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Foreign Businesses Meet the Wild, Wild World of SALT – Part 1

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State and local tax practitioners are familiar with the vast number of jurisdictions, the variety of tax types, and the weight of state and local tax laws, regulations, and guidance that must be reviewed to successfully navigate and advise taxpayers on their compliance obligations. Foreign businesses, however, are often surprised to learn that there are substantial differences between the rules for complying with federal income tax provisions and those applicable at the subnational (that is, state and local) level.[1]

Part 1 of this article will discuss rules that non-U.S. businesses must follow (income tax treaties and the IRC), federal constitutional provisions that apply to non-U.S. businesses (the supremacy clause and the foreign commerce clause), threshold taxability issues (nexus and P.L. 86-272), and quirky local taxes that routinely fall under the radar of foreign businesses. Part 2 will focus on income inclusion issues (worldwide combination, extraterritorial income, and apportionment) and potential constraints on the ability to collect tax judgments from non-U.S. entities (the revenue rule).

Foreign Corporations Covered by Treaties

Under the supremacy clause, "all treaties[2] made, or which shall be made, under the authority of the United States, shall be the supreme law of the land."[3] Income tax treaties are bilateral written agreements between countries that address differences in tax regimes and seek to avoid double taxation of income by the treaty partner countries by limiting taxation on transactions that may involve both countries. Income tax treaties also provide for the exchange of information to prevent tax evasion and may exempt some classes of income, such as interest or dividends, or provide reduced tax rates. In addition to treaties, sometimes called conventions, there may be protocols (that is, a treaty or international agreement that amends an existing treaty) and notes that apply.

Treaties will spell out which taxes imposed by each nation — usually referred to as state, as in nation-state, or contracting state, not to be confused with subnational states — are covered by the treaty. For example, the treaty with France covers "the Federal income taxes imposed by the Internal Revenue Code (but excluding social security taxes)" and "the excise taxes imposed on insurance premiums paid to foreign insurers and with respect

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to private foundations."[4] It does not apply to any other state taxes and, accordingly, the Texas comptroller has ruled that the imposition of Texas's franchise tax is permissible under the France-U.S. treaty.[5]

The treaty with Canada does not cover "taxes imposed by the states of the United States, and by the provinces of Canada," but if these taxes are imposed, a foreign tax credit is ensured under the treaty to eliminate double taxation.[6] The Japan-U.S. income tax treaty "provides for an exemption from the local inhabitant taxes and the enterprise tax in Japan in respect of the operation of ships or aircraft in international traffic by U.S. enterprises, provided that no state or local government in the United States imposes a similar tax on a [*sic*] in respect of such operations by Japanese enterprises."[7]

Subnational taxes are not covered (at least none were discovered),[8] with the notable exception that treaties may contain a nondiscrimination provision that "prohibits discriminatory taxation with respect to all taxes, whether or not they are covered taxes … and whether they are imposed by the Contracting States, their political subdivisions or local authorities."[9]

Relying on nondiscrimination provisions in treaties, taxpayers have challenged some state tax impositions. In *In re Bayerische Beamtenkrankenkasse* AG,[10] the New York State Tax Appeals Tribunal rejected the New York State Division of Taxation's argument that the tribunal lacked jurisdiction to review the taxpayer's claim that a violation of the Germany-U.S. tax treaty[11] had occurred because of the division's attempt to use an alternative allocation method against a non-U.S. insurance corporation and held that because "its alien corporate status triggers the differential tax treatment," this treatment violated the nondiscrimination provision of the treaty.

Another New York case, *Reuters Ltd. v. Tax Appeals Tribunal*,[12] considered whether the nondiscrimination provisions of the 1975 U.K.-U.S. tax treaty were violated, this time with disappointing results. Reuters, a U.K. corporation, had set up a branch office in New York, and the Division of Taxation had computed the corporate franchise/income tax based on Reuters' worldwide income apportioned to New York. Reuters' New York branch operated at a loss, but its business as a whole was profitable. The New York Court of Appeals rejected Reuters' argument that it was treated unfavorably compared with a New York corporation that earned no income outside the state because Reuters was "a single, inseparable business enterprise" and said Reuters' argument amounted to "a flank attack on the 'unitary business' principle."[13] The proper comparison, according to the court, was to a U.S. corporation having a branch in New York but conducting business internationally. Applying that comparison, the court found that no discrimination occurred under the treaty.

