DIRECT SELLING

MULTI LEVEL MARKETING

NETWORK MARKETING

AND

SALES TAXES

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EXECUTIVE SUMMARY

- Presently 45 states and the District of Columbia impose a sales tax.
- Only the states of Alaska, Delaware, Montana, New Hampshire and Oregon do not currently impose a sales tax. However, various local jurisdictions in Alaska do impose a sales tax.
- More than 7,500 local jurisdictions (counties, cites, etc.) impose a sales tax.
- Only the States of Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Rhode Island and West Virginia do not currently allow local jurisdictions to impose a sales tax.
- Of the 7,500 local jurisdictions, 7,200 are administered by their respective state.
- The 300 local jurisdictions not administered by their respective states are in Alabama, Alaska, Arizona, Colorado, Idaho and Louisiana.
- There are therefore 300 local jurisdictions that a company must have a separate agreement and register with if it desires to collect all of the sales taxes in the United States.
- Exemptions vary from state to state. Currently there is no uniform definition of exempt products, services or entities among the states.
- Food products are not taxable in 24 states and the District of Columbia.
- Food products are subject to sales tax at a reduced rate in 12 states.
- Vitamins, food supplements and nutritional supplements are not taxable in ten states and the District of Columbia.
- Vitamins, food supplements and nutritional supplements are subject to a reduced rate in the state of Illinois and Utah.
- Dietary supplements are subject to a reduced rate in the state of West Virginia.
- The responsibility for the collection of sales taxes falls on the retailer.
- The definition of “retailer” varies significantly between states and local jurisdictions.
- The States of Kansas, Michigan, Missouri, Texas, Washington, Wisconsin and Wyoming require all direct selling, multi level and network marketing companies to register, collect, and remit sales taxes and will not knowingly allow the independent sellers to register, collect and remit. These states are aggressively seeking companies not in compliance.
- Effective August 1, 2005, the State of Kentucky broadened its sales tax nexus standard to include remote sellers who use in-state affiliates to facilitate remote sales. Whether they will attempt to include direct selling, multi level and networking marketing companies under this standard is not known as of this date.
- On April 9, 2008, the New York Legislature enacted various budget proposals, which included a novel and far-reaching approach to sales tax nexus based on Web site linking arrangements (sometimes called “affiliation agreements”). Under this new law, an out of state Internet seller is presumed to have nexus with New York and thus will be required to collect and remit use tax on all sales to New York if it pays a commission to New York residents in exchange for displaying an Internet link that allows prospective customers to “click through” to an out-of state seller’s Web site. This controversial statute conflicts with basic principles of commerce clause nexus and has already generated at least two lawsuits challenging its constitutionality.

- The remaining states and local jurisdictions have statutory authority to require any company to collect their sales tax, even if that company is not a retailer, if the state or local jurisdiction deems it necessary for the protection and efficient administration of the revenue due. Given the current financial condition of the states and local jurisdictions, it is anticipated that many will become very aggressive and seek to impose this provision.
- The States of Alabama, California, Connecticut, Georgia, Illinois, Indiana, Minnesota, Missouri, New Jersey, New York, North Carolina, South Dakota, Virginia and Wisconsin have "public contracting nexus laws".
- While the states and local jurisdictions have a vast arsenal to exercise control over a company for the collection of sales taxes, companies may rely on Public Law 86-272 (federal constitutional law), which sets forth when a state or local jurisdiction can exercise jurisdiction over the company, thus requiring it to collect sales tax. In addition, the company may rely on two constitutional doctrines: the Due Process Clause and the Commerce Clause.
- The Streamlined Sales Tax Project is an effort created by state governments, with input from local governments and the private sector, to simplify and modernize sales and use tax collection and administration. There is no specific provision in the project for direct selling, multi level or network marketing companies; however, it will simplify the administration of sales taxes for these companies.
- The Internet Tax Freedom Act which places a moratorium on state and local taxes on Internet access and multiple or discriminatory taxes on Ecommerce Internet access was enacted in October 1998. The Act expired on October 21, 2001, and was extended until November 21, 2003 and was extended again until November 1, 2007. On October 31, 2007, President Bush signed the Internet Tax Freedom Act Amendments Act of 2007 which extended the moratorium until November 1, 2014. This new Act also broadened the tax ban to include forms of online communication beyond simple Web access. These changes will protect instant messaging and e-mail, including voice and video messaging services as well as personal storage and other video services regardless of who provides them. It does not prohibit a state or local government from taxing purchases made via the Internet nor does it protect a seller from collecting sales taxes on its sales if it has a legal responsibility to do so.
- Companies that retail products directly to the general public or as a convenience to the retail customers of their independent sellers, in addition to selling at wholesale to their independent sellers, will find it more difficult to defend itself from the responsibility of collecting sales taxes than a company that is only wholesaling.
- Companies that do not collect all the sales taxes still have a legal responsibility to ensure that its sellers are in compliance and must obtain a resale certificate from each of its sellers. These must be maintained by the company and renewed periodically.
- While a company may determine that it does not have a legal responsibility to collect all sales taxes that are imposed, it may have a moral and ethical responsibility to do so.
- A company may voluntarily elect to administer sales taxes. It is important to have a formal written agreement with the various state and local jurisdictions. Do not register without having a formal written agreement.

- Companies that elect to administer all the sales taxes will incur some additional costs, including personnel, software and compliance.
- There are many benefits that a company will derive if it elects to administer all the sales taxes. These include, but are not limited to, conformance with the Sarbanes-Oxley Act; controlling and ensuring compliance with the various sales taxes laws; reducing the compliance burden and associated costs on its sellers; time value of money; vendor compensation; and creating a culture of partnership between the company, its salesforce, and state and local taxing jurisdictions.
- Your company’s credibility depends on your knowledge and compliance with the law, your commitment to your salesforce and customers and your awareness of legal and regulatory trends affecting the industry.
- Companies that do not seriously address the administration of sales taxes but ignore the issue all together may learn too late that they face a significant liability for failure to comply, and a loss of credibility.

Introduction

Every direct selling company, whether new or established, must be aware of its obligations regarding sales tax. The focus of this article is to answer the most frequently asked questions regarding sales taxes for direct selling, multi level and network marketing companies.

Sales Taxes in the United States

Presently 45 states, the District of Columbia and more than 7,400 local jurisdictions (counties, cities, etc.) impose a sales tax.

The states of Alaska, Delaware, Montana, New Hampshire and Oregon do not currently impose a sales tax.

Thirty-six states allow local jurisdictions to impose a sales tax. Only the states of Connecticut, Indiana, Kentucky, Maine, Maryland, Massachusetts, Michigan, Rhode Island and West Virginia do not have local sales taxes.

