

WEST VIRGINIA STATE TAX DEPARTMENT
Technical Assistance Advisory 2005-02

SUBJECT: CONSUMER SALES AND SERVICE TAX - USE TAX – Neither **(1)** a retailer subsidiary (**RETAILER**) owned by a parent corporation (**PARENT**), nor **(2)** third party merchants (**MERCHANTS**) for which the **PARENT'S** internet and telephone customer support services subsidiary (**CONTACT COMPANY**) provides customer support services will be subject to the West Virginia State requirement for collecting either Consumers Sales and Service Tax or Use Tax on sales of the **RETAILER'S** merchandise or the **MERCHANTS'** merchandise to West Virginia customers where:

The **CONTACT COMPANY** will continue to block e-mail and telephone orders or inquiries originating in West Virginia. Such orders or inquiries will be re-routed to separately incorporated customer service entities located outside the State of West Virginia,

The **CONTACT COMPANY** will not be subject to the control of an e-commerce service provider (**E-COMMERCE SERVICE PROVIDER COMPANY**) that is a subsidiary of **PARENT** which operates the Website through which **CONTACT COMPANY** provides much of its customer services.

The **CONTACT COMPANY** will not be subject to the control of **RETAILER** or **MERCHANTS**.

The **CONTACT COMPANY** will enter into arms length transactions with these entities in order to provide the Customer Support Services described above.

The **CONTACT COMPANY** will not actively solicit orders on behalf of **PARENT**, **RETAILER** or **MERCHANTS**.

The **CONTACT COMPANY** will not deliver ordered goods to the purchasers, and

The **CONTACT COMPANY** will not be providing Customer Support to West Virginia residents.

However, the aforementioned entities will be subject to sales or use tax collection responsibilities in West Virginia if they maintain a physical presence in the state and make sales to West Virginia residents, or otherwise engage in activities giving rise to nexus with West Virginia, regardless of where the "Customer Support" takes place.

This Technical Assistance Advisory is issued in response to a request for a Technical Assistance Advisory ("TAA") dated August 5, 2005. In the request for a TAA the Taxpayer discusses a proposed project which may be undertaken in West Virginia by a subsidiary [**CONTACT COMPANY**] of a Parent Corporation ("**PARENT**").

The Taxpayer's request for a TAA, dated August 5, 2005, reads in part as follows:

In a letter dated October 27, 1999, a Parent Corporation (the . . . "**PARENT**") requested a Technical Assistance Advisory ("TAA") from the [West Virginia Tax Department] (the "Department"). In the 1999 TAA request letter, the **PARENT** asserted that it should not have nexus for sales and use tax purposes in West Virginia as a result of an arms length contract with a customer service subsidiary [**CONTACT COMPANY**] for the performance of customer service support activities on its behalf. In the 1999 TAA request, the **PARENT** stated that its customer service subsidiary would perform only "pre-sale" and

"post-sale" support and that all customer contacts originating from inside West Virginia would be "blocked." In this context, "blocked" meant e-mail and phone contacts from West Virginia residents to the new customer service support entity would be screened and transferred to a separately incorporated customer service entity located outside West Virginia.

In November of 1999, the Department issued TAA 99-002, in which it agreed with the **PARENT'S** assertion that such activity by its subsidiary would not create nexus for the **PARENT'S** Internet sales into West Virginia. *[Note that Technical Assistance Advisory 99-002 can be found on the West Virginia Tax Department web site.]*

The **PARENT** now requests that the Department issue a new TAA effectively incorporating the facts and findings of TAA 99-002, and ruling on additional facts pertinent to the **PARENT'S** plans to expand the activities of the customer support entity in West Virginia. In short, the **PARENT** would now like to enable the West Virginia customer support entity [**CONTACT COMPANY**] to "take customer orders" on behalf of its affiliated retailers and third party merchants, in addition to performing the pre-sales and post-sales activities detailed in TAA 99-002. The **CONTACT COMPANY** would continue to "block" in-state contacts. The relevant additional facts are as follows:

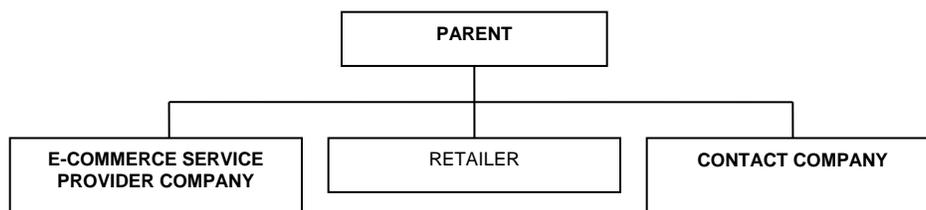
PARENT is a holding company that has created several subsidiaries, each of which performs a distinct function within the **PARENT'S** corporate structure. **PARENT** has no employees or property in West Virginia. However, **PARENT** does have a customer services subsidiary operating in West Virginia (see **CONTACT COMPANY**, below). "**RETAILER**" is the primary retailing entity on the [retail sales] Website. . . . **RETAILER** has no employees or property in West Virginia.