Relying on a relevant comparison found by the court in *Reuters*, the New York City Department of Finance ruled that the nondiscrimination provision in the Japan-U.S. treaty barred the imposition of the city's bank tax if the tax liability would exceed that if the bank were a domestic corporation.[14]

The Washington Department of Revenue Appeals Division addressed the Germany-U.S. tax treaty nondiscrimination provision as applied to the business and occupation tax and found that it did not prohibit tax on the Washington-sourced royalties received by a German pharmaceutical corporation because royalty income is taxed regardless of whether it is received by non-U.S. or U.S. corporations.[15] The appeals division was not troubled by article 12 of the treaty, which, broadly speaking, provides that "royalties derived and beneficially owned by a resident"[16] are only taxable by the country of residence, unless the owner has a permanent establishment in the other country, and it concluded that a "taxpayer should be able to exclude that income taxed by Washington from its German tax base, thus avoiding double taxation." Because quasi-judicial forums generally can only address as-applied constitutional challenges, potential constitutional issues were not addressed, but a question remains as to whether subjecting the royalties violates the foreign commerce clause.

As the IRS notes on its website: "Some states honor the provisions of U.S. tax treaties and some states do not." However, the New York State Tax Appeals Tribunal concluded that "treaties are the supreme law of the land and that they are part of the law of every state. Accordingly, if the tax treaty and the tax law are in conflict in the present matter, the tax treaty must prevail and the notice of deficiency must be deemed invalid."[17]

New Jersey passed legislation, vetoed by the governor, that would include in the computation of corporation business tax "any income exempt from federal taxable income under any treaty obligation of the United States, unless such exclusion, exemption, deduction, or credit is explicitly made applicable to states under the express terms of a tax treaty entered into by the United States."[18] New Jersey's Division of Taxation recently issued a notice providing that "income that was protected by a treaty is not required to be added back" under New Jersey's corporate business tax, unless it is required to be added back under the state's related-party addback provisions.[19]

Foreign Corporations Without Treaty Protection

Generally, foreign corporations are only taxed on their U.S.-source income that is effectively connected with a U.S. trade or business.[20] Thus, if a foreign corporation has U.S.-source income, it must determine whether it has a trade or business in the United States to which the income is effectively connected.[21]

Unlike the view taken by many states, under Treasury's regulations, sporadic or infrequent use of another person's U.S. fixed place of business will not result in a foreign corporation being treated as having a U.S. fixed place of business.[22] Likewise, the federal regulations take a more generous view than do some states and some treaties when it comes to management activity undertaken by top management: "A foreign corporation shall not be considered to have an office or other fixed place of business merely because a person controlling that corporation has an office or other fixed place of business from which general supervision and control over the policies of the foreign corporation are exercised."[23]

The IRC and Treasury regulations also address the factors for determining whether types of income are effectively connected income.[24] Fixed or determinable periodic income, which includes some income, dividends, rents, salaries, and gains and losses from sales or exchanges of capital assets, is ECI based on two factors: (1) whether the income, gain, or loss is derived from assets used in or held for use in the conduct of a U.S. trade or business; or (2) whether the activities of such trade or business were a material factor in the realization of the income, gain, or loss.[25]

The concept of ECI attributable to a U.S. trade or business is similar but not identical to that of profits attributable to a U.S. PE, which is a treaty concept.[26] If a treaty is in place, it is the PE rules that are applicable, and if a PE exists, taxation would be limited to profits attributable to the PE.

If a foreign corporation has U.S.-source income but is not engaged in a U.S. trade or business, the resulting income is non-ECI (NECI), which includes fixed or determinable periodic income, and may be subject to 30 percent withholding unless an exemption exists or a treaty provides for a lower rate of withholding.[27]

Here is a table that summarizes the rules:

Place of Incorporation / Income Type	**Taxability of U.S.-Source Income**	**Taxability of Non-U.S.-Source Income**
Foreign — ECI	All, subject to treaty	All, subject to treaty
Foreign — NECI	Some, subject to treaty	None
Foreign incorporated subsidiary of U.S. corporation	ECI rules apply	Subpart F income taxed to shareholder

