State & Local Tax Insights

Battle California! Sales Tax Nexus Gets Even More Interesting

By Thomas H. Steele and Kirsten Wolff

In the past, we have reported on so-called affiliate nexus or "Amazon" statutes and the challenges brought by Amazon.com against New York's nexus law.[1] Those statutes generally impose a sales and use tax collection responsibility on out-of-state retailers that have agreements with in-state entities, when the in-state entities refer customers to the retailer, either by Internet Web site or otherwise.[2] The in-state entities are often known as Internet affiliate marketers.

In addition to asserting nexus based on Internet affiliate marketing relationships, many states, including New York, have also passed statutes that impose nexus on an out-of-state retailer based on the in-state activities performed by a member of the retailer's corporate family (common ownership nexus).

In this article, we bring you an update on the latest nexus law passed in California, which includes components relating to both Internet affiliate marketers and commonly owned entities. We also summarize a few significant developments in the battles over sales tax nexus around the country, including the ways in which large retailers are coping with the changing landscape. Finally, we provide a few benchmarks regarding the ways in which we believe the affiliate nexus laws should be interpreted to assist

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retailers in managing their relationships with Internet affiliate marketers and commonly owned entities in light of the sales tax nexus risks.

California: The Latest Sales Tax Nexus Statute

On June 28, Gov. Jerry Brown (D) signed into law California's budget for fiscal 2011-2012.[3] The budget includes a bill that creates nexus for out-of-state retailers based on the in-state presence of Internet marketing affiliates and the in-state presence of commonly owned entities, under certain circumstances.

Internet Affiliate Marketing Nexus

The Amazon law portion of the bill imposes a sales tax collection responsibility on out-of-state retailers that have certain Internet affiliate marketing relationships with persons in the state.[4] Specifically, the bill modifies the definition of "retailer engaged in business in this state" to include "[a]ny retailer entering into an agreement . . . under which a person . . . in this state, for a commission or other consideration, directly or indirectly refer[s] potential purchasers . . . by an Internet-based link or an Internet Web site, or otherwise," as long as some de minimus sales thresholds are met.[5] The rule does not apply "if the retailer can demonstrate that the person in [California] with whom the retailer has an agreement did not engage in referrals in the state on behalf of the retailer that would satisfy the requirements of the commerce clause of the United States Constitution."[6]

California's statute provides some additional detail, which is not present in other states' statutes, on the application of the new nexus standard to advertising. In particular, California's law states that agreements to provide advertising (whether on television, radio, in print, or on the Internet) do not trigger nexus, unless (1) the fee for the advertisement is a commission or otherwise based on sales and (2) (at least for advertising on an Internet Web site) the in-state person also "directly or indirectly solicits potential customers in [California] through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites . . . ."[7] Thus, in contrast to many other affiliate nexus statutes, California's statute makes clear that an Internet affiliate that merely advertises for an out-of-state retailer does not create nexus, even if the payment for the advertising service is commission-based.[8]

Common Ownership Nexus

In addition to the Internet affiliate marketing nexus provisions, California's new law also includes a provision that imposes a sales tax collection obligation on an out-of-state retailer based on that retailer's relationship with other members of a commonly controlled group that are also members of a combined reporting group.[9] Nexus based on common control is triggered when the member of the group "performs services in [California] in connection with tangible personal property to be sold by the retailer, including, but not limited to, design and development of tangible personal property sold by the retailer, or the solicitation of sales of tangible personal property on behalf of the retailer."[10]

This law seems to trigger nexus based on in-state activities that are plainly beyond the scope of the activities identified in *Tyler Pipe* as the types of in-state activities on which nexus for an out-of-state retailer can permissibly be based. The standard articulated in *Tyler Pipe* was, of course, that an in-state entity's activities on behalf of an out-of-state retailer could create nexus for the retailer when the activities help the retailer "establish and maintain a market in th[e] state for the sales."[11]

California's law seems to reach beyond that category of activities to impose nexus based on a potentially broad array of services provided by the in-state entity, some of which have little or nothing to do with selling or creating a market for the tangible personal property in the state, including, for instance, the design and development of property sold by the retailer. According to some reports concerning the legislation, that provision was likely intended to create nexus for Amazon based on the research and development work for the Kindle, an e-book reader sold exclusively by Amazon, performed in California by Amazon's subsidiary, Lab126.[12]

Indeed, comparing California's new statute with other states' laws that create nexus based on relationships with members of a commonly owned group reveals that the California law has taken its nexus claim to a new level. Other states' laws sometimes impose nexus on an out-of-state retailer when the in-state member of the commonly owned group sells the same or similar product and uses the same or similar business name or trademarks as the out-of-state retailer.[13] Limiting the nexus trigger to those activities is plausible, at least if it creates no more than a presumption that the sales of common products may provide the necessary link to solicitation required by the United States Constitution. The California statute, in contrast, infers a market connection even when the activity is quite distinct from, and in many cases distant from, the process of marketing or selling, as would be the case for activities that are directed simply to the design or development of a product.[14] Moreover, the taxpayer does not have a right to overcome the presumption by showing that the commonly owned entity did not engage in referrals satisfying the constitutional requirements for solicitation.

Amazon and Others Strike Back!

In the face of the new statutes passed by California and other states, Amazon and other retailers have initiated a variety of legal and political measures to challenge these new laws.

One measure typically used has been to simply cancel affiliate marketing relationships, often quite publicly, stressing to state legislatures that their quest for new sales tax

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Upcoming 2011 Speaking Engagements

October 19 – 20
Council on State Taxation (COST) 42nd Annual Meeting & Audit Session
New Orleans, Louisiana
Craig B. Fields
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Hollis L. Hyans

October 20 – 21
American Bar Association, Tax Section, State and Local Tax Committee
Denver, Colorado
Philip M. Tatarowicz

October 26
The Chicago Tax Club
Rosemont, Illinois
Paul H. Frankel

October 26 – 27
Vanderbilt University Law School's 18th Annual Paul J. Hartman State and Local Tax Forum
Nashville, Tennessee
Craig B. Fields
Paul H. Frankel
Hollis L. Hyans

November 3
State Tax Roundtable for Utilities and Power (STARTUP)
Phoenix, Arizona
Andres Vallejo

November 4
2011 Annual Meeting of the California Tax Bar & California Tax Policy Conference
San Jose, California
Timothy A. Gustafson
Carley A. Roberts

November 8
Financial Institution State Tax Coalition
Hollis L. Hyans

November 7 – 9
Institute for Professionals in Taxation
Monterey, California
Hollis L. Hyans
Philip M. Tatarowicz

November 10
Michigan Tax Conference
Novi, Michigan
Paul H. Frankel

November 10
Council on State Taxation (COST) New Jersey Regional Program
Basking Ridge, New Jersey
Mitchell A. Newmark
Carley A. Roberts
R. Gregory Roberts
Irwin M. Slomka

