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Treasury Issues Guidance on the MBT Economic Nexus Standard

GRAND RAPIDS, MI – Monday, March 17, 2008 – The Department of Treasury has provided additional guidance and examples of when and how an internet web site can be determined to be "purposeful" or "active solicitation". These examples and the guidance are important to determine if non-Michigan companies have nexus in Michigan. However, it is also very important to determine if a Michigan based inter-sales firm can apportion sales out of Michigan.

A taxpayer whose business activities are subject to tax both within and outside of Michigan is permitted to apportion its tax base to Michigan. [MCL 208.1301(2)] Section 301(3) describes the circumstances under which a taxpayer will be considered subject to tax in another state. [MCL 208.1301(3)] For purposes of apportionment, in determining whether a taxpayer is "subject to tax in another state" within the meaning of section 301(3), the Department will apply the same standard used to determine nexus for out-of-state taxpayers, which is set forth in section 200(1). That standard requires that the taxpayer has a physical presence in this state, or that the taxpayer "actively solicits sales" in this state and has gross receipts of at least \$350,000 sourced to Michigan. [MCL 208.1200(1)]

Because the nexus standard references \$350,000 in gross receipts sourced to a single state (Michigan), in applying that standard to determine whether a taxpayer is subject to tax in another state for purposes of apportionment, the Department will require that the taxpayer meet the \$350,000 gross receipts threshold in a single non-Michigan state. Also, section 301(3) by its terms refers to "another state" (singular) having jurisdiction to subject the taxpayer to tax. [MCL 208.1301(3)] Accordingly, a Michigan-based taxpayer having gross receipts of \$150,000 in one non-Michigan state and gross receipts of \$200,000 in another non-Michigan state would not meet the section 301(3) standard and would not be able to apportion its tax base. [Treasury FAQ N5]

As section 200(1) specifically directs that it is gross receipts of \$350,000.00 or more sourced to Michigan [and active solicitation of sales in this state] that determine substantial nexus, the definition of gross receipts found in section 111 will be applied, not the definition of sales. [Treasury FAQ N6]

"Actively solicits" means purposeful solicitation of persons within this state. "Solicitation" means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order. Solicitation is purposeful when it is directed at or intended to reach persons within Michigan or the Michigan market. [Treasury FAQ N7]

Active solicitation includes, but is not limited to, solicitation through (1) the use of mail, telephone, and e-mail; (2) advertising, including print, radio, internet, television, and other media; and (3) maintenance of an internet site over or through which sales transactions occur with persons within Michigan. [Treasury FAQ N7]

In short, soliciting sales through an internet site available to everyone everywhere is purposeful solicitation of persons within Michigan – even if the internet site in question is not limited to Michigan. Of course, in evaluating whether acts of solicitation are sufficient to establish active solicitation, the Department examines the activity on a facts and circumstances basis. To the extent that an internet site clearly excludes the Michigan market or refuses orders from persons within Michigan, then that person is not actively soliciting sales in Michigan through the internet site.

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[Treasury FAQ N7]

Example 1. A retailer located outside Michigan maintains an internet site over and through which customers may browse products and place orders. The internet site is generally available to all persons throughout the country. Through maintenance of the interactive site, the retailer intends to reach all persons and markets, including persons within Michigan and the Michigan market. The retailer is actively soliciting sales in Michigan.

Example 2. A retailer located outside Michigan maintains an internet site that advertises products and provides the terms under which such products may be purchased from the retailer. Although customers may not place orders directly through the internet site, the internet site provides a phone number and printable order form and invites customers to place orders through the phone or mail. Through this internet site, the retailer intends to reach all persons and markets, including persons within Michigan and the Michigan market. The retailer is actively soliciting sales in Michigan.

Example 3. A retailer located outside Michigan maintains an internet site over and through which customers may browse products and place orders. The retailer does not accept orders from and does not ship to persons within Michigan. The retailer does not direct its activities at persons within Michigan or the Michigan market. The retailer is not actively soliciting sales in Michigan.

Example 4. A manufacturer located outside Michigan maintains an internet site over and through which persons may view the manufacturer's products and specifications. The manufacturer does not accept orders through the internet site, provide order forms, or invite persons to call the manufacturer with orders. Although the internet site is generally available to all persons throughout the country, the manufacturer is not actively soliciting sales in Michigan.

Please stay tuned for more news and follow the [MichiganStateAndLocalTax Blog](#) for information as it becomes available.

If you have questions please feel free to contact me. I would be happy to be of assistance.

Sincerely,

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