Foreign Commerce Clause

Article I, section 8, clause 3 of the Constitution empowers Congress to "regulate Commerce with foreign Nations, and among the several states." While the Court has set out four prongs for taxes to pass muster under the commerce clause,[28] when the clause applies to foreign nations (the foreign commerce clause), the Court concluded in *Japan Line* that "a more extensive constitutional inquiry is required." It added two additional prongs that ask (1) whether there is an enhanced risk of multiple taxation; and (2) whether the tax impairs federal uniformity in an area where federal uniformity is essential — that is, its "one voice" test.[29] As with the commerce clause, the Court has held that in addition to the affirmative grant of power to the Congress, there is a dormant element to the foreign commerce clause that limits states' authority.[30]

Violations of the foreign commerce clause have been alleged — and rejected by the Supreme Court — based on the use of apportioned worldwide income and worldwide combined reporting.[31] In 1984, after the Supreme Court's decision in *Container*, at the behest of corporations, Treasury formed a Worldwide Unitary Taxation Working Group that recommended in its 1984 report that states adopt a water's-edge unitary combination for U.S.- and foreign-based companies.[32] States, including California, Florida, New Hampshire, and Utah, and the Multistate Tax Commission endorsed water's-edge combined reporting conditioned on improved federal compliance and cooperation.[33] The report stated that federal legislation would be introduced if states failed to give effect to the report's water's-edge recommendation.

While several states and the District of Columbia[34] permit worldwide combined reporting, including California,[35] Connecticut,[36] Massachusetts,[37] and Montana,[38] the method is not required. However, mandatory worldwide combination is rearing its head again, with Hawaii,[39] Minnesota,[40] and New Hampshire[41] proposing bills to adopt that method. Although none of these states have succeeded in adopting worldwide combined reporting, New Hampshire Gov. Chris Sununu (R) signed legislation establishing commissions to consider the issue, and Maine has mandated the preparation of a report for adopting worldwide combined reporting for some corporations.[42]

Application of the foreign commerce clause to Utah's personal income tax was considered in *Steiner v. Utah State Tax Commission*.[43] The Steiners challenged Utah's failure to provide a mechanism to avoid double taxation of S corporation income that was also taxed by Germany. On their joint personal income tax return, they claimed an "equitable adjustment" to exclude the foreign income from Utah taxable income since credits for foreign taxes are not allowed. The Utah State Tax Commission disallowed the adjustment, but the state district court

ruled that the claimed equitable adjustment for foreign business income should be allowed.[44] Although based on statutory grounds, dormant foreign commerce clause concerns motivated the ruling. However, the Utah Supreme Court reversed and held that (1) the dormant commerce clause did not require the state to apportion a residency-based income tax instead of granting a credit; (2) the dormant foreign commerce clause does not require that Utah allow a deduction for income earned in foreign countries; and (3) the "equitable adjustment" provision did not require a deduction for foreign income. The court refused to apply the foreign dormant commerce clause to individuals or S corporation shareholders becausethe U.S. Supreme Court had not yet done so and held that Utah could tax the foreign income of residents. The Supreme Court rejected the Steiners' petition for writ of certiorari.[45]

As U.S. individuals and corporations continue to expand their footprints and investments overseas, increased challenges premised on the foreign commerce clause and additional guidance from the Court are expected.

Nexus

Perhaps the most critical mistake made by foreign companies considering starting business operations in the United States is to conclude that they are not subject to state taxation because they are either (1) covered by a treaty and have no U.S. PE[46] and thus are not subject to federal income tax; or (2) not covered by a treaty, but they have no ECI attributable to a U.S. trade or business.

Although the issue of nexus for non-U.S. companies existed pre-*Wayfair*, after the decision,[47] which lowered the nexus bar for use tax collection by eliminating the physical presence requirement, the chasm between treaty PE rules and what constitutes a U.S. trade or business and state nexus rules became wider. It must be kept in mind that the treaty concept of PE requires a physical presence — a fixed place of business — that can be narrower than the expansive view that states take in determining whether a business is doing business for state tax purposes. For example, using independent agents, having facilities used to store inventory, or merely performing clerical functions in the taxing jurisdiction generally does not constitute a PE, but those factors are generally state nexus triggers.[48] Texas has concluded that even though maintaining a sales office is not a PE, the existence of the office created nexus.[49] Likewise, entities not covered by a treaty may not have a U.S. trade or business under federal law but may still trigger states' nexus rules or thresholds.

While the OECD has recognized in its pillar 1 blueprint that "in an increasingly digital age, taxing rights can no longer be exclusively determined by reference to physical presence,"[50] the move away from the physical presence standard in the international arena has been slow. Thus, it is not surprising that foreign businesses may bristle at the imposition of economic nexus.

