sales and Use Tax to a Remote Seller”(hereinafter the “Guidelines”), published by MTC on October 25, 1994.[18] The objective of this commentary is to identify issues and areas in which the interpretation of “substantial nexus” is in need of clarification, and to offer our analysis of certain aspects of this issue.

RECENTLITIGATION

Since Quill, the highest courts of three states have addressed Commerce Clause nexus. At the Administrative level in New York, the issue of nexus post Quill has been addressed in a number of Administrative Law Judge and Tribunal decisions.[19]

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[18] Recently the Multistate Tax Commission also promulgated Nexus Program Bulletin NB 95-1 (December 20, 1995), describing nexus consequences of various kinds of activities engaged in by direct marketers of computers, etc. This report does not specifically comment on the substantive provisions of that Bulletin. The Bulletin does, however, serve as an example of the kinds of questions that the Department should be addressing in promulgating guidance on vendors' responsibilities to collect New York taxes.

[19] See, for example, the decisions in New Milford Tractor Co., Inc., 1993-3A NYTC J:1175, rev'd 1994-1A NYTC T:966, 1995-1 ANYTC T:607; NADA Services Corporation, 1994-2A NYTC J:3057 (stayed pending the outcome in Orvis); Monroe Distributing, Inc., 1993-3 NYTC J:1132, aff'd 1994-lA NYTC T:1140; Robert Mann d/b/a Bob Mann Construction Equipment, 1994-2 NYTC J:53, aff’d 1994-1A T:1035; Rollins Environmental Services(NJ).Inc., and Rollins Environmental Services(TX). Inc., 1993-3 NYTC J:1056 (see note 5), aff'd 1994-1A NYTC T:1054; Stainless. Inc., 1992-3 NYTC J:566, rey'd 1993-2 T:295; Kaplan Furniture Company, 1992-4 NYTC J:2381; Special Reports Office. Inc., 1993-3 NYTC J:945.

This activity reflects a fairly high level of litigation in New York and throughout the country. Moreover, since the factual situations presented in each case differ, the precedential value of the case law is limited, and issues are addressed essentially on an ad hoc basis; this makes it likely that the state of the law will become even more contentious and confusing.

A review of the decisions of the highest courts of Arkansas, New York and Ohio illustrates these points. In Pledger v. Troll Book Clubs,[20] the Supreme Court of Arkansas decided that teachers who took orders and collected money for books were not agents of the out-of-state bookseller. Troll was a New Jersey corporation that was not registered to do business in Arkansas. It had no place of business in Arkansas, nor did it have employees or own property in the State. Troll marketed children's books by mailing catalogs to teachers. The catalogs instructed the teachers how to process orders and how to collect money for the orders. After collecting orders each teacher filled out one master order in his or her name and sent it to Troll. Payment was handled in one of three ways: either (1) parents sent checks to the teacher who forwarded them with the order; (2) teachers wrote personal checks to Troll after having collected cash from students; or (3) the school issued a check to Troll. When the books arrived the teacher distributed them. Teachers could receive cash or merchandise “bonuses” depending on the size of the order.

The Arkansas Supreme Court held that the wording of the Arkansas statute was broad enough to cover Troll, so the only constraint on the State's ability to require the collection of

[20] 316 Ark. 195 (1995).

use tax was the physical presence test of Bellas Hess and Quill,[21] The Arkansas Department of Finance and Administration claimed that the teachers were the agents of Troll, and therefore the physical presence test was satisfied. The Court agreed that the proper test was agency. The Court held, however, that there was no agency relationship because the teachers had no authority to act for Troll, and because the teachers were not subject to Troll's control. The Court distinguished a California decision prior to Quill[22] "involving almost an identical arrangement"[23] on the dual grounds that the California court viewed physical presence as only one of the factors to be considered for nexus, and that California law, unlike Arkansas law, allows an agency relationship to be implied retroactively by ratification.[24]

There was a concurring opinion and a dissent in Troll. Associate Justice Brown argued that the proper test for agency was found in the use tax statute, not in case law. He argued that teachers might qualify as agents under the tax statute even if they were not agents under the common law. He concurred in the opinion, however, because the Department of Finance and Administration had failed to present this argument below. Under Arkansas law, therefore, the Court was, in his opinion, foreclosed from considering the argument.[25] Associate Justice Hayes dissented on the grounds that an agency was created when

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21 Id., at 196-198.

22 Scholastic Books Clubs, Inc. v. State Board of Equalization, 207 Cal. App. 3d 734 (1989).

23 Troll, at 200.

24 Id., at 201.

25 Id., at 202.

the teacher returned the order form, and that even an independent contractor arrangement that is less than an agency relationship would have established physical presence under the U.S. Supreme Court's test in Scripto v. Carson.[26] Justice Hayes suggested that the holding in Quill should be confined to those safe harbor situations in which mail-order sellers solicit by mail and deliver by common carrier.[27]

The Troll case is a good example of the pitfalls of the Quill test of nexus. The same economic activity has been treated differently by California and Arkansas, based in part on differing interpretations of the local law of agency. This is unfortunate, but may be inevitable. We do agree that the presence of an agent or independent contractor in the state can be (if not de minimis) sufficient to confer nexus, and while it is likely to produce interstate differences in result, we also believe that the only way to evaluate the nature of an agency or independent contractor relationship is by reference to the parties' rights and obligations under the state laws that govern that relationship.