November 12
Bergen County CPAs
Paramus, New Jersey
Paul H. Frankel

November 15
Greater Houston Partnership Annual Tax Conference
Houston, Texas
Paul H. Frankel

November 29
New Jersey CPA Society State Tax Day
Middlesex, New Jersey
Paul H. Frankel

December 1
Council on State Taxation (COST) 2011 Regional State Tax Seminar
Seattle, Washington
Eric J. Coffill
Craig B. Fields
Carley A. Roberts
Thomas H. Steele
Andres Vallejo

December 12 – 13
New York University's 30th Institute on State and Local Taxation
New York, New York
Craig B. Fields
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revenues may well have an effect on local jobs.[15]

Taking a different tactic in Tennessee and South Carolina, Amazon successfully brokered deals with those states' legislatures under which the lawmakers have given Amazon an exemption on sales tax collection in exchange for Amazon's development of job-creating distribution centers in those states. South Carolina enacted a statue giving Amazon and similar retailers a five-year pass on collecting sales tax in the state, and Tennessee simply declined to pursue affiliate nexus legislation.[16]

In other cases, retailers have challenged the laws through litigation. For example, the Direct Marketing Association challenged and obtained a preliminary injunction against Colorado's variant on the nexus statute by arguing that it discriminated against interstate commerce by requiring compliance and reporting of out-of-state sellers, which was not required of in-state sellers.[17]

Another trade association that supports Internet marketers, the Performance Marketing Association, has filed suit against Illinois, presenting a straightforward commerce clause challenge to Illinois's new Amazon law, which requires out-of-state retailers to collect Illinois sales tax based on the in-state presence of Internet affiliate marketers.[18] This case joins the case brought by Amazon and Overstock.com against New York's law as another challenge to the aggressive nexus positions adopted by states around the country.[19]

In California, Amazon has adopted an even more dramatic approach that, if successful, could send shockwaves across the country. After California passed A.B.x1 28, Amazon not only terminated all of its affiliate relationships in the state, but also began work on

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a referendum petition to include a measure on the November ballot that asks voters to repeal the new law. The attorney general has approved the petition and Amazon is hard at work gathering the over 500,000 signatures necessary to get the referendum on the ballot.

What's a Retailer to Do in This Aggressive Nexus Climate?

It is tough to navigate the ever-changing nexus rules, especially for an online retailer with business in several states. Nevertheless, we believe that there are a few principles retailers should be able to rely on for guidance and a reasonable level of security in their online marketing and cooperation with commonly owned entities.

First, we continue to maintain that for Internet affiliate marketing, engaging a third party to provide basic advertising should not be enough contact with a state to trigger nexus. We believe that principle should hold true whether the third-party advertiser is an Internet affiliate marketer posting banner ads online or a more traditional media outlet printing copy in a magazine. Some state statutes, like North Carolina's, seem to specifically protect standard advertising from triggering the nexus standard.[20] California's statute appears to create a safe harbor for Internet advertising as long as the Internet marketer does not engage in additional solicitation activities.[21] Other statutes have rejected this distinction and expressly include standard advertising in the state as a nexus trigger.[22] Still other states protect advertising only if the advertiser is not compensated by commission.[23] Nevertheless, although there is some variation in the way in which states treat advertising, it is our view that to impose a sales tax collection obligation on an out-of-state retailer solely on the basis that the retailer engages in advertising in the state violates *Quill* and is unconstitutional, regardless of whether the advertiser is paid on a commission basis.[24]

Second, a so-called marketing affiliate should not be treated as creating nexus for the remote seller unless the affiliate has both a significant presence in the state and performs activities in the state that are directly related to solicitation, sales or marketing support. The first of these requirements is presented in Amazon's challenge to the New York law. That statute states that the entity making the referrals of potential customers must be a resident of New York but then provides no definition of the term "resident."[25] Under those circumstances, Amazon has argued that it would be impossible for it to determine which of its Internet affiliate marketers are residents, presumably because one can imagine a variety of often insubstantial activities that might lead one to be treated as a resident, particularly if the affiliate is a corporation.[26]

The California law aggravates this problem by basing nexus on agreements with any *persons in the state*.[27] No matter how broad the term "resident" may be defined, the phrase "persons in th[e] state" is almost certainly broader. Thus, California has pushed the edges of the nexus envelope by imposing nexus on out-of-state retailers on the basis of referrals made apparently by any person physically present in the state, regardless of whether that person is a resident. As difficult as Amazon has claimed it would be to identify its Internet affiliates who are New York residents, it certainly will be a much more challenging task to determine which Internet affiliates are merely present in California. For example, a blogger who uses Internet affiliate marketing as a revenue stream to support her blog may spend 11 months in Hawaii and one month in California. If she is viewed as a "person in th[e] state," she would trigger nexus for the out-of-state retailer under the California statute, even though the out-of-state retailer may have no contact with or even knowledge of the fact that she is in California.[28]

The second of the requirements relating to "presence" of the affiliate is perhaps even more fundamental, namely whether the marketing affiliate (even if a resident of the state) is actually performing any activities *in that state* that should be viewed as marketing support. This is particularly problematic when the affiliate is a large company with operations in the marketing state that create the necessary residency or presence in the state but when the activities of the affiliate in that state do not constitute solicitation because the company's sales and marketing support is provided by operations located entirely in other states. For example, assume a Web site that belongs to a large airline is resident in New York because the airline's planes fly into New York's airports. Assume also that the airline has an office in Florida that is responsible for all of the Web site's affiliate marketing and advertising activities. Even if this airline's affiliate presence in New York may be viewed as significant, that presence should not trigger nexus for an out-of-state retailer that effectively deals only with the Florida operation that handles the Web site.[29]

Conclusion

In sum, the battles over nexus for sales tax collection purposes will certainly continue, in the courts, in the halls of the state legislatures, and, in California, maybe in the voting booths. Other states are likely to jump on the bandwagon by passing similar nexus statutes. We will continue to monitor the developments and keep you posted.

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MoFo Attorney News

Morrison & Foerster's State & Local Tax Group would like to welcome the following attorneys to the firm:

- **Philip M. Tatarowicz** joins us as Of Counsel in the Washington D.C. office.
- **Open Weaver Banks** joins us as Of Counsel in the New York office.
- **W. Justin Hill** joins us as an associate in the New York office.

