
Nexus and the Need for Clarification: The Rise of Economic and Attributional Nexus

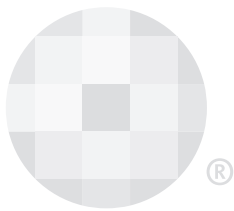
By Christina Berger

Christina Berger explores economic and attributional nexus and the principles on which these concepts are based.

The Rise of Economic and Attributional Nexus

The U.S. financial industry is a pervasive force in daily life. Not only do the nation's largest banks, headquartered in places like New York, make a tremendous number of loans to businesses throughout the country, but also these institutions' footprint on the average consumer is clear when considering the enormous credit card industry. A 1975 Federal Reserve Board Study noted that 29 percent of all loans made to businesses by member banks of the Federal Reserve System were made to out-of-state borrowers.¹ Although this study is clearly dated, no one can question the growth of interstate lending and the daily impact financial institutions have on the economy and day-to-day operations of life and business in the United States.

The major component of lending and financial activities of these banks is in the form of extending direct credit to customers. Before a bank makes a loan or issues a credit card, it investigates the customer's credit standing. If the loan is to be secured by property, it may physically inspect the property, as well as determine if the property is already encumbered by liens. When the bank makes the loan or issues a credit card, it may be required to take further action on a local level to perfect its security interest in property by recording a mortgage or perfecting a lien. In the event the borrow defaults on the loan, or is delinquent on credit card payments, the bank may have a representative visit a customer, or alternatively it may have local counsel bring suit. All of



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these actions may be completed by bank employees, affiliates, agents or independent representatives.²

States around the country are facing increased financial pressures; falling revenue combined with demand for more services. States must fill their coffers somehow, and rather than increasing the burden on in-state taxpayers, states are increasingly looking to out-of-state businesses for revenue. As a result, more states may look to economic nexus as a viable source of tax revenue.³ In the past, state taxation of financial institutions generally has relied on traditional nexus concepts that are based on a requirement of physical presence to establish the jurisdiction to tax. Although most states continue to follow this traditional physical presence requirement, some states have sought to subject out-of-state financial institutions to tax based on the theory of economic nexus.⁴ This development is best understood by examining the framework of law in the area of multistate income taxation, including P.L. 86-272, the constitutional framework, the expansion of attributional nexus and the development of economic nexus theory.

Income Tax Nexus

Nexus is defined as the minimum business activity or connection that an out-of-state company must have with a taxing state. A nonresident corporation is subject to a state's income tax when it has contacts that are sufficient to create nexus. Contacts that are adequate to create nexus are determined by the U.S. Constitution and federal law. Nexus is also governed by state statutes, regulations and case law. The Interstate Commerce Tax Act (P.L. 86-272) provides federal guidance on which activities establish nexus for income tax purposes for sales of tangible personal property, and which activities are protected.

Interstate Commerce Tax Act (P.L. 86-272)

Federal Public Law 86-272 (P.L. 86-272), was enacted to protect taxpayers from overzealous states attempting to assert nexus each time an employee of a out-of-state business solicited business in their states. P.L. 86-272 provides multistate corporations selling tangible personal property with a limited safe harbor from states that impose taxes on net income. P.L. 86-272 prohibits states from taxing the income of a nondomiciliary company if the company's only in-

state activity is the solicitation of orders by a company representative where orders are processed in another state, and the goods are sent from a point outside the state. Activities that create income tax nexus for such companies include: maintenance of an office or any other place of a business, installing or making repairs to products, providing technical assistance, service or training, investigating creditworthiness of customers, approving or accepting orders, and ownership or leasing of real or personal property.

Unfortunately, P.L. 86-272 has clear limitations. It offers no protection "to other types of activities in a state and does not apply to non-income taxes (e.g., sales or use taxes) or to the sale of services or intangibles."⁵ Consequently, the state income taxation of finance companies that do not sell tangible personal property is based on the Due Process and Commerce Clause tests. Federal and state courts of appeals, tax courts and other tax tribunals have issued varying and sometimes contradictory decisions in this area.⁶ In the absence of clear federal law, the question of nexus must be evaluated based on the U.S. Constitution and existing case law.