On June 4, 1995, the New York Court of Appeals decided that, under Quill. “substantial nexus” did not require “substantial physical presence.”[28] The majority opined that the Quill reaffirmation of the Bellas Hess rule serves to assure tax immunity only to those “vendors” whose sole connection with

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[26] 362 U.S. 207 (1960).

[27] Troll, at 207.

[28] Orvis, 1995 N.Y. Lexis 1140, p.21-22.

customers in the taxing state is by common carrier or the United States mail.[29] The dissent in Orvis noted that the employees of Orvis made only twelve visits to New York within the thirty-six month assessment period, and that the employees of the taxpayer in the companion case, Vermont Information Processing,[30] made at most forty-one visits into New York during the same period. The dissent suggested that these visits should have been considered de minimis by the majority.

Obviously it is not practical to write precise rules defining the number or quality of visits that confer nexus. It would, however, be helpful for the Department to articulate in more general terms the behavior that rendered Orvis and Vermont Information Processors subject to tax, and to describe some safe harbors of behavior that would not confer nexus. Furthermore, by stating the Commerce Clause test not as one of "substantial physical presence" but rather as "demonstrably more than the slightest presence," we believe that the majority opinion in Orvis has provided the Department with broad latitude to find Commerce Clause nexus with out-of-state vendors "doing business" in New York. It is important for the Department to explore the scope of this latitude, and to communicate with taxpayers as to its view of the activities that render vendors taxable.

The Ohio Supreme Court recently decided that the Commerce Clause and Ohio Law prevent substantial nexus solely by reason of the presence in Ohio of a resident sister corporation that distributed catalogs, allowed charges on its credit card,

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[29] Id., at p.16.

[30] Vermont Info. Processing, Inc. v. Tax Appeals Tribunal, 86 N.Y. 2d 165 (1995), cert. den. 95-506 U.S. Supreme Court (November 27, 1995).

and accepted returned merchandise for the out-of-state corporation.[31] The Ohio Board of Tax Appeals had concluded that the out-of-state vendor did not have physical presence in Ohio, but that nexus was created by the language of the Ohio taxing statute that imputed the presence of an affiliate to the vendor. The Ohio Supreme Court concluded that the brother-sister relationship of the corporations did not create nexus, and that the activities of the resident corporation did not create substantial nexus.

We do not believe nexus can be established merely by the presence of an affiliate in the state. Instead, any assertion of nexus premised on a relationship to another person who is present in the state requires an analysis of the relationships between the in- and out-of-state persons, their dealings with one another and with third parties, and any other relevant factors that shed light on the basic question of whether the in-state person functions as an alter ego, agent or other proxy for the out-of-state vendor. It would be helpful for the Department to address these issues in guidance, and set forth its position on, for example, the significance of owning a general or limited partnership interest in a partnership with New York assets, or the kinds of intercompany dealings that raise the possibility of nexus.

MULTISTATE TAX COMMISSION GUIDELINES

The Guidelines are an example of the development of a comprehensive, and in many respects aggressive, interpretation of nexus under Quill. Whether the Department should adopt such an

[31] SFA Folio Collections, Inc. v. Tracy, 73 Ohio St. 3d 119 (1995)

aggressive approach to nexus is a policy matter on which we express no opinion. We do, however, believe that some of the conclusions expressed in the Guidelines are subject to challenge. The remainder of this Report comments on certain individual aspects of the Guidelines, focusing in particular on the need for nexus guidelines in New York.

1. The preamble to the Guidelines states that the Commerce Clause nexus test will be met if the out-of-state vendor has more than a de minimis presence in the taxing state. De minimis is defined to mean a contact with the state that is trivial. Under the Guidelines, contacts are more than trivial when the vendor's contacts taken together, exceed the slightest presence and enable the out-of-state business to enjoy the benefits, privileges and services of an organized society provided by the taxing state, or when the contacts are not inadvertent but represent a conscious choice of the vendor to submit itself to the jurisdiction of the taxing state. The Quill Court held that "a few floppy diskettes" did not give rise to substantial nexus.[32]

In New York the level of physical presence necessary for nexus was specifically addressed in Orvis and Vermont Information Processing, with the Court of Appeals holding that a "substantial" presence is not necessary, "[r]ather, it must be

[32] Quill at 315. Quill Corporation had licensed proprietary software to some of its North Dakota customers. The software enabled customers to check Quill's current inventories and prices and to place orders directly. If Quill had provided this service over the Internet there would have been no floppy disks or other physical manifestations of the software in North Dakota. As discussed below, the Guidelines anticipate this by suggesting that the telephone sale or licensing of data in which the out-of-state business claims an interest would constitute physical presence or "deemed" physical presence. This aspect of the Guidelines is discussed in section 4, below.

demonstrably more than a slightest presence (see National Geographic Society v. California Bd. Of Equalization, 430 U.S. 551."[33] Presumably the Orvis test is consistent with the test in Quill -- Orvis could not have permitted a lower standard of presence than Quill, and de minimis may have the same meaning as "demonstrably more than slightest." If the standard of presence in New York is higher than that permitted in Quill that should be made clear. In any event, it would be useful to have some examples of presence that is not considered de minimis. The examples need not attempt an exhaustive review of what de minimis means, so much as provide a sense of how the analysis is conducted.

