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FBA Seller's Guide to Sales Tax

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One of the most commonly asked questions by sellers who utilize Fulfillment by Amazon (FBA) is this: in what states am I required to collect sales tax? It's a good question and one that all businesses, not just online businesses, need to address. The purpose of this report is to help sellers answer this question for themselves.

Before we dive in to answering this question let's ask a different question first: *What will happen to me if I don't collect sales taxes in other states?* The answer is: Probably nothing. At least right away probably, but the tax man has a long arm and an even longer memory.

Now, we're not interested in fear mongering, so we're not going to talk about criminal penalties and jail. But there is a real and practical risk to not collecting sales tax where it's required. The risk is that neglecting the tax collection responsibility could destroy your whole business and bankrupt you personally. How? We call it the Biggest Tragedy in Sales Tax and it goes like this: When you make sales into a state and do not collect the sales tax believing that you aren't required to do so for whatever reason, nothing will happen to you at first. In fact, not charging sales tax could give you a boost at the beginning even. But, a few years down the line, when a state tax auditor catches up to you, that's when the hammer comes down. Because, at that point, the auditor will simply require that you pay the uncollected taxes yourself, out of your own pocket. That's how sales tax laws work. If you don't collect the tax from your customer as required, then you owe it yourself. And to add insult to injury, they'll assess you penalties and interest on top. And you could actually count yourself as lucky if they catch you in the first few years. In fact, the state may take 7 to 10 years (or more) to find you and still go back to day one. This has devastated many businesses and it's why we call it the Biggest Tragedy in Sales Tax. We don't want anyone to get slammed with it.

This is precisely why we take a conservative approach to sales tax collection. We recommend as you read the discussion below, that you consider the same approach.

Executive Summary

As an FBA seller (or any business for that matter) you should consider collecting tax in any state where the following conditions are met:

- You have "substantial nexus" in that state. Meaning you have more than a very slight physical presence;
- What you sell is subject to sales tax in that state; and
- The amount of tax would be "material" to your business if it came out of pocket.

These criteria are discussed below and we recommend you take the time to read the discussion which follows this summary.

FBA Sellers and Nexus: The easiest way to determine if you have nexus is whether you have inventory in an FBA Fulfilment center (FC). To the best of

our knowledge, Amazon has FCs in sixteen different states. Two of those states, (NH & DE) do not have sales tax. So for the rest of this article we will limit our discussion to the remaining fourteen states that do have a sales tax. Of those fourteen states, thirteen have specific laws and/or policies that assert owning inventory in their state or using a warehouse is enough to create “substantial nexus”. The fourteenth state (Nevada,) would almost certainly assert this as well.

FBA Sellers and Taxability: Tangible personal property (TPP) is property that can be seen, touched, tasted and/or smelled. Most states tax all items of TPP, unless there is a specific exemption. The majority of what is sold through FBA fits the definition of TPP, and as such it is going to be taxable to almost all of your customers. As an exception, some states do not tax groceries, some or all clothing and dietary supplements; however, other states do tax those items and in general it is fairly safe to assume that what you sell will be taxable in most states.

FBA Sellers and Materiality: Materiality is a hazier concept. The question is whether the amount of tax you should be collecting is worth worrying about from a financial standpoint. Sometimes with low volume, the cost to collect and remit the tax exceeds the amount of tax itself. Obviously, you need to use judgment in this. It’s an issue for each of you to decide for yourselves; however, it is generally better to be conservative in this approach. If you have nexus and what you sell is taxable, and you decide the amount of tax to collect is negligible, then many sellers will not collect it at all. However, you need to keep an eye on the sales volume so you don’t get stuck later on.

FBA Sellers and Their Inventory: Since Amazon does not always notify you before it moves your inventory to a new FC, larger sellers often get registered in all the states where FBA has an FC on a proactive basis. It allows them to start charging tax from the day their exposure begins. Smaller and midsize sellers usually wait until they see sales from a particular FC before they charge tax in the state.