The majority of the local jurisdictions are administered by their respective state. The states of Alabama, Alaska, Arizona, Colorado, Idaho and Louisiana allow the local jurisdictions imposing a sales tax to self-administer. If a company is collecting sales taxes in these states, it must deal directly with those jurisdictions that are self administered.

Sales tax rates vary state by state and even within the majority of states that have local jurisdictions imposing a sales tax.

Rates are subject to constant change, especially the local jurisdictions.

Exemptions vary from state-to-state; currently there is no uniform definition of exempt products, services or entities among the states. Some of the more common exemptions among the states are food, supplements and clothing.

The states of California, Connecticut, Florida, Indiana, Iowa, Kentucky, Maine, Maryland, Massachusetts, Michigan, Minnesota, Nebraska, Nevada, New Jersey, New York, North Dakota, Ohio, Pennsylvania, Rhode Island, Texas, Vermont, Washington, Wisconsin, Wyoming and the District of Columbia exempt food.

Food is taxed at a reduced rate in the states of Arizona, Arkansas, Colorado, Georgia, Illinois, Louisiana, Missouri, North Carolina, Tennessee, Utah, Virginia, and West Virginia.

The states of Connecticut, Florida, Maryland, Michigan, New Jersey, New York, Pennsylvania, Texas, Vermont, Wyoming and the District of Columbia exempt vitamins and dietary, food and nutritional supplements.

The states of Illinois and Utah impose a reduced rate of tax on vitamins, food supplements and nutritional supplements.

The state of West Virginia imposes a reduced rate of tax on dietary supplements.

The states of Connecticut, Massachusetts, Minnesota, New Jersey, Pennsylvania, Rhode Island and Vermont exempt most clothing from sales tax. In addition, many states have an annual sales tax holiday on clothing (a period of time when clothing is not taxed).

The taxability of delivery charges, freight and shipping and handling varies by state.

The enormous number of taxing jurisdictions results in a substantial compliance burden. A company must determine the correct tax, overcome the complexity of filing numerous returns and making numerous payments, dealing with states and localities that have inconsistent laws and administrative procedures and possibly handling audits that may arise from such a substantial burden.

Sales Taxes Collection Responsibilities

The general rule of law places the responsibility to collect and remit sales on the retailer if the retailer has nexus.

However, be advised that the majority of states have statutory authority to impose the responsibility for collection of sales tax on a seller, even if that seller is not a retailer, if the state deems it necessary for the protection and efficient collection of the revenue due to the state.

Nexus (Public Law 86-272)

A. Definition of Nexus.

In the sales and use tax field, nexus refers to the contacts that exist between a taxpayer and a jurisdiction seeking to obligate the taxpayer to enforce the jurisdiction's sales and use tax laws. Nexus literally means "ties". Well-established principles of federal constitutional law prohibit a jurisdiction lacking contact with a taxpayer from exercising jurisdiction over the taxpayer. Just as a state court cannot render a judgment against a person who is not subject to the court's jurisdiction, neither can a state subject a person to its taxing power. Thus, the United States Supreme Court has ruled that a taxpayer who has no physical presence in a taxing jurisdiction is not subject to the obligation to collect sales/use taxes in that state. (Miller Bros. V. Maryland, 347 U.S. 340 (1954)).

B. Constitutional Basis of Nexus

Two constitutional doctrines, the Due Process Clause and the Commerce Clause, are involved in the determination of whether there are ties between a state and a taxpayer.

1. The Due Process Clause

The Due Process Clause essentially asks whether it is fair for a state to require a taxpayer to enforce its sales and use tax collection laws. To decide what is fair, the courts determine whether the taxpayer's activities in the state benefit from the protection and services afforded by the taxing state. For years, the test for determining whether the taxpayer enjoyed such benefits had been thought to require a physical presence in the taxing state.

With respect to the Due Process Clause, the United States Supreme Court has now repudiated the physical presence test. The current test under the Due Process Clause for deciding if it is fair to tax someone is whether the taxpayer has "purposefully directed sales efforts toward residents of that state." If so, the Due Process Clause, by itself, will not act to bar the imposition of tax on a company that has no physical presence. Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

2. The Commerce Clause

The Commerce Clause is the second federal constitutional doctrine involved in nexus determinations. The Commerce Clause prohibits state taxes that interfere with commerce between the states. A state may tax interstate activities so long as: (1) the tax applies to activities that have substantial ties to the taxing state; (2) the tax is fairly apportioned to reflect the level of activities in the taxing state; (3) the tax does not discriminate against interstate business in favor of purely intrastate business; and (4) the tax is fairly related to services provided by the taxing state.

The Commerce Clause's requirement that there be "substantial" ties to the taxing state is similar to the substantial tie concept under the Due Process Clause but serves a different purpose. Even though it may be "fair" to require a taxpayer to enforce a state's sales and use tax laws (a Due Process concept), the impact of requiring such compliance in a large number of states might add up to an undue burden on interstate commerce. Also, the Supreme Court recognizes that it is difficult for a taxpayer operating in a large number of states to determine what level of activity other than having a physical presence is enough to create nexus. Thus, for the Commerce Clause purposes, there is still a requirement that in order to have nexus, a taxpayer must have a physical presence in the taxing state. Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992).

3. The United States Supreme Court

Nexus controversies have surfaced most dramatically in mail order cases. In 1967, the U.S. Supreme Court ruled that a mail order house that did all

of its solicitation in Illinois by mail and made its deliveries by mail or common carrier could not be forced to collect Illinois sales tax on its sales in the state (National Bellas Hess v. Illinois Department of Revenue, 386 U.S. 753 (1967)). The Court said there were two reasons for not subjecting a company that had no physical presence in a state to a sales tax collection duty. First, under the Due Process Clause of the U.S. Constitution, basic fairness required that before a state could tax someone, that person had to be physically in the state so he would be extracting some benefit from the state in exchange for being subjected to the tax collection duty. Second, the Commerce Clause forbade imposing sales tax collection duties because the multiple reporting responsibilities faced by companies with no physical presence in the state would interfere with interstate commerce.

In the years following National Bellas Hess, the states had increasingly argued that changes in the scope of the mail order business, with annual sales in 1990 exceeding $180 billion, plus changes in the law, meant that the decision had become outmoded. North Dakota was typical of states that enacted legislation that made a company having "economic nexus" by virtue of directing advertising into the state even without physical presence, subject to the sales tax collection duty. Illinois also passed economic nexus legislation.

Quill sells office supplies by mail. It had no salesmen or place of business in North Dakota but solicited business by mail, telephone, fax and computer. It delivered its product by common carrier. North Dakota assessed a tax against Quill, which the State Supreme Court upheld.