Caveat Emptor, "Let the Buyer Beware"

By Craig B. Fields, Richard C. Call, and W. Justin Hill

Many states have adopted bulk sale laws that may hold a purchaser in an asset sale liable for a seller's unpaid state tax liabilities. Indeed, approximately forty states currently have bulk sale laws that are intended to minimize the risk that a seller will sell some or all of the company's assets without paying its outstanding state tax liabilities.[1] Under these laws, a purchaser may be held liable for multiple types of state taxes (e.g., sales and use taxes, corporate income taxes, property taxes) that remain unpaid by the seller. Furthermore, the amount of unpaid taxes for which a purchaser may be held liable can, in some cases, exceed the purchase price of the assets acquired.

When acquiring another business, purchasers may perceive an asset purchase (rather than a stock purchase) to be a good way to minimize the amount of state tax liabilities that the purchaser will inherit. Although this may be true, purchasers often must comply with procedural requirements in multiple states in order to ensure that the seller's unpaid state tax liabilities are not transferred to the purchaser along with the assets. If these requirements are not met, the purchaser may be liable for a variety of unpaid state taxes.

The principal procedural mechanism used by many states to provide protection to purchasers is a bulk sale notice. The bulk sale notice alerts the state to the asset transfer. It also allows the state to review the seller's tax history and issue the purchaser a tax clearance certificate, which may serve as a complete defense from a future assessment against the purchaser of the seller's tax liabilities.

Our experience has been that with careful, timely planning and due diligence, a purchaser may affirmatively use the bulk sale laws to reduce significant state tax uncertainty. In this article, we will discuss: (1) a purchaser's potential state tax liability under states' bulk sale laws; (2) the bulk sale notice and filing procedures employed by states that enable a purchaser to achieve increased certainty regarding a seller's unpaid state tax liabilities; and (3) other special issues related to states' bulk sale laws.

Potential State Tax Liability

Bulk sale laws generally require an asset purchaser to withhold from the purchase price an amount equal to the seller's unpaid state tax liabilities, including penalty and interest. If not withheld, the purchaser will be liable for the unpaid liability.[2] The following describes: (A) the amount of tax for which a purchaser may be liable; (B) the types of taxes for which a purchaser may be liable; (C) the states in which a purchaser may be liable for unpaid state taxes; and (D) what sales may result in the application of a state's bulk sale law.

Amount of Potential Liability

The amount of liability that a purchaser may inherit varies by state. Some states limit a purchaser's liability to the amount of the purchase price.[3] Thus, a purchaser could end up paying twice for the same assets – once to the seller and once to the state. However, if several states are involved, the potential liability could be several times the purchase price.

To make matters worse, in some states the liability for unpaid taxes may exceed the purchase price of the purchased assets, thus further increasing the cost ultimately paid for the assets.[4] For example, Arizona holds a purchaser liable for the seller's unpaid Arizona taxes, with interest and penalties, and does not limit the purchaser's liability to the amount of the purchase price.[5] Similarly, Louisiana does not limit the purchaser's liability and holds a purchaser liable for the seller's unpaid Louisiana sales tax obligation, including the interest and penalties accrued.[6]

Taxes for which a Purchaser May Be Liable

Traditionally, state bulk sale laws only applied to sales and use taxes.[7] That remains true in some states, such as New York.[8] However, several states have enacted statutes that have expanded the purchaser's potential liability to include additional taxes. For instance, New Mexico's bulk sale law applies to all New Mexico taxes with the exception of the personal and corporate income taxes.[9] Some state bulk sale laws apply to all taxes that the state imposes.[10] Furthermore, many state laws hold a purchaser liable for accrued interest and penalties on unpaid taxes.[11]

Holding a purchaser liable for more than just sales and use taxes presents unique challenges for purchasers, especially when acquisitions are on a tight deadline. In Pennsylvania, for example, the purchaser is liable for the seller's sales tax and corporate income tax liabilities through the date of the sale if at least 51% of the assets of the business are sold.[12] From a sales and use tax perspective, the seller may be able to readily estimate potential liability by identifying all taxable sales up to the date of the asset transfer. The requirement to file quarterly tax returns helps facilitate the determination of potential liability for periods throughout the year. However, computing the seller's income tax liability up to the date of a sale can be more difficult. The corporate income tax return is filed on an annual basis and the seller may have difficulty determining the income tax liability for the partial year. In such cases, the Pennsylvania Department of Revenue allows taxpayers to estimate the amount due, but the Department may assess additional tax at year end, for which the purchaser may be liable if the seller defaults on the payment.[13] Thus, the escrow amount or the amount withheld from the purchase price may need to be

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Caveat Emptor

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held for an extended period.

States that May Assert a Liability Against a Purchaser

Purchasers also need to consider in which states they may be subject to bulk sale laws. Many states' bulk sale laws hold a purchaser liable for the seller's unpaid state tax liabilities regardless of the purchaser's connection to the state or the assets' connection to the state.[14] Instead, such states' bulk sale laws apply whenever the seller has sufficient contacts with the state to be subject to tax. For example, the New York statute holds a purchaser liable for the tax liability of any seller that is "required to collect tax" (i.e., any seller with New York nexus).[15] The statute places no limitation on the type of purchaser subject to New York's bulk sale law.[16] Thus, if a company that does business only in Oregon buys assets that are located in Oregon from a seller that has a New York sales and use tax liability, New York might assert that its bulk sale law applies to the sale. Because state statutes may apply broadly, purchasers acquiring assets from a seller with a large state tax footprint may need to consider the bulk sale reporting requirements of many states.

However, we believe that, despite the broad language of some bulk sale statutes, the Due Process Clause and the Commerce Clause of the United States Constitution prevent a state from imposing liability on a purchaser merely because the seller has nexus with that state.

Purchasers against whom bulk sale liability has been asserted should consider whether the United States Constitution prevents the application of such laws to their facts.

Sales That May Trigger the Purchaser's Tax Liability

States define the sales to which their bulk sale laws apply differently. Bulk sale laws often apply when the amount of assets transferred by a business are substantial (hence the term "bulk sale"). For example, South Carolina's bulk sale law applies "[i]n the case of the transfer of a majority of the assets of a business, other than cash, whether through sale, gift, devise, inheritance, liquidation, distribution, merger, consolidation, corporate reorganization, lease or otherwise . . . ."[17] Similarly, a regulation of the New Mexico Taxation and Revenue Department provides several indicia of sales to which its bulk sale law applies, including the following:

1. Has a sale and purchase of a major part of the materials, supplies, equipment, merchandise or other inventory of a business enterprise occurred between a transferor and a transferee in a single or limited number of transactions?[; and]

. . . .

