

VENABLE[®] LLP

Sales and Use Tax for Nonprofits: Updates & Expectations for 2013

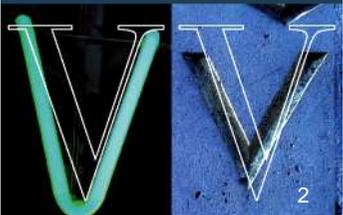
Moderator: Jeffrey S. Tenenbaum
Speakers: Walter R. Calvert & Tammara F. Langlieb

March 26, 2013



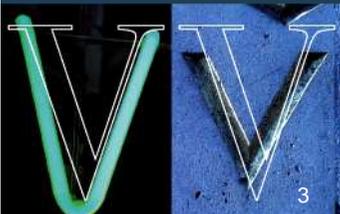
Agenda

- Internet Selling
- Internet Buying
- Nexus
- Sales and Use Tax Audits
- Conference Hosting



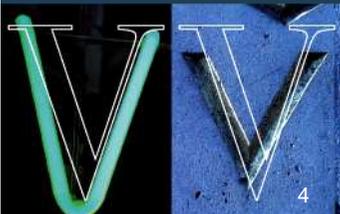
Internet Selling: Vendor Obligations When Selling For On-Line

- Exempt organization overview:
 - Typically no generally applicable exemption for sales.
- Retailer obligations:
 - Retailer with “physical presence” in the state of product delivery needs to collect and remit sales tax on behalf of purchaser.
 - Certificates required to verify purchaser claims for exemption.



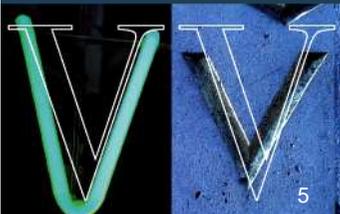
Internet Selling: Vendor Obligations When Selling On-Line

- Retailer obligations:
 - States cannot compel out-of-state Internet vendors—without “presence” in the buyer’s state—to collect the sale/use tax owed by state residents.
 - Based on 1967 Supreme Court ruling.
 - Would create an undue burden on interstate commerce.



Internet Selling: Vendor Obligations When Selling On-Line

- Sales and use tax is generally imposed on retail purchaser.
 - But vendor has an obligation to collect and remit the tax to the taxing jurisdiction.
 - And a vendor will have liability for failure to do so.
 - Location of buyer's will typically impose the taxes.
- Sales tax is a collection burden imposed on retail vendor to collect on behalf of purchaser.
 - Difficult to “chase” purchasers after sale.
 - Easier to “chase” retailers.
 - Challenges arise with drop shipments.



Internet Selling: Vendor Obligations When Selling On-Line

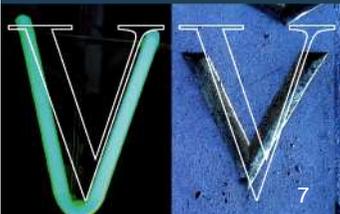
- Difficulty in Compliance:
 - Not all states have sales tax.
 - State sales tax laws are not uniform (exemptions vary widely).
 - Different locality rates.
 - Some (but not all) states collect on behalf of localities.
- Magnitude of Problem:
 - Sales and use taxes generate almost 1/3 of a typical state's total revenue.
 - Revenue loss projections of approximately \$10.1 billion in 2011.

(Source: CRS Report for Congress. "State Taxation of Internet Transactions". June 7, 2011)



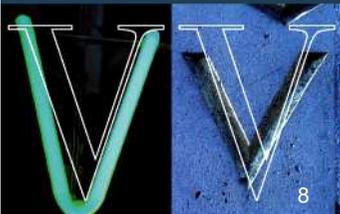
Internet Selling: Vendor Obligations When Selling On-Line

- Proposed Solution:
 - SSUTA (Simplified Sales and Use Tax Agreement).
 - Simplifies administration with:
 - Uniform tax definitions and exemptions, rate simplification, and state-level administration.
 - Encourages "remote sellers" selling over the Internet and by mail order to collect tax on sales to customers living in the streamlined states.



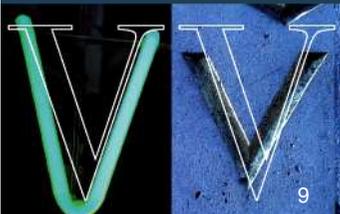
Internet Buying: Obligations and Exemptions For On-Line Purchases

- Purchaser's Obligation:
 - Use tax – how it works.
 - Self-report if retailer does not collect sales tax.
 - Not widely followed.
 - Difficult to audit.