The U.S. Supreme Court ruled that Bellas Hess was still good law. It said that the Commerce Clause still required that a taxpayer have a physical presence in a state before the state can subject it to the sales tax collection duty. In part, this was because a contrary result could overwhelm mail order businesses with the obligation to file thousands of tax returns. Also, the Court said that companies were entitled to rely on Bellas Hess in arranging their affairs. Bellas Hess set up a "bright-line test" requiring physical presence. That is a reasonable test.

However, the Court also said that the Due Process clause no longer required a physical presence. This meant Congress could authorize the imposition of sales tax collection duties because it has the power to concede to the State's power to regulate interstate commerce.

C. Activities Which Constitute Nexus

1. Presence of Agents, Employees or Other Representatives in the State

The physical presence test is clearly satisfied when a taxpayer has employees in the state (Reader's Digest v. Mahon, (Il. 1970)). Even if the employees simply travel through the state soliciting orders (General Trading Co. v. State Tax Commissioner, 322 U.S. 335 (1994)), or there is only one employee in the state (Tyler Pipe Industries v. Washington, 483 U.S. 282 (1987)) there is enough contact to establish nexus.

New York's highest court held that a Vermont mail order seller whose employees visited New York in person had nexus (In the Matter of Orvis Company v. Tax Appeals Tribunal; In the Matter of Vermont Information Processing, Nos. 138 and 139, N.Y. Ct. of App., June 14, 1995). Orvis sold mail order outdoor clothing and equipment. New York retailers stocked Orvis goods. During a three-year period, Orvis employees came from Vermont 12 times to visit the New York retailers. Vermont Information Processing sold software by mail. Its employees made occasional visits to New York to resolve problems, give instructions and install software. The Court of Appeals ruled that Quill does not require a "substantial physical presence" but that the vendor's presence must be "demonstrably more" than a "slight presence." The physical presence may be shown by the presence of the vendor's employees in the taxing state or by the conduct of economic activities in the taxing state by the vendor's personnel or on its behalf. In both cases, the employee visits were enough to confer nexus.

The furthest scope of this doctrine appears in Scripto v. Carson, where the U.S. Supreme Court found Scripto was subject to Florida's sales tax because it had independent contractors soliciting sales in the state. The independent sales representatives sent orders to Scripto's headquarters outside Florida for acceptance but the Court found that there was enough activity in the state by the representatives to subject the company to the obligation to collect the state's sales tax.

2. Affiliate Nexus

Another tactic employed by states from time to time is the assertion of nexus by affiliation. The activities of a parent corporation in soliciting sales and performing activities on behalf of a subsidiary can create nexus for the subsidiary on an agency basis (Western Acceptance Co. v. Florida Dept. of Revenue, So. 2d 492 (Fla. App. 1st Dist. 1985)).

Other cases have expressly refused to subject an out-of-state mail order subsidiary to nexus because of in-state activities by the parent retailer or

related subsidiary that have stores in the state (Bloomingdale's By Mail Ltd. v. Pennsylvania Dept. of Revenue (Pa. 1989); SFA Folio Collections v. Bannon, (Conn. 1991)). In SFA Folio Collections v. Tracy, (Ohio S. Ct., August 16, 1995), the Ohio Supreme Court ruled that a mail order subsidiary owned by a parent that also operated two Ohio retail stores was not subject to Ohio use tax collection obligation. The court determined that the mail order subsidiary itself had to be physically present in Ohio to confer nexus (that the presence of an affiliated corporation was insufficient). In Current, Inc. v. State Board of Equalization, 24 Cal. App. 4th (Cal. App. Ct. 1994), an out of state mail order vendor's parent corporation maintained a physical presence in California. The State Board of Equalization attempted to require the mail order vendor to collect use tax on its sales to California customers based on the presence of its parent corporation. The Court held that because the parent did not solicit business, nor act as an agent for its mail order subsidiary, and since both were separately operated, the physical presence of the parent could not be attributed to the subsidiary, simply on the basis of ownership. In Borders Online, LLC v. State Board of Equalization, 2005 Cal. App. LEXIS 875 (1st Dist. May 31, 2005), the court determined that an internet seller with no physical presence in California was required to collect and remit on its internet sales to California residents. Borders Online LLC, is a dot.com affiliate of Borders Inc., a company that owns and operates a chain of stores in the country. Borders Online, LLC, referred to its customers to the in-state stores for returns and customer service. The court concluded that this relationship satisfied the California statutes and created "substantial nexus."

3. Independent Agents

The use of independent agents (as opposed to employees) may create nexus for sales and use taxes. In Scholastic Book Clubs v. State Board of Equalization (Cal. 1989), the court found that teachers who solicited books sales in return for discount merchandise from an out-of-state mail order seller were the seller's agents and subject to California taxing jurisdiction. However, the creation of an agency depends on the facts of each case. Where there is a contractual relationship and the in-state party is acting for its own benefit, there is no agency (L.L. Bean v. Pennsylvania, (Pa. 1986)).

However, In Pledger v. Troll Book Clubs, 316 Ark. 195, 871 S.W.2d 389 (Ark.1994), the court refused to find that there was sufficient control over the teachers by a company that essentially operated the same way as Scholastic Books (See Troll Book Clubs v. Tracy, Ohio Board of Tax Appeals, 1994 Ohio Tax Lexis 1374 (8/19/94)). However, the Kansas Board of Tax Appeals found that teachers soliciting sales of books were

apparent agents of the book club (In The Matter of Scholastic Book Clubs, BTA No. 93-16709-DT (8/7/95)).

4. Property in a State

The maintenance of property in a taxing jurisdiction can subject a taxpayer to nexus. In Nelson v. Montgomery Ward and Nelson v. Sears Roebuck (U.S. Supreme Court 1941), the Court found that the presence of retail stores in the state subjected the companies to sales tax collection obligations on mail order activity and other retail stores. Also, the same result was found in National Geographic Society v. California (U.S. Supreme Court, 1977). Moreover, a company that has paper or catalogs at a printer, film at a photographer, pallets at a customer, inventory, or dies at a vendor, risks having nexus in that state. However, the Quill decision held that Quill's maintaining software in North Dakota and selling merchandise on approval did not create nexus; a slight presence does not create nexus.

States may attempt to assert sales tax nexus over a person who has intangible property in a state. For example, it may claim that the licensing of a trademark creates nexus. This position is based on Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E. 2d 13 (S.C. 1993) and Lanco Inc. v. Director, N.J. Div. of Taxn., No. A-89, 10/12/06.

5. Border Sales

Retailers near state borders can be subject to a sales tax collection obligation if they regularly direct advertising into the border state and make deliveries and repairs using their own vehicles and employees (Brown's Furniture v. Wagner, (Ill. 1996), Good's Furniture House v. Iowa State Board of Tax Review, (Iowa, 1986)). However, merely contacting independent installers who installed carpeting sold to customers in the border state did not give rise to a sales tax collection obligation. (Mississippi State Tax Commission v. Bates (Miss. 1990)).