3. Was a substantial part of both equipment and inventories transferred?[18]

As can be seen from the quoted language above, a state's bulk sale law may not use the term "bulk." Some states use general terms to describe the applicable transactions. For instance, Texas' bulk sale law applies when a person "sells the business or the stock of goods of the business. . . ."[19] By contrast, the New York tax law actually uses the term "bulk" in its statute, which defines the transactions to which bulk sale liability attaches as "a sale, transfer, or assignment *in bulk* of any part or the whole of his business assets, otherwise than in the ordinary course of business. . . ."[20]

Although it may seem reasonable that bulk sale liability may arise from the sale of most of the assets of the business, a state's bulk sale laws may apply even when an insubstantial amount of a company's assets are sold. For example, in *Matter of Prestige Pool & Patio Corp.*, a New York Administrative Law Judge recently determined that a bulk sale occurred when a pool installation company sold three of its vehicles to an unrelated pool company for less than $20,000.[21] Because New York's bulk sale reporting requirements were not met, the purchaser was liable for the seller's unpaid sales tax obligations, which was an amount nearly equal to the total purchase price of the vehicles.[22] Interestingly, as noted by the Administrative Law Judge in *Prestige Pool*, under New York law, multiple purchasers could be potentially liable for a seller's unpaid state taxes based on New York's definition of "bulk" sale.[23]

Bulk Sale Filing Requirements

States typically have mechanisms for protecting a purchaser from becoming subject to the seller's tax liabilities. In fact, the Pennsylvania Department of Revenue's Web site states that "[t]he Department of Revenue is responsible for enforcing the bulk sale law and *ensuring* a purchaser does not unknowingly become liable for all of a seller's Pennsylvania tax liabilities."[24] Thus, states typically relieve an asset purchaser from the seller's unpaid state tax liability when the proper reporting requirements are met. These filing requirements, which generally involve filing a bulk sale notice, are procedural in nature and are enacted to ensure that the state is aware of the pending transaction. The filing allows the state to take action to recover any unpaid taxes and notify the purchaser of potential liabilities. The following paragraphs discuss these reporting requirements.

Duty of Buyer or Seller

Although a purchaser may ultimately be liable for the seller's unpaid state taxes, some states place the burden of filing the bulk sale notice on the seller while other states place the burden on the purchaser. If the state imposes the filing duty on a purchaser, the purchaser may be able to avoid liability by timely filing a bulk sale notice with the state and withholding an amount equal to the seller's unpaid state taxes from the purchase price.[25] If the responsibility is imposed on a seller, the purchaser can still be liable for the seller's unpaid state tax obligations if the purchaser does not obtain a receipt from the

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New York Finds Assertions of Tax Not Very Entertaining: Determining Primary Purpose

By Roberta Moseley Nero and Bee-Seon Keum

The New York State Division of Taxation ("Division") has taken inconsistent positions on when a business activity constitutes "entertainment" for corporation franchise tax ("CFT") purposes. In *Matter of Celebrity Cruises, Inc.* and *NewChannels Corp. v. Tax Appeals Tribunal*, the Division attempted to tax cruise line operators and a cable operator as entertainment businesses.[1] By contrast, in *Matter of Capitol Cablevision Systems, Inc.*, the Division argued that a provider of cable television programming was a transmission business instead of an entertainment business.[2] The taxpayers prevailed in all three cases. In the following sections we analyze when a business activity constitutes entertainment for CFT purposes as illustrated by *Celebrity Cruises*, *NewChannels* and *Capitol Cablevision* and conclude that the proper classification of a business for CFT purposes requires examining the business as a whole and not just one aspect of the business.

Applicable Case Law

In *Celebrity Cruises*, the Administrative Law Judge ("ALJ") overruled a deficiency determination by the Division asserting tax against two cruise line operators, Celebrity Cruises, Inc. and Royal Caribbean Cruises, Ltd.[3] The issue was whether the companies were principally engaged in the conduct of a transportation business within the meaning of New York Tax Law Sections 183 and 184, which impose tax on transportation and transmission corporations. The Division argued that the companies should file returns under Article 9-A rather than Article 9 because the companies' transportation of passengers was purportedly ancillary to the primary function of delivering entertainment.[4] Article 9-A imposes tax on general business corporations while Article 9 imposes tax on certain specialized businesses, including transportation and transmission companies.

The ALJ rejected the Division's assertions and concluded that, under the plain meaning of the statute, the companies were "without question" principally engaged in transportation and not entertainment.[5] The companies' ships transported passengers to various ports on the itinerary. Their largest capital investments were the vessels and other equipment necessary for the operation of the vessels. Most of the companies' incomes were derived from passenger ticket revenue. The companies incurred the majority of their expenses from operating and maintaining the vessels. While entertainment, accommodation, dining, and shopping were arguably integral to the companies' cruises, they were merely incidental to the main purpose of transporting passengers.

Similarly, in *NewChannels* the issue was whether two providers of cable television access were principally engaged in the conduct of a transmission business within the meaning of New York Tax Law Sections 183 and 184.[6] The companies were cable operators that obtained television signals from cable programmers such as HBO and the Disney Channel and transmitted the signals to customers. The Division argued that the companies were taxable as general corporations under Article 9-A instead of transmission companies under Article 9 because the focus of the companies' business was allegedly to provide entertainment.[7]

The court stated that the Division's assertions were "entirely irrational" and "completely unsupported by the record."[8] Under the plain meaning of the statute, the court found that providing entertainment was merely incidental to the companies' function of transmitting signals.[9] The companies were extremely limited in their capacity to manipulate the signals they obtained from cable programmers and the companies offered limited original programming. The companies' largest capital investments were in their cable plants and transmission equipment. Most of the companies' incomes were derived from subscriber fees and most of the companies' expenses came from maintenance costs.

By contrast, the Division in *Capitol Cablevision* argued that a company that provided cable television programming should be subject to tax under Article 9 as a transmission business instead of under Article 9-A as a general business selling entertainment.[10] Like the cable operators in *NewChannels*, the company in *Capitol Cablevision* transmitted television signals by cable and initiated programming at its offices. However, unlike in *NewChannels*, the Division asserted that the company was subject to tax under Article 9 as a transmission business.[11] The Tax Appeals Tribunal rejected the Division's argument and held that the company was principally engaged in providing entertainment.[12] The company sold a monthly program package of television signals to its subscribers that, in the company's judgment, represented "the best blend of channels and subject matter to achieve its goal of attracting and keeping subscribers."[13] Furthermore, the company originated programming towards the same goal. The Tax Appeals Tribunal concluded that the transmission of television signals was merely the means by which the company conveyed its product to its customers and not its business.[14]

Determining Primary Purpose Requires Examining the Business As a Whole

The Division erred in *Celebrity Cruises*, *NewChannels* and *Capitol Cablevision* by

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Primary Purpose

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asserting that a component of the companies' businesses constituted the primary purposes of those businesses. When determining how to classify a business for tax purposes, the nature of a taxpayer's business controls and not simply one aspect of the business' operations. Just because a business has an entertainment component does not mean that entertainment is the primary purpose of that business. The business must be viewed in its entirety considering all of the facts. Whether a business is primarily engaged in entertainment or something other than entertainment depends upon what the business is doing as a whole.