Some states that adopted substantial economic presence standards pre-*Wayfair* excluded non-U.S. corporations.[51] And some states have adopted income tax factor presence nexus standards that deem nexus to exist once a set threshold of payroll, property, or sales has been met. These factor presence nexus thresholds vary by state and are often revised yearly to reflect inflation.

Businesses should not assume that the nexus thresholds applicable at the state level also apply at the local level. For example, until recently, New York City did not provide for economic nexus even though the state had adopted an economic nexus provision if a company's New York-sourced receipts exceeded $1 million.[52] Application of the factor presence standards can also trigger water's-edge election issues for foreign corporations that are affiliates of U.S. affiliates filing unitary combined returns.[53]

Further, even if a foreign corporation has contacts that are sufficient to support a nexus finding, they and their advisers should make sure to review states' "doing business" definitions, which may exclude activities and may result in them not being subject to the tax. For example, New York has special exclusions for alien corporations that are tied to IRC section 864.[54] And Tennessee, in the context of the state's franchise tax (not income tax), ruled that a non-U.S. corporation that had no ECI was not subject to the franchise tax because although it was "doing business" in the state, it was not considered to have a substantial nexus with Tennessee.[55]

Public Law 86-272

Although some view Public Law 86-272[56] as a nexus provision, in actuality it bars a state from imposing net income taxes on a business that has nexus if its activities are limited to soliciting business, the contracts for any sale are entered into outside the state, and the goods are shipped from outside the state. It is inapplicable to taxes other than those imposed on net income, and most states take a narrow view of its applicability. Recently, the MTC and several states have updated or proposed updating their P.L. 86-272 guidance to address electronic commerce.[57] The MTC's revised statement provides several examples of activities that are unprotected under P.L. 86-272, including contracting with a marketplace facilitator for the sale of the business's products on the marketplace facilitator's online marketplace if the facilitator maintains inventory, including that of the business, at fulfillment centers in a state where the business's customers are located. Other activities include post-sale assistance via electronic chat or email, online credit card solicitation, and the placement of internet cookies on customers' computers for purposes that are not ancillary to solicitation of sales of tangible personal property.[58] Foreign businesses that sell tangible personal property over the internet and want to rely on P.L. 86-272 to protect them from state net income taxes should closely evaluate each state's P.L. 86-272 guidance in light of their own particulars and consider the validity of the states' positions.[59]

Some states view P.L. 86-272's protections as applicable only in the context of interstate commerce and not foreign commerce. For example, California has taken the position that P.L. 86-272 applies only to U.S. states and Puerto Rico.[60] Other states, including Alabama, Illinois, Kentucky, and Michigan, however, reject this restricted view of P.L. 86-272 and have indicated that they will apply P.L. 86-272 to transactions in foreign commerce.[61] In August 2021 the MTC revised its policy statement on P.L. 86-272 to provide that "by its terms, the statute does not apply to foreign commerce" but that a state "may elect to apply P.L. 86-272 in the context of foreign commerce," and if it does, "it will do so consistently whether it is determining if activities of a foreign seller are protected or whether it is determining if sales into the foreign jurisdiction will be thrown back."[62]

New York has announced its position that a non-New York corporation that meets the state's $1 million receipts threshold for establishing nexus will *not* be required to file income tax returns if all its activities are protected under P.L. 86-272.[63]

Some Quirky Local Taxes

Foreign businesses are often surprised at the number of localities and the vast array of taxes and the daunting registration and licensing requirements they impose. A study by the federal Government Accountability Office that focused on states' expanded authority after *Wayfair*[64] to require businesses that lack any physical presence in the state to collect sales tax on remote sales to in-state customers noted that of the 45 states that impose sales tax, 37 also have local sales taxes, and Alaska, which does not have a state sales tax, imposes local sales taxes.[65] Of the approximately 30,000 local jurisdictions in the United States, "between 10,000 and 12,000 do" so.[66] While most states have centralized administration of local sales tax, the GAO study states that "Alabama

has over 300, Alaska has over 100, Colorado has 70, and Louisiana has 64" localities that "administer their own unique sales taxes."[67] Complying with local tax requirements is so onerous that suits challenging decentralized local tax administration as violative of the commerce and due process clauses have been filed.[68] And the breadth of the sales taxes is only the tip of the iceberg.

