VERMONT DEPARTMENT OF TAXES

TECHNICAL BULLETIN

TAX: Corporate and Business Income Tax **TB-70**

SUBJECT: Corporate and Business Income Tax Nexus, Filing Requirements, and Minimum Tax Liability **ISSUED: March 1, 2018**

STATUTORY REFERENCE: 32 V.S.A. §§ 5811(15), 5833, and 5862.

Introduction

This bulletin summarizes the Department's administration of Vermont's law pertaining to corporate and business income tax nexus,[1] the circumstances under which a foreign business entity[2] is deemed to have nexus with Vermont, and related income tax filing and minimum payment requirements. Generally, nexus is a measure of the connection that a taxpayer or income has with a state, and which, when established sufficiently, subjects the taxpayer or that income to that state's tax jurisdiction.

Vermont Statutes Annotated

Vermont's corporate income tax is imposed annually "upon the income earned or received in that taxable year by every taxable corporation." 32 V.S.A. §§ 5831, 5832. A "taxable corporation" is one that: (1) was incorporated under the laws of the State; (2) possessed a certificate of authority to do business within the State; or (3) received any income allocable or apportionable to the State under the provisions of 32 V.S.A. § 5833 at any time during the taxable year. 32 V.S.A. § 5811(15). Income is apportioned to Vermont under a three-factor apportionment formula based on a taxable corporation's property, payroll, and sales sourced to this State. *See* 32 V.S.A. § 5833 and Reg. § 1.5833.

Taxable corporations are required to file a Vermont corporate income tax return and are subject to the greater of the income tax determined under 32 V.S.A. § 5832(1) or the minimum corporate gross receipts tax under 32 V.S.A. § 5832(2)(C)-(E).

An S corporation, partnership, or limited liability company engaging in activities in Vermont that would impose a filing requirement on a C corporation must file a Vermont business income tax return. 32 V.S.A. §§ 5914(a), 5920(a). S corporations, partnerships, and limited liability companies

---

[1] Note that nexus for sales and use tax is governed by different laws and standards.

[2] A foreign business entity is a business entity incorporated or formed under the laws of a jurisdiction other than Vermont. A foreign corporation need not possess a certificate of authority to do business in Vermont to be considered a "taxable corporation."

generally are not subject to a net income tax[3], but are required to pay an annual minimum tax. 32 V.S.A. §§ 5915, 5921. All shareholders, partners, and members are required to report their distributive share of income received from any such entity on the appropriate Vermont income tax return. 32 V.S.A. §§ 5822, 5823.

There are two statutory exemptions to the minimum tax. A "small farm corporation" qualifying under 32 V.S.A. § 5832(2)(A) is subject to a smaller minimum corporate income tax of $75. A partnership engaged solely in the maintenance and management of intangible investments, the value of which does not exceed $20,000, and which receives annual investment income that does not exceed $5,000, is exempt from minimum tax. 32 V.S.A. § 5921.

Constitutional Considerations

The Due Process Clause and the Commerce Clause of the United States Constitution limit Vermont's power to tax foreign corporations, S corporations, limited liability companies, partnerships, or other business entities. The Due Process Clause requires that there be some "minimum connection between the interstate activities and the taxing State." *Mobil Oil Corp. v. Comm'r*, 445 U.S. 425, 436-37 (1980). The Commerce Clause requires "substantial nexus" between the taxed activity and the taxing State. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

Under Vermont law, substantial nexus does not require physical presence. Income tax nexus is established when a foreign corporation intentionally or regularly exploits Vermont's market. Vermont's apportionment formula ensures that a taxable corporation will only be taxed on income attributable to its Vermont activities, as a corporation will only have income apportioned to Vermont if its wage, property and/or sales factor(s) exceeds zero.

P.L. 86-272

Vermont's ability to tax is limited by Public Law 86-272 (15 U.S.C. § 381), which prohibits a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the taxpayer within the state consists of the solicitation of orders for sales of tangible personal property. To qualify, the orders must be sent outside the state for acceptance or rejection and, if accepted, must be filled by shipment or delivery from a point outside the state. This statute also protects a corporation from net income tax if it uses an independent contractor solely to solicit sales, make sales, or maintain an office in the state, and the independent contractor sells or solicits for more than one principal.