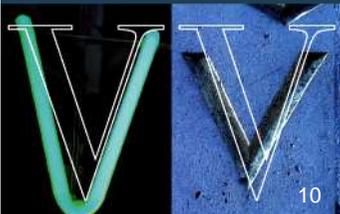
Internet Buying: Obligations and Exemptions For On-Line Purchases

- Exemption:
 - Sale for use in exempt purpose.
 - Many IRC § 501(c)(3) and § 501(c)(4) organizations are exempt from sales tax.
 - Exemption statutes vary widely.
 - Typically, the organization must provide proof of exemption and certificate of exemption from the state.
 - Sale for resale exemption.



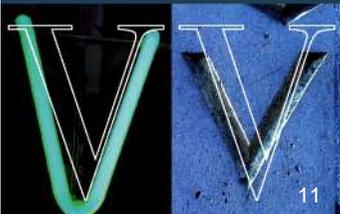
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- The basics of nexus:
 - Due Process clause of Constitution requires some “definite link” between a state and the person/property/transaction it seeks to tax.
 - Some physical presence is required:
 - Building (office or warehouse).
 - Employee (teleworkers).
 - Employees attending a conference.



Nexus – Where Has Amazon Taken Us and Where Are We Headed

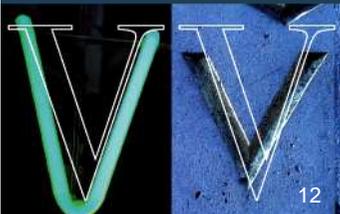
- Nexus through others:
 - Agency nexus:
 - Retailer has no physical presence.
 - Nexus is created by “agent” or “representative” in the state acting on its behalf.
 - Typical case is Scholastic book club cases.



Nexus – Where Has Amazon Taken Us and Where Are We Headed

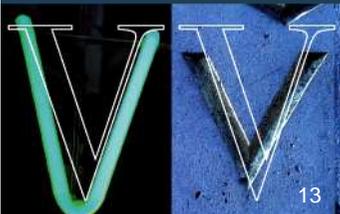
– Affiliate Nexus:

- Typical case is where a retailer has no physical presence with state.
- However, affiliated company—parent, subsidiary, or brother/sister corporation—has presence in the state.
- File as “unitary group” for state income tax purposes.
- Retailer sends mail-order sales to state where affiliated company has presence.

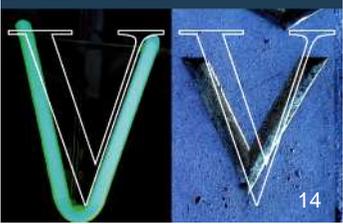
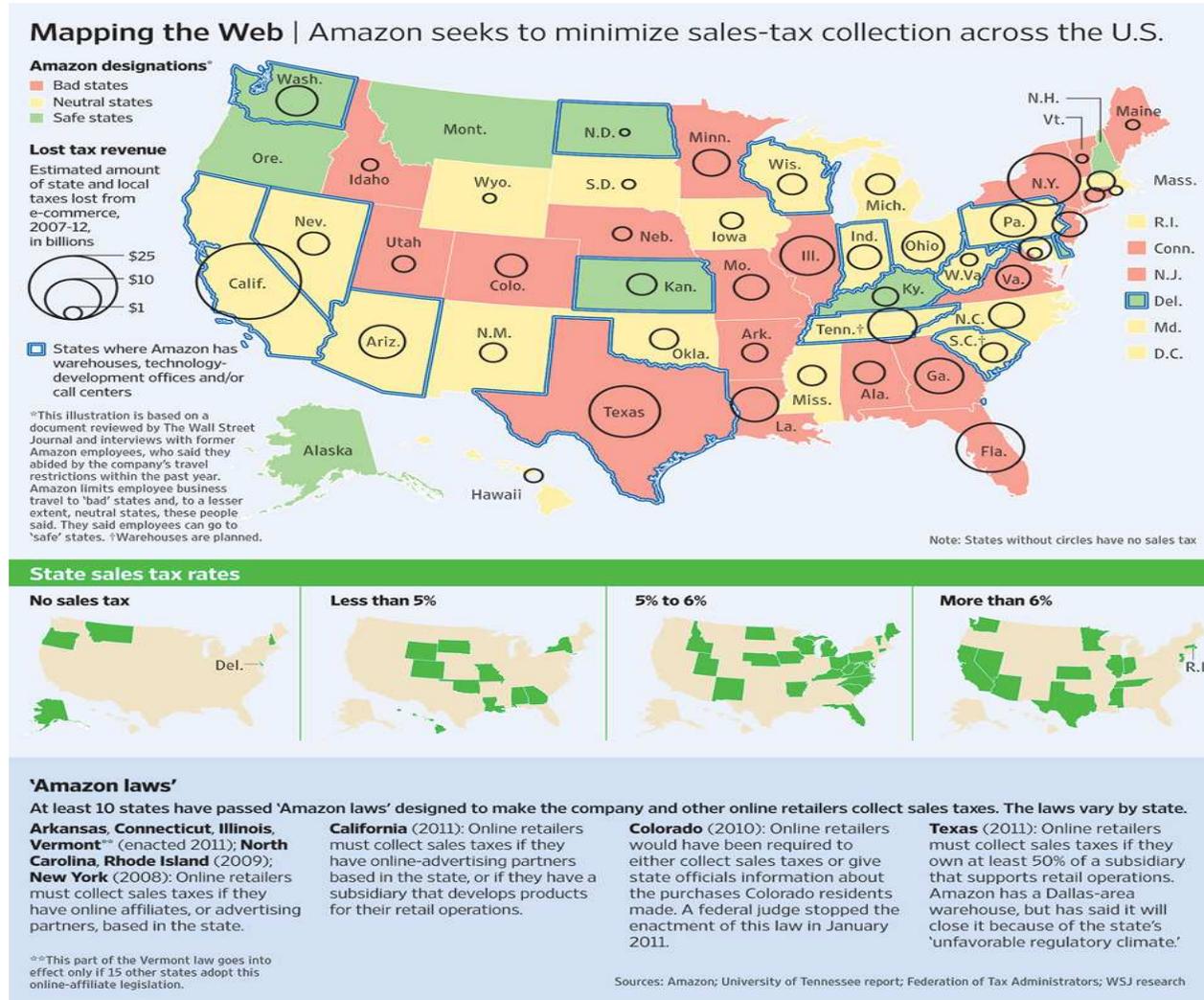