6. Trade Shows

Attending a trade show is unlikely to create nexus; but where the representative attending the show solicits sales there can be a serious risk that the solicitation will create nexus. Beware renting displays or distributing catalogs at the trade show. However, in Share International v. Florida Dept. of Revenue (8/21/95), the Florida Supreme Court decided that selling at trade shows for several days each year was not sufficient to create nexus.

7. Local Advertising

Advertising purposely directed to a state can be an important element in establishing nexus if there is some form of activity in that state. Merely delivering solicitations through the mail or by common carrier is protected under Quill. Fax and telephone solicitation is also protected if the goods are delivered by common carrier or by mail.

However, beware of freestanding inserts, which are delivered with the newspaper, as opposed to the mere purchase of advertising space in the newspaper. The insert could be used as a basis for arguing to the state that the newspaper has become a local agent for making ad deliveries.

8. Economic Nexus

Economic nexus is currently being used by many states to require companies without a physical presence but selling in their state the responsibility for collecting and remitting sales taxes.

9. Web-Related Activities

Nearly every company in today's current business environment has a Web site to promote or sell products, communicate with their independent sellers or provide customer service.

Due to the inherently interstate nature of Internet communications, these kinds of activities are often overlooked when a company analyzes its nexus risks in any given state.

Some states have specifically addressed the nexus consequences of maintaining a Web site. Not all states adopt the same approach. In general, however, it makes a difference for nexus purposes where the server is located. It also makes a difference who owns it.

In summary, it is important for companies to review the nexus stance taken in the state or states where Internet hosting or Web site infrastructure is located. Owning or using a Web site in some states may inadvertently create nexus for sales taxes.

D. States Asserting Nexus/ Special Procedures for Collection of Sales Taxes

1. Alaska

Alaska is the only state that authorizes local jurisdictions to impose a sales tax without a corresponding state sales tax.

Presently over 100 cities and boroughs have adopted a sales tax.

The rates vary by jurisdiction.

The majority of these jurisdictions will not allow companies in this industry to register, collect and remit on behalf of its independent sellers. Their preference is to allow only local vendors do so.

2. Arkansas

In 2001, the state passed Act 922 which amended Code § 26-53-124 of their sales and use tax law to provide that out of state vendors with significant connections to the state of Arkansas must collect the sales and or use tax on sales made to Arkansas customers.

The provisions of this act were effective January 1, 2002.

Companies having independent sellers in the state should review this section to determine if they should enter into an agreement and register.

3. California

Under Revenue and Taxation Code Section 6015(b) of the California Transactions (Sales) and Use Tax Law, the state regards persons as retailers if they are selling tangible personal property through salespersons, representatives, peddlers, canvassers or agents who operate under or obtain the property from them.

Revenue and Taxation Code section 6203 of the California Transactions (Sales) and Use Tax Law, defines circumstances when a retailer is considered to be engaged in business in the state for sales and use tax purposes including (but not limited to):

- Maintaining, occupying or using any type of office, sales room, warehouse or other place of business in California. This includes use that is temporary, indirect or through an agent or other representative.
- Having any kind of representative operating in the state for the purpose of taking orders, making sales or deliveries, installing, or assembling tangible personal property.
- Making repairs or providing maintenance or service to property sold, whether by employees, agents or other representatives.
- Deriving rentals from a lease of tangible personal property located in California.

Due to the large deficit the state currently has, it has become very aggressive and has notified several direct selling, multi level and network marketing entities that they must register and collect the sales taxes imposed by the state and its local jurisdictions. The state is also attempting to obtain sales taxes on prior sales.

In addition, the state is requiring direct selling, multi level and network marketing companies collecting their sales tax to include in the agreement (or addendum to the agreement) between the company and its independent sellers the following statement "The company will be responsible for the collection and remittance of all applicable California sales & use taxes on the retail selling price of the product. The company cannot accept California resale certificates from any of its independent sellers unless they hold a California sales and use tax permit and sell the products through a storefront".

See California Sales and Use Tax Annotations 480.0355.

Companies having independent sellers in the state should collect sales tax on their sales in the state.

4. <u>Connecticut</u>

Connecticut amended §12-213(a) (20) which defines their definition of "carrying on or doing business" effective July 13, 2005, for all taxable years commencing on or after January 1, 2005.

A new sub-section was added, which provides that a company that participates in a trade show or shows at the convention center (as defined in section 32-600(30)) shall not be deemed to be carrying on or doing business in Connecticut, regardless of whether the company has employees or other staff present at such trade show, provided such company's activity at such trade show is limited to displaying goods or promoting services, no sales are made, any orders received are sent outside the state for acceptance or rejection and are filled from outside this state, and provided that such participation is not more than fourteen days in the aggregate during the company's income year for federal tax purposes.

5. <u>Hawaii</u>

The state of Hawaii imposes a general excise tax. This tax applies to all retail sales, wholesale sales and commissions (bonus) payments paid to independent sellers.

The current rate on retail sales and commission (bonus) payments is 4% and the current rate on wholesale sales is ½% (.005).

Companies that collect and remit the excise tax on behalf of their independent sellers are required to enter into a "Multi-Level Marketing Company Excise Tax Agreement".

Companies entering into this agreement must collect the excise tax on all retail sales, pay the excise tax on their wholesale sales and deduct and remit the excise tax on all commission (bonus) payments paid to their independent sellers.

The state requires companies to pay the excise tax on the total of their retail sales including the tax collected. Therefore the effective rate is 4.166%. Companies are permitted to charge the effective rate on their retail sales.

Effective January 1, 2007, the City and County of Oahu imposes an excise tax of 0.5%. The total rate in the city and county is 4.5%. The effective rate will is 4.712%. Companies are permitted to charge the effective rate on their sales.

For additional information, see Tax Facts 96-1, General Excise vs. Sales Tax.

6. Kansas

Under Kansas Statute 79-3702 and Administrative Regulation 92-20-7, direct selling, multi level marketing and network marketing companies are required to register, collect and remit sales taxes on behalf of their independent sellers. The independent sellers are not allowed to register as retailers with the State of Kansas.

This position is reiterated in Private Letter Rulings P-2003-008, P-1999-259, P-1998-261, P-1998-211, and P-1998-29, Notice 00-06, Opinion Letters 0-2001-004 and O-2000-043 and Questions and Answers #79 (August 1, 1991).

In the Matter of Family Eagles (Kansas Supreme Court, April 18, 2003), the company, a Texas corporation, did not have any physical presence in Kansas except independent sales representatives (ISR's) who were Kansas residents. The company sells coins, jewelry and other products through commissioned ISRs. All sales are made through an ISR; there was no other solicitation through telemarketing, advertising, or catalog. All orders were accepted and shipped from the company's location in Texas. The

court affirmed that independent contractors in the state does create nexus for sales and use tax collection.