For example, an out-of-state company will not be subject to Vermont net income tax if its only connection to Vermont is the shipment of tangible personal property into the State to fulfill orders because fulfillment activities are protected pursuant to P.L. 86-272. If, however, the out-of-state company conducted any additional activity that established a separate Vermont nexus, such as using

[3] Certain pass-through entities are required or may elect to file a composite tax return and pay composite income tax on behalf of their non-resident shareholders, partners, or members. 32 V.S.A. §§ 5914(b), 5920(b).

Vermont roadways on trucking routes unrelated to fulfillment services, then the protections of P.L. 86-272 would no longer apply as the use of Vermont's roadways to transport inventory exceeds the Public Law. Under these circumstances, the company would be subject to Vermont income taxes and the sale of tangible personal property into the State would be properly included in its sales factor for apportionment purposes under 32 V.S.A. § 5833.

As this example illustrates, the activity creating the Vermont income tax nexus does not have to be related to the allocated and apportioned income. Furthermore, P.L. 86-272 only pertains to the sale of tangible personal property. If an out-of-state company sells both tangible personal property and other products into Vermont, income tax nexus will be created by the sale of the other products and, as a result, all sales properly sourced to Vermont pursuant to Reg. § 1.5833 will be included in the sales factor.

Whether an activity is protected by P.L. 86-272 depends on the extent of the taxpayer's activity in Vermont. In *Wisconsin Department of Revenue v. Wrigley*, 505 U.S. 214 (1992), the United States Supreme Court interpreted "solicitation of orders" to include activities that are entirely ancillary to requests for purchases and which serve no independent business function apart from their connection to the soliciting of orders. *De minimis* activities that do not constitute "solicitation of orders," but only establish a trivial connection with the state, are also immune from taxation. An activity is not protected merely because it is performed by a salesperson.

P.L. 86-272 only applies to net income taxes. Business entities engaging in activities protected by P.L. 86-272 are still required to pay minimum gross receipts tax under 32 V.S.A. §§ 5832(2)(C)-(E), 5915, 5921.

Please note that Vermont law extends additional protections to specific fulfillment operations conducted within the State. For a full list of qualifying operations, please see the definition of "taxable corporation" under 32 V.S.A. § 5811(15)(C)(i).

"No Vermont Activity" Returns

Foreign businesses having recurring, periodic Vermont business activity should file a "No Vermont Activity" return with the Department for any tax year in which the business entity does not have income tax nexus with Vermont. Such filing notifies the Department that the business may have future tax liability and/or filing requirements and would like to keep its income tax account open. When a business entity ceases operations in Vermont, it should notify the Department by filing a "Final Return," after which the filing requirement ends. A business entity filing an "Inactive" or "No Vermont Activity" return is not subject to an annual minimum tax.

Examples of Activities Giving Rise to Nexus with Vermont:

The following list is meant to provide examples of activities that could create income tax nexus. This list is merely meant to provide general guidance, as the Department cannot address every possible scenario that could arise. Each example listed below should be considered in context, as a business entity's circumstances typically involve more than one isolated activity within a state. Developments in this area of law occur regularly, and the below information is subject to change. These examples are not legally binding.

Certain activities listed below may be protected by P.L. 86-272, in which case additional analysis must be done to determine whether net income tax applies.

A foreign business entity is considered to have nexus with Vermont for income tax purposes if it engages in any one of the following activities:

- Owns or leases real property or personal property in Vermont
- Uses or sells intangible property in Vermont, including the receipt of royalties and the licensing of software and other properties
- Makes sales of tangible personal property into Vermont
- Maintains an office, store, warehouse in Vermont in home or otherwise
- Has one or more employees working in Vermont, including employees who work or telecommute from their homes in Vermont
- Provides services in Vermont, through employees and/or independent contractors
- Sends representatives to exhibit at a trade show, conference, craft fair, festival, etc. or to conduct training or seminar in Vermont
- Gives a performance in Vermont
- Meets with clients in Vermont
- Holds inventory or goods on consignment in Vermont
- Delivers goods into Vermont (e.g., acting as a carrier independent of a sale of tangible personal property)
- Uses Vermont roadways to transport tangible personal property
- Makes loans using Vermont property as collateral
- Makes loans to Vermont residents

Kai Samsom
Commissioner of Taxes

3/1/19
Date