Moreover, the business must be viewed from the perspective of its customers on what they buy and pay for, in addition to the perspective of the sellers. As an example, most people would not view a long-distance flight on a plane as entertainment no matter how many in-flight movies, cocktails, meals and other entertainment services were offered. Under the Division's approach, taking a flight across the country in the middle seat in the back of the plane near the restroom would constitute entertainment and not transportation merely because the passenger receives a bag of peanuts while watching a movie. Entertainment is certainly an aspect of the experience of taking a flight (and a larger or smaller aspect, depending on the flight). However, the primary purpose for taking a flight for most passengers is to get from one place to another.

Conclusion

When determining how to classify a business for tax purposes, the nature of a taxpayer's business controls and not simply one aspect of the business' operations. This requires examining the actual business under the facts as well as how

WHEN DETERMINING HOW TO CLASSIFY A BUSINESS FOR TAX PURPOSES, THE NATURE OF A TAXPAYER'S BUSINESS CONTROLS…

the customers and sellers perceive the business. States should not assume that an aspect of a business constitutes the entire business just because the applicable statute did not expressly enumerate that particular business. Even though the statute may not address a particular set of facts, the statute must be strictly construed.[15] Moreover, any ambiguities must be resolved in favor of the taxpayer.[16]

Whether a business activity is entertainment or something else depends on the nature of the business as a whole and not simply one aspect of the business' operations, and the classification should not be based merely on how the state wants to tax that particular business. ■

1 *Matter of Celebrity Cruises, Inc.*, DTA Nos. 822986, 823273, 822987 (N.Y.S. Div. of Tax App., Nov. 10, 2010); *NewChannels Corp. v. Div. Tax Appeals*, 279 A.D.2d 164 (N.Y. App. Div., 3d Dep't 2001).

2 *Matter of Capitol Cablevision Sys., Inc.*, DTA No. 800124 (N.Y.S. Tax App. Trib. June 9, 1988).

3 DTA Nos. 822986, 823273, 822987 (N.Y.S. Div. of Tax App., Nov. 10, 2010).

4 *Id.*

5 *Id.*

6 279 A.D.2d 164, 166 (N.Y. App. Div., 3d Dep't 2001).

7 *Id.* at 165.

8 *Id.* at 169.

9 *Id.*

10 DTA No. 800124 (N.Y.S. Tax App. Trib. June 9, 1988).

11 *Id.*

12 *Id.*

13 *Id.*

14 *Id.*

15 *See* 279 A.D.2d at 167 ("Where the language of a tax statute is unambiguous, it should be construed in such a manner as to give effect to the plain meaning of the words employed therein."); DTA No. 800124 ("[A]n administrative agency may not extend the meaning of statutory language to apply to situations not embraced within the statute.").

16 *Id.*

Battle California!

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Previously published in substantially similar form in *State Tax Notes*, September 12, 2011.

Update: Since we drafted this article, the story of Amazon's defense against California's new nexus law has taken another, rather unexpected, turn. According to reports, Amazon successfully gathered enough signatures to put its referendum to repeal the nexus law on the ballot in June 2012.[30] However, Amazon will not be pursuing that path, in light of the fact that it struck a deal with state legislators to delay the effective date of the nexus law by one year (i.e., until September 15, 2012) in exchange for Amazon's efforts to pursue federal legislation that would create a national standard for use tax collection. Both houses of the legislature passed a bill that reflects the extended effective date and the bill is awaiting the Governor's signature.[31] Assuming that the bill is signed into law, we'll just have wait to see what happens in the next round of the fight! ■

1 *See* Thomas H. Steele and Kirsten Wolff, *Reflections on the Current State of "Attributional Nexus": When May a State Use the Presence of an In-State Entity to Claim Jurisdiction Over an Out-of-State Seller*, in University of Southern California Gould School of Law 61st Tax Institute – Major Tax Planning 2009 (Matthew Bender 2009) ("*Attributional Nexus*"); Thomas H. Steele, Andres Vallejo, and Kirsten Wolff, *No Solicitation: The "Amazon" Laws and the Perils of Affiliate Advertising*, 59 State Tax Notes at 939 (Mar. 28, 2011) ("*No Solicitation*").

2 Technically, asserting nexus on an out-of-state retailer that sells into the state results in imposing a duty to collect use taxes due for the customer. Because sales and use taxes are complimentary taxes paid at the same rate, in this article we adopt the common practice of referring to nexus as giving rise to a sales tax collection responsibility.

3 A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011).

4 *Id.*

5 *Id.* § 1 (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(A)). The law applies only if the retailer's total sales in the state over the past 12 months exceed $500,000 and the sales based on referrals from Internet affiliate marketers (that is, persons who refer purchasers to the retailer by Internet-based links or otherwise), exceed $10,000. A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011) (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(A)(i), (ii)).

6 *Id.* (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(E)).

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Battle California!

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7 A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011) (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(B), (C)). The newly adopted California Revenue and Taxation Code section 6203(c)(5)(C) provides in full as follows:

> Notwithstanding subparagraph (B) [which provides that agreements to provide advertising for commission-based compensation trigger nexus], an agreement under which a retailer engages a person in this state to place an advertisement on an Internet Web site operated by that person, or operated by another person in this state, is not an agreement described in subparagraph (A) [which provides that an agreement with a person in the state to refer customers in exchange for a commission creates nexus], unless the person entering the agreement with the retailer also directly or indirectly solicits potential customers in this state through use of flyers, newsletters, telephone calls, electronic mail, blogs, microblogs, social networking sites, or other means of direct or indirect solicitation specifically targeted at potential customers in this state.

8 Similarly, New York's statute requires an out-of-state seller that advertises in the state to collect New York sales tax, but only "if such person has some additional connection with the state which satisfies the nexus requirement of the United States Constitution." N.Y. Tax Law § 1101(b)(8)(i)(C)(II). In contrast, other states' laws seem to create affiliate nexus based merely on advertising, regardless of the compensation structure. *See* R.I. Gen. Laws. § 44-18-15(a)(6); H.B. 6652, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011) (to be codified at Conn. Gen. Stat. § 12-407(a)(15)(A)(v)).

9 A commonly controlled group is defined variously as a parent and subsidiary corporate family, in which the parent owns more than 50% of at least one of the subsidiaries; two or more corporations, at least 50% of the stock of which is owned by the same person; two or more corporations that are stapled entities; or two or more corporations, more than 50% of the stock of which is owned by members of the same family. Cal. Rev. & Tax. Code § 25105(b)(1)-(4).