Constitutional Limitations

Although states have broad discretion to impose tax, the U.S. Constitution limits the ability of a state to levy taxes on out-of-state businesses. Two provisions of the U.S. Constitution limit a state's ability to tax an out-of-state business: the Due Process Clause and the Commerce Clause. Nexus must exist under both the Due Process Clause and Commerce Clause before a state can tax an out-of-state corporation.

Due Process

In cases involving state taxation, it had long been said that the Due Process Clause requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."⁷ It also has been stated for many years that under the Due Process Clause, "[t]he simple, but controlling question is whether the state has given anything for which it can ask a return."⁸ In *Quill Corp. v. North Dakota*, the U.S. Supreme Court identified the concept of "notice" as the cornerstone of due process nexus.⁹ In *Quill*, rather than concentrating on the defendant's mere presence in a forum, the Court focused on whether the defendant had sufficient contacts with the forum state to expect to defend a suit there.

The Court indicated that “the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him.” The central question is whether the corporation as a foreign entity availed itself of the legal and economic benefits of a forum state.¹⁰ However, economic exploitation of a market is insufficient to trigger a filing requirement absent nexus under the Commerce Clause.

The Court noted that it was possible that previous state taxation cases before the Court may have given the impression that the Due Process Clause required a person to have some sort of physical presence (e.g., employees, representatives or property) in a state to establish jurisdiction to tax.¹¹ However, the Court explained that Due Process jurisprudence has evolved substantially over the years, especially in the area of judicial jurisdiction. The Court noted:

Some states may seek to tax these business based on a theory of “economic nexus.” This approach has been applied with increasing success to businesses in the financial services industry.

Building on the seminal case of *International Shoe Co. v. Washington*, we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction “such that the maintenance of the suit does not offend ‘traditional notions of fair play and substantial justice.’” In that spirit, we have abandoned more formalistic tests that focused on a defendant’s “presence” within a State in favor of a more flexible inquiry into whether a defendant’s contacts with the forum made it reasonable, in the context of our federal system of government, to require it to defend the suit in that State.¹²

Citing to its decision in the civil procedure case *Burger King Corp. v. Rudzewicz*,¹³ the Court noted that:

Applying these principles, we have held that if a foreign corporation purposely avails itself of the benefits of an economic market in the forum State, it may subject itself to the State’s in personam jurisdiction even if it has no physical presence in the State.¹⁴

The Court drew a distinction between the nexus required by the Commerce Clause and the nexus required by the Due Process Clause. The Court observed that the Commerce Clause “substantial-nexus requirement is not, like Due Process’ minimum contacts requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce.”¹⁵ Consequently, “a corporation may have the ‘minimum contacts’ with a taxing

State as required by the Due Process Clause, and yet lack the ‘substantial nexus’ with the State as required by the Commerce Clause.”¹⁶

Commerce Clause

Under the Commerce Clause, a taxpayer is required to have “substantial

nexus” with a state for the state to have taxing jurisdiction over the taxpayer.¹⁷ The Supreme Court will sustain a Commerce Clause challenge against a state tax, provided the tax:

1. is applied to an activity with a sufficient nexus with the state;
2. is fairly apportioned;
3. does not discriminate against interstate commerce; and
4. is fairly related to the services provided by the state.¹⁸

The Court adopted a new test to evaluate jurisdiction, which examines both the Due Process and Commerce Clauses. It established a three-part test to determine when jurisdiction exists under the Constitution. First, the corporation must direct its activities at the residents of the state.¹⁹ Second, those contacts must be sufficient for due process purposes.²⁰ Third, the tax must be related to the benefits the corporation receives from the forum state.²¹ *Quill* established that physical presence was not required to establish jurisdiction under the Due Process Clause. However, to establish jurisdiction under the Commerce Clause a substantial nexus was required. The Court held that under the Commerce Clause, North Dakota’s tax represented an unconstitutional burden on interstate commerce. Therefore, while *Quill* met the Due Process minimum contacts requirement, it failed to meet the substantial nexus requirement of the Commerce Clause.²²

Although the U.S. Supreme Court has expressly recognized that an in-state physical presence is required before a state may impose a sales or use tax collection responsibility on an out-of-state vendor,²³ it has not expressly extended that requirement for income tax nexus under the Commerce Clause. Despite the fact that the Court did not extend the bright-line physical presence standard beyond sales and use tax, the Court clearly stated that nexus under the Commerce Clause required more than the personal jurisdiction standard of the Due Process clause.²⁴ Further, the Supreme Court has consistently held that Commerce Clause's substantial nexus requirement involves some degree of physical presence in a taxing jurisdiction. Subsequent state court rulings on this issue have held that the physical contacts need not be substantial so long as they are more than the "slightest physical presence."²⁵