E-COMMERCE SERVICE PROVIDER COMPANY) is an e-commerce service provider that essentially operates the Website. E-commerce services performed by **E-COMMERCE SERVICE PROVIDER COMPANY** include, listing sellers on the Website, credit card processing, fraud control, advertising and other services related to helping affiliated sellers (e.g., **RETAILER**) and third party sellers that list and sell products on the Website. Additionally, **E-COMMERCE SERVICE PROVIDER COMPANY** may perform these services in conjunction with an entirely new website (e.g. www.hypotheticalMERCHANT.com) that it creates for certain third party sellers (all third party sellers hereinafter "**MERCHANTS**"). **E-COMMERCE SERVICE PROVIDER COMPANY** has arms length service agreements with both **MERCHANTS** and **RETAILER**. **E-COMMERCE SERVICE PROVIDER COMPANY** has no employees or property in West Virginia.

CONTACT COMPANY is a provider of customer support services for Website customers purchasing from **RETAILER**. **CONTACT COMPANY** is a wholly-owned subsidiary of **PARENT**, and currently operates a customer service facility in [a West Virginia location]. **CONTACT COMPANY** was qualified to do business in West Virginia in 2000

...

The "simplified corporate structure" diagram is as follows:



In the future, **CONTACT COMPANY** would like to contract with **E-COMMERCE SERVICE PROVIDER COMPANY** to provide it with "customer service support" that **E-COMMERCE SERVICE PROVIDER COMPANY** could then resell to its Merchant customers. Additionally, **CONTACT COMPANY** might also directly contract with **MERCHANTS** to provide "customer service support." In both instances, the term "customer service support" would include all of the customer services activities¹ described in TAA 99-002 and, in addition, "customer order taking." In this context, "customer order taking" would mean phone or e-mail order taking from non-West Virginia residents for products sold either by **MERCHANTS** or **RETAILER**. Hereinafter, "customer service support" and "customer order taking" shall be referred to collectively as "Customer Support."

CONTACT COMPANY would "block" all West Virginia residents from receiving "Customer Support" when contacted whether they are contacted by phone or email. Under this fact scenario, **RETAILER** and **E-COMMERCE SERVICE PROVIDER COMPANY** assert that **CONTACT COMPANY'S** "Customer Support" activities would not create nexus in West Virginia for **RETAILER** or **MERCHANTS**. [Footnote omitted]

Prior to expanding the "Customer Support" services provided by **CONTACT COMPANY**, **E-COMMERCE SERVICE PROVIDER COMPANY** is interested in solidifying an interpretation from the Department relating to the application of the State's sales and use taxes. [The Taxpayer is] convinced that the provisions of West Virginia Code § 11-15-1 *et seq.* and West Virginia Code § 11-15A-1 *et seq.* will not require **CONTACT COMPANY** to collect the taxes imposed by these articles relating specifically to sales made by **RETAILER** or **MERCHANTS** to customers located in the State of West Virginia when such sales are not processed through the "Customer Support" services provided by **CONTACT COMPANY**.

....

The request for a TAA goes on to discuss a number of decisional law precedents relating to nexus and taxing jurisdiction. The request for a TAA closes with the following discussion:

CONTACT COMPANY will not be subject to the control of **E-COMMERCE SERVICE PROVIDER COMPANY**, **RETAILER** or **MERCHANTS**. Rather, **CONTACT COMPANY** will enter into arms length transactions with these entities in order to provide the Customer Support Services described above. Furthermore, the Customer Support to be undertaken by **CONTACT COMPANY** presents an even weaker argument that nexus should be imputed than that presented in the "agency nexus" cases cited above. For example, **CONTACT COMPANY** will not actively solicit orders on behalf of **RETAILER** or **MERCHANTS**.... **CONTACT COMPANY**... will not deliver the ordered goods to the purchasers. Most significantly, however, **CONTACT COMPANY** will not be providing

¹ The original footnote from the Taxpayer's August 5, 2005 request for a TAA reads as follows: In the "Facts" section of TAA 99-002, then State Tax Commissioner Palmer stated that "Contact Company will take sales orders for Corporation's merchandise." In actuality, at that time, Contact Company did not take sales orders on behalf of the Corporation. Rather, it provided pre-sale and post-sale support, as detailed in the 1999 TAA request letter.