10 A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011) (codified at Cal. Rev. & Tax. Code § 6203(c)(4)). As we have stated elsewhere, *see Attributional Nexus*, ¶ 209, we believe a statute that bases a nexus finding on nothing more than common ownership should not survive a constitutional challenge. Similarly, we do not believe that merely engaging in a unitary business relationship with an in-state company confers nexus over the out-of-state company. *See, e.g.*, *Current, Inc. v. State Bd. of Equalization*, 29 Cal.Rptr. 2d 407 (Ct. App. 1994). One might question the fundamental approach of state laws that treat activities of a commonly owned entity as creating nexus when the same activities by a third party plainly would not create nexus. For example, would anyone reasonably assert that using a third party in California to assist in product design somehow creates nexus for the out-of-state company that ultimately sells that product in the state? And if not, why should those same activities by a commonly owned subsidiary produce different results?

11 *Tyler Pipe Indus. v. Washington State Dep't of Revenue*, 483 U.S. 232, 250 (1987) (internal quotation marks omitted).

12 *See* Declan McCullagh, *California targets Kindle lab in Amazon tax spat*, CNET, June 29, 2011, http://news.cnet.com/8301-31921_3-20075651-281/california-targets-kindle-lab-in-amazon-tax-spat/.

13 *See* N.Y. Tax Law § 1101(b)(8)(i)(I); Idaho Code Ann. § 63-3615A; S.B. 1, 82nd Leg., 1st Called Sess. (Tex. 2011) (codified at Tex. Tax Code Ann. § 151.107(a)(7)).

14 The California statute may be compared with Texas's new law that creates nexus based on sales of similar products with a similar business name by an in-state corporate parent or subsidiary, or based on advertising or any other activity "intended to establish or maintain a marketplace for the retailer" in Texas. S.B. 1, 82nd Leg., 1st Called Sess. (Tex. 2011) (to be codified at Tex. Tax Code § 151.107(a)(7)(B)). Although the breadth of the Texas statute will no doubt be tested for constitutionality, its list of activities seems at least plausibly related to the Court's pronouncements in *Tyler Pipe*. *See Tyler Pipe*, 483 U.S. at 250.

15 *See, e.g.*, Matt Richtel and Verne G. Kopytoff, *Amazon Backs End to Online Sales Tax in California*, N.Y. Times, July 11, 2011, http://www.nytimes.com/2011/07/12/technology/amazon-backs-end-to-online-sales-tax-in-california.html; Janet Novack, *Illinois Governor Signs Amazon Internet Sales Tax Law*, Forbes, Mar. 10, 2011, http://www.forbes.com/sites/janetnovack/2011/03/10/illinois-governor-signs-amazon-Internet-sales-tax-law/.

16 *See* 2011 S.C. Acts 32.

17 *Direct Mktg. Ass'n v. Huber*, No. 10-cv-01546-REB-CBS, 2011 U.S. Dist. LEXIS 9589 (D. Colo. Jan. 26, 2011). Colorado's legislature considered, but ultimately rejected, a measure that would have repealed the legislation that requires out-of-state sellers to report to the state the names of customers from whom they did not collect the state's use tax and to report to the customers the amount of sales made to that customer each year so that the customer can pay the use tax. Colo. Rev. Stat. § 39-21-112(3.5); 1 Colo. Code Regs § 201-1.

18 Complaint, *Performance Mktg. Ass'n, Inc. v. Hamer*, No. 1:11-cv-03690 (N.D. Ill. June 1, 2011); 35 Ill. Comp. Stat. 105/2.

19 *See Attributional Nexus*, ¶ 208; *No Solicitation*, at 939-942.

20 *See* N.C. Gen. Stat. § 105-164.8(b)(5).

21 A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011) (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(C)).

22 *See* R.I. Gen. Laws § 44-18-15(a)(6); H.B. 6652, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011) (to be codified at Conn. Gen. Stat. § 12-407(a)(15)(A)(v)).

23 *See* A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011) (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(A)-(C)) (suggesting that television, radio, and print advertising, if paid based on commission, creates nexus). As noted, Web-based advertising is protected regardless of whether the advertiser is paid a commission.

24 *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992).

25 N.Y. Tax Law § 1101(b)(8)(vi).

26 *Amazon.com LLC v. N.Y. State Dep't of Tax. & Fin.*, 877 N.Y.S.2d 842, 848-49 (N.Y. Sup. Ct. 2009); *Amazon.com, LLC v. N.Y. State Dep't of Tax. & Fin.*, 913 N.Y.S.2d 129, 144 (N.Y. App. Div. 2010). The statutes in Rhode Island, North Carolina, and Arkansas contain a provision similar to New York's that bases nexus on relationships with "residents" of the state. R.I. Gen. Laws § 44-18-15(a)(2); N.C. Gen. Stat. § 105-164.8(b)(1), (3); Ark. Code Ann. § 26-52-117(d)(1).

27 A.B.x1 28, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011) (codified at Cal. Rev. & Tax. Code § 6203(c)(5)(A)).

28 The new nexus statutes in Illinois and Connecticut also base nexus on referrals made by a "person located in th[e] State." 35 Ill. Comp. Stat. 105/2(1.1), (1.2); H.B. 6652, 2011 Gen. Assemb., Reg. Sess. (Conn. 2011) (to be codified at Conn. Gen. Stat. §§ 12-407(a)(12)(L), 12-407(a)(15)(A)(x)).

29 *See J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831, 833, 841 (Tenn. Ct. App. 1999) (holding that a Delaware Bank had no nexus with Tennessee because the third-party activities that the state attributed to the bank were conducted wholly outside the state).

30 "Amazon, Lawmakers Broker Deal to Drop Referendum, Delay Use Tax," BNA Daily Tax Report, Sept. 9, 2011.

31 A.B. 155 Sec. 6, 2011-2012 Leg., 1st Ex. Sess. (Cal. 2011).

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seller showing that the seller has paid its tax obligations.[26] A state's department of revenue generally issues such receipts or other forms of verification attesting to the seller's tax history.

Purchasers should consider the bulk sale filing requirements in all states where the seller may have a state tax payment obligation, even those states where the duty to file the notice is placed on the seller. Aside from potential tax liability, the purchaser may not be able to obtain business permits, such as a sales tax registration permit, in states where the seller has an outstanding tax liability.[27] For example, in *Carlton Southwest, Inc. v. Oklahoma Tax Commission*, the Oklahoma Court of Appeals affirmed an Administrative Law Judge's determination that, pursuant to Oklahoma law, the Oklahoma Tax Commission could not issue a sales tax permit to a purchaser in the bulk sale of an automotive dealership until the seller's delinquent sales tax claims were settled.[28] The purchaser in that case failed to withhold from the purchase price the amount necessary to pay the seller's unpaid tax liability. The Oklahoma Tax Commission estimated the seller's unpaid sales tax liability based on the seller's previously filed sales tax reports and the purchaser was obligated to pay the outstanding tax liability, including interest and penalty, before it could obtain a sales tax permit. Thus, by not filing the bulk sale notice, the purchaser wound up paying the full purchase price to the seller and then an additional amount to the Oklahoma Tax Commission.