Nexus – Where Has Amazon Taken Us and Where Are We Headed

- Amazon or "click-through" nexus:
 - A new subclass of affiliate nexus.
 - Retailer has no physical presence.
 - Nexus is created by a rebuttable presumption:
 - Retailer has nexus based on its agreement with a third party (who has physical presence in taxing state), who directly or indirectly refers customers to retailer and receives compensation for the referral.
 - Target of legislation is Amazon.

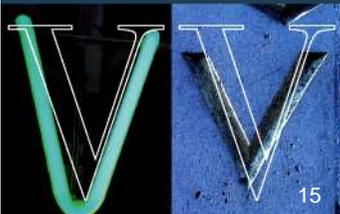


Nexus – Where Has Amazon Taken Us and Where Are We Headed



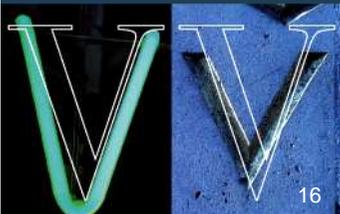
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- “Amazon” legislation often has dollar referral limits.
 - Don’t want to tax small retailers.
 - Typical rule is retailer needs to have gross receipts of more than \$10,000 based on sales to in-state residents resulting from in-state referrals.
- Some states pass legislation.
- Other states enter into settlement agreement with Amazon.



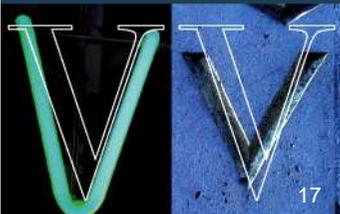
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- Future predictions:
 - Need to level the playing field.
 - Borders Group tried to set up mail-order affiliate to avoid paying sales tax.
 - California court rejected this argument.
 - Borders is now facing bankruptcy liquidation.
 - States need revenue.
 - Some states try to educate on self-reporting.
 - Colorado legislation (but declared illegal).



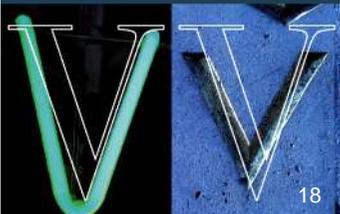
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- Proposed federal legislation:
 - Marketplace Fairness Act (S.1832).
 - Sponsor: Sen. Mike Enzi (R-WY).
 - Applicable to states that are members of SSUTA and to states that adopt minimum simplification requirements.
 - State is authorized to require all sellers making remote sales to its residents to collect and remit sales and use taxes.
 - Small business exception.