2. The second section of the Guidelines sets forth standards for establishing nexus under the Due Process clause. The Guidelines assert that an out-of-state vendor has nexus under the Due Process Clause: (i) if it or its representative is, or is deemed to be, physically present in the taxing state; (ii) if the out-of-state business purposefully directs business activities to a customer in the taxing state, either directly or through a representative, and the resulting obligation of the business under the application of the taxing state's sales and use tax is related to the benefits the out-of-state business receives from those activities; (iii) if the out-of-state business engages in a systematic or regular solicitation of business in the taxing state, either directly or through a representative; or (iv) if the out-of-state business engages in general business in the

[33] Orvis, 1995 NY Lexis 1140, page 22.

taxing state, either directly or through a representative, even though the subject [sic] of the sales or use tax being applied is unrelated to those general business contacts.[34]

The Due Process test of nexus is predicated upon notions of "fair play and substantial justice."[35] While "fair play and substantial justice" is a vague concept, the Due Process nexus test clearly is less restrictive than the Commerce Clause test. We believe, however, that currently it is not necessary to explore the boundaries of Due Process nexus in formulating guidance on use tax collection responsibilities, at least until Congress alters or eliminates the separate Commerce Clause test for certain transactions or circumstances. It would be better instead to focus the current efforts solely on identifying the parameters of Commerce Clause nexus.

3. The Guidelines state that, in addition to the (actual or deemed) physical presence test, substantial nexus also can be established under the Commerce Clause when Due Process "minimum contacts" nexus is satisfied and the application of the taxing state's law does not "unduly burden the interstate commercial activities of the out-of-state business."[36] This iteration of the basis for Commerce Clause nexus squarely raises the question of what was decided in Quill and Bellas Hess -- whether some presence is necessary to find nexus, or whether nexus can be predicated on economic contacts provided that this does not

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[34] Section II.A of the Guidelines.

[35] Quill, at 307.

[36] Section II. B(2) of the Guidelines.

"unduly burden" commerce, with the caveat being that persons "who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business" cannot be required to collect use tax.[37] In Orvis the New York Court of Appeals stated that "[w]hile a physical presence of the vendor is required, it need not be substantial,"[38] indicating that (at least in a case where physical location was a meaningful element of the business in question) New York does not have nexus to a vendor in the absence of some physical presence in the State.

It may be that the suggestion in the Guidelines that Commerce Clause nexus can be based on the absence of undue burdens was intended as a catalyst for exploring the development of state guidelines in conjunction with businesses, or for Congressional action, rather than an attempt to supplant an in-state presence test with the more general rationale for Commerce Clause nexus articulated in Quill.[39] Obviously, however, the question raised by the Guidelines is an important threshold question that must be resolved in formulating the state's approach to nexus. We believe that the second prong of the Guidelines' description of Commerce Clause nexus is not correct, and that, consistent with Orvis and with the Supreme Court's interest in maintaining a "bright line," the correct approach is to require some presence, actual or deemed, before finding nexus. The scope of deemed presence is, however, another important question, and that is discussed below.

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[37] National Bellas Hess, 386 U.S. 753, 758 (1967)

[38] Orvis, 1995 NY Lexis 1140 at p. 21.

[39] Quill, at 312.

4. The Guidelines state that Commerce Clause nexus exists when a vendor has a "deemed physical presence" in the taxing state.[40] A "deemed physical presence" includes having "any interest in, or right to use, intangible property that is used in the taxing State, while retaining, in the case where the out-of-state business is the grantor with respect to the use of the intangible property, an interest therein."[41] Initially, we note that the quoted language is difficult to parse, and that it would be preferable to deal separately and more clearly with interests in intangibles held by licensees and interests held by licensors or owners.

In asserting Commerce Clause nexus based on a "deemed" physical presence that stems from intangibles, the Guidelines again raise the issue of what was decided in Quill. In a sense, Quill created an issue that Bellas Hess had not: Bellas Hess predicated nexus on the presence of instate "retail outlets, solicitors, or property;" Quill changed this to a test for "a physical presence."[42]

The Guidelines' position that "physical" presence can include "deemed" physical presence though intangibles may exceed the permissible scope of nexus under the Commerce Clause. While

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[40] Sections II.B.(1) and II.C. of the Guidelines.

