

## **STATE NEXUS SURVEYS**

Nexus is the legal requirement that a state is not permitted to impose any tax (or require a taxpayer to collect sales tax) if the entity does not have sufficient contact with the state. Each state is different in terms of the minimum contacts that will subject a taxpayer to taxation in the state. Similarly, within each state the minimum contacts for the purpose of sales and use tax generally differ from the minimum contacts required to subject a taxpayer to income/franchise taxation. It is possible for a taxpayer to have nexus for purposes of sales/use tax but not for income/franchise tax since the standard of contacts are lower for sales/use tax.

The determination of whether a taxpayer has nexus and is, therefore, subject to state tax is governed by both federal and state law. Federal law requires there be nexus between the company and the state that is attempting to assert the tax. The state law defines the minimum level of contact once the federal law is satisfied.

Nexus for federal purposes is required under both the Commerce Clause and the Due Process Clauses of the U.S. Constitution. Nexus for federal purposes has generally been held to mean a physical presence in the state. *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 US 753 (1967). This physical presence can be established by an office, warehouse, or systematic and regular visits to the state by an employee, agent, or representative.

For years the requirements of nexus for the Commerce Clause and the Due Process Clause were interpreted to be the same. In 1992, the U.S. Supreme Court made a distinction between these two requirements. Under the Commerce Clause, a tax is valid if applied to an activity that has substantial nexus with the taxing state. Under the Due Process Clause, there must be a minimum connection between a state and the person, property, or transaction being taxed. In *Quill Corp v. North Dakota*, 504 US 298, the court reaffirmed *National Bellas Hess*'s bright line rule under the Commerce Clause that requires a physical presence in the state. *Quill* overturned *National Bellas Hess* with regard to Due Process in stating that physical presence is not required to satisfy Due Process, only a minimum connection which may include the use of agents.

Once the federal standard is met, the state standard must be met. As indicated above, each state has different minimum standards and these standards vary based upon the type of tax being imposed. For example, generally the use of an agent within a state will give rise to sales/use tax nexus but not income/franchise tax nexus.

If your company has done or is doing business in a state either through company personnel and assets or by use of an agent or other individual acting on behalf of the company and the business is not registered in the state, it is advisable to understand what the minimum contacts are in that state. Carbis Walker can help. We can examine a particular state or various states in which your company may have exposure and provide your company with a written analysis of the exposure for various types of tax as well as suggestions for minimizing exposure.