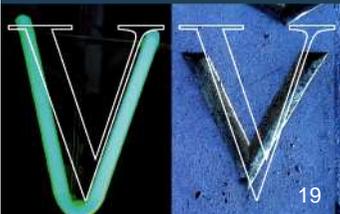
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- Main Street Fairness Act (H.R. 2701/S. 1452).
 - Sponsors: Rep. John Conyers (D-MI-14)/Sen. Richard Durbin (D-IL).
 - Applicable to states that are members of SSUTA .
 - Sellers must collect sales and use tax for remote sales sourced to member states.
 - Small business exception.



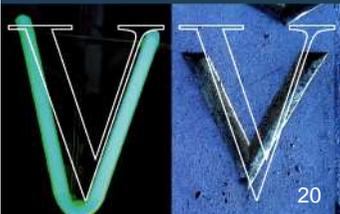
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- Marketplace Equity Act (H.R. 3179).
 - Sponsors: Rep. Steve Womack (R-AR).
 - Applicable to states that adopt simplification sales tax system.
 - State is authorized to require all sellers making remote sales to its residents to collect and remit sales and use taxes.
 - Small business exception.



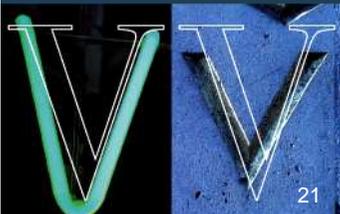
Nexus – Where Has Amazon Taken Us and Where Are We Headed

- Digital Goods and Services Tax Fairness Act (H.R. 1860/S. 971)
 - Sponsors: Rep. Lamar Smith (R-TX) and Sen. Ron Wyden (D-OR)
 - Prohibits state and local governments from imposing higher taxes on certain sales of digital goods and services than are imposed on tangible goods.



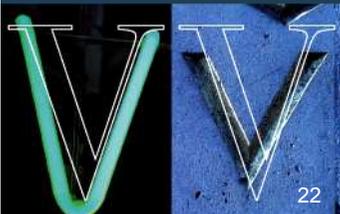
Sales and Use Tax Audits – Nexus Questionnaires

- Many states issue nexus questionnaires to determine whether a company is doing business in the state.
- Typical questions focus on activities that indicate nexus, such as whether the company:
 - Owns or leases real property.
 - Maintains inventory.
 - Actively solicits orders for retail sales through “agents”.
 - Sends employees into the state to attend trade shows or conduct seminars.



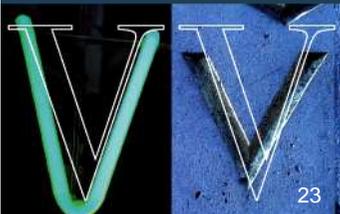
Sales and Use Tax Audits – Nexus Questionnaires

- Answers to questions could trigger sales tax audit.
- Important to take questionnaires seriously and evaluate activities annually.
- Consult advisor before sending in questionnaire.
- Risks of not responding.
- Alternative means of responding.



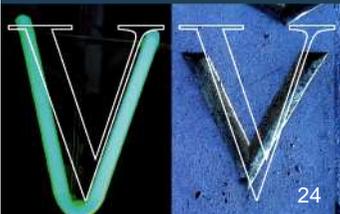
Conference Hosting – When You Are “the Fellow behind the Tree”

- Retail sales at conference or convention:
 - Generally, need to collect and remit sales tax.
 - Some states (such as California) have exemption if conference is below a certain number of days.
- Presence at conference could create nexus for future sales to in-state residents.
 - How long does “nexus” last?



Conference Hosting – When You Are “the Fellow behind the Tree”

- Sales tax on “registration” tickets:
 - No uniform laws.
 - Often local county or city tax with less guidance than at state level.
 - Laws are often unclear.
 - Even if tax does not apply to registration fee, it may apply to other events.
- Additional promoter’s responsibilities:
 - Inform trade show providers of sales tax obligations.
 - Inform state of name of trade show providers.



Questions

Jeffrey S. Tenenbaum, Partner
JSTenenbaum@Venable.com
t 202.344.8138 | f 202.344.8300

Walter R. Calvert, Partner
WRCalvert@Venable.com
t 410.244.7726 | f 410.244.7742

Tammara F. Langlieb, Staff Attorney
TFLanglieb@Venable.com
t 410.244.7821 | f 410.244.7742

To view Venable's index of articles, PowerPoint presentations, recordings and upcoming seminars on nonprofit legal topics, see www.Venable.com/nonprofits/publications, www.Venable.com/nonprofits/recordings, www.Venable.com/nonprofits/events.