[41] Section II.C.(2) of the Guidelines.

[42] National Bellas Hess referred to the "sharp distinction . . . between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." Supra, at 758. Quill, on the other hand, referred to the "sharp distinction . . . between mail-order sellers with [a physical presence in the taxing] state and those who do no more than communicate . . . ." Supra, at 311.

intangibles may have satisfied a Bellas Hess search for in-state "property", it is not clear that intangibles can give rise to the physical presence that is sought under Quill. It is possible, however, that the interpretation of the Commerce Clause will develop such that Commerce Clause nexus will include the non-de minimis use of (or permitting others to use) intangible assets in the state. Thus, while we believe that the Commerce Clause requires finding some presence of the vendor in the state, and not just the absence of an undue burden on interstate commerce, we also believe that, for those businesses where intangible property is a significant element, it may be that the Commerce Clause (and Quill) will be interpreted to permit the assertion of nexus based on non-de minimis use of intangible property in the state. Furthermore, while Orvis involved only the question of whether the presence of people in New York during the audit period was de minimis, the majority decision did state that a vendor's presence in a state could be found based on the presence of its "property" in the state, or on the "conduct of economic activities" in the state performed by the vendor's personnel or on its behalf.[43] The majority in Orvis also stated that the "bright line" test of Bellas Hess is that the only complete safe haven lies in conducting business only by common carrier or U.S. mail. These statements could support a future determination that nexus can be premised on a deemed presence stemming from the use of intangible personal property in New York.

Clearly the effect of intangible property on a vendor's nexus to New York is a very important issue, and one as to which it is exceedingly important to know the Department's position.

[43] Orvis, supra, at p. 178.

5. The Guidelines also find nexus when the vendor retains a representative, or retains a representative who in turn retains another representative, (including independent contractors), if the representative or sub-representative solicits or conducts business or performs services in the state on behalf of the out-of-state business. The underscored language raises issues because it does not appear that the services being performed in a state by a representative or independent contractor need to relate to sales in the state, but instead need only be performed by an in-state representative on behalf of the out-of-state vendor.

Whether this is the correct interpretation of the Guidelines, or of the case law, is an important issue that will affect both out-of-state businesses selling into New York and in-state businesses that perform legal, engineering, accounting, advertising and other services in New York. We believe that, in order to support a finding of nexus, the serviced performed by an in-state representative should be related to the vendor's in-state sales. Thus, for example, the non-de minimis presence of an independent contractor providing services as a sales representative should give rise to nexus. By contrast, engaging a New York accounting firm to provide audit and tax return preparation services should not, by itself, create nexus with New York. The nature and prevalence of these questions regarding the consequences of using New York independent contractors is another good illustration of why it is important that the Department issue guidance setting forth its interpretations of nexus.

6. The Guidelines suggest that, once established, nexus should continue for a year.[44] There is no mention of the required duration of nexus in Orvis, except that the contacts with New York were measured coterminously with the audit periods.

We agree with the view that having a physical presence at some point within a particular time period should suffice for establishing nexus. Consideration should be given to whether, as an administrative matter, it is better to tie that time period to businesses' sales tax reporting cycles or audit cycles, rather than to the passage of a fixed period of time following the event that created nexus. Whatever the parameters, however, the important point is that a position should be developed and published, so that vendors will be aware of their responsibilities.

7. The Guidelines contain non-exclusive lists of examples of activities that would or would not establish Commerce Clause nexus. The examples of nexus-producing activities include some aggressive interpretations, such as "advertising directed at in-state persons through local newspapers or periodicals, or local television or radio,"[45] and the "regular use of a financial network, such as a credit or debit card system, that facilitates or promotes the market of the out-of-state business in the taxing state."[46] The first example is quite broad and fails to recognize, for example, cross-border distribution or

[44] Section II.E of the Guidelines.

[45] Section III.A.(4)(b) of the Guidelines.

[46] Section III.A. (4) (f) of the Guidelines.

broadcasting that could achieve an advertising function in-state without requiring any in-state presence.[47] The second cited example is unclear at best, and seems ill-advised if it imputes nexus based on the vendor's acceptance of credit cards. In certain respects the Guidelines' examples move substantially beyond the current development of the law in any state under Quill, and while examples clearly are needed to illustrate general principles, some of the Guidelines' examples are overbroad.

CONCLUSION

Congressional action is a prerequisite to stemming the loss of state and local sales and use tax revenue that results from Quill's continued application of essentially outdated legal concepts that do not correspond well to the current and increasing sophistication of national and global economies. Until such action occurs, we expect tremendous amounts of litigation, as states seek to establish the reach of their Commerce Clause jurisdiction.

In this environment, out-of-state businesses are burdened by uncertainties as to their responsibilities (and those of their competitors), and in-state businesses may also be impacted by concerns that contacts with them create nexus.

