

Resolution 2019-2 Opposing Business Activity Tax Nexus Legislation

Background

Business activity taxes are levied by states for the privilege of doing business in the state and are generally measured by the portion of gross or net income derived from the state. These include state corporate income taxes, gross receipts taxes, business license taxes, franchise taxes, business and occupation taxes, and insurance premiums taxes.

The U.S. Supreme Court has found that the U.S. Constitution allows a state to tax a portion of business income if there is a substantial nexus between the business and the taxing state. The Supreme Court has also acknowledged in *South Dakota v. Wayfair*, 585 U.S. ____ (2018) that a physical presence is not required for businesses to have substantial nexus in a state and be subject to state and local tax responsibilities.

In recent years, bills have been introduced in both the House and Senate named the Business Activity Tax Simplification Act (BATSA). On September 14, 2015, the Congressional Budget Office considered a version of BATSA in HR 2584 (114th Congress) and estimated “that the costs -- in the form of forgone revenues -- to state and local governments would be more than \$2 billion in the first full year after enactment and at least that amount in subsequent years.”

The bill would eliminate state jurisdiction to tax business income derived from the state unless the business had a substantial amount of physical presence in the state and would provide that certain types of physical presence could not be considered for purposes of determining the jurisdiction to impose business activity taxes. The bill also would expand the limitations of P.L. 86-272 to all forms of business activity taxes (instead of just net income taxes) and to the solicitation of sales of all types of property and services instead of just tangible personal property.

BATSA would cause the following disruptions in state and local tax systems:

- As a departure from existing U.S. Supreme Court precedent, the legislation would allow some businesses and industries to easily avoid paying state taxes.
- The legislation would also provide an incentive for other companies to engage in aggressive tax planning and structuring in order to avoid substantial amounts of tax in the states in which they do business essentially changing their business form, but not the nature of the income-producing activities. In particular, larger companies would be able to transfer intangible assets to holding companies incorporated in no-tax or low-tax states.
- The legislation favors large multi-national and multi-state businesses over in-state businesses. It would allow large corporations that can conduct business online to solicit business and compete with locally-based companies and exploit the market in that state without being subjected to the same taxes that in-state businesses are required to pay.
- The expansion of P.L. 86-272 is unwarranted and runs counter to the direction that business operations are taking.

Resolution

The Federation of Tax Administrators strongly opposes any legislation that would restrict a state's constitutional authority to impose tax on the portion of a businesses' income derived from that state. The FTA opposes any legislation that would require physical presence for the imposition of state business activity taxes.

This resolution shall automatically terminate three years after the Annual Business Meeting at which it is adopted, unless reaffirmed in the normal policy process. To be voted on by the membership at the June 26, 2019 Annual Business Meeting.