Attributional Nexus

Most states adhere to the traditional nexus concept requiring physical presence to establish jurisdiction to tax. It is necessary to examine the amount of time that employees spend in other states during any given year, as well as the activities that they engage in. Some states specify a specific number of visits that are permitted before the state will assert nexus. For others, there is no "bright line" test. An increasing area of concern, especially for finance companies, is that states that will assert nexus based on attribution.

States have expanded beyond the principle of "physical presence" nexus to develop the "attributional" nexus theory. Attributional nexus refers to the concept that a state can assert nexus over an entity on the premise that the entity has an economic, legal or operation relationship with another entity already subject to taxation. The key attributional nexus theories are agency nexus and alter ego or affiliate nexus.

Agency Nexus

The existence of an agency relationship between two parties is dependent on specific factual elements: the manifestation by the principal that the agent shall act for him; the agent's acceptance of the task; and the understanding that principal is in control of the task.²⁶ In state taxation, the agency theory may confer nexus upon an out-of-state entity if an in-state

person acts as an agent representing the interests of its out-of-state principal.²⁷ An agency relationship generally exists if the agent (the in-state person) has the right to impose a legal obligation on its principal (the out-of-state corporation).

Thus, the state must typically show that the in-state entity is under the authority and control of the out-of-state entity. If the state can make such a showing, nexus is then attributed from the in-state entity to the out-of-state entity. Under this theory, if nexus can be attributed to the out-of-state corporation through the agency relationship, the state can impose tax on the out-of-state corporation's income.²⁸

The U.S. Supreme Court has sanctioned a finding of nexus based on agency principles.²⁹ In *Scripto v. Carson*, the U.S. Supreme Court held that nexus can be established on the basis of an agency relationship.³⁰ In this case, the Court examined whether an out-of-state company (Scripto) would be subject to Florida tax based on the existence of in-state representatives. Scripto did not, in and of itself, have a physical presence in Florida. Scripto, instead, utilized representatives in Florida that conducted continuous local solicitation of orders on Scripto's behalf. Scripto filled these orders out-of-state and shipped product to Florida customers. However, to support a finding that nexus exists, there must be actual agency, and the agency relationship must be significantly associated with the taxpayer's ability to establish and maintain a market in the state.³¹ A true agency relationship results only where there is "an agreement for the creation of a fiduciary relationship with control by the principal," and that "agency will not be assumed from the mere fact that one does an act for another."³²

Alter Ego or Affiliate Nexus

The alter ego theory of attributional nexus is similar to the general corporate law concept of "piercing the corporate veil."³³ If an entity in a taxing state is completely controlled by an out-of-state corporation, the state can disregard the corporate shield and impose its tax on the foreign corporation. Alter ego nexus deals with whether the mere presence of an affiliate in the taxing state is sufficient to establish nexus for an out-of-state business. A state asserting alter ego or affiliate nexus takes the position that the group is a unitary business.³⁴ Factors that courts have considered in determining whether an alter ego relationship exists include: common officers and

directors; overlap of other personnel; the autonomy of each entity; similar or identical trade names; and representations to the public as to the separate nature of the entities.³⁵ New Jersey has joined the increasing number of states with courts that have rejected physical presence as the constitutional standard for income tax nexus.³⁶

In *Lanco, Inc. v. Director, Division of Taxation*, the New Jersey Superior Court, Appellate Division, considered whether physical presence is required for income tax nexus.³⁷ Lanco is a Delaware holding company with no employees, agents or property in New Jersey. The company's only connection with New Jersey was that it licensed trademarks, service marks and trade names to an affiliate, Lane Bryant, Inc., which had retail operations in the state. The tax court initially ruled that physical presence was a necessary element of the Commerce Clause, regardless of whether the tax at issue was a sales tax or income tax.³⁸ The appellate division reversed the tax court, holding that Lanco was subject to New Jersey's corporation business tax (CBT) reasoning that the substantial nexus applies only to sales and use tax.³⁹ This holding was subsequently affirmed by the New Jersey Supreme Court, which noted that it believed that the Supreme Court in *Quill* did not "intent to create a universal physical-presence requirement for state taxation under the Commerce Clause."⁴⁰

