



STATE OF WEST VIRGINIA
Department of Revenue
State Tax Department

COPY

Earl Ray Tomblin
Governor

Craig A. Griffith
State Tax Commissioner

2011 APR -1 AM 10:10

TECHNICAL ASSISTANCE ADVISORY 11-002

SUBJECT: Nexus of Out-of-state Customers of Commercial Printer for Collection of Use Taxes and Payment of Income and Business Franchise Taxes.

This letter is in reply to your request for issuance of a technical assistance advisory that up-dates technical assistance advisory 96-003, as provided in W. Va. Code §11-10-5r, and is based upon facts submitted in support of the earlier request and additional information recently provided. Your letter of September 29, 1995, requested issuance by the Tax Commissioner of a technical assistance advisory concluding that certain contacts of customers of _____, with the State of West Virginia, described more particularly below, will not be sufficient nexus with the State of West Virginia to make those customers subject to the West Virginia consumers sales and service tax or use tax, the personal or corporation net income tax, or the West Virginia business franchise tax.

While the facts applicable to technical assistance advisory 96-003 remain effective, your letter of November 5, 2010, requests issuance by the Tax Commissioner of an up-dated technical assistance advisory concluding that certain other contacts of customers of _____, with the State of West Virginia, described more particularly below, will not be sufficient nexus with the State of West Virginia to make those customers subject to the West Virginia consumers sales and service tax or use tax, the personal or corporation net income tax, or the West Virginia business franchise tax.

FACTS:

The material facts provided in your letter of September 29, 1995, for purposes of this technical assistance advisory are as follows: _____ (the "Printer") is an out-of-state corporation which has acquired a plant site in West Virginia for the purpose of constructing and operating a commercial printing facility. Contracts for print work are solicited by or through Printer's sales representatives. Where a particular job is printed depends upon factors such as ability of the printing plant to meet customer deadlines, capability of equipment at a particular plant, previous experience of a printing plant with print work desired by a particular customer, and proximity of the print plant to the customer's distribution area. The customer may request that a particular print job be done, or not done, by a particular plant. Due to the nature of the printing process and printing industry practice, it is common for a print customer to have raw materials, work in process and finished print goods located at its printer's plant.

Customers frequently purchase and provide to the printer the paper which is to be used for their print jobs. Customers order this paper from the paper manufacturer and arrange for it to be delivered to the printing plant. The amount of raw paper inventory belonging to customers that will be located at Printer's West Virginia printing facility, both in terms of quantity and value, will vary throughout the year depending upon the customer, what is being printed, the frequency such item is printed and when during the year such item is printed. Printer will also maintain an inventory of paper for use in print jobs where the customer does not provide the paper. Printer will typically print magazines, catalogs, color advertising circulars and similar items. Due to the size of the print runs, it will not be unusual for a job to be done in segments. Thus, a customer could have certain portions of a job completed and still be awaiting completion of the remainder of the job. Upon completion of the print job, the finished product may be stored on the printer's premises for a period of time prior to the scheduled mailing or distribution date. Length of this storage depends upon what is being printed and its time sensitive nature.

For example, if a magazine published weekly is being printed, the finished print job will remain at Printer's printing plant for only a very short period of time. Something that is less time sensitive may remain for

longer periods of time. Printer's printing plant will include a distribution facility integrated with the United States Postal Service through which individual catalogs and other printed materials can be sent to Printer's customers, or mailed directly to their magazine subscribers or other customers, e.g., catalogs delivered to persons on customer's distribution list. Production may be delivered in bulk to the Printer's customers or to others for further distribution. For example, a customer's printed magazine may be mailed to individual subscribers, as well as shipped in bulk to magazine wholesalers and retailers.