We recognize that it is not possible to address every nexus issue. We do, however, believe that New York should promulgate fairly comprehensive guidance outlining its

[47] See Miller Bros, v. Maryland, 347 U.S. 340 (1954).

interpretation of the scope of the Commerce Clause. We suggest that the Depar ment begin this process promptly, and consult with a wide array of businesses, analyzing both traditional and emerging forms of interstate business. Particular attention needs to be paid to issues of “intangible” presence, both in the sense of using intangible assets, and in the sense of electronic “presence.” In formulating its interpretation of Commerce Clause nexus New York will need to make some fundamental policy choices as to how aggressively to interpret the scope of nexus. Some of these choices may be guided by the case law to date, others may reflect collateral concerns for in-state businesses, and others may reflect a decision to assert nexus aggressively, in order to level, to the greatest extent possible, the treatment of in-state and out-of-state vendors.

We have discussed herein certain aspects of the case law and the proposed Guidelines, which we believe helps to frame the kinds of issues that need to be addressed. At this point we refrain from making broad recommendations on the scope of the Department's interpretation of Commerce Clause nexus, for we believe the fundamental policy issues this task presents are not properly within the scope of this Report. We expect that some choices the State makes will be controversial. Nevertheless, while choices will prompt debate, it is still very important to make the Department's positions known, in broad and specific guidelines, so that businesses can be apprised of their responsibilities to collect tax.

NEXUS GUIDELINE FOR APPLICATION OF A TAXING STATE'S SALES AND USE TAX TO A REMOTE SELLER

(D*R*A*F*T 10/25/94)

THIS DOCUMENT IS A DISCUSSION DRAFT OF POSSIBLE UNIFORM NEXUS STANDARDS. THE DRAFT STANDARDS CONTAINED IN THE DOCUMENT HAVE NOT BEEN APPROVED BY THE MULTISTATE TAX COMMISSION OR ITS MEMBER STATES AND DO NOT REPRESENT ANY FORMAL POSITION ON THE ISSUE OF NEXUS IN SALES AND USB TAX ADMINISTRATION. THIS DOCUMENT SOLELY REPRESENTS A PRELIMINARY EXPLORATION OF ISSUES INHERENT IN UNDERSTANDING THE LIMITS OF STATE SALES AND USE TAX NEXUS UNDER THE CONSTRAINTS OF THE DUE PROCESS CLAUSE AND THE COMMERCE CLAUSE OF THE U.S. CONSTITUTION. THE DOCUMENT IS BEING MADE AVAILABLE TO REGISTRANTS OF THE 1994 BUSINESS/GOVERNMENT DIALOGUE ON STATE TAX UNIFORMITY AND TO THE ANNUAL CONFERENCE OF THE NATIONAL ASSOCIATION OF STATE BAR TAX SECTIONS TO PROMOTE CONSIDERATION OF WHETHER JOINT BUSINESS AND GOVERNMENT DEVELOPMENT OF UNIFORM NEXUS STANDARDS FOR STATE SALES AND USE TAXATION IS IN THE BEST INTEREST OF BUSINESS AND STATE TAX ADMINISTRATORS. PERSONS REVIEWING THIS DOCUMENT ARE INVITED TO SUBMIT COMMENTS ON THE DOCUMENT TO

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D*R*A*F*T 10/25/94

For Discussion Purposes Only

NEXUS GUIDELINE TOR APPLICATION or A TAXING STATE'S SALES AND Use TAX to A Remote Seller

I. INTRODUCTION.

The application of a taxing State's sales or use tax is defined by the laws of that State. (For purposes of this guideline application of a taxing State's sales or use tax includes a duty to collect a sales tax or a use tax from the customer of the out-of-state business.) Application of a State’s sales and use tax is nonetheless subject to the existence of requisite nexus under the Due Process Clause and the Commerce Clause of the U.S. Constitution. This Guideline informs business of the signatory States' practice with respect to determining whether an out-of-state business has sufficient contacts with a taxing State under the Due Process Clause and Commerce Clause of the U.S. Constitution to support application of a taxing State's sales or use tax, including a duty to collect a sales tax or a use tax from the out-of-state business’ customer. The guideline reflects the signatory States' best understanding of applicable law and represents an effort to minimize post-transactional assessments reflecting constitutional understandings for which no advance notice has been given. In determining the possible application of a taxing State's sales or use tax under the Constitution of the United States, the statement makes no distinction between the vendor and vendee form of a sales and use tax. The signatory States understand that if a set of circumstances will support the constitutional application of one form of tax, the same set of circumstances will support application of the other form of tax.

For purposes of “minimum contacts nexus” under the Due Process Clause or “substantial nexus” under the Commerce Clause, the fundamental constitutional question is whether a taxing State has jurisdiction over an out-of-state business. The requisite jurisdiction that will support application of a taxing State’s sales and use tax under the U.S. Constitution is not necessarily

dependent upon the establishment of minimum contacts nexus or substantial nexus over the transaction being subjected to tax. Similarly, under the U.S. Constitution it is not essential that the transactions being subject to tax be connected or related to the minimum contacts nexus and substantial nexus that may exist with respect to the out-of-state business. However, as a matter of state law, the application of a sales and a use tax may be dependent upon the occurrence of a “taxable moment” in the taxing State. Thus, no taxable sale or use will occur under most state law unless a “sale” or a “use,” as defined by state law, occurs within the taxing jurisdiction.