Variations in Bulk Sale Filing Deadlines and States' Response Times

Regardless of whether the purchaser or seller is required to notify the state of the pending asset sale, the timing and deadlines of bulk sale notice requirements

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vary significantly from state to state. Some states require the seller or purchaser to file the bulk sale notice prior to the closing date, while other states allow the notice to be filed after the closing date. For example, Connecticut recommends that the purchaser file a bulk sale notice at least ninety days before the closing, while New Jersey and New York require the purchaser to file a bulk sale notice at least ten days before the date of sale.[29] If the state allows the notice to be filed after the closing date, the window for filing may be short (e.g., ten days after the closing date in Hawaii).[30]

Once the seller or purchaser files a bulk sale notice with a state, the state is generally required to notify the filing party of the seller's unpaid tax obligations. Many states have a statutorily prescribed response time, which can be as little as ten days or as long as six months.[31] However, some states do not have a statutorily imposed response time constraint.[32]

If notified by a state of potential unpaid liabilities, a purchaser must escrow or withhold such notified amount from the purchase price. If not notified by a state, a purchaser may face some difficult choices. The purchaser may decide to place an estimated amount in escrow to cover the seller's potential state tax obligations or withhold an estimated amount from the purchase price. However, it is unlikely that the purchaser will know with certainty whether it withheld a sufficient amount until it receives a response from each state. The seller, on the other hand, may place pressure on the purchaser to return the escrow or withheld amount as soon as possible or attempt to bargain for no escrow or withholding.

Bulk Sale Notice Forms and Required Information

The amount of information required by a state varies. A state may require substantial information or may only require the identities of the seller and purchaser and the date on which the sale is to be completed. Some states supply forms that a seller or purchaser may use to file a bulk sale notice. New York requires the filing of a one page form.[33] New Jersey requires a purchaser to: (1) file form C-9600; (2) set forth the price, terms, and conditions of sale; and (3) state whether the seller has represented or informed the purchaser that it owes any sales tax, whether the purchaser has knowledge that such taxes are owing, and whether any such taxes are, in fact, owing.[34] Connecticut and Idaho require the purchaser to attach a copy of the asset purchase agreement to the bulk sale notice.[35]

Additional Considerations

Bulk sale laws may present other issues for purchasers. For instance, a purchaser may be subject to an extended statute of limitations period, may be barred from challenging a state tax assessment or may be held liable for the unpaid state tax liability of the seller's predecessor.

Statute of Limitations

State statutes of limitations may be extended or otherwise changed when a purchaser buys assets. Thus, a state may be permitted to assert a seller's unpaid state tax liability against a purchaser even after the seller's statute of limitations period has expired.[36] The statute of limitations may be based on the date of sale, as in Maine, where the state may assess sales and use tax against the purchaser at any time within six years from the date of the asset sale.[37] By contrast, in North Carolina the statute of limitations for assessments expires one year after the statute of limitations would otherwise have run had the sale not occurred.[38]

Notably, the statute of limitations changes may influence a purchaser's accounting following a sale. Public companies often take into account statutes of limitations periods for reserve and reporting purposes, such as under FIN 48.[39] Thus, establishing the appropriate reserves may require an analysis of the statute of limitations changes resulting from a bulk sale.

Challenging an Assessment

In some cases a purchaser may be precluded from challenging a state tax assessment. In *Pennsylvania Department of Revenue v. Qwest Transmission, Inc.*, the Commonwealth Court of Pennsylvania held that the purchaser in an asset sale was not allowed to contest a Pennsylvania corporate income and franchise tax assessment for the seller's unpaid taxes because the purchaser did not contest the amount within the seller's statutory resettlement period.[40] After a bulk sale, the Pennsylvania Department of Revenue issued a settlement (i.e., an assessment) for the seller's unpaid liabilities for a period prior to the sale.[41] The seller's statutory resettlement period was ninety days from the date that the Department assessed the liability against the seller. During that ninety days, neither the seller nor the buyer contested the assessed tax.[42] The court concluded that the purchaser was liable for the $2,535,173.50 tax assessment even though the purchaser did not know of the seller's unpaid tax liability during the ninety day resettlement period.[43] Had the purchaser secured a bulk sale clearance certificate prior to the sale, it would have had an opportunity to discover the unpaid tax liability and contest the assessment within the statutory resettlement period.[44] The court determined that the purchaser's "lack of diligence" deprived it of the opportunity to raise the issue after the expiration of the resettlement period.[45]

Unpaid Tax Liability of the Seller's Predecessor

The purchaser in a bulk sale may also be liable for the unpaid tax liability of the seller's predecessor.[46] Upholding a New York State Administrative Law Judge determination, the New York State Tax Appeals Tribunal held that a company that purchased a convenience store without filing a bulk sale notice was liable for the sales tax obligation of the seller's prede-

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cessor.[47] Brooklyn Subs, Inc. ("Brooklyn") purchased a convenience store from Buy Rite Grocery Corp. ("Buy Rite") and was informed by the New York State Division of Taxation that Buy Rite had an outstanding sales tax liability.[48] Brooklyn did not withhold a sufficient amount from the price to cover Buy Rite's unpaid sales tax liability.[49] Brooklyn subsequently sold the business to 751 Bergen Dely, Inc., which also did not file a bulk sale notice with the state.[50] The Tax Appeals Tribunal held 751 Bergen Dely, Inc. liable for the unpaid sales tax obligation of Buy Rite, the seller's predecessor.[51]

Conclusion

When entering into an asset deal, a purchaser should remember the Latin phrase *caveat emptor* — "let the buyer beware." A purchaser of a business' assets may be liable in multiple states for the unpaid state tax liabilities of the seller. State laws typically relieve purchasers of such liability when proper, timely reporting occurs. With proper planning and due diligence, the purchaser in an asset sale can successfully reduce the state tax uncertainty resulting from such transactions. ■

1 *See, e.g.*, Fla. Stat. § 212.10(1); Ga. Code Ann. § 48-8-46; N.Y. Tax Law § 1141(c).

2 *See, e.g.*, Cal. Rev. & Tax. Code § 6811; Texas Tax Code Ann. § 111.020. Texas law provides that a "purchaser of a business or stock of goods who fails to withhold an amount of the purchase price [sufficient to pay the seller's unpaid state tax obligations] is liable for the amount required to be withheld to the extent of the value of the purchase price." Texas Tax Code Ann. § 111.020(b).

3 *See, e.g.*, Cal. Rev. & Tax. Code § 6812(a); Texas Tax Code Ann. § 111.020(b).