Although *Lanco* involved a Delaware holding company licensing intangibles to an affiliate, the Court did not limit the decision to transactions which involved affiliates. This stands in stark contrast to other cases regarding an intangible holding company, where courts have limited the application to cases with similar facts.⁴¹

As a result of the *Lanco* ruling, an increasing number of activities may subject a taxpayer to nexus and income tax in New Jersey, including: licensing franchises; licensing images; licensing software; selling electronic media for download *via* the Internet or *via* mobile devices; or providing financial services such as credit cards and mortgage products to New Jersey customers.⁴² Clearly the issue of at-

tributional nexus has broad reaching implications to those in the financial industry. Some states may seek to tax these business based on a theory of "economic nexus." This approach has been applied with increasing success to businesses in the financial services industry.

Economic Nexus

A myriad of states have adopted expansive nexus provisions to tax out-of-state financial institutions.

In evaluating income and franchise taxes, the key concern is whether the business activity satisfied the strict nexus requirements of the U.S. Constitution. A state has taxing jurisdiction over an out-of-state vendor if nexus is established with that state under the Constitution's Due Process

and Commerce Clauses. Under traditional nexus provisions, a state may not impose a corporate income tax on an out-of-state company based solely on economic presence. However, many jurisdictions assert that an out-of-state business that purposefully avails itself of the market in a state will satisfy an "economic presence" or "economic nexus" standard and will be subject to the state's taxing jurisdiction with regard to income taxes.⁴³

According to the economic nexus theory, a state has jurisdiction to tax a business to the extent an out-of-state business avails itself of the benefits of its marketplace without regard to the existence of physical presence in a state. Economic presence in a state can be measured by: the number of customers in the state, the value of intangible assets and deposits in the state or the receipts attributable to the state.

Historically, holding a note or mortgage receivable and receiving interest thereon, absent a physical presence, were not activities that established "substantial nexus." However, while a financial institution may not maintain a place of business within the state or send its representatives into the state, the exploitation of the market (*i.e.*, making loans), in the eyes of certain states, may be sufficient to establish nexus under an

Attributional nexus refers to the concept that a state can assert nexus over an entity on the premise that the entity has an economic, legal or operation relationship with another entity already subject to taxation.

economic presence theory. In recent years, states have attempted to impose tax on out-of-state financial institutions on the basis that the out-of-state financial institution originates loans in the state. Indiana, Iowa, Kentucky, Massachusetts, Minnesota, Pennsylvania, Tennessee and West Virginia have adopted statutes that deem an out-of-state financial institution to be doing business and have nexus if the company holds intangible assets (e.g., loans) attributable to customers in the state. As discussed below, the states have had mixed success in subjecting out-of-state financial institutions, with no physical presence in the state, to tax based solely on originating or acquiring loans in the state.

Financial institution economic nexus statutes, which are similar from state to state, typically provide that a financial institution will be subject to tax in the state if it has a certain number of customers in the state or assets worth a certain dollar value attributable to a state. In Kentucky, for example, a financial institution is presumed to be doing business in the state, and is thus subject to tax, if it “obtains or solicits business with twenty or more persons” in the state during the year or has \$100,000 in receipts attributable to Kentucky sources.⁴⁴

Recent Developments

This trend of imposing tax on out-of-state financial institutions based solely on economic presence was subdued in 1999 when the Tennessee Court of Appeals struck down Tennessee’s economic nexus statute. In *J.C. Penney National Bank v. Johnson*,⁴⁵ the court held that an out-of-state bank did not establish nexus through the issuance of credit cards to Tennessee residents. Consequently, the court ruled that Tennessee’s economic nexus statute for financial institutions was unconstitutional because it did not require physical presence. The court determined that the physical presence test set forth in *Quill* should be followed in income/franchise tax cases and not limited solely to sales and use tax.