II. Nexus Guideline.

A. Due Process Clause: Minimum contacts nexus, or nexus based upon the requirements of the Due Process Clause, for possible application of the taxing State's sales or use tax is satisfied, when one or more of the following activities is found to be beyond de minimis:

(1) an out-of-state business or its representative is, or is deemed to be, physically present in the taxing State; or

(2) an out-of-state business purposefully directs business activities to a customer in the taxing State, either directly or through a representative, and the resulting obligation of the business under the application of the taxing State's sales and use tax is related to the benefits the out-of-state business receives from those activities (that is, the tax pertains to that business); or

(3) an out of-state business engages in systematic or regular solicitation of business in the taxing State, either directly or through a representative; or

(4) an out-of-state business engages in general business in the taxing State, either directly or through a representative, even though the subject of the sales or use tax being applied is unrelated to those general business contacts.

B. **Commerce Clause: Substantial nexus, or nexus based upon the requirements of the Commerce Clause, for possible application of the taxing State's sales or use tax is satisfied, when:**

(1) an out-of-state business or its representative is, or is deemed to be, physically present in the taxing State, or

(2) an out-of-state business purposefully directs business activities into the taxing State or regularly or systematically solicits business in the taxing State, either directly or through a representative [i.e., “minimum contacts” nexus is satisfied], and the application of the taxing State's sales and/or use tax does not unduly burden the interstate commercial activities of the out-of-state business.

C. Physical Presence: An out-of-state business is, or is deemed to be, physically present in the taxing State for possible application of that State's sales or use tax when the business engages in one or more of the following activities beyond a de minimis level:

(1) owns, leases, uses or maintains real or tangible personal property located in the taxing State; or

(2) has any interest in, or a right to use, intangible property that is used in the taxing State, while retaining, in the case where the out-of-state business is the grantor with respect to the use of the intangible property in the taxing State, an interest therein; or

(3) retains in the taxing State an in-state representative or representatives, including independent contractors, who solicit or conduct business or perform services on behalf of the out-of-state business; or

(4) retains a representative or representatives who own, lease, use or maintain real or tangible property in the taxing State and the representative uses the property to represent the out-of-state business in the taxing State; or

(5) retains a representative or representatives who has any interest in, or a right to use, intangible property that is used in the taxing State, while retaining, in the case where the representative or representatives are the grantor with respect to the use of the intangible property, an interest therein and the representative uses the intangible property to represent the out-of-state business in the taxing State; or

(6) retains a representative or representatives who in turn retain an in-state representative or representatives, including independent contractors, who solicit or conduct business or perform services on behalf of the out-of-state business or on behalf of the first level representative and the

representation of the first level representative by the lower level representative pertains to first level representative's representation of the out-of-state business; or

(7) maintains in the taxing State by private contract, and not by purchase from a common carrier in the common carrier's status as a common carrier, telecommunication linkage that permits the out-of-state business to establish and maintain a market in the taxing State; or

(8) engages in other "activities" in the taxing State which constitute a physical connection with the taxing State, including, without limitation, the conclusion of the taxable sale in the taxing State; or

(9) performs or renders services in the taxing State.

D. De Minimis: De Minimis is exceeded when:

(1) The contacts and activities of the out-of-state business, or the contact and activities that are attributed to the out-of-state business exceed in the aggregate the slightest presence, that is, constitute a nontrivial connection to the taxing State, and the out-of-state business enjoys the benefits, privileges and services of an organized society provided by the taxing State; or

(2) The actual or deemed physical presence is not inadvertent, but represents a conscious choice of the out-of-state business to submit itself to the jurisdiction of the taxing State, as is the case where the presence arises from a regular or systematic business practice, the pursuit of an established company policy on a continuing basis, or an affirmative decision of management.

E. Duration of Nexus.

If minimum contacts nexus or substantial nexus exists under the principles of this guideline, such nexus will continue to exist without more through the last day of the twelfth month following the temporal point at which nexus was established.

F. Definitions.

(1) **"Application of the Taxing State's Sales and/or Use Tax."** The phrase "application of the taxing State's sales and/or use tax" also includes a duty to collect a sales tax or a use tax from a customer.

(2) **“Common Carrier.”** The term “common, carrier” means one who holds itself out to the public as engaged in the business of providing transportation of persons or property, including intangible property through telecommunications, from place to place for compensation on an indifferent basis.

(3) **“Contract Carrier.”** The term “contract carrier” means one who is in the business of providing transportation of persons or property, including intangible property through telecommunications, from place to place for compensation under exclusive agreement.

(4) **“Deemed to be Physically Present.”** The phrase “deemed to be physically present” means a physical presence attributed to an out-of-state business by reason of the presence of a representative or an interest in property in the taxing State.