Localities also impose a potpourri of other and often unusual and unexpected taxes: 67 percent have a business tax based on economic activity, 11.2 percent have a flat tax, 30.4 percent have a gross receipts tax, 20.1 percent impose a tax based on the number of employees or payroll, 6.5 percent impose a property tax on square footage, and 3.9 percent tax profits.[69] There are also real estate transfer taxes — sometimes imposed when a controlling interest in an entity owning realty is transferred — commercial rent taxes, occupation taxes, and even surcharges on CEO compensation. As if these impositions aren't enough, many localities also have registration and licensing requirements.

Conclusion

Addressing the threshold taxability issues of non-U.S. businesses can be quite challenging to businesses venturing into the United States. Part 2 of this article will consider income inclusion and some apportionment issues (which can be daunting even for U.S. businesses) and the thorny issues that may be faced by states when seeking to collect from foreign businesses.

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1 In this article, references to states will include localities, but non-U.S. corporations and their advisers should consider local tax provisions, which may vary from their state counterparts. Further, even when the state and local tax provisions are the same, localities have been known to interpret their provisions differently from the state.

2 A detailed discussion of treaties and their provisions is beyond the scope of this article. Treasury and the IRS both provide access to U.S. income tax treaties, protocols, notes, and technical explanations.

3 U.S. Const., Art. VI, cl. 2.

4 Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, signed in Paris on August 31, 1994, at Article II(a). Treasury's technical explanation of the convention with France notes that Social Security taxes are separately addressed in a bilateral Social Security Totalization Agreement.

5 Tex. Policy Ltr. Rul. No. 9312L1276G04 (Nov. 12, 1993).

6 Treasury Department Technical Explanation of the Convention Between the United States of America and Canada With Respect to Taxes on Income and on Capital, signed in Washington on September 26, 1980 (as amended by the protocol signed in Ottawa on June 14, 1983, and the protocol signed in Washington on March 28, 1984) at 3 of 105.

7 Department of the Treasury Technical Explanation of the Convention Between the Government of the United States of America and the Government of Japan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital Gains, signed in Washington on November 6, 2003, at 7 of 115.

8 *See Barclays Bank PLC v. Franchise Tax Board*, 512 U.S. 298, 322 (1994) ("The tax treaties into which the United States has entered do not generally cover the taxing activities of subnational governmental units such as States … the Senate has on at least one occasion, in considering a proposed treaty, attached a reservation declining to give its consent to a provision in the treaty that would have extended that restriction [use of arm's-length methods] to the States.").

[9] Treasury Department Technical Explanation of the Convention Between the Government of the United States of America and the Government of the French Republic for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital, signed in Paris on August 31, 1994, at 5 of 59. *See also, e.g.*, Department of the Treasury Technical Explanation of the Convention between the Government of the United States of America and the Government of the United Kingdom of Great Britain and Northern Ireland for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and on Capital Gains, at 9 of 131 ("Except with respect to Article 25 (Non-Discrimination), state and local taxes are not covered by the Convention."); Department of the Treasury Technical Explanation of the Protocol Between the United States and New Zealand, signed in Washington on December 1, 2008; Protocol Amending the Convention Between the United States of America and New Zealand for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income, signed in Wellington on July 23, 1982, at 5 of 52 ("Article 23 [Non-Discrimination] applies with respect to all taxes, including those imposed by state and local governments.").

[10] *In re Bayerische Beamtenkrankenkasse AG*, DTA No. 824762 (N.Y. Tax App. Trib. Sept. 11, 2017); *In re Landschaftliche Brandkasse Hannover*, DTA No. 825517 (N.Y. Tax App. Trib. Sept. 11, 2017).

[11] Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes, signed August 29, 1989 (as amended by a protocol signed June 1, 2006).

[12] *Reuters Ltd. v. Tax Appeals Tribunal*, 82 N.Y.2d 112 (1993) *aff'g* 180 A.D.2d 270 (1992).

[13] *Id.* 82 N.Y.2d 116.

[14] N.Y.C. Fin. Ltr. Rul. No. 03-4802 (June 19, 2003).

[15] Washington Tax Determination 15-0251, 35 WTD 230 (Wash. App. Div., Sept. 11, 2015).

[16] Convention Between the United States of America and the Federal Republic of Germany for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion With Respect to Taxes on Income and Capital and to Certain Other Taxes, general effective date under article 32: January 1, 1990; for former German Democratic Republic: January 1, 1991.