More recently, however, the West Virginia Supreme Court of Appeals upheld the circuit court

ruling that an out-of-state credit card bank with only isolated and sporadic physical presence in West Virginia had nexus with West Virginia as it satisfied the taxability criteria of West Virginia’s financial institution “economic nexus” statute.⁴⁶ Under this statute, a financial institution is presumed to have nexus if it has more than 20 customers in the state or it has gross receipts of at least \$100,000 attributable to sources in the state.⁴⁷

During the years under review, MBNA’s only physical presence in the state involved a few in-state contacts by attorneys hired to represent MBNA in minor debt collection disputes. The West Virginia office of a Kentucky law firm handles these disputes but there were no actual court appearances and no fees were billed. There were no other physical contacts with West Virginia directly or through agents or independent contractors.

The Respondent argued that “substantial nexus” under the Commerce Clause requires physical presence that must be “more than a slightest presence.” The “extremely” limited type and frequency of physical presence in this case was a “slightest presence” and not “significantly” associated with the taxpayer’s ability to establish and maintain a market in West Virginia. Therefore, MBNA was able to overcome the “presumption” of nexus in the statute by demonstrating that there was insufficient physical presence in West Virginia.

The circuit court Judge found as a matter of law that MBNA’s lack of a physical presence in West Virginia is not a prerequisite to finding substantial nexus to satisfy the Commerce Clause for the imposition of corporate net income and business franchise taxes.⁴⁸ Further, there is a presumption of a substantial nexus based on the substantial revenue that MBNA generates from West Virginia citizens.⁴⁹ Various banking and consumer credit laws have enabled MBNA to generate income from West Virginia customers, without the need for a physical presence in West Virginia.⁵⁰ The circuit court concluded that the nexus requirement set out in the statute is clear and unambiguous and will be applied rather than construed.⁵¹ This conclusion, which was subsequently upheld by the West

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Virginia Supreme Court, is important because it is the first case in which a court upheld the imposition of an income or franchise tax where the taxpayer did not even have intangible assets in a state.⁵² The Court notably said:

[W]e believe that the *Bellas Hess* physical-presence test, articulated in 1967, makes little sense in today's world. In the previous almost 40 years, business practices have changes dramatically. When *Bellas Hess* was decided, it was generally necessary that an entity have a physical presence of some sort, such as a warehouse, office, or salesperson, in a state in order to generate substantial business in that state. This is no longer true. The development and proliferation of communication technology exhibited, for example, by the growth of electronic commerce now makes it possible for an entity to have a significant economic presence in a state absent any physical presence there. For this reason, we believe that the mechanical application of a physical-presence standard to franchise and income taxes is a poor measuring stick of an entity's true nexus with a state.⁵³

As neither the *J.C. Penny* case nor the *MBNA* case was heard by the U.S. Supreme Court, the high Court has not sanctioned economic nexus related to financial institutions. Thus, it is reasonable to conclude that unless a state has a specific economic nexus statute related to financial institutions, then that state should not be able to assert economic nexus over the institution. Further, the remaining financial institution economic nexus states have not yet issued judicial decisions regarding their state statutes. It is questionable that the remaining states will hold in favor of imposing tax based solely on economic nexus.⁵⁴

The Need for Resolution

It is clear that in light of falling state revenues and states' desires to tax out-of-state businesses, more states may look to economic nexus as a viable source of tax revenue.⁵⁵ A final resolution is important to resolve uncertainties in this area.⁵⁶ It is important for clear guidance to exist so that business know whether the use of credit cards, holding an open invoice, obtaining credit or arranging flexible payment terms will create nexus in a another state. It will also be important for businesses to understand how a parent-subsidiary relationship will be treated when one of the entities arranges for or directly handles the financing activities of another.⁵⁷ It is no longer a stretch to consider that any of these activities may be construed as a corporation availing itself of the benefits of a state's economic market.

The recent decisions in West Virginia (*MBNA*) and New Jersey (*Lanco*) demonstrate that states have significant latitude in asserting their taxing jurisdiction against nonresident corporations with no physical presence in the state. Not only do these decisions conflict with other state court decisions, but also it is questionable whether they are consistent with the approach previously articulated by the U.S. Supreme Court. As a result, taxpayers and advisors must make a variety of inferences as to what may be done in light of the judgments by various state taxing authorities.⁵⁸

Unfortunately, the Supreme Court declined to hear the *MBNA* or *Lanco* cases,⁵⁹ even though the results conflict with the previous decision by the Tennessee Court of Appeals in *J.C. Penny National Bank*, and arguably with *Quill*. It remains to be seen whether the Court or Congress will step in to provide taxpayers and states with clarification to settle these issues and provide uniformity among states.