It is important to realize that once you have nexus in a state, you must collect tax on all sales into that state, whether you ship them yourself or through another platform.

Discussion

The following section provides state specific information on the activities of owning inventory in a state, utilizing a warehouse in a state, and using Fulfilment services in the state. If one or more of the activities are not listed under the state heading it is because the state does not address that activity.

Before we go further, it is important to know that states make their own tax laws and policies. We do not always agree with what the states assert. When defending companies in a sales tax audit, we often take aggressive positions. However, when it comes to tax planning, like where to register, we believe it pays to be conservative. The reason is simple economics. You will usually spend far more money fighting a state, than you would if you were compliant with what they assert. Having said this, there are a few exceptions to the general rule of being conservative which we will discuss later when we cover materiality.

To get started, there are three factors that should be considered when deciding where you should register to collect sales tax. The first factor to consider is whether or not the state can assert that you have a responsibility to collect the tax on its behalf. This responsibility will be based on whether you have nexus, a concept which we will explain in the next section. The second factor is to determine if what you sell is taxable and the third is to decide if the amounts of money involved are material.

Nexus

As previously stated, the first factor is based on whether you have nexus with a state. Nexus can be defined as the connection or link with a state that must be present, before the state can force you to pay its tax or collect tax on its behalf. When it comes to sales tax, this link must be defined by a physical connection; however, “physical” does not just mean having real property like an office or a factory in a state. It can also include other types of property like inventory or rented or leased equipment. It can even include your activities, your employee’s activities, and in many instances, the activities of third parties who are helping you to “establish and maintain a market.” The activities that create nexus are plentiful and can vary from state to state. Rather than trying to identify all of these activities, we will

concentrate on those that are common to all sellers utilizing FBA.

For those who utilize FBA, there are four common nexus creating activities: The first is your location, the second is inventory, the third is warehouse use, and the fourth is Fulfilment services. In the last section we will identify how each state views the second, third and fourth activities. (We do not go into detail about the first as we assume it is not in doubt.) We will also cite the corresponding state statute, rule or guidance that references the activity. For now let's discuss each activity in general.

Your Location: As mentioned above, you must have a link or connection with a state before the state can force you to collect tax on its behalf. Living in a state, your location, is an activity that would give rise to nexus. The state can tax its own residents however it decides to do it with no constitutional prohibitions. As such, every state asserts that it creates the responsibility to collect or pay all applicable taxes.

Inventory: In general, having inventory in a state is considered a nexus creating activity. Some states address inventory specifically and some by implication. Of the states that address it specifically, they often use different terms. For example California (CA BOE Publication 77) uses the term "stocks of merchandise" while Pennsylvania (Sales and Use Tax Bulletin 2011-01) uses the term "stock of goods". In Arizona (Arizona DOR Publication No. 623), the state asserts that the ownership of tangible personal property (TPP) in the state is a nexus creating activity. For clarification, property can be classified as real property, tangible personal property or intangible property. When it comes to FBA sellers, your inventory will almost always be classified as tangible personal property (TPP).

Some states while not addressing inventory specifically have responded to surveys where they assert that having "supplies" in the state is a nexus creating activity. Still other states take an even more indirect approach to inventory by stating the use of a warehouse or "place of distribution" is a nexus creating activity.

The following FBA states either have specifically stated or have at least clearly implied that having inventory in the state is a nexus creating activity:

AZ, FL, CA, IN, KS, KY, NJ, PA, SC, TN, TX, VA & WA. It is highly likely that NV would also assert that having inventory in the state is a nexus creating activity.

Warehouse Use: When discussing inventory we mentioned that states often talk about warehouse use as a nexus creating activity. The state of Texas provides a great example of the type of wording often used by states concerning warehouses. The state asserts if a business, “maintains, occupies, or uses, permanently or temporarily, directly or indirectly, or through an agent, by whatever name called, a kiosk, office, place of distribution, sales or sample room, warehouse or storage place, or other place where business is conducted. (Tex. Tax Code Ann. §151.107(a)(1)). The import wording here is use. There is not a requirement that the warehouse be owned by you or that the use even be permanent.