[17] *Landschaftliche Brandkasse Hannover*, DTA No. 825517 (citations omitted).

[18] N.J. A. 4202 (intro. June 18, 2018), proposing to add N.J. Stat. Ann. section 54:10A-4(k)(16). *See also* N.J. S. 1779 (intro. Feb. 13, 2020); N.J. A. 5474 (intro. June 6, 2019), which proposed amendments to N.J. Stat. Ann. section 54:10A-4.11) (A combined group that elects to be taxed on a water's-edge basis, some income derived from a corporation organized outside the United States would not be included in the net income of the combined group if that income is exempt from federal income tax by operation of a federal income tax treaty.).

[19] N.J. Div. of Taxation Notice, "Income Excluded Pursuant to a Tax Treaty and CBT Returns" (May 20, 2022).

[20] IRC sections 882(a), 864(c). A detailed discussion of the federal income taxation of foreign corporations is beyond the scope of this article.

[21] The rules for determining whether a fixed place of business exists for a business in the United States are provided in reg. section 1.864-7.

[22] Reg. section 1.864-7(b)(2).

[23] Reg. section 1.864-7(c).

[24] *See, e.g.*, section 864(c) and reg. 1.864-4 (U.S. Source Income Effectively Connected With U.S. Business).

[25] Sections 864(c)(2), 871(a)(1).

[26] Rev. Rul. 81-78, 1981-1 C.B. 604 ("The concept of taxing profits attributable to a permanent establishment in the United States in the context of a tax treaty such as the subject Convention is analogous to the concept of taxing income effectively connected with conduct of a trade or business embodied in section 864(c) of the Code. … Although there are many areas in which the 'attributable to' and 'effectively connected' principles overlap, these principles are only analogous. They are not synonymous."), *amplified by* Rev. Rul. 84-17, 1984-1 C.B. 308. This revenue ruling also discusses the genesis of the ECI concept in 1966, from the previous "force of attraction" principle.

[27] IRC section 881.

[28] *See Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977). The four prongs required for a state tax to survive a commerce clause challenge are that the tax (1) is applied to an activity with substantial nexus to the taxing state; (2) is fairly apportioned; (3) does not discriminate against interstate commerce; and (4) is fairly related to the services provided by the taxing state.

[29] *Japan Line Ltd. v. County of Los Angeles*, 441 U.S. 434, 446 (1979).

[30] *Wardair Canada Inc. v. Florida Department of Revenue*, 477 U.S. 1 (1986). Several U.S. Supreme Court justices have questioned whether a dormant commerce clause exists. *See, e.g., Comptroller of the Treasury of Maryland v. Wynne*, 575 U.S. 542, 572-573, 576 (2015) (in his dissenting opinion, Justice Antonin Scalia, joined by Justice Clarence Thomas, called the dormant commerce clause the "synthetic commerce clause," a "judicial fraud," and a "brazen invention").

[31] *Barclays Bank*, 512 U.S. 298; *Container Corp. of America v. Franchise Tax Board*, 463 U.S. 159 (1983); *Bass, Ratcliff & Gretton v. State Tax Commission*, 266 U.S. 271 (1924).

[32] Treasury, "The Final Report of the Worldwide Unitary Taxation Working Group, Chairman's Report and Supplemental Views" (Aug. 1984).

[33] *Id.* at 153/156 (State Members, p. 53).

[34] D.C. Code Ann. section 47-1810.07(b).

[35] Cal. Rev. & Tax Code section 25101.

[36] Conn. Gen. Stat. section 12-218f.

[37] 830 CMR 63.32B.2(5)(c).

[38] Mont. Admin. R. section 42.26.204(1).

[39] Hawaii H.B. 441 and S.B. 1302 (intro. Dec. 10, 2021, carried over to 2022 regular session).

[40] Minnesota H.F. 2228 (intro. Mar. 15, 2021).

[41] New Hampshire H.B. 102 (intro. Aug. 18, 2021).

[42] Laws 2022, ch. 12 (signed Apr. 12, 2022); Me. L.D. 428 (eff. Aug. 8, 2022).

[43] *Steiner v. Utah State Tax Commission*, 219 U.T. 47 (2019).

[44] *Steiner & Steiner-Reed v. Utah State Tax Commission.*, Dkt. No. 170901774 (Utah Dist. Ct., Jan. 30, 2018).