7. Maryland

The State reiterated its nexus position in their Fall 2005 ReveNews.

Out-of-state vendors have nexus for sales and use taxes purposes if they have offices, distribution, storage or other facilities for the sale of tangible personal property or taxable service in Maryland or have an agent, salesperson, repairman, or other representative in the state or that enters the state on a regular basis.

The state did not define representative, site any rulings or court cases or give any examples.

In a letter dated May 22, 2006 from the State of Maryland Revenue Administration Division-Legal, the division stated that if a company will collect and remit sales tax on behalf of its independent sellers in the state, it **must** enter into an agreement with the state to do so. If it does not enter into this agreement, the independent sellers must obtain their own sales tax license collect and remit directly.

8. Michigan

Revenue Administrative Bulletin 1999-1 describes the jurisdictional standard to determine whether a seller is subject to the collection of Michigan's sales tax.

The state's position is that direct selling, multi level and network marketing companies have nexus for the collection of their sales tax due to the presence of their independent sellers.

The state is aggressively seeking out companies that have independent sellers in the state and are not currently collecting the sales tax.

In addition, the state is requiring all companies to file and pay their Single Business Tax.

Presently the state is allowing companies to file a "Voluntary Disclosure Request" to avoid additional taxes, interest and penalties for prior periods and to register for, collect and pay these taxes for all future years.

9. Missouri

Section 144.605(14) and Reg. Section 12 CSR 10-114.100 (effective June 30, 2005) of the Missouri Revised Statutes determines when a vendor has sufficient nexus requiring registration with the state to collect and remit sales/use taxes on its sales in the state. Under this new regulation, an out-of-state vendor must register, collect and remit sales/use taxes when the vendor has physical presence in the state.

Physical presence is defined under this regulation as (1) owning or leasing tangible personal or real property in the state; or (2) having employees, agents, representatives, independent contractors, brokers, or others that reside in, or regularly and systematically enter into the state on behalf of the vendor.

The state's position is that direct selling, multi level and network marketing companies that have independent sellers in the state must enter into an agreement, register collect and remit or obtain resale certificates from their independent sellers.

In addition, the state has taken the position that all direct selling, multi level marketing and network marketing companies having independent sellers in their state have nexus for income tax. See Amway Corporation v. Director of Revenue, 794 S.W.2d 666 (1990).

10. Nevada

Pursuant to a Temporary Regulation adopted October 4, 2004, the State Tax Commission has revised its sales tax collection agreement with direct selling, multi level marketing and network marketing companies.

The revised agreement contains various provisions requested by the Direct Selling Association for its member companies.

Unless a direct selling company enters into a signed Sales/Use Tax Collection Agreement, approved by the Tax Commission, it is not authorized to operate as a Direct Sales Organization and may not collect and remit taxes on behalf of its independent sellers.

If your company is collecting and remitting sales taxes on behalf of your independent sellers and does not have an agreement or has the prior version, you must contact the state and request that your company be allowed to enter into the new agreement.

11. New Mexico

Based on the Dart decision, the state will impose its income tax and franchise tax on direct selling, multi level marketing and network marketing companies that have the same or similar facts to this case.

See In The Matter Of The Protest of Dart Industries, Inc. ID No. 02-1522410-00-3, Assessment No. 1972584, 04-03 for full explanation.

In addition, based on the Dell Catalog Sales decision, the state will impose its gross receipts tax on companies having an indirect physical presence in the state.

See In The Matter Of The Protest of Dell Catalog Sales, L.P. ID No. 02-416593-00 0, Assessment No. 2549063, 06-11 for full explanation.

Presently, the state is reviewing its gross receipts collection agreement (Form TS-22) with direct selling, multi level marketing and network marketing agreement to determine if the company must collect and remit the tax on both the sale of tangible personal property/services and bonus payments to their independent sellers or only on the sale of tangible personal property/services.

Many companies have requested that it only be responsible for the collection and payment of the tax on its sales of tangible personal property/services and not on bonus payments due to the costs involved.

12. New York

On April 9, 2008, the New York Legislature enacted various budget proposals, which included a novel and far-reaching approach to sales tax nexus based on Web site linking arrangements (sometimes called "affiliation agreements"). Under this new law, an out of state Internet seller is presumed to have nexus with New York and thus will be required to collect and remit use tax on all sales to New York if it pays a commission to New York residents in exchange for displaying an Internet link that allows prospective customers to "click through" to an out-of state seller's Web site. This controversial statute conflicts with basic principles of commerce clause nexus and has already generated at least two lawsuits challenging its constitutionality.

It is probable that the state may attempt to apply this new law to companies in this industry.

13. Oklahoma

Under Tax Commission Rule 710:65-19-214, (a) vendors operating a multi-level distribution system will collect tax on the gross receipts of the retail value of the products sold. This tax is to be passed through the multi-level distributors, who will not be required to hold an Oklahoma sales tax permit, to the consumers/users. (b) For example, the vendor who sells to distributors, who in turn sell to consumers/users at home parties, is required to collect, report, and remit sales tax on the total amount of gross receipts received by the vendor's distributors from the sales of tangible personal property or taxable services. The distributors will collect the tax from consumer. (c) Shipping and handling charges associated with the shipment of multi-level sales merchandise to the distributor or the distributor's customers are not subject to sales tax, if separately stated.

There is currently a disagreement between some multi-level companies and the Tax Commission as to whether the tax must be collected on the suggested retail price or the actual sales price.

A ruling to clarify this issue is pending with the Office of the General Counsel.

14. Pennsylvania

The State of Pennsylvania imposes a sales/use tax, corporation income tax and capital stock/foreign franchise tax.

The state is asserting nexus for their capital stock/foreign franchise tax on all direct selling, multi level marketing and networking companies, even if the company is not a domestic corporation and has no property or employees in the state. The state’s position is that if the company has independent sellers in the state, it has nexus for this tax.

The state has not at this time, asserted nexus for their sales/use tax or corporation income tax on companies whose only connection with the state is that it has independent sellers in the state.

15. South Carolina

On September 5, 2007, the Department issued Revenue Ruling 07-03 “Nexus Creating Activities for Sales and Use Taxes’.

The state has not at this time, used this ruling in an attempt to assert nexus for their sales/use tax on companies whose only connection with the state is that it has independent sellers in the state.

16. South Dakota

South Dakota Codified Law 5-18-2.1, effective July 1, 2003, states, "that no public corporation may purchase goods or services from any retailer, if the retailer or any affiliate of the retailer fails or refuses to collect and remit sales and use tax on any sale delivered by any means to a location within South Dakota."