The following states have either specifically state or have at least implied that warehouse use in the state is a nexus creating activity: CA, FL IN, KS, KY, NJ, PA, SC, TX, VA & WA. It is highly likely that NV would also assert that warehouse use in the state is a nexus creating activity.

Fulfillment Services: The Fulfilment services offered by Amazon include, but are not limited to, storage or warehousing of inventory, order processing, picking and packing of inventory, shipping, customer service and returns management. Some states such as PA (Sales and Use Tax Bulletin 2011-01)) directly address Fulfilment services and assert they are taxable. Other states address it indirectly and have responded to surveys where they indicated Fulfilment services are a nexus creating activity. Many other states assert that any activity, even if provided by third parties, that help a company to create or maintain a marketplace are nexus creating. Some states while not addressing Fulfilment services directly have responded to surveys where they assert that using Fulfilment services in the state is a nexus creating activity.

The following states have either specifically stated or have at least implied that using Fulfilment centers in the state is a nexus creating activity: CA, FL, NJ, PA, SC, TN & WA. In addition certain states have a catchall phrase like, relationships with anyone who helps to “establish or maintain a market” are

nexus creating; or they specifically mention an activity that FBA performs, such as customer service, is a nexus creating activity. This could lead the following states to assert that utilizing Fulfilment services is a nexus creating activity: AZ, IN, KS, KY & TX.

Taxability

The first thing to know is that, in general, most states say that an item of tangible personal property (TPP) is, by default, subject to the tax. TPP (as opposed to real property or intangible property) is always taxable, unless there is a specific exemption and there are lots of different exemptions for TPP. For example, many states exempt certain types of machinery and even repair parts sold to a manufacturer. There are lots of specific rules that come into play on these exemptions in different states. Many states also exempt purchases of clothing and food (and/or dietary supplements), which are complicated areas since states have widely varying definitions of what constitutes food.

In general, the majority of what you sell on amazon will be taxable. If you have questions about your specific products, there are firms (such as Peisner Johnson & Company) who can assist you with these determinations. The good news is, once you are registered in a state you can have Amazon track the taxability and collect the right rates through their systems. The key is to match what you sell with the correct category. It is a fairly simple process, but again there are firms that can assist you should you need help.

Materiality

Once you have determined you have nexus and that what you sell is taxable, the next step is to run out, get registered and start collecting taxes right away! Don't panic — yet. First look at materiality. For example, if your sales into a state for the entire previous year were \$200 then the amount of tax you would owe be in the neighborhood of \$16. It may not make good business sense to get registered under this scenario. Yes the state would assert you should, but if the state found you and charged penalty and interest how much could you possibly owe? In general, not much and the cost of registering, collecting and remitting the taxes with tax returns would probably be greater than the cost of paying the tax, penalty and interest out of your own pocket in the case of you being audited. In this instance, many

of our clients would choose to watch their sales volume and wait until it makes more business sense to get registered.

Many ask us what that magic number is or what the threshold should be before they should get registered. We don't have a standard answer. What is material for one company may not be material for another. In addition, your liability will grow with time, if you do not register and start collecting taxes, then, in theory, the state could go back to the date your nexus began in the state. In reality they only go back 7-10 years, but do so routinely. A number we have seen some companies use is \$250 a month in taxable sales. This equates to \$3000 a year or \$12,000 over a 4 year period. The tax on \$12,000 in sales would be \$960 and you may have an additional 50% or so in fines and penalties which bring us into the \$1,500 range. For some, this is a material number and they would want to avoid this from coming out of their pocket. The way to do so is get registered and start collecting. If you have large profit margins with deep pockets then you may choose a higher threshold, but for small sellers with lower profit margins and little reserves, the \$3,000 seems to be reasonable. What number is material for you?