(5) **“In-State Persons.”** The term “in-state persons” means any individual or entity which is resident in, maintains a regular place of business in, or is corporately or commercially domiciled in, this State.

(6) **“Intangible Property That is Used in the Taxing State.”** For purposes of determining whether an out-of-state business is physically present or deemed to be physically present in a taxing State, the term “intangible property that is used in the taxing State” means intangible property that is

(a) commercially exploited within the taxing State by the out-of-state business or by another person to whom the out-of-state business, while retaining an interest in the intangible property, has granted a right to use the intangible property in the taxing State; or

(b) maintained intangible property within the taxing State for purposes of discharging a legal or contractual obligation that permits the out-of-state business to conduct business with respect to the taxing State.

(7) **“Lease.”** The term “to lease” means any arrangement allowing for the use of property.

(8) **“Maintaining.”** The term “maintaining” means to keep in existence, continuity, or operation.

(9) **“Occasional.”** The term “occasional” means occurring at infrequent or irregular intervals in a State.

(10) **“Out-of-State Business.”** The term “out-of-state business” means any individual or entity which is not resident in, does not maintain a regular place of business in, or is not corporately or commercially domiciled in, this State.

(11) **“Purposefully.”** The term “purposefully” means willfully directing activities to access a market in a State.

(12) **“Regular.”** The term “regular” means occurring at fixed or uniform intervals in a State.

(13) **“Representative.”** The term “representative” includes any individual or entity that solicits sales, conducts business, or provides services in the taxing State on behalf of an out-of-state business. Such term includes, but is not limited to, employees, agents, corporate entities, related or unrelated to the out-of-state business, and independent contractors. A representative may be resident or non-resident in the taxing State.

(14) **“Solicitation.”** The term “solicitation” means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.

(15) **“Slightest Presence.”** The term “slightest presence” means a level of activity or contact that is neither (i) a regular or systematic business practice nor (ii) quantitatively or qualitatively significant to the commercial interest of the business.

(16) **“Systematic.”** The term “systematic” means methodically planned.

III. Examples

A. **Example of Nexus Based Upon Physical Presence or Deemed Physical Presence.** The following examples exemplify, but do not describe the exclusive, factual circumstances depicting a physical presence or deemed physical presence.

(1) Physical presence through the ownership, lease, use, or maintenance of real and tangible personal property.

a. Repair shop.

b. Parts department.

c. Purchasing office.

d. Employment or recruiting office.

e. Warehouse.

f. Inventory.

g. Mobile stores, i.e., vehicles with drivers that are sales personnel who make sales from the vehicles.

h. Real property or fixtures to real property of any kind.

i. Sales office.

j. Retail or wholesale stores.

k. Catalog order office.

l. Distribution office.

m. Presence of equipment on more than an occasional basis.

n. Rolling stock.

o. Computer equipment.

p. Communications equipment.

q. Billboards, showrooms, advertising kiosks, sample and display rooms, and other similar property devoted to advertising, solicitation, or other marketing purposes.

r. Maintaining, by any employee, an office or place of business (in-home or otherwise).

s. Consigning tangible personal property to any person, including an independent contractor or other representative.

t. Maintaining a security interest in merchandise sold to in-state persons or in other property located in-state.

u. Regular in-state deliveries of merchandise sold to in-state persons from out-of-state locations in vehicles operated by the out-of-state business.

(2) Physical presence through any interest in, or a right to use, intangible property that is used in the taxing State.

a. Licensing of a trademark or service mark, or patent, copyright, or other protected intellectual property right, such as know-how, trade secrets and the like, that authorizes commercial exploitation of the intangible property within the taxing State, regardless of whether immediate commercial exploitation is intended or occurs.

b. Licensing of a celebrity endorsement that authorizes commercial exploitation of the intangible property, regardless of whether immediate commercial exploitation is intended or occurs.

c. Sale (or licensing the use) of data in which the out-of-state business claims an interest that is retrieved through telecommunications.

d. Posting of security in the form of intangible assets deposited with a person located in the taxing State that discharges an obligation imposed on the out-of-state business by law or contract as a condition for conducting business with respect to the taxing State.

(3) Physical presence through in-state representatives.

a. Presence of a division or other business segment of an out-of-state business, regardless of whether the in-state corporate division or business segment performs activities related to the out-of-state business' sales activities.

b. Presence of representatives who provide warranty repair services or provide maintenance services on behalf of an out-of-state business for merchandise that has been sold to in-state persons.

c. Presence of representatives who place local advertising on behalf of the out-of-state business.

d. Presence of representatives who collect on current or delinquent accounts on behalf of the out-of-state business.

e. Presence of representatives to respond to or mediate customer complaints on behalf of the out-of-state business.

f. Presence of representatives to conduct quality control (or similar) inspections on behalf of the out-of-state business.

g. Presence of representatives to demonstrate new product lines, discuss manufacturing problems or specifications with in-state, unrelated manufacturers, suppliers, or producers, or to discuss purchases of products by in-state, unrelated wholesalers or retailers on behalf of the out-of-state business.

h. Presence of representatives performing installation services or supervising installation on behalf of the out-of-state business.

i. Presence of representatives performing engineering functions or other services to in-state persons relating to technical assistance on behalf of the out-of-state business.

j. Presence of representatives repossessing merchandise sold to in-state persons on behalf of the out-of-state business.

k. Presence of representatives performing delivery services or picking up or replacing damaged or returned property on behalf of the out-of-state business.

l. Presence of representatives investigating the credit worthiness of in-state persons on behalf of the out-of-state business.