This section defines a retailer and affiliate as follows:

- A retailer is any person performing services in this state or engaged in the business of selling tangible personal property for use, storage or other consumption.
- An affiliate is any person who directly owns or controls, is owned or controlled by, or is under common ownership or control with, another person.

This law is intended to require all businesses and their affiliates selling tangible personal property or providing services to public corporations in the state to register for, collect and remit to South Dakota sales taxes.

17. Texas

Under Texas Tax Code Section 151.024 and Rule 3.286(a)(3), the state considers direct selling, multi level marketing and network marketing entities to be "retailers" and responsible for the collection of sales taxes and will not issue a sales tax license to an independent seller. This has been the position of the state since 1984.

The State has reiterated this position in numerous published letters, rules and hearings and its Tax Policy News and is very aggressive in obtaining compliance from direct selling, multi level and network marketing companies.

To ensure compliance, the state has established the Business Activity Research Team (BART) which is a dedicated staff of professionals to contact all companies in this industry that are conducting business in the state but not registered.

See Texas **Tax Policy Division Letters** of September 2, 2004 (200409775L), April 28, 2004 (200404214L), October 8, 2002 (200210492L), July 24, 2002 (200207313L), June 21, 2002 (200206212L), April 30, 2002 (200204023L), July 31, 2001 (200107395L), July 31, 2001 (200107390L), May 23, 2001 (200105249L), May 16, 2000 (200005301L), April 12, 2000 (200004182L), September 15, 1999 (9909685L), September 14, 1999

(9909678L), July 13, 1999 (9907556L), July 9, 1999 (9907537L), June 11, 1999 (9906483L), June 8, 1999 (9906474L), April 16, 1999 (9904358L), April 15, 1999 (9904414L), April 14, 1999 (9904379L), March 18, 1999 (9903278L), February 4, 1999 (9902238L), February 3, 1999 (9902170L), September 18, 1998 (9809822L), August 4, 1998 (98087146L), July 28, 1998 (9807699L), July 1, 1998 (9807763L), June 22, 1998 (9806569L), March 25, 1998 (9803418L), January 22, 1998 (9801182L), October 2, 1997 (9710933L), July 16, 1997 (9707595L), May 27, 1997 (9705474L), May 23, 1997 (9705477L), September 5, 1996 (9609955L), August 14, 1996 (9608L1426A05), August 14, 1996 (9608487L), July 24, 1996 (9607L1426A08), July 10, 1996 (9607L1426A04), February 5, 1996 (9602L1398G14), July 28, 1995 (9507960L), March 15, 1995 (9503141L), December 16, 1994 (9412825L), November 23, (19949411770L), November 8, 1994 (9411692L), February 3, 1993 (9302L1220A03), October 1, 1991 (9110L1136A04), July 1, 1991 (9107L1119E10), March 8, 1989 (8903L0928F12), July 1, 1988 (8807L0888C04), June 1, 1986 (8606L0742E09), March 17, 1986 (8603L0719E07), November 1, 1985 (8511L0678E03), October 1, 1984 (8410L0595E12), May 1, 1984 (8405L05777C09), April 1, 1984 (8404L0577C14), February 27, 1984 (8402L0559A13), October 27, 1983 (8310L0535C06), **Rules** dated April 13, 2005 (200504058R) and September 25, 2002 (200209455R), **Hearings** 42,368 (200303874P), 37,308 (200002391H) and 32469 (9705479H) and **Tax Policy News** Volume XVII, Issue 8- August 2007.

Companies having independent sellers in the state must establish procedures to be in compliance.

18. Utah

The state will permit direct selling, multi level and network marketing companies to register, collect and remit on behalf of their independent sellers if the company has entered into an agreement with the state.

The state's position is set forth in Letter Ruling 02-022 (October 9, 2002). The state's preference is to have direct selling, multi level marketing and network marketing companies enter into an agreement, register, collect and remit in lieu of having each independent seller register, collect and remit.

If a company is not collecting, it must obtain a resale certificate from its independent sellers.

19. Washington

The state has taken the position that direct selling, multi level marketing and network companies having independent sellers in their state must collect and remit sales taxes on behalf of their independent sellers.

The state does not impose an income tax. However, the state does impose a Business and Occupation (B & O) tax on both the retail and wholesale transactions of tangible personal property and services.

Rule WAC 458-20-246 provides an exemption from the B & O tax for direct selling, multi level marketing and network marketing companies that do not have nexus.

However, in a determination dated October 9, 2006 in the matter of Melaleuca, Inc., the court determined that the company did not qualify for the exemption under Rule WAC 458-20-246 because it accepted orders directly from the retail customers of its independent sellers.

The decision is being appealed.

Other companies in the industry can expect to be contacted by the Department of Revenue regarding their method of selling to and through their independent sellers. If contacted you may request that the matter be held pending the outcome of the appeal.

In addition, the state is contacting companies in this industry requesting that the company complete and return a "Business Activities Questionnaire". The purpose of this questionnaire is to determine if the company, or a third party compensated by the company, is providing any services of any nature in the state.

These services include maintenance and repairs, training, installation, construction contracts or "services in relation to establishing or maintaining sales in the state".

If the company is providing any services directly or through a compensated third party of any nature in the state, the state is requiring the company to file and pay the B & O tax, including penalties and interest for the previous four years and payment for all future periods.

The state is also sending letters to companies that have independent sellers in the state that are not registered. The purpose of this letter is to determine if the company's independent sellers are in compliance and that the company has obtained resale certificates from the independent sellers.

The state is very aggressive in ensuring that there is total compliance from the company and its independent sellers.

The state's current position based on the Melaleuca, Inc. decision is as follows:

> If a direct selling company is not otherwise subject to the B&O tax and ***only*** makes sales to their "Independent Sellers" and retail customers must purchase product(s) from the "Independent Seller", the state will regard the company as exempt from the B&O tax.
>
> However, if the company makes sales directly to a retail customer that places and order via the internet, fax, telephone, or mail, the company will be responsible for payment of the B&O as follows:

- **Retailing** The company is responsible for the B&O tax on all retail sales that it had under the retail classification. These are sales made directly to a retail customer regardless of whether an independent seller receives any credit (bonus or profit) on the sale.
- **Wholesaling** The company is responsible for the B&O tax on all its sales to its independent sellers under the wholesale classification. The tax base will be the selling price (generally the wholesale price) to the independent sellers.
- **Membership Fees** If the company makes any sales to a retail customer, the membership fees that it receives are now subject to the B&O under the services classification.

The above position is based on the company having an Agreement (a No B&O Agreement-there are different Agreements available) with the Department for the collection and payment of the State and Local sales taxes and litter tax.

If the company does not have an Agreement, all of its sales will be subject to the B&O tax under the retailing classification.

20. Wisconsin

The state notified several direct selling companies that they have nexus for its sales and income taxes. The state is demanding that the companies file and pay these taxes for the prior 5 years and for all future years.