ENDNOTES

¹ See J. Hellerstein, "Federal Constitutional Limitations on State Taxation of Multistate Banks," in Report *State and Local Taxation of Banks* (1975), prepared for the Board of Governors of the Federal Reserve System, Senate Comm. on Banking, Housing & Urban Affairs, 92d Cong., 1st Sess., App. 11, 435-436 (Dec. 1971).

² See generally, Hellerstein & Hellerstein, STATE TAXATION ¶6.31.

³ Gregg Mauro, *Establishing Nexus: What is the Effect of a Corporation's Financial*

Activities?, 12 J. OF MULTISTATE TAX'N 9 (Jan. 2003).

⁴ Indiana, Kentucky, Massachusetts, Minnesota, Tennessee and West Virginia have all adopted such statutes. Each statute has some requirement of total assets, deposits or receipts within the state to establish nexus

⁵ *Supra* note 3.

⁶ *Id.*

⁷ *Miller Bros. Co. v. Maryland*, 347 US 340, 74 S Ct 535 (1954).

⁸ *Wisconsin v. J.C. Penney Co.*, 311 US 435,

61 S Ct 246 (1940).

⁹ See *Quill Corp. v. North Dakota*, 504 US 298, 112 S Ct 1904 (1992).

¹⁰ See *Burger King Corp. v. Rudzewicz*, 471 US 462, at 478-83 (1985).

¹¹ *Supra* note 9, at 306-308. The Court cited as examples *National Bellas Hess, Inc. v. Dep't of Revenue of Ill.*, 386 US 753 (1967), *Scripto, Inc. v. Carson*, 362 US 207 (1960), *Nelson v. Sears, Roebuck & Co.*, 312 US 359 (1941), and *Felt & Tarrant Mfg. Co. v. Gallagher*, 306 US 62 (1939).

