

2009 DRAFTING REQUEST

Bill

Received: 12/18/2008

Received By: jkreye

Wanted: As time permits

Identical to LRB:

For: Administration-Budget

By/Representing: Lillethun

This file may be shown to any legislator: NO

Drafter: jkreye

May Contact:

Add. Drafters:

Subject: Tax, Other - sales

Extra Copies:

Submit via email: NO

Pre Topic:

DOA:.....Lillethun, BB0293 -

Topic:

Economic nexus standard for Internet businesses

Instructions:

See attached

Drafting History:

<u>Vers.</u>	<u>Drafted</u>	<u>Reviewed</u>	<u>Typed</u>	<u>Proofed</u>	<u>Submitted</u>	<u>Jacketed</u>	<u>Required</u>
/?				_____			S&L
/P1	jkreye 12/20/2008	bkraft 12/22/2008	rschluet 12/22/2008	_____	cduerst 12/22/2008		S&L
/P2	jkreye 01/06/2009	bkraft 01/06/2009	rschluet 01/06/2009	_____	sbasford 01/06/2009		

FE Sent For:

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/P2 bjk'16

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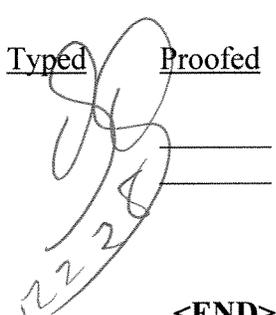
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/?	jkreye	1/PI bjk 12/22					

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<END>

1223

2007-09 Budget Bill Statutory Language Drafting Request

- Topic: Economic Nexus Standard for Internet Businesses
- Tracking Code: BB0293
- SBO team: Tax, Transportation and Budget Development Team
- SBO analyst: Chad Lillethun
 - Phone: 266-7597
 - Email: Chad.Lillethun@wisconsin.gov
- Agency acronym: DOR
- Agency number: 566
- Priority (Low, Medium, High): High

Intent:

Amend the definition of "retailer engaged in business" to clearly include an Internet retailer that has an affiliate physically located in Wisconsin that makes similar sales.

2009-2011 Legislative Proposal
Wisconsin Department of Revenue
IS&E Division

Date: November 25, 2008

TITLE: Economic Nexus Standard for Internet Businesses

DESCRIPTION OF CURRENT LAW AND PROBLEM

Section 77.51(13g), Wis. Stats. (2005-06), defines "retailer engaged in business in this state," unless otherwise limited by federal statute, for purposes of requiring collection of use tax, to mean any of the following:

- (a) Any retailer owning any real property in this state or leasing or renting out any tangible personal property located in this state or maintaining, occupying or using, permanently or temporarily, directly or indirectly, or through a subsidiary, or agent, by whatever name called, an office, place of distribution, sales or sample room or place, warehouse or storage place or other place of business in this state.
- (b) Any retailer having any representative, agent, salesperson, canvasser or solicitor operating in this state under the authority of the retailer or its subsidiary for the purpose of selling, delivering or the taking of orders for any tangible personal property or taxable services.

This connection with the state is generally referred to as "nexus." Section Tax 11.97, Wis. Adm. Code (October 1997 Register), in interpreting various court decisions on the subject of nexus, further provides that a "retailer engaged in business in this state" also includes the following:

- (a) Any person servicing, repairing or installing equipment or other tangible personal property in Wisconsin.
- (b) Any person delivering goods into this state in company operated vehicles.
- (c) Any person performing construction activities in this state.

Many businesses are selling their goods and services via the Internet. Today, it is easy for a business located in California or Alaska to make sales to customers in Wisconsin. As businesses increase their sales territory to other states with Internet sales, the question arises as to whether such a business must collect sales or use tax on sales in those states. For many Internet businesses, the answer is no because they are not "engaged in business" (i.e., do not have nexus) in states other than where they reside. However, for multistate businesses who have store locations in every state, they are required to collect Wisconsin sales or use tax on all sales into a state, including Internet sales, because they have "nexus" in every state.

Businesses with physical locations in every state that also sell "online" find they are at a competitive disadvantage with other Internet retailers who don't have nexus in a state and do not collect sales tax on their sales. In order to avoid this retail price disadvantage, businesses with physical locations in many states have transferred their Internet sales operation to a separate entity. That separate Internet sales entity often only registers and collects tax in the state it resides, while its affiliate continues to collect in every state. This is true even though, in

(eg. contract w/ Amazon.com)

*Local John's gets credit for a DVD from Target but
having the order filled by Amazon w/out sales tax.*

order to continue to provide exceptional customer service, the Internet retailers with physical location affiliates have allowed purchasers to return merchandise to the affiliates and exchange merchandise with merchandise for sale at affiliate stores. The Internet retailers have also set up kiosks in their affiliates' stores for use by customers to order online.