The state's position is based on its opinion that the companies have "control" over their independent sellers based of its rules and procedures as set forth in its independent seller's manual.

In all cases, the only contacts with the state were that the companies had independent sellers in the state These companies had no employees or inventory nor did they own, lease or rent property of any nature or provide any services in the state.

21. Wyoming

The State of Wyoming requires licensing of all non-resident businesses wholesalers and retailers to obtain a sales/use tax license if they meet the statutory definition of a "vendor" under W.S.39-16-101(a) (x).

The state's position is that companies having even one independent seller in their state is a "vendor" and therefore must register, collect and remit sales/use tax on their sales in the state.

22. Public Contracting Nexus States

The States of Alabama, California, Connecticut, Georgia, Illinois, Indiana, Minnesota, Missouri, New Jersey, New York, North Carolina, South Dakota, Virginia and Wisconsin have amended state procurement codes and public contracting laws in an effort to acquire nexus over out-of-state sellers.

These "public contracting nexus laws" prevent a seller from receiving public procurement contracts unless it and all affiliated sellers collect and remit tax on sales to in-state residents. As a practical matter, the inability to sell to institutional or governmental purchasers can have an impact on business operations.

The Streamlined Sales Tax Project

The Streamlined Sales Tax Project (SSTP) is an effort created by state governments, with input from local governments and the private sector, to simplify and modernize sales and use tax collection and administration. The project's proposals will incorporate uniform definitions within tax bases, simplified audit and administration procedures, and emerging technologies to substantially reduce the burdens of tax collection. This project is focused on improving sales and use tax administration systems for both Main Street and remote sellers for all types of commerce.

The key features of the Streamlined Sales Tax System include:

- **Uniform definitions within tax bases.** Legislatures still choose what is taxable and exempt but will use the common definitions for key items in the tax base.
- **Simplified exemption administration for use and equity-based exemptions.** Sellers are relieved of the "good faith" requirements that exist in current law and

will not be liable for uncollected tax. Purchasers will be responsible for incorrect exemptions claimed.

- **Rate simplification.** States will be responsible for the administration of all state and local taxes and the distribution of the local taxes to the local governments. State and local governments will use common tax bases and accept responsibility for notice of rate and boundary changes. States will be encouraged to simplify their own state and local tax rates.
- **Uniform sourcing rules**. The states will have uniform sourcing rules for all property and services.
- **Uniform audit procedures.** Sellers who participate in one of the certified Streamlined Sales Tax System technology models will either not be audited or will have a limited scope audit, depending upon the model used.
- **Paying for the system.** To reduce the financial burdens on the sellers, states will assume the responsibility for implementing the Streamlined Sales Tax System.

Participation in the system by both vendors and states is voluntary. Also, registration by vendors in the Streamlined Sales Tax System does not infer nexus for business activity or income tax purposes.

The threshold for enactment of the Streamlined Sales and Use Tax Agreement was met in June 2005 and became effective on October 1, 2005.

Companies had until midnight September 30, 2006, to register under the system and qualify for the no-look-back amnesty in the 13 states that are full members of the project. In the seven associate member states, amnesty is still available.

The Direct Selling Association held a meeting with the State and Local Government Advisory Council to the Governing Board of the Streamlined Sales and Use Tax Agreement in November 2005.

It is the opinion of the Council that companies in this industry will still need to enter into an agreement with the states even if they register under the SST.

The Internet Tax Freedom Act

The Internet Tax Freedom Act which places a moratorium on state and local taxes on Internet access and multiple or discriminatory taxes on Ecommerce Internet access was enacted in October 1998. The Act expired on October 21, 2001, and was extended until November 21, 2003 and was extended again until November 1, 2007. On October 31, 2007, President Bush signed the "Internet Tax Freedom Act Amendment Act of 2007" which extended the moratorium until November 1, 2014.

The new legislation also broadened the tax ban to include forms of online communication beyond simple Web access. These changes will protect instant messaging and e-mail, including voice and video messaging services as well as personal storage and other video services regardless of who provides them.

It does not prohibit a state or local government from taxing purchases made via the Internet nor does it protect a seller from collecting sales taxes on its sales if it has a legal responsibility to do so.

The ITFA does not, as some have asserted, preclude sales and use taxes on any and all commerce conducted over the Internet. State and local jurisdictions are allowed to impose sales and use taxes on all such electronic sales, provided that the tax (and its rate) are the same as that which would be imposed on the transactions if they were conducted in a more traditional manner, such as over the phone or through mail order.

The ITFA is intended to prevent any jurisdiction from imposing special taxes on Internet transactions, other than such taxes that a jurisdiction already has the ability to impose.

The ITFA also prohibits state and local jurisdictions from imposing taxes on Internet access charges, and protects against the imposition of new tax liability for consumers and vendors involved in commercial transactions over the internet.

Sarbanes-Oxley

State and local taxes have typically been an autonomous function in many companies because of their highly specialized nature, particularly sales and use taxes, and because of their lesser significance, in terms of dollars, when compared to federal income taxes. But Sarbanes-Oxley makes the state and local function much more closely related to the rest of the accounting function as companies and professionals working in these areas must start to develop documentation and procedures to ensure they meet the standards set under Section 404 of Sarbanes-Oxley and also Auditing Standard No. 2 of the Public Company Accounting Oversight Board. Informal systems will not meet these strict new standards to show the presence of the effectiveness of internal control procedures.

Collection of Sales Taxes by a Direct Selling, Multi Level Marketing or Network Marketing Company

Based on current law, a company with independent sellers in the states of Kansas, Michigan, Missouri, Texas, Utah, Washington, Wisconsin and Wyoming must be registered and collect and remit sales taxes imposed by these states and any local jurisdictions.

A company should review its operations in all states to determine if it must legally enter into an agreement, register, collect and remit sales tax with any additional states.

Companies are encouraged and allowed to enter into a voluntary agreement for the collection of sales taxes in the other states and jurisdictions.

In practice, states and local jurisdictions will accept an agreement on a prospective basis and will not require any information or payment of taxes prior to the date of the agreement.

A company entering into an agreement with a state that has local sales taxes that are administered by the state will be required to collect the local taxes. A separate agreement is required for each local jurisdiction that is self-administered.

States will require the company to collect on all its sales whether to or through their independent sellers or Web site.

If a company elects not to collect and remit sales taxes for every state and local jurisdiction, it must advise its sellers to do so. The company would be well advised to ensure that its sellers register and remit the appropriate sales taxes. The company may do this by obtaining a valid resale certificate (not a copy of their sales tax license) from each seller from whom the company is not itself collecting taxes.

If a company makes a decision to accept the responsibility to administer sales taxes, it is important to review all aspects of doing so including but not limited to:

- <u>Agreements</u>

  Do not register or begin collecting without having an agreement with any state or local jurisdiction.