On the opposite side of the equation is a company that has taken off like a rocket. They may have had nexus for three and a half years and have sales of \$100,000 per year in a state. It may be a mistake for a company in this position to do a registration through normal means because the state will want all the back tax, penalty and interest from the date your nexus began. Instead a voluntary disclosure agreement or VDA may be the right vehicle for this company to register. In a VDA you can limit the look back to 3 years in some states and waive 100% of the penalty and depending on the state some interest. This could save you some substantial money. VDAs are usually performed on an anonymous basis by third parties.

When it comes to materiality you don't want to get registered before you're ready, but you don't want to wait too long either. In both instances you could be costing yourself unnecessarily. Choosing the right time to get registered usually boils down to whether the costs of getting registered and filing are less than the costs associated with the state finding you. In today's world those costs of registering and filing are falling on a regular basis.

Common Misconceptions

One common misconception is that only Congress has the right to regulate interstate commerce; this right having been granted by the Commerce Clause of the United States Constitution. While this is true, the constitution does not say that states cannot tax any form of interstate commerce. Many states had argued that the portion of activities that happened within their borders should be subject to their ability to tax.

The Supreme Court set much precedent disallowing the “direct taxation” of interstate commerce. However, the Court broke precedent and reversed itself in a 1977 case involving Mississippi and Complete Auto Transit (Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)). In this case the Court decided that a state could directly tax interstate commerce as long as the tax met a “four prong test.” The Court said a tax is permissible under the commerce clause if it, “is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State.” This case resulted in the states having the authority levy sales taxes on interstate commerce.

Another common misconception is that relationships with third parties, such as FBA, cannot create nexus. After all, FBA is just a business that you contract with. Unfortunately, as hard as this may be to believe, the fact that third parties can create nexus for you, is one of the more settled nexus creating issues. It has actually been to the U.S. Supreme Court twice. The first case is Scripto v. Carson, 362 U.S. 207 (1960) and the second is Tyler Pipe v. Wash. Dept. of Rev., 483 U.S. 232 (1987). These cases both involved independent contractors and the court affirmed in both cases that third parties can indeed create nexus for you. To paraphrase the court, it does not matter what you call someone, how you pay them or even if they represent you exclusively. What does matter, “is whether the activities performed in the state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.”

Although Tyler Pipe dealt directly with sales, it has been commonly asserted

and held by lower courts that any activity related to creating and maintaining a market is a nexus creating activity. Therefore, many of the activities of FBA, could be considered to be nexus creating. They provide for the storage of products, the acceptance of orders, shipping and handling, and they accept returns. Each of these services independently is vital to sales and could fit that definition. Taken as whole, it is hard to argue that they do not and many states assert that they do.

The third misconception is that having inventory in a state or utilizing Fulfilment services is not a “substantial nexus.” When voicing these opinions, the Quill case is often quoted (Quill Corp. v. North Dakota, 504 U.S. 298 (1992)). In addition these individuals often state that they, like Quill, are remote sellers and that only Congress has the right to regulate interstate commerce.

However, there is a big difference in the fact pattern of Quill and those utilizing FBA services. In the Quill case, the taxpayer did not have inventory in the state nor were they utilizing any third party services. While the Supreme Court agreed that Quill did not have substantial nexus, they did not actually define what creates substantial nexus. The Court indicated that perhaps Congress was better suited to answer these questions and left it up to them if they disagreed with the Court. Congress has not acted and the Supreme Court has not heard any sales tax nexus cases since 1992.

The Quill decision did not overturn Complete Auto, Scripto or Tyler Pipe. Therefore, as we have discussed previously, the states do have the right to tax interstate commerce as long as it meets the four prong test and that third party activities can create nexus. With no input from congress or the Supreme Court over the last 22 years, the state courts have consistently held that these activities can create nexus.