[45] *Steiner v. Utah State Tax Commission*, 140 S. Ct. 1114 (2020).

[46] *See, e.g.*, U.S. Model Income Tax Convention, article 5(1).

[47] *South Dakota v. Wayfair Inc.*, 138 S. Ct. 2080 (2018).

[48] U.S. Model Income Tax Convention, art. 5(4).

[49] Tex. Policy Ltr. Rul. No. 9312L1276G04 (Nov. 12, 1993).

[50] OECD, "Tax Challenges Arising From Digitalisation — Report on Pillar One Blueprint: Inclusive Framework on BEPS," at 3.1.186 (2020).

[51] *See, e.g.*, Conn. Gen. Stat. section 12-216a(b)(1) ("The [economic presence nexus standard] shall not apply to any company that is treated as a foreign [non-U.S.] corporation under the Internal Revenue Code and has no income effectively connected with a United States trade or business.").

[52] Laws 2022, ch. 555 (S.B. 9454) (conforms New York City's business taxes to the state's franchise tax to provide that corporations deriving receipts from city sources of $1 million or more be subject to the city's business corporation tax. A corporation with less than $1 million but more than $10,000 of receipts from city sources will also be subject to the city's business corporation tax if the corporation is part of a unitary group that in the aggregate derives receipts from city sources of $1 million or more).

[53] Cal. Franchise Tax Board Notice 2016-02 (Sept. 9, 2016) (addressing the effect of the enactment of the factor presence nexus standards in Cal. Rev. & Tax. Code section 23101(b)).

[54] 20 NYCRR section 1-3.3(b).

[55] Tenn. Dep't of Rev., Rev. Rul. 20-08 (Oct. 9, 2020). Another potential area for confusion (and traps) for non-U.S. corporations is the types of state taxes. Some states call their income taxes franchise taxes (New York), while other states refer to the doing-business taxes administered by secretaries of state as franchise taxes (Tennessee). Other states may refer to their corporate income taxes as excise taxes (Massachusetts), and many states will have alternative methods (such as a tax on capital or net worth) for determining tax liability under a single tax regime (North Carolina).

[56] 15 U.S.C. sections 381-384.

[57] MTC Statement of Information Concerning Practices of the Multistate Tax Commission and Supporting States Under P.L. 86-272 (rev. Aug. 4, 2021); Cal. Franchise Tax Board Tech. Advice Memo. 2022-01 (Feb. 14, 2022); New York State Department of Taxation and Finance Draft Regulation 1-2.10 (Apr. 2022). It is unclear whether additional states will update their P.L. 86-272 guidance and whether the guidance will be limited to prospective application or apply retroactively.

[58] MTC Statement, *id.*

[59] For example, in *Online Merchants Guild v. Hassell*, No. 179 M.D. 2021 (Pa. Commw. Ct. June 22, 2022), the court rejected Pennsylvania's position that nexus was established by businesses that sell merchandise through Amazon's Fulfillment by Amazon Program and whose merchandise was stored by Amazon in the state. Although a nexus and not a P.L. 86-272 case, if nexus is lacking, resorting to P.L. 86-272 to provide protection from net income tax imposition is unnecessary.

[60] *In re Dresser Industries Inc.*, 82-SBE-307 (Cal. State Bd. of Equalization, June 29, 1982).

[61] Ala. Admin. Code 810-27-1-.19(8); 86 Ill. Admin. Code 100.3200, Ky. Admin. Regs. 16:240; Mich. DOR, Michigan Business Tax FAQs, N9 (Oct. 15, 2019).

[62] Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272 (adopted Aug. 4, 2021).

[63] N.Y. Department of Taxation and Finance, Corporate Tax Reform FAQs. The FAQ also provides that corporations opting to file returns but claiming P.L. 86-272 protection "must have the box on line C of page 1 marked, be completed in its entirety, and have $0 entered on Part 2, line 4."

[64] *Wayfair*, 138 S. Ct. 2080.

[65] GAO-22-106016 (June 14, 2022).

[66] *Id.*

[67] *Id.*

[68] *See, e.g.*, *Halstead Bead Inc. v. Lewis*, No. 2:21-cv-02106 (E.D. La. 2022) (challenging parish-by-parish and intraparish sales and use tax compliance; case dismissed under the federal Tax Injunction Act).

[69] Charles Swenson, "City Business Taxes: More Than You Think," *State Tax Notes*, Dec. 21, 2016, p. 759.

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