4 *See, e.g.*, N.J. Stat. Ann. § 54:50-38(c); 72 Pa. Cons. Stat. § 1403(a); *but see* N.Y. Comp. Codes R. & Regs. tit. 20, § 537.0(c)(2) (limiting the purchaser's liability to the purchase price).

5 Ariz. Rev. Stat. § 42-1110(B).

6 La. Rev. Stat. Ann. § 47:308(A).

7 *See, e.g.*, Ga. Code Ann. § 48-8-46; N.C. Gen. Stat. § 105-164.38; N.Y. Tax Law § 1141(c).

8 N.Y. Tax Law § 1141(c) (covering "any tax pursuant to this article" (i.e., Article 28, Sales and Compensating Use Tax)).

9 N.M. Stat. Ann. § 7-1-61.

10 *See, e.g.*, 72 Pa. Cons. Stat. § 1403(a) (imposing liability for all unpaid Pennsylvania taxes); S.C. Code Ann. § 12-54-124 (providing that a lien is placed on the assets transferred in the amount of all unpaid South Carolina taxes).

11 *See, e.g.*, Ariz. Rev. Stat. § 42-1110(B); La. Rev. Stat. Ann. § 47:308(A); 34 Tex. Admin. Code § 3.7(a).

12 72 Pa. Cons. Stat. § 1403.

13 Form Rev-1076, *Procedures for Securing a Bulk Sale Clearance Certificate* (Pa. Dep't of Revenue Aug. 2008).

14 *See, e.g.*, N.Y. Tax Law § 1141; La. Rev. Stat. Ann. § 47:308(A); Texas Tax Code Ann. § 111.020(b).

15 N.Y. Tax Law § 1141.

16 *Id.*

17 S.C. Code Ann. § 12-54-124.

18 N.M. Admin. Code § 3.1.10.16.

19 Texas Tax Code Ann. § 111.020(a).

20 N.Y. Tax Law § 1141(c) (emphasis added); N.Y. Comp. Codes R. & Regs. tit. 20, § 537.1(a). Pennsylvania also uses the term "bulk sale." 72 Pa. Cons. Stat. § 1403.

21 *Matter of Prestige Pool & Patio Corp.*, DTA No. 822713 (N.Y.S. Div. of Tax App., Aug. 19, 2010). New York Administrative Law Judge decisions are not precedential. *See* N.Y. Comp. Codes R. & Regs. tit. 20, § 3000.15(e)(2).

22 DTA No. 822713 (N.Y.S. Div. of Tax App., Aug. 19, 2010).

23 *Id.*

24 Bulk Sales Notice, Law, Policies & Tax Bulletins, Pa. Dep't of Revenue, available at http://www.portal.state.pa.us/portal/server/pt/community/laws__policies/11426/bulk_sales_notice/581077 (last visited Aug. 11, 2011) (emphasis added).

25 *See* Md. Code Ann., Tax-Gen. § 11-505. In Maryland, a purchaser that files a bulk sale notice with the state is no longer liable for the seller's unpaid Maryland sales and use tax obligations. After receiving the bulk sale notice, the Maryland Comptroller of Revenue will inform the purchaser if the seller has unpaid Maryland sales and use tax obligations and the purchaser must withhold that amount from the purchase price. *Id.*

26 *See* Colo. Rev. Stat. § 39-26-117(1)(d) & (e); Miss. Code Ann. § 27-65-55(1). Colorado and Mississippi require the purchaser to withhold sufficient funds from the purchase price to cover the seller's unpaid sales tax obligations and do not offer the purchaser the option of filing a bulk sale notice for the purchaser to use as a complete defense to avoid personal liability. These states require the seller to obtain a receipt from the states' respective Departments of Revenue showing that the seller has paid its tax obligations and provide the receipt to the purchaser. The purchaser is liable if it does not obtain the receipt from the seller.

27 *See* Okla. Stat. tit. 68, § 1364(H). The Oklahoma statute provides that "the Tax Commission shall not issue a permit to continue or conduct the business to the purchaser until all tax claims due to the State of Oklahoma have been settled." *Id.*

28 781 P.2d 1192 (Okla. Civ. App. 1989).

29 *Successor Liability for Sales and Use Taxes and Admissions and Dues Tax, Informational Publication 2002(16)*, (Conn. Dep't of Revenue Servs. Sept. 15, 2002); N.J. Stat. Ann. § 54:50-38; N.Y. Tax Law § 1141(c).

30 Hawaii Rev. Stat. § 237-43(a) (requiring the seller to file a bulk sale notice within ten days after the closing date).

31 *See, e.g.*, "Frequently Asked Questions: Law and Procedures for the Filing of the C-9600 Form" (N.J. Division of Taxation Dec. 9, 2010) (stating that the Division must notify the purchaser within ten days of receiving the bulk sale notice); Wash. Rev. Code Ann. § 82.32.140(4) (providing that the purchaser is not liable for the seller's Washington excise tax obligations if the Washington Department of Revenue does not respond to the purchaser's bulk sale notice filing within six months of receiving the notice).

32 *See* 72 Pa. Stat. Ann. § 1403(a) (providing that the Pennsylvania Department of Revenue must issue a certificate to the seller indicating the seller's Pennsylvania state tax liability, but the statute does not place a time constraint on the Department).

33 Form AU-196.10, *Notification of Sale, Assignment, or Transfer in Bulk* (N.Y.S. Dep't of Taxation and Fin. Dec. 2010).

34 *Frequently Asked Questions: Law and Procedures for the Filing of the C-9600 Form* (N.J. Division of Taxation Dec. 9, 2010).

35 Conn. Agencies Regs. § 12-2-9(b); Idaho Admin. Code r. 35.01.02.119.

36 *See, e.g.*, Mass. Gen. Laws ch. 62C, § 44(b); Neb. Rev. Stat. § 77-2707(2).

37 Me. Rev. Stat. Ann. tit. 36, § 177(6).

38 N.C. Gen. Stat. § 105-164.38(c).

39 FIN 48 refers to what was originally entitled, FASB Interpretation Number 48, *Accounting for Uncertainty in Income Taxes*, and is now known as FASB ASC 740-10, *Accounting for Uncertainty in Income Taxes*.

40 765 A.2d 818 (Pa. Commw. Ct. 2000).

41 *Id.*at 819.

42 *Id.*

43 *Id.*

44 *Id.*

45 *Id.* at 821.

46 *See, e.g.*, *Matter of 751 Bergen Dely, Inc.*, DTA No. 821738 (N.Y.S. Div. of Tax App., July 23, 2009); *GABGEO, Inc. v. Director, Div. of Taxation*, 23 N.J. Tax 38 (N.J. Tax Ct. 2006).

47 *Matter of 751 Bergen Dely, Inc.*, *supra*.

48 *Id.*

49 *Id.*

50 *Id.*

51 *Id.*