Printer's customers will, from time to time, send personnel into West Virginia for the purpose of performing review and approval tasks with respect to items being printed. This includes, but is not limited to, performing color checks and other ancillary activities in connection with their print job. Such personnel will be in this State only for the period of time necessary to perform the specific activity. The frequency with which such personnel are in this State during any twelve month period and the length of each stay depends upon what is being printed and the number of times during a 12 month period a new, different or revised edition of a product is printed for a customer. For example, color checks on a catalog that is printed twice a year will normally occur twice a year. Time spent in this state by employees of the out-of-state customer on behalf of their out-of-state employer is limited to the amount of time necessary to complete the specific ancillary activity. This could be a day or less, or several days depending upon what is being printed. Printer's customers are typically large national mailers. It is assumed for purposes of this advisory that such customers mail their product or products into West Virginia, but otherwise have no other contacts or presence in West Virginia.

The additional material facts provided in your letter of November 5, 2010, for purposes of this technical assistance advisory are as follows: Printer is in the process of developing a "Distributive" off-line co-mail network to better serve the Printer's new catalog plants and Printer's collective catalog client base. There are 3 co-mail sites, one of which is located in WV, which will function as regionalized consolidation points. The catalogs will be printed and bound in their "home" plant, and the bound/finished product will be shipped to these consolidation sites.

The consolidation sites will serve a particular geographic region of the country. Catalogs participating in this program will have portions of their mailing shipped to all three of these facilities to be consolidated there. In these facilities, the titles will be combined, addressed and then mailed from there. The USPS will have representatives in the facility and will verify the mail from these sites.

Printer's clients have questioned whether nexus will be established when catalogs are printed in another State and then sent to West Virginia for mailing services which result in the catalogs being shipped to client's customers throughout the country with only an extremely small number (500 catalogs) going to West Virginia customers. The rest of the order will be shipped to customers outside of West Virginia. Printer's clients assert that even under the additional facts presented, they are not to be considered to be regularly, systematically or purposefully directing their activities at West Virginia customers and, as a result, nexus should not result.

DISCUSSION AND ANALYSIS:

Under the preceding facts, including the additional material facts provided in your letter of November 5, 2010, it is clear that all contacts these out-of-state clients of Printer have with West Virginia will be directly connected with, limited to, and in furtherance of services Printer contractually agrees to provide to them as clients, which services are limited to printing items, such as magazines, catalogs, advertising supplements, etc., distributing the finished product pursuant to the customer's instructions, and ancillary activity in connection with these services. The question presented here is whether mere ownership by Printer's out-of-state clients of raw materials paper inventory located in West Virginia for processing by Printer, the ownership of print work in progress and the ownership of the finished printed product by the client, held at, or in transit to, or from, the printer's West Virginia facility for a period of time before delivery are sufficient, in and of themselves, to impose a consumers sales and service tax or use tax collection requirement on Printer's out-of-state clients, or to impose on such clients an obligation to file West Virginia income or business franchise tax returns and pay either tax. The power of a State to tax an out-of-state business is subject to three principal limitations. These are: (1) limitations found in the Commerce

Clause, Article I, § 8, cl. 3 of the United States Constitution, and the Due Process Clause of Fourteenth Amendment thereto, (2) limitations imposed by federal law, e.g., Public Law 86-272, etc., and (3) limitations which a State may voluntarily impose upon itself.

A. DUE PROCESS: Until recently, United States Supreme Court decisions have not always clearly distinguished between the Due Process Clause and the Commerce Clause when determining whether or not a State may tax an out-of-state business or require that business to collect a tax imposed by the State. In *Quill Corporation, v. North Dakota*, 504 U.S. 298, 119 L. Ed. 2d 91, 112 S. Ct. 1904 (1992), the Court clarified that these two clauses are analytically distinct. *Id.*, 119 L. Ed. 2d, at 102. "The Due Process Clause 'requires some definite link, some minimum connection between a state and the person, property of transaction it seeks to tax,' *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-345, 98 L. Ed. 744, 74 S. Ct. 535 (1954), and that the 'income attributable to the State for tax purposes must be rationally related to 'values connected with the taxing State'" *Moorman Mfg. Co. v. Blair*, 437 U.S. 267, 273, 57 L. Ed. 2d 197, 98 S. Ct. 2340 (1978) (citation omitted)." *Quill Corp.*, *supra*, 119 L. Ed. 2d, at 102. Due Process standards, at least for use tax collection purposes, do not require a physical presence in the State, so long as the out-of-state business is "doing business" in the State in an *in personam* jurisdictional sense. See *id.*, 119 L. Ed. 2d, at 103-104.