Customer Support to West Virginia residents. Such activity will be blocked and re-routed to separately incorporated customer service entities located outside the State of West Virginia. Thus, even if **CONTACT COMPANY** could be found to be an "agent" of **RETAILER** or **MERCHANTS** under West Virginia law, the blocking of contacts with intrastate customers means that **CONTACT COMPANY** cannot be characterized as helping to make or maintain a market on behalf of **RETAILER** or the **MERCHANTS** in West Virginia; therefore, **CONTACT COMPANY** cannot create tax nexus for **RETAILER** or **MERCHANTS** in West Virginia. *Tyler Pipe Industries v. Dept of Revenue*, 483 U.S. 232, 252, 97 L.Ed. 2d 199, 107 S.Ct. 2810 (1987). Indeed, in TAA 99-002, the Department actually contemplated customer order taking by **CONTACT COMPANY**. [The TAA states:] "**CONTACT COMPANY** will take sales orders for Corporation's [herein **PARENT's**] merchandise." In that situation, as in this one, however, intrastate orders were to be blocked. Consequently, in this situation, as in that one, no tax nexus in West Virginia can be found to exist.

Given all of the above, [the Taxpayer's] conclusion is that to impute nexus to **RETAILER** or **MERCHANTS** because **CONTACT COMPANY** has a physical presence in West Virginia will directly offend both the Commerce Clause of the United States Constitution and West Virginia corporate law. Accordingly, the **RETAILER** and **E-COMMERCE SERVICE PROVIDER COMPANY** request that a TAA be issued confirming the following conclusions:

The provision of "Customer Support" services by **CONTACT COMPANY** will not result in **CONTACT COMPANY'S** nexus with the State of West Virginia being imputed to **RETAILER** or **MERCHANTS**.

Neither **RETAILER** nor **MERCHANTS** [Footnote omitted] will be required to collect West Virginia sales or use tax, pursuant to West Virginia Code §§11-15-1 et seq. and West Virginia Code §§ 11-15A-1 et seq., respectively, on sales of their products to customers in West Virginia as a result of "Customer Support" services provided by **CONTACT COMPANY**.

DETERMINATION

The Tax Department hereby incorporates in this Technical Assistance Advisory the facts and findings set forth in Technical Assistance Advisory 99-002.

The determination set forth herein is based on the following facts, as stated in the Taxpayer's August 5, 2005 letter:

That **CONTACT COMPANY** will continue to block e-mail and telephone orders or inquiries originating in West Virginia. Such orders or inquiries will be re-routed to separately incorporated customer service entities located outside the State of West Virginia,

That **CONTACT COMPANY** will not be subject to the control of **E-COMMERCE SERVICE PROVIDER COMPANY, RETAILER** or **MERCHANTS**.

That **CONTACT COMPANY** will enter into arms length transactions with these entities in order to provide the Customer Support Services described above.

That **CONTACT COMPANY** will not actively solicit orders on behalf of **PARENT, RETAILER** or **MERCHANTS**.

That **CONTACT COMPANY** will not deliver ordered goods to the purchasers.

That **CONTACT COMPANY** will not be providing Customer Support to West Virginia residents.

It is the determination of the West Virginia Tax Department that the provision of "Customer Support" services by **CONTACT COMPANY** will not result in **CONTACT COMPANY'S** nexus with the State of West Virginia being imputed to **RETAILER** or **MERCHANTS**.

It is the determination of the West Virginia Tax Department that neither **RETAILER** nor **MERCHANTS** will be required to collect West Virginia sales or use tax, pursuant to West Virginia Code §§11-15-1 et seq. and West Virginia Code §§ 11-15A-1 et seq., respectively, on sales of their products to customers in West Virginia as a result of "Customer Support" services provided by **CONTACT COMPANY**. However, **MERCHANTS** and **RETAILER** will be subject to sales or use tax collection responsibilities in West Virginia if they maintain a physical presence in the state and make sales to West Virginia residents, or otherwise engage in activities giving rise to nexus with West Virginia, regardless of where the "Customer Support" takes place.

The conclusions reached in this Technical Assistance Advisory are based upon the facts and representations submitted in the request for a TAA dated August 5, 2005, and in the original letter submitted to request TAA 99-002, and upon 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 the Tax Department for purposes of this determination, or if there is a material change in the applicable law, the conclusions reached in this Advisory may no longer apply.

Precedential Value - Under W. Va. Code § 11-10-5r(b), a Technical Assistance Advisory has no precedential value except to the Taxpayer who requests the advisory, unless the Tax Commissioner specifically states that it has precedential value. This Technical Assistance Advisory is declared to have precedential value, and may be cited by other Taxpayers, but shall be considered to be relevant only when the material facts and laws are essentially the same as those on which this Technical Assistance Advisory is based.

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 Taxpayer waives its right to confidentiality. This Technical Assistance Advisory will be released in redacted form as Technical Assistance Advisory 2005-02.

Issued: August 24, 2005

Virgil T. Helton
Acting Tax Commissioner