State Specific Information



Arizona



Inventory: Arizona asserts that the ownership of tangible personal property within the state is a nexus creating activity. (Arizona DOR Publication No. 623)

Fulfillment Services: Arizona does not directly address fulfillment services. However they assert that activities that fall under the umbrella phrase “establishing and maintaining a market” are nexus creating activities, even when performed by third parties. They specifically list resolving customer complaints as one of those activities. (Arizona DOR Publication No. 623)



California

Inventory: California asserts that keeping “stocks of merchandise” in the state for the purpose of making sales in the state is a nexus creating activity. (CA BOE Publication 77)

Warehouse Use: California asserts that using a warehouse or place of distribution, directly or indirectly, even on a temporary basis is a nexus creating activity. (Cal. Rev. & Tax. Code §6203(c)(1), CA BOE Publication 77)

Fulfillment Services: California asserts that “selling” includes all activities that are integral to making sales and specifically lists fulfillment

activities as one of those activities. The acceptance of returns is considered under the fulfillment umbrella. California has taken the position that if an item can be returned to an instate location – even if the orders are fulfilled from outside the state that this would be considered part of the sales process and therefore be nexus creating. This issue actually went to the California Court of Appeals and was affirmed. Since FBA performs sales related activities on behalf of their users CA would most probably assert that usage of FBA would create nexus. (Cal. Rev. & Tax. Code §6203(c)(1), Cal. Rev. & Tax. Code §6203(c)(2), *Borders Online LLC v. State Board of Equalization*. Case No. A105488 (Cal. Ct. App., May 31, 2005), CA BOE Publication 77)



Florida

Inventory: Florida asserts that ownership of real or tangible personal property (TPP) located in the state, is a nexus creating activity. (Fla. Stat. §212.0596(2)(j))

Fulfillment Services: Florida does not directly address the use of fulfillment services in its statutes, however they responded to a CCH Sales and Use Tax Nexus survey in 2010 in which they stated that the use of fulfillment

centers was a nexus creating activity. (CCH Sales and Use Tax Nexus Survey, Florida Department of Revenue, June 30, 2010)



Indiana

Inventory: Indiana asserts that “regularly maintaining a stock of TPP” in the state is a nexus creating activity. (Ind. Code § 79-3702(h)(1)(F))

Warehouse Use: Indiana asserts that using a warehouse or place of distribution, directly or indirectly, even on a temporary basis is a nexus creating activity. (Ind. Code § 6-2.5-3-1(c)(1))

Fulfillment Services: Indiana does not directly address Fulfillment services. However they have a catch all statement which reads, “may be required by the state to collect tax under this article to the extent allowed under the Constitution of the United States and federal law.” Since we know that the U.S. Supreme Court has allowed activities that fall under the phrase of “establishing and maintaining a market” to be nexus creating, even when performed by third parties, there is the possibility that Indiana can assert that Fulfillment services are nexus creating. In addition Indiana states that having agents who accept returns in the state is a nexus

creating activity. (Ind. Code § 6-2.5-3-1(c)(2), Ind. Code § 6-2.5-3-1(c)(4))



Kansas

Inventory: Kansas asserts that “regularly maintaining a stock of TPP” in the state is a nexus creating activity. In addition The KS DOR responded to a CCH survey stating that having “supplies” in the state is a nexus creating activity. (Kan. Admin. Regs. § 79-3702(h)(1)(E), CCH Sales and Use Tax Nexus Survey)

Warehouse Use: Kansas asserts that using a warehouse or place of distribution, directly or indirectly, even on a temporary basis is a nexus creating activity. (Kan. Admin. Regs. §§ 79-3702(h)(1)(A))

Fulfillment Services: Kansas does not directly address Fulfillment services. However they assert that any other activities that fall under the umbrella phrase “establishing and maintaining a market” are nexus creating activities. In addition The KS DOR responded to a CCH survey stating that using Fulfillment services in the state is a nexus creating activity. (Kan. Admin. Regs. §§ 79-3702(h)(1)(F), CCH Sales and Use Tax Nexus Survey)



