

The Glynn Group, Ltd.

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States quick to take advantage of new nexus non-rules

In was only a couple of weeks ago that the U.S. Supreme Court refused to hear two cases that would have addressed the issue of substantial economic presence in a state being enough to constitute nexus. The cases both involved situations where states assessed income and franchise taxes to companies with no physical presence in the state. Supreme Court inaction could change nexus rules.

In West Virginia, Bank of America's FIA Card Services, formerly MBNA, was attempting to seek a refund of \$460,000 in income and franchise taxes assessed by the state. While Bank of America has no physical presence in West Virginia, the state took the position that the bank had an economic presence in the state through its credit card customers.

In New Jersey, Lanco Inc., a subsidiary of Charming Shoppes Inc., licenses trademarks to women's apparel stores in the state. New Jersey found that to be sufficient grounds to assess income and franchise taxes. Lanco is a Delaware company.

These cases chip away at the nexus requirements established by a previous Supreme Court decision, *Quill v. North Dakota*, a ruling that stated a company must have a physical presence in a state in order for that state to collect sales and use taxes.

Both West Virginia and New Jersey have taken the position that physical presence isn't a requirement for the collection of income and franchise taxes.

"We will probably see a surge in the adoption of taxes by [other] states based on nothing more than the quantum of business that institution does in the state," said David Swayze, a Wilmington, DE-based attorney, in a comment to the *Wilmington News Journal*.

Other states are joining New Jersey and West Virginia with legislation supporting taxation without physical presence. In New Hampshire, a new law defines in-state business to include business with a "substantial economic presence" and permits the state to collect its business profits tax on such out-of-state companies doing business in the state. This provision of the New Hampshire law is effective July 1st.

The new Michigan Business Tax, scheduled to become effective January 1, 2008, assesses companies doing business in Michigan with no physical presence in the state, earning more than \$350,000 in revenue that can be attributed to sales in Michigan. The new tax replaces the Michigan Single Business Tax and provides incentives for in-state companies.

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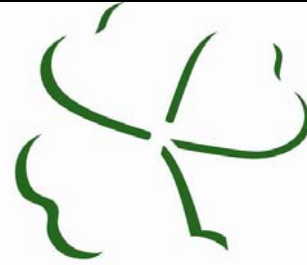
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Page 2

Senate fights back on recent Supreme Court nexus issue

A bill has been introduced in the U.S. Senate that would require businesses to have a physical presence in a state in order to be subject to income and "other business activity taxes." This proposed legislation is offered in direct response to the recent U.S. Supreme Court refusal to consider the previously mentioned cases where in states assessed income and franchise taxes on companies.

The Senate bill, known as the Business Activity Tax Simplification Act of 2007 (BATSA) would solidify an earlier Supreme Court ruling (*Quill v. North Dakota*), a benchmark ruling that has been the cornerstone of nexus decisions for more than a decade, by requiring physical presence for the application of all business activity taxes.

BATSA has been introduced by Senators Mike Crapo (R-ID) and Charles E. Schumer (D-New York). "Businesses should not be punished with double taxation simply because their products reach beyond state borders," stated Schumer in a press release. "At a minimum, this is a huge administrative burden. In the worst case scenario, these differing state tax treatments will drive businesses to states with more favorable laws. Either way, the effect on commerce is debilitating."

Some states have already taken a firm position in their nexus laws regarding physical presence being a requirement for collection of income and franchise taxes. States that have not established a position in this area might now rely on the New Jersey and West Virginia cases and the Supreme Court's refusal to hear the cases as precedent.

States are continuing to get more aggressive in their collection efforts. If you have questions or concerns regarding this article please contact [The Glynn Group, Ltd](#)