(4) Physical presence through other “activities” constituting a physical connection with the taxing State.

a. Activities of a contract carrier that is the actual in-state deliverer (service provider) of the very transaction that is the actual object of what is being sold.

b. Advertising directed at in-state persons through local newspapers or periodicals or local television, radio, or other local means of electronic transmission.

c. Maintenance of a dedicated or virtual telecommunications network that facilitates or promotes the market of the out-of-state business in the taxing State.

d. More than isolated use of the taxing State’s judicial or legal system or public records recording system.

e. Occurrence in the taxing State of the taxable sale that is the subject of the taxing State's sales and use tax.

f. Regular use of a financial network, such as a credit or debit card system, that facilitates or promotes the market of the out-of-state business in the taxing State.

(5) Physical presence through the performance or rendering of services.

(6) Physical presence or deemed physical presence that is in excess of de minimis, i.e., exceeds a slightest presence.

a. Any connection to the taxing State that is either quantitatively or qualitatively more than a trivial connection, including

(i) in-state sales that exceed [? percent] of all sales for the reporting period or that are effected under an established company policy pursued on a continuing basis; and

(ii) maintenance of a sample or display room (including attendance at a trade show) for [? days] at one location for any twelve month period.; or

b. In-state real or tangible personal property or intangible property that reflects a conscious election by the out-of-state business to subject itself to the jurisdiction of the taxing State, such as the acquisition or maintenance of the property based upon the affirmative decision of management or upon a regular or systematic business practice; or

c. In-state representation by a representative that reflects a conscious election by the out-of-state business to subject itself to the jurisdiction of the taxing State, such as the appointment of the representative based upon the affirmative decision of management or under a regular or systematic business practice.

B. **Examples of Facts Which Do Not Support Nexus Based Upon Physical Presence or Deemed Physical Presence.** The following examples exemplify, but do not describe the exclusive, factual circumstances depicting a lack of physical presence or deemed physical presence.

(1) Any connection to the taxing State that neither quantitatively or qualitatively exceeds a trivial connection, including

(a) in-state sales that do not exceed [? percent] of all sales for the reporting period or that are effected inadvertently and not under an established company policy pursued on a continuing basis; and

(b) maintenance of a sample or display room (including attendance at a trade show) for [? days] or more at one location for any twelve month period; or

(2) In-state real or tangible personal property or intangible property that is acquired or maintained inadvertently without any conscious election to subject the out-of-state business to the jurisdiction of the taxing State as would be the case where the acquisition or maintenance of the property is based upon the actions of a non-management employee acting without an affirmative decision of management or a regular or systematic business practice; or

(3) In-state representation by a representative that is inadvertent and does not reflect a conscious election by the out-of-state business to subject itself to the jurisdiction of the taxing State as would be the case where the appointment of the representative is based upon the actions of a non-management employee acting without an affirmative decision of management or a regular or systematic business practice.

(4) Connections, activities, or presence with the taxing State of an out-of-state business achieved solely through common carrier or U.S. mail.

(5) Advertising in national (or out-of-state) periodicals, newspapers, television, radio or other forms of electronic transmission that is only incidentally directed at in-state persons and is not commonly received by in-state persons.

(6) Solicitation of business in-state through catalogs, flyers, the U.S. mail, or telephone, when delivery is effected by the U.S. Mails or common carrier.

(7) Sale (even if technically a license of a protected intellectual property right) of tangible personal property in the form of a book, off-the-shelf software, video recording, audio recording, multimedia recording, and the like where the

sale (or license) is for purposes of the personal consumption of the purchaser (or licensee) and does not authorize the commercial exploitation of the intangible property. An out-of-state holder of an interest in a copyright is not physically present or deemed physically present in a taxing State solely by virtue of retail sales (licenses) of tangible personal property containing protected intellectual property, unless the holder retaining an interest in the intellectual property authorizes in the sale (license) commercial exploitation of the intellectual property in the taxing State.

(8) Maintenance of intangible property in the taxing State that is not required by law or by terms of contract in order for the out-of-state business to conduct business with respect to the taxing State. Bank or other depository accounts, unsecured accounts receivable and similar intangibles that are not maintained in the taxing State to discharge obligations imposed by law or contract in order for the out-of-state business to conduct business with respect to the taxing State do not in of themselves constitute physical presence nor are they deemed physical presence.)