Kentucky

Inventory: Kentucky asserts that using a warehouse is a nexus creating activity. Since having inventory at an FBA warehouse is “using” a warehouse, Kentucky would most probably assert that having inventory in the state is a nexus creating activity. (Ky. Rev. Stat. Ann. § 139.340(2)(a))

Warehouse Use: Kentucky asserts that using a warehouse or place of distribution, directly or indirectly, even on a temporary basis is a nexus creating activity. (Ky. Rev. Stat. Ann. § 139.340(2)(a))

Fulfilment Services: Kentucky asserts that utilizing a representative in Kentucky who accepts or exchanges returns is considered to be “necessary to establishing and maintaining a market” and as such is a nexus creating activity. (Ky. Rev. Stat. Ann. § 139.340(2)(f))



Nevada

Nevada has not offered specific guidance on nexus since 2007. Their current guidance is, “collection and remittance of the sales tax apply to every retailer whose activities have a sufficient nexus with this State to satisfy the requirements of the United States Constitution.” Since this limitation is imposed on every state,

we believe this guidance is of little value. In other words, the state takes the position that everything could create nexus, except those activities that would violate the constitution. Since most states would assert that at least one, if not all of the activities involving inventory, warehouses or Fulfilment services do not violate the constitution we believe it is probable that Nevada would do the same. (NV Rev. Stat. § 372.724.1(a))



New Jersey

Inventory: New Jersey does not provide clear guidance in their statutes or publications as to their position on having inventory in the state. However, they have responded to a sales and use tax survey performed by CCH in which they indicated having inventory in state is a nexus creating activity. (N.J. Stat. Ann. §54:32B-2(i), CCH Sales and Use Tax Nexus Survey)

Warehouse Use: New Jersey does not provide clear guidance in their statutes or publications as to their position on using a warehouse in the state. However, they have responded to a sales and use tax survey performed by CCH in which they asserted using a warehouse is a nexus creating activity. (N.J. Stat. Ann. §54:32B-2(i), CCH Sales and Use Tax

Nexus Survey)

Fulfilment Services: New Jersey does not provide clear guidance in their statutes or publications as to their position on using Fulfilment services in the state. However, they have responded to a sales and use tax survey performed by CCH in which they asserted using Fulfilment services, if the provider is acting as an agent, is a nexus creating activity. Some states consider the acceptance and exchange of returns enough to create that agency relationship. (N.J. Stat. Ann. §54:32B-2(i), CCH Sales and Use Tax Nexus Survey)



Pennsylvania

Inventory: Pennsylvania asserts that maintaining a stock of goods is a nexus creating activity. (61 Pa. Code §56.1(b)(3), Sales and Use Tax Bulletin 2011-01)

Warehouse Use: Pennsylvania asserts that using a warehouse or place of distribution, directly or indirectly, even on a temporary basis is a nexus creating activity. (72 P.S. §7201(b)(1), 61 Pa. Code §56.1(b)(1), Sales and Use Tax Bulletin 2011-01)

Fulfilment Services: Pennsylvania has adopted a very aggressive in asserting what creates nexus for remote sellers.

Fulfilment services are one of the activities that it asserts create nexus for remote sellers. (72 P.S. §7201(b)(1), 61 Pa. Code §56.1(b)(1), 61 Pa. Code §56.1(b)(3), Sales and Use Tax Bulletin 2011-01)



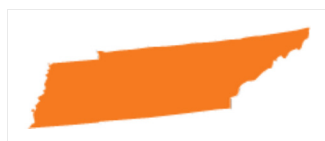
South Carolina

Inventory: South Carolina has stated that the storage of inventory is a nexus creating activity. (Revenue Ruling 07-3, South Carolina Department of Revenue, September 25, 2007, South Carolina Sales and Use Tax Manual, 2013 Spring Edition Chapter 13. Nexus)