- ¹² *Supra* note 9, at 307.
- ¹³ *Supra* note 10.
- ¹⁴ *Supra* note 9, at 307.
- ¹⁵ *Id.* at 309.
- ¹⁶ *Id.*
- ¹⁷ See *Complete Auto Transit, Inc. v. Brady*, 430 US 274 (1977).
- ¹⁸ *Id.*
- ¹⁹ *Supra* note 9, at 308.
- ²⁰ *Id.*
- ²¹ *Id.*
- ²² See *Supra* note 9, at 312-13 (It is possible to meet one while failing to meet the other).
- ²³ See *Supra* note 9, at 312-13.
- ²⁴ *Id.*
- ²⁵ See *Orvis Co. v. Tax Appeals Tribunal of New York*, 654 NE 2d 954 (N.Y. 1995). See also, *Magnetek Controls, Inc v. Dep't of Treasury*, 221 Mich. App. 400; 562 NW2d 219 (Mich. Ct. App. 1997) which held that more than 10 visits was sufficient to create nexus; *Town Crier, Inc. v. Dep't of Revenue*, 315 Ill. App. 3d 286, 733 NE2d 780 (Ill. App. Ct., 1st Dist., 2000).
- ²⁶ RESTATEMENT (SECOND) OF AGENCY (1958).
- ²⁷ See, e.g., *Scripto, Inc. v. Carson*, 362 US 207 (1960); *Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue*, 483 US 232 (1987).
- ²⁸ One may argue under *Quill*, that the out-of-state corporation does not have a physical presence; therefore, agency nexus cannot be upheld. However, proponents of this theory suggest that the agency relationship between the in-state taxpayer and the out-of-state corporation creates a physical presence for the out-of-state corporation.
- ²⁹ E.g., *Scripto v. Carson*, 362 US 207 (1960).
- ³⁰ *Scripto v. Carson*, 362 US 207 (1960).
- ³¹ *Tyler Pipe Industries v. Washington*, 483 US 232 (1987).
- ³² *Reifsnyder v. Dougherty*, 301 Pa. 328, 152 A 98 (1930).
- ³³ John P. Barrie and Carole L. Iles, *Attributional Nexus: Taxing Corporations That Lack Sufficient In-State Presence*, 14 J. OF MULTISTATE TAX'N 1 (Mar.-Apr. 1994).
- ³⁴ William G. Nolan, *Crossing the Bright Line: Evaluating Physical Presence in Quill's Shadow*, 7 J. OF MULTISTATE TAX'N 6 (Jan.-Feb. 1998).
- ³⁵ *Supra* note 33.
- ³⁶ Kyle O. Sollie and David J. Gutowski, *What Now for Intangible Holding Companies in the Wake of Lanco?*, 15 J. OF MULTISTATE TAX'N 9 (Jan. 2006).
- ³⁷ *Lanco, Inc. v. Director, Division of Tax'n*, 879 A2d 1234 (N.J. Super. Ct. App. Div., 2005).
- ³⁸ *Lanco v. Director*, 21 NJ Tax 200 (2003).
- ³⁹ *Supra* note 37.
- ⁴⁰ *Lanco v. Director*, 908 A2d 176 (N.J. 2006). *Cert. denied*, 127 Sct 2974 (2007).
- ⁴¹ See e.g., *A&F Trademark, Inc. v. Tolson*, 605 SE2d 187 (N.C. App., 2004). *Cert. denied*, 546 US 821, 126 S. Ct. 353 (2005).
- ⁴² *Supra* note 36.
- ⁴³ *Supra* note 3.
- ⁴⁴ Ky. Rev. Stat. Ann. §136.520 (2008).
- ⁴⁵ *J.C. Penney National Bank v. Johnson*, 19 SW3d 831 (Tenn. Ct. App. 1999).
- ⁴⁶ *West Virginia Tax Commissioner v. MBNA America Bank, N.A.*, 640 SE2d 226 (W.Va. Nov. 21, 2006). *Cert. denied sub nom., FIA Card Services v. Tax Commissioner*, 127 Sct 2997 (June 18, 2007).
- ⁴⁷ W. Va. Code. §11-24-7b(d) (1996).
- ⁴⁸ *Supra* note 46.
- ⁴⁹ *Id.*
- ⁵⁰ *Id.*
- ⁵¹ *Id.* Note, as discussed above a number of state courts in recent years have upheld economic nexus on out-of-state corporations that license trademarks. States have reached this conclusion by holding that *Quill's* physical presence standard is only applicable to sales and use taxes.
- ⁵² Richard Weiss, *MBNA America Bank: A New Standard for Nexus in Franchise Taxation?*, 17 J. OF MULTISTATE TAX'N 1 (Mar.-Apr 2007).
- ⁵³ See *Supra* note 46.
- ⁵⁴ Note, there is also a trend in the states to attempt to impose tax on out-of-state corporations that license trademarks and trade names in the state. In *Geoffrey, Inc. v. South Carolina Tax Commission* 437 SE2d 13 (S.C. 1993), *cert. denied*, 510 US 992, 114 Sct 550 (1993), the South Carolina Supreme Court held that a Delaware holding company (*Geoffrey*) licensing various trade names and trademarks to a corporate affiliate had nexus for South Carolina income tax purposes. *Geoffrey* had no employees, offices or tangible personal property in South Carolina. However, the Court found that since the licensing agreements allowed the use of *Geoffrey's* trade names in the state (from which it derived income), *Geoffrey* had purposely directed its activities toward South Carolina, and the exploitation of its marketplace created "substantial nexus." The Court also noted that the "minimum connection" required by the Due Process Clause is satisfied by the presence of *Geoffrey's* intangible property in South Carolina. Such intangibles included account receivables arising from sales made in South Carolina by the licensee (*Toys R Us*), who had a license to use such trademarks and trade names. This precedent is directly applicable only in South Carolina at this time. However, several states have rules or policy statements that borrow the concept that a corporation licensing trademarks and trade names in a state can be taxable even without a physical presence.
- ⁵⁵ *Supra* note 3.
- ⁵⁶ *Supra* note 52.
- ⁵⁷ *Supra* note 3.
- ⁵⁸ *Supra* note 3.
- ⁵⁹ *West Virginia Tax Commissioner v. MBNA America Bank, N.A.*, W. Va., 640 SE2d 226 (W.Va. Nov. 21, 2006), *cert. denied sub nom., FIA Card Services v. Tax Commissioner*, 127 Sct 2997 (June 18, 2007); *Lanco v. Director*, 908 A2d 176 (N.J. 2006), *cert. denied*, 127 Sct 2974 (2007).

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