In the case of *Borders Online, Inc. vs. California State Board of Equalization* (No. A105488, May 31, 2005), the California Court of Appeals held that an out-of-state corporation that made online retail sales of tangible personal property was obligated to collect and remit California sales and use tax because its brick-and-mortar affiliate acted as its agent when it accepted returns of merchandise purchased online.

States continue to struggle to collect use tax from the purchasers using these Internet retailers.

Arkansas and Minnesota have enacted legislation that clearly provides that such Internet retailers are engaged in business in their states if they have an affiliate in the state with physical locations that make similar sales. California and Louisiana introduced similar language that has not been enacted.

The DOR's Nexus Unit has contacted several Internet retailers to inform them that they are engaged in business in Wisconsin under existing law by virtue of affiliates' services performed on their behalf. Several, but not all, have registered to collect Wisconsin sales or use taxes. It is advantageous that Wisconsin's law clearly provide that such Internet retailers are engaged in business in Wisconsin.

RECOMMENDATION FOR ACTION

- ✂ Amend the definition of "retailer engaged in business" to clearly include an Internet retailer that has an affiliate physically located in Wisconsin that makes similar sales.

ADMINISTRATIVE IMPACT

The statute will clearly state that Internet retailers affiliated with retailers having store locations in Wisconsin making similar sales should collect Wisconsin sales or use tax on sales in Wisconsin. A clear statutory provision should provide a greater understanding for Internet retailers who are required to register and collect Wisconsin sales tax.

FAIRNESS /TAX EQUITY

Such a clarification will ensure a level playing field for all retailers with physical locations who additionally make sales via the Internet through a division or separate related entity.

IMPACT ON ECONOMIC DEVELOPMENT

May increase business for Wisconsin retailers if there is no longer a perceived savings of sales tax by Wisconsin consumers purchasing via the Internet.

FISCAL EFFECT

Based on the expectations of several states that have pursued similar efforts to clarify nexus standards regarding affiliate entities, state sales tax collections are estimated to increase by \$1.5 million annually under the proposal.

County and stadium sales taxes were approximately 7.7% of state sales tax collections in FY07. Assuming this percentage remains constant, county and stadium sales tax collections are estimated to increase approximately \$100,000 annually under the proposal.

DRAFTING INSTRUCTIONS

Amend sec. 77.51(13g), Wis. Stats. to provide that a "retailer engaged in business in this state" includes a person having an affiliate in this state. An "affiliate" should be defined to mean a person that uses its facilities or employees in this state to advertise, promote or facilitate the establishment or market for sales of items by a related person to purchasers in this state or for the provision of services to the related person's purchasers in this state, such as accepting returns of purchases or assistance in resolving customer complaints. "Related" should also be defined.

Attached are copies of bills from Arkansas and Minnesota that should be used as a guide in drafting the definitions.

EFFECTIVE DATE AND/OR INITIAL APPLICABILITY

Day after publication.

INTERESTED/AFFECTED PARTIES

In-state retailers and associations that represent them. These retailers believe that there should be no advantage as a result of sales tax due between purchasing locally and online.

DOR CONTACT PERSON

Diane Hardt, Division Administrator
(608) 266-6798

PREPARED BY

Vicki L. Gibbons
Director, Audit Bureau
(608) 266-3612
Vicki.Gibbons@revenue.wi.gov



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1223/P1

JK:.....

Lbjk

DOA:.....Lillethun, BB0293 - Economic nexus standard for Internet businesses

FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION

SAV
S-refv

in 12-20-08

do not gen.

1 AN ACT ...; relating to: the budget.

Analysis by the Legislative Reference Bureau

TAXATION

OTHER TAXATION

Under this bill, for sales and use tax purposes, a retailer engaged in business in this state includes any person who has an affiliate in this state, if the person is related to the affiliate for federal tax purposes and if the affiliate uses facilities or employees in this state to advertise, promote, or facilitate the establishment of or market for sales of items by the related person to purchasers in this state or for providing services to the related person's purchasers in this state, including accepting returns of purchases or resolving customer complaints.

For further information see the *state and local* fiscal estimate, which will be printed as an appendix to this bill.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

2 SECTION 1. 77.51 (13g) (c) of the statutes is created to read:

3 77.51 (13g) (c) Any person who has an affiliate in this state, if the person is

4 related to the affiliate, as provided under section 267 of ^{the} Internal Revenue Code, and

SECTION 1

1 if the affiliate uses facilities or employees in this state to advertise, promote, or
2 facilitate the establishment of or market for sales of items by the related person to
3 purchasers in this state or for providing services to the related person's purchasers
4 in this state, including accepting returns of purchases or resolving customer
5 complaints.

