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offered by online ecommerce platforms means even small clients can suddenly be mired in complexities of multistate tax rules from their very first sale.

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Accountants are being pulled in to the trend of the online marketplace. The ease offered by online ecommerce platforms means even small clients can suddenly be mired in complexities of multistate tax rules from their very first sale. The following article is the second in a three part series discussing policy changes brought on by the growth of ecommerce sales.

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In Part 1 of this series, we discussed the U.S. Supreme Court cases that defined the

offices, inventory, equipment or other assets in a state (owned or leased).

It is widely agreed among sales tax practitioners that nexus and sales tax compliance obligations are established for retailers as a result of storing inventory in a state. As such, for remote sellers that store inventory in a third-party warehouse in a state, it is widely understood that this creates a **physical presence** for sales tax nexus purposes.

What remains to be determined, and is not currently before the U.S. Supreme Court, is whether remote sellers that use third-party fulfillment services, such as Fulfillment By Amazon, are actually the "seller of record" or a "retailer" under state sales tax laws, given that such remote sellers lose all but legal title to the inventory once it is in the hands of the third-party fulfillment service provider.

Over the course of many years worth of audit adjudication and litigation, states have developed "attributional nexus" theories, through which nexus is imposed on an out-of-state seller based not on its activities, but rather on the activities of an in-state representative, or an in-state affiliate. In the sales tax context, these so-called "attributional nexus" standards have been based on theories of agency. As such, nexus can also be established by independent contractors or third parties that are deemed to represent the remote seller.

All states consider that in-state solicitation, either by employees or independent contractors, will establish sales tax nexus. Many states – in particular the most populous and aggressive states, from a sales tax nexus perspective – will assert that any third-party activities conducted "on behalf of" an out-of-state seller that are associated with the ability of the out-of-state seller to "establish and maintain a marketplace" will create sales tax nexus, regardless of the third party's activities or their purpose.

As examples, consider these cases:

- [*Tyler Pipe Indus. Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232 (1987) (quoting

third party is acting "on behalf of" the out-of-state seller, and the third party's activities are "significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." [*Tyler Pipe*, 483 U.S. 232, 250 (1987) (quoting the Washington Supreme Court decision on appeal, 715 P.2d 123, 126 (Wash. 1986)); *Scripto*, 362 U.S. 207, 211 (1960).]

As such, a company who doesn't have a physical presence in a state may still be found to have a substantial nexus if its connection with an in-state third party meets these requirements. For example, having an employee or a third party (even if considered an independent contractor) provide marketing, training, installation, support services, picking up or delivering inventory, meeting with suppliers, are all activities that can and have established nexus for an out-of-state seller.

In addition, if a company or its representatives are conducting certain activities in a state, even if the presence is only for a few days, it may be deemed to have nexus and be "engaged in business" or "doing business" in that state for purposes of sales tax.

In part three of this series, we will discuss how certain states are using these sales tax nexus decisions and theories to define physical presence rules for ecommerce retailers.

Sales Tax