Warehouse Use: South Carolina asserts that using a place of business for storing of inventory is a nexus creating activity. A place of business included a warehouse or distribution center. Safe harbor provisions do not apply to FBA sellers, only those who put distribution centers in place (SC Code § 12-36-80, SC Code § 12-36-2691(C), Revenue Ruling 07-3, South Carolina Department of Revenue, September 25, 2007, South Carolina Sales and Use Tax Manual, 2013 Spring Edition Chapter 13. Nexus)

Fulfilment Services: South Carolina asserts that using an unrelated Fulfilment center to process orders

from out of state buyers is a nexus creating activity. FBA sellers are not granted the safe harbor exemption offered to Amazon. (Revenue Ruling 07-3, South Carolina Department of Revenue, September 25, 2007, South Carolina Sales and Use Tax Manual, 2013 Spring Edition Chapter 13. Nexus)



Tennessee

Inventory: Tennessee asserts that the activity of importing tangible personal property (TPP), or causing to be imported into the state, from another state or country, for the purpose of sale at retail or for storage to be used and consumed in the state, is a nexus creating activity. In addition, the state has responded to a sales and use tax survey performed by CCH in which they indicated having “supplies” in state is a nexus creating activity. (Tenn. Code Ann. §67-6-102(23)(A), CCH Sales and Use Tax Nexus Survey)

Fulfillment Services: Tennessee does not provide clear guidance in their statutes or publications as to their position on using Fulfillment services in the state. However, they have responded to a sales and use tax survey performed by CCH in which they indicated having using Fulfillment services in state is a nexus creating activity. In addition there have been numerous cases in Tennessee, which

have been decided in favor of the state, that reference the use of third parties and whether they help to create or maintain a market place. (Tenn. Code Ann. §67-6-102, CCH Sales and Use Tax Nexus Survey, America Online, Inc. v. Johnson, Arco Building Systems, Inc. v. Chumley)



Texas

Inventory: Texas asserts that a nexus is created if receipts are derived from the sale of tangible personal property (TPP). (Tex. Tax Code Ann. §151.107(a)(3), 34 Tex. Admin. Code §3.286(a)(2)(E)))

Warehouse Use: Texas asserts that using a warehouse or place of distribution, directly or indirectly, even on a temporary basis is a nexus creating activity. (Tex. Tax Code Ann. §151.107(a)(1), 34 Tex. Admin. Code §3.286(a)(2)(A))

Fulfillment Services: Texas does not directly address Fulfillment services. However they assert that “Nexus means sufficient contact with or activity within this state, as determined by state and federal law, to require a person to collect and remit sales and use tax.” In addition, Texas has applied the “establish and maintain a market” language, of the Supreme Court decision, in

administrative hearings decisions. (34 Tex. Admin. Code §3.286(a)(5), Decision, Hearing No. 46,541, Texas Comptroller of Public Accounts, May 10, 2006)



Virginia

Inventory: Virginia asserts that owning tangible personal property (TPP) is a nexus creating activity. When it comes to FBA sellers, your inventory will almost always be classified as tangible personal property (TPP). (Va. Code Ann. §58.1-612(C)(9))



Washington

Inventory: Washington asserts that maintaining a “stock of goods” in the state is a nexus creating activity. (Wash. Admin. Code §458-20-193(9), Wash. Rev. Code §82.12.040(1), CCH Sales and Use Tax Nexus Survey)


Warehouse Use: Washington asserts that “utilizing” a warehouse in the state is a nexus creating activity. (Wash. Admin. Code §458-20-193(9), Wash. Rev. Code §82.12.040(1))


Fulfillment Services: Washington does not specifically mention Fulfillment services in their statutes, rules or regulations. However they do

mention third parties and activities that are “associated with the seller’s ability to establish or maintain a market for its products.” In addition they responded to a CCH sales and use tax survey in which they asserted that the use of Fulfilment services is a nexus creating activity. (Wash. Admin. Code §458-20-193(9), Wash. Rev. Code §82.12.040(1), CCH Sales and Use Tax Nexus Survey)

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