6 (END)

2009-11 LRB Draft Review

Date: January 2, 2009

LRB Number: 1223-P1 (S.14 - Economic Nexus Standards)

Reviewed by: Vicki Gibbons and Mike Hinnendael

Brief Description of LRB Draft:

This bill expands the sales and use tax nexus provisions to include any person who has an affiliate in this state, if the person is related to the affiliate for federal tax purposes and if the affiliate uses facilities or employees in this state to advertise, promote, or facilitate the establishment of or market for sales of items by the related person to purchasers in this state or for providing services to the related person's purchasers in this state, including accepting returns of purchases or resolving customer complaints.

Comments on Draft:

Page 1, line 4 – delete “as provided under section 267 of the Internal Revenue Code,”. Add the following after, or at the end of, the newly-created sec. 77.51(13g)(c):

person
Two persons are related persons under this subsection if ~~one of the persons meets at least one of the following tests with respect to the other person;~~ *each of*

(1) ~~one or both persons~~ *is* is a corporation, and one person and any person related to that person in a manner that would require an attribution of stock from the corporation to the person or from the person to the corporation under the attribution rules of section 318 of the Internal Revenue Code owns directly, indirectly, beneficially, or constructively at least 50 percent of the value of the corporation's outstanding stock;

(2) one or both persons is a partnership, estate, or trust and any partner or beneficiary, and the partnership, estate, or trust and its partners or beneficiaries own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the profits, capital, stock, or value of the other person or both persons; or

(3) an individual stockholder and the members of the stockholder's family (as defined in section 318 of the Internal Revenue Code) owns directly,

indirectly, beneficially, or constructively, in the aggregate, at least 50 percent of the value of both persons' outstanding stock.

Changes Needed & Why:

Section 318, IRC is broader as to the entities it applies to. Section 267(c) also relates to constructive ownership of stock, but 267(b) lists specific "relationships".

We would like to more closely follow Minnesota law which refers to sec. 318, IRC.



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1223/P1 P2
JK:bjk:rs
Stays RMR

DOA:.....Lillethun, BB0293 - Economic nexus standard for Internet businesses

FOR 2009-11 BUDGET -- NOT READY FOR INTRODUCTION

SAV
Insert
in 1-6-09

do not gen.

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Analysis by the Legislative Reference Bureau

TAXATION

OTHER TAXATION

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1 and if the affiliate uses facilities or employees in this state to advertise, promote, or
2 facilitate the establishment of or market for sales of items by the related person to
3 purchasers in this state or for providing services to the related person's purchasers
4 in this state, including accepting returns of purchases or resolving customer
5 complaints.

INSERT 2-5

6 (END)

2009-2010 DRAFTING INSERT
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB-1223/P2ins
JK:bjk:rs

Insert 2 - 5

ms 91

1 For purposes of this paragraph, 2 persons are related if any of the following
2 apply:

3

1. One person, or each person, is a corporation and ^{*e one*} 1 person and any person
4 related to that person in a manner that would require a stock attribution from the
5 corporation to the person or from the person to the corporation under section 318 of
6 the Internal Revenue Code owns directly, indirectly, beneficially, or constructively at
7 least 50 percent of the corporation's outstanding stock value.

8

2. One person, or each person, is a partnership, estate, or trust and any partner
9 or beneficiary; and the partnership, estate, or trust and its partners or beneficiaries;
10 own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50
11 percent of the profits, capital, stock, or value of the other person or both persons.

12

3. An individual stockholder and the members of the stockholder's family, as
13 defined in section 318 of the Internal Revenue Code, owns directly, indirectly,
14 beneficially, or constructively, in the aggregate, at least 50 percent of both persons'
15 outstanding stock value.



State of Wisconsin
2009 - 2010 LEGISLATURE

LRB-1223/P2

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3 person's purchasers in this state, including accepting returns of purchases or
4 resolving customer complaints. For purposes of this paragraph, 2 persons are
5 related if any of the following apply:

6 1. One person, or each person, is a corporation and one person and any person
7 related to that person in a manner that would require a stock attribution from the
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9 the Internal Revenue Code owns directly, indirectly, beneficially, or constructively at
10 least 50 percent of the corporation's outstanding stock value.

11 2. One person, or each person, is a partnership, estate, or trust and any partner
12 or beneficiary; and the partnership, estate, or trust and its partners or beneficiaries;
13 own directly, indirectly, beneficially, or constructively, in the aggregate, at least 50
14 percent of the profits, capital, stock, or value of the other person or both persons.

15 3. An individual stockholder and the members of the stockholder's family, as
16 defined in section 318 of the Internal Revenue Code, owns directly, indirectly,
17 beneficially, or constructively, in the aggregate, at least 50 percent of both persons'
18 outstanding stock value.

19 (END)