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"Click-Through" and "Affiliate" Nexus - What Does It All Mean?

STATE AND LOCAL TAX
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"Click-Through" and "Affiliate" nexus: What does it mean and more importantly, how does it affect my business?

Just as advancements in modern technology are changing the way we conduct business, they are also changing the way in which state governments assert sales and use tax registration and collection responsibilities, also known as "nexus." Determining where to register and file returns is becoming increasingly problematic as state and local tax jurisdictions keep changing their rules.

While the opinion of the United States Supreme Court in the case of *Quill v. North Dakota* (1992) is the law of the land in determining when a state may impose its sales or use tax collection responsibilities, many states have found new ways of applying the physical presence standard established in *Quill* to businesses who conduct their activities remotely or electronically. In *Quill*, the Court ruled that in order for a state to impose registration and collection responsibilities on an out-of-state business, that entity must have a significant nexus that exceeds the slight physical presence of conducting business via the U.S. Mail and common carrier. Since the ruling, states looking to extend sales and use tax registration and collection responsibilities to out-of-state businesses have had to identify some type of physical presence connection between the state and the out-of-state business beyond the slight physical presence described in *Quill*.

One of the ways in which states are asserting sales and use tax nexus on remote sellers is commonly called "click through" or "affiliate" nexus. In 2008, New York passed legislation targeting larger internet retailers such as Amazon.com by changing their definition of "vendor" to include businesses that have contractual agreements with New York residents to pay a commission for sales made through an internet link on the New York resident's website. The legislation created a difficult rebuttable presumption that the New York resident was soliciting on the behalf of the remote seller. The connection between the remote seller and the presumed solicitation activities of the New York resident created a physical presence nexus that required the registration and collection of New York sales or use tax. The terms "click-through" or "affiliate" are terms used to describe the relationship that is creating the nexus or registration requirement.

Soon after, other states started passing similar legislation to revise their definitions of "vendor," "doing business" or "maintaining a place of business" in order to redefine their nexus standards to include remote sellers. To date, Arkansas, California, Colorado, Connecticut, Georgia, Illinois, New York, North Carolina, Rhode Island, and Vermont all have click-through statutes or rules. Most state click-through nexus provisions contain a rebuttable assumption regarding electronic solicitation and a dollar amount threshold that must be met in order to achieve substantial nexus standard that targets remote sellers. In addition, Florida, Hawaii, Indiana, Iowa, Kansas, Maine, Massachusetts, Michigan, Minnesota, Mississippi, New Mexico, Pennsylvania

and West Virginia recently introduced nexus legislation targeting remote sellers.

Most state click-through nexus provisions contain a rebuttable assumption regarding electronic solicitation and a dollar amount that must be met in order to achieve the substantial nexus standard that is referenced in Quill. Rebuttable standards and dollar thresholds vary by state. One of the few states that passed click-through and affiliate nexus standards that did not contain either a rebuttable presumption or a dollar threshold was Illinois. The Illinois legislation was recently challenged in court and was struck down as unconstitutional, in part because the legislation failed the substantial nexus requirement established in Quill.

Pennsylvania took a different approach to the issue and reinterpreted existing law to apply to click-through and affiliate relationships under the premise that such relationships may fall within the definition of "maintaining a place of business within the Commonwealth." Since these changes in interpretation are not the result of legislation, there is no rebuttable assumption or threshold amount that establishes a substantial nexus. The lack of a rebuttable presumption and the recent Illinois decision may have been factors in the subsequently proposed Pennsylvania legislation.

Taxpayers must beware that affiliate nexus does not only apply to click-through relationships with third parties but may apply to related entities where that affiliate has a physical presence in the state. Most state affiliate nexus provisions include activities by third parties (related or not) that enable a remote seller to build or maintain a market place in the state. Examples include but are not limited to accepting returns, maintaining a warehouse that is used by the remote seller, or providing any other services to the remote seller's customers such as performing repairs, maintenance or training.

While these types of activities performed by a third party (related or not) are not necessarily new to the imposition of nexus, much of the new legislation goes a step further and indicates that if the remote seller and an in-state related entity use an identical or substantially similar name, trademark or goodwill, that may be enough to create physical presence substantial nexus or a physical presence-equivalent.

Recently the Court of Appeals in New Mexico in the case of [Barnesandnoble.com](#) ruled that:

"The goodwill developed both directly, by in-store activities promoting the Taxpayer's website, and indirectly, by consumer's increased awareness of Barnes & Noble due to the presence of in-state stores, helped to establish and maintain a market in New Mexico for the Taxpayer. This created a substantial nexus between Taxpayer and New Mexico to support the imposition of the GRT (Gross Receipts Tax)."

This case is currently under appeal at the New Mexico Supreme Court.

All taxpayers should periodically review their business relationships with third parties to determine the impact to their sales and use tax registration and filing requirements. Any questions regarding registration and filing requirements or the internet sales tax should be directed to your [state and local tax professional](#)

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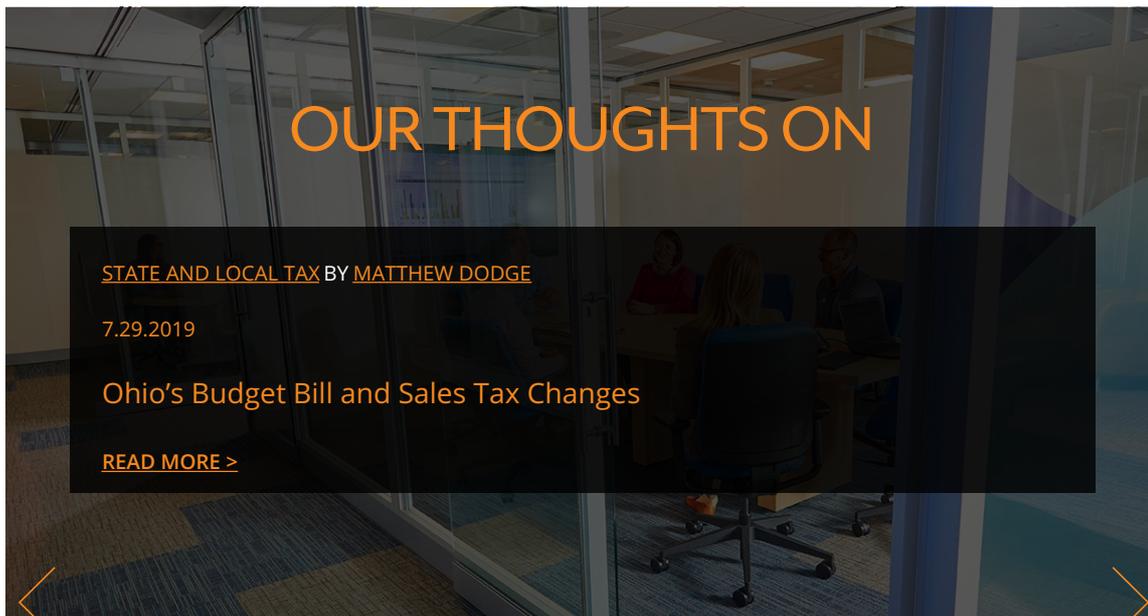


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