  If your company is currently collecting sales taxes without an agreement you should obtain one immediately.

  If a company is going to register, collect and remit sales taxes on behalf of its independent sellers all of the states and home rule locals require that the company enter into an agreement or letter of understanding.

  Collecting sales taxes without an agreement may create a misunderstanding with the state or local jurisdiction that could lead to a significant liability for the company.

  A direct selling company that registered, collected and remitted Virginia state and local sales taxes without an agreement was assessed by the state for failure to comply and was required to pay additional taxes, penalties and interest. See State of Virginia Public Document 98-122.

  A direct selling company that registered, collected and remitted New York State and local taxes more than 10 years without an agreement was assessed $1.1 million for failing to have and comply with the terms of the agreement required by the state for direct selling, multi level and network marketing companies.

  Other companies have had similar experiences that have resulted in a liability to the company.

There are many important elements that must be set forth in the agreement including but not limited to nexus, effective date, basis for collection, adjustments, required records, special forms, other taxes imposed by the state or jurisdiction, prior periods and any disclosures.

Some states and local jurisdictions will not accept a formal agreement. In these cases the company should prepare a letter of understanding and request approval. In all situations, your agreement or letter of understanding must set forth all important facts of the arrangement.

Some states and local jurisdictions have their own agreement. Review these agreements in detail to ensure that it will do not impose any requirements that do not follow how your company will administer sales taxes. A company should request changes or clarify any items in writing.

- Accounting and Records

  States and local jurisdictions have substantial power to assess taxpayers without adequate records. Sellers must maintain records of all sales invoices, adjustments, exemption certificates, and other pertinent records relating to sales and tax collections.

  All invoices must show the ship-to address, a description of each product or service sold including delivery/shipping and handling charges, the wholesale and suggested retail price and sales tax. Sales tax and delivery/shipping and handling charges must be separately stated.

  A company must maintain monthly detailed reports of sales by state and local taxing jurisdiction.

  These records must be maintained generally three to five years after the return is filed.

- Notification to Independent Sellers

  It is important that the company notify its independent sellers of its agreements with the states and local jurisdictions.

  The company should explain in writing its administration of the taxes and what the responsibilities and any special requirements are for the independent sellers.

  This notification should be made prior to the company collecting any taxes.

- Software

  The administration of sales taxes may seem overwhelming. Fortunately, tax compliance software vendors and service providers have developed many different applications to assist businesses.

  Applications are available to assist all businesses from small to large. Nearly all applications handle taxability of products and service, determination of tax rate and jurisdiction, monthly updates, monthly sales and sales tax reports by state/local jurisdiction and preparation of returns that must be filed.

  It is important that all products are properly setup for taxability within the software and testing is done. Invoices should show both the selling price to the independent sellers and suggested retail price.

- Personnel

  A company should assign this responsibility to a designated individual or individuals. The responsible individual(s) should have experience or knowledge of sales and use taxes or be given adequate training.

Benefits for the Company

There are many benefits that a company will derive from administering the sales taxes on behalf of its sellers including but not limited to:

- Conformance with the Sarbanes-Oxley Act
- Controlling the compliance of sales taxes
- Reducing the compliance burden on sellers
- Recruiting and retention of independent sellers
- Time value of money
- Vendor compensation
- Good standing with their independent sellers, states and local jurisdictions

Costs Associated With Collecting Sales Taxes

While there are many benefits to the company, it must be aware that there are certain costs associated with collecting the taxes that the company will incur, including but not limited to:

- Setup
- Personnel
- Software
- Compliance and audits
- Additional tax filings

Summary

State and local sales taxes are a hot topic in tax policy. Given the current deficit that many states and local jurisdictions have, companies should expect that states and local jurisdictions will become even more aggressive in this area as they seek to increase their revenues without increasing taxes.

Direct selling, multi level marketing or network marketing companies that do not seriously address the question of sales taxes but ignore the issue altogether may learn too late that they face a significant liability for failure to comply. In the event the company does not collect the tax, and their sellers did not collect and remit the tax, the company may find itself liable for the entire amount, plus interest and penalties.

Selected Judicial Decisions

Bloomingdale's By Mail Ltd. v. Pennsylvania Dept. of Revenue, (Pa. 1989)
Borders Online, LLC v. State Board of Equalization, 2005 Cal. App. LEXIS 875 (1st Dist. May 31, 2005)
Brown's Furniture v. Wagner, (Ill. 1996)
Current, Inc. v. State Board of Equalization, 24 Cal. App. 4th (Cal. App. Ct. 1994)
General Trading Co. v. State Tax Commissioner, 322 U.S. 335 (1994)
Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E. 2d 13 (S.C. 1993)
In Pledger v. Troll Book Clubs, 316 Ark. 195, 871 S.W.2d 389 (Ark.1994)
In the Matter of Family Eagles, (Kansas Supreme Court, April 18, 2003)
In the Matter of Orvis Company v. Tax Appeals Tribunal; In the Matter of Vermont Information Processing, Nos. 138 and 139, N.Y. Ct. of App., June 14, 1995)
In The Matter of Scholastic Book Clubs, BTA No. 93-16709-DT (8/7/95)
In The Matter Of The Protest of Dart Industries, Inc., ID No. 02-1522410-00-3, Assessment No. 1972584, 04-03
Lanco Inc. v. Director, N.J. Div. of Taxn., No. A-89, 10/12/06
L.L. Bean v. Pennsylvania, (Pa. 1986)
Miller Bros. V. Maryland, 347 U.S. 340 (1954)
Mississippi State Tax Commission v. Bates, (Miss. 1990)
National Bellas Hess v. Illinois Department of Revenue, 386 U.S. 753 (1967)
National Geographic Society v. California, (U.S. Supreme Court, 1977)
Nelson v. Montgomery Ward and Nelson v. Sears Roebuck, (U.S. Supreme Court 1941)
Quill Corp. v. North Dakota, 112 S. Ct. 1904 (1992)
Reader's Digest v. Mahon, (Il. 1970)
Scholastic Book Clubs v. State Board of Equalization, (Cal. 1989)
Scripto v. Carson
SFA Folio Collections v. Bannon, (Conn. 1991)
SFA Folio Collections v. Tracy, (Ohio S. Ct., August 16, 1995)
Share International v. Florida Dept. of Revenue, (8/21/95)
Troll Book Clubs v. Tracy, Ohio Board of Tax Appeals, 1994 Ohio Tax Lexis 1374 (8/19/94)
Tyler Pipe Industries v. Washington, 483 U.S. 282 (1987)
Western Acceptance Co. v. Florida Dept. of Revenue, So. 2d 492 (Fla. App. 1st Dist. 1985)

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