SALES TAX NEXUS

As companies continue to market and sell across state lines, it can be complicated to track sales tax requirements for each state to which they sell.

The U.S. Constitution provides limitations on the state's power to tax out-of-state businesses by requiring a "physical presence" in order to establish nexus. Nexus is a sufficient connection between a business and a state that allows the state to subject the business to its taxing jurisdiction. Federal statutes do not define "physical presence"; therefore, it is left to the states' interpretation. When a business has any activity in a state, it should be examined for potential sales tax implications.

NEXUS CONSIDERATIONS TO KEEP IN MIND...

PHYSICAL LOCATION

This could be owning, leasing, maintaining or occupying an office, warehouse, or other place of business. It could be directly through the business or through an agent or subsidiary. States may determine this to be the home-office of a remote employee.

THIRD-PARTY ACTIVITIES

The use of an unrelated third-party fulfillment center, credit investigator, installer or repairer may establish a "physical presence."

ACTIVITY

Having employees (temporary or permanent), independent contractors or representatives visit a state to deliver, install or sell, can establish a "physical presence". This can also include attending trade shows, conducting training, or handling customer complaints. Some states have issued thresholds on visitations while others leave it open. Any presence may trigger nexus.

"CLICK-THROUGH"

The click-through nexus laws presume that an out-of-state seller of tangible personal property or taxable services has sales tax nexus in a state if it pays a commission (or other consideration) to an out-of-state person who, through an internet link, refers customers to the out-of-state seller's website. The law does require that the referral results in a sale and those sales exceed a threshold.

ECONOMIC THRESHOLDS

States are challenging the "physical presence" requirement by issuing economic thresholds. For example, South Dakota requires sales tax collection when an out-of-state seller's gross revenue from the sales of tangible personal property, electronically transferred products, or services delivered into SD exceeds $100,000 OR if that seller has 200+ separate transactions (regardless of dollar amount) from those sales into SD. Other states are preparing to follow.

NEXUS CONSIDERATIONS CONTINUED...

INVENTORY

Having title to property located in a state can create nexus. This can include consigned inventory.

DELIVERY

Delivering tangible personal property with company-owned vehicles could establish nexus. States may not offer minimum amounts of visits to establish nexus.

ADVERTISING

Regular, seasonal, or continuous advertising in newspapers, billboards or distributed mailings can result in establishing nexus.

REGISTERED WITH STATE AGENCIES/DEPARTMENTS

Being authorized to do business, holding a business license or being registered as a government vendor may establish nexus. If a business is registered for payroll and/or workers' compensation, it is likely that nexus is established.

NOTICE/REPORTING

Some states are enacting legislation that require out-of-state vendors, with in-state sales exceeding a threshold, to inform their customers of a potential use tax liability and/or to report these sales to the state. Such states include Colorado and Louisiana.

If you have any questions about sales tax nexus and how it may affect your business, feel free to reach out to:

Partner, Matthew Barbieri, CPA | mbarbieri@wiss.com | 212.634.6259