B. COMMERCE CLAUSE: The *Quill* decision confirmed that the Court will sustain a tax against a Commerce Clause challenge so long as the tax satisfies the four-part test set forth in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). See *Quill Corp.*, 119 L. Ed. 2d, at 105. This test requires that the "tax [1] is applied to an activity with a substantial nexus to the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the taxing State. *Complete Auto*, 430 U.S., at 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076. "Substantial nexus" under the Commerce clause sufficient to require an out-of-state business to collect a State's use tax requires that the out-of-state business have a physical presence in the State. See *Quill Corp.*, *supra*, 119 L. Ed. 2d, at 110; *National Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753, 18 L. Ed. 2d 505, 87 S. Ct. 1389 (1967). The *Quill* Court also stated that the "substantial-nexus" requirement of the Commerce Clause is not, like the "minimum-contacts" requirement of the Due Process Clause, a proxy for notice. Rather, it is a means for limiting state burdens on interstate commerce. Therefore, even if the out-of-state business has the necessary minimum contacts with a taxing State for Due Process purposes, it may lack the "substantial nexus" with that State required by the Commerce Clause. See *Quill Corp.*, *supra*, 119 L. Ed. 2d, at 107.

We conclude that mere ownership by Printer's out-of-state clients of raw materials paper inventory located in West Virginia for processing by Printer, occasional visits to Printer's facility by representatives of Printer's out-of-state clients for the limited purpose of performing ancillary activities in connection with their print job, and the ownership of the work in progress or finished printed product by the client, held for a limited period of time at, or in transit to, or from, Printer's West Virginia facility are not sufficient, in and of themselves, to impose a consumers sales and service tax or use collection requirement on Printer's out-of-state clients and such contacts are insufficient to impose on such customers a duty to file returns and pay West Virginia income or business franchise tax returns. This is because these out-of-state clients of Printer, under the facts presented for purposes of this advisory will not be regularly, systematically and purposefully directing their activities at West Virginia customers for purposes of selling them goods or services.

CONCLUSION:

It is the determination of the Tax Commissioner that: (1) Under the facts and circumstances described in this advisory, Printer's out-of-state clients will not be required to collect and remit West Virginia consumers sales and service tax or use tax, or be required to file returns and pay West Virginia income or business franchise taxes. (2) In the event an out-of-state client of Printer has any additional contact with this State not included in the facts stated herein for purposes of this advisory, Printer's out-of-state client may be subject to the taxing jurisdiction of this State depending upon the specific facts and circumstances and provided such taxation is permissible under the Due Process and Commerce Clauses of the United States Constitution and not otherwise prohibited by federal law. The conclusions reached in this technical

assistance advisory are based upon the facts submitted and application of current law. In the event there is a material change in the facts, or if it is determined that material facts were omitted or are materially different from those furnished to us for purposes of this ruling, or there is a material change in the applicable law, the conclusions reached in this advisory may no longer apply.

Declaration of Precedential Value: -- Under W. Va. Code §11-10-5r(b), a Technical Assistance Advisory has no precedential value, except to the person who requests the advisory, unless the Tax Commissioner specifically states that it has precedential value. Due to the specialized nature of the question presented for ruling, this Technical Assistance Advisory is declared to have no precedential value, and may not be relied upon by any person other than the Printer and Printer's out-of-state clients whose contacts with this State do not exceed those stated in this Technical Assistance Advisory.

Publication: -- Under W. Va. Code §11-10-5r(e), the Tax Commissioner is required to release technical assistance advisories to the public after they are modified to delete identifying characteristics unless the person requesting the advisory waives its right to confidentiality. This advisory is released as Technical Assistance Advisory 11-002. Here, the right to confidentiality was waived. If you have any questions about this advisory, please contact this office at your convenience.

Sincerely,

Craig A. Griffith
Tax Commissioner

ISSUED: March 28, 2011