Income Tax - Information Release

IT 2001-01 – Nexus Standards & Filing Safe Harbors for Individuals

Introduction

This information release describes the standards the Department of Taxation will apply to determine whether a nonresident is subject to Ohio’s individual income tax. Specifically, this information release addresses the standards used to determine if a nonresident individual has nexus with Ohio. For nexus standards for pass-through entities, see Information Release IT 2001-02; for nexus standards for trusts and estates, see Information Release IT 2001-03.

The full text of the current version of R.C. 5747.01 can be found at: http://codes.ohio.gov/orc/5747.01
The full text of the current version of R.C. 5747.02 can be found at: http://codes.ohio.gov/orc/5747.02
The full text of 15 U.S.C. §381-384 (i.e., P.L. 86-272) can be found here.
The full text of the MTC Statement of Information on P.L. 86-272 can be found here.

Observation/ Law

Ohio Law. Division (A) of R.C. 5747.02 levies an annual income tax on “every individual”:
- Residing in Ohio;
- Earning or receiving income in Ohio;
- Earning or receiving Ohio-sourced lottery winnings, prizes, awards or winnings on casino gaming; or
- Otherwise having nexus with or in Ohio under the Constitution of the United States.

The tax applies to both Ohio residents and nonresidents. Division (I) of R.C. 5747.01 defines “resident” as an individual who is domiciled in Ohio, subject to section 5747.24 of the Revised Code. The concepts of residency for individuals are outlined in Information Releases IT 2015-02 and IT 2007-08. Conversely, a “nonresident” is defined as one who is not a resident. R.C. 5747.01(J).

Federal Law. Sections 381-384 of 15 U.S.C., better known as Public Law 86-272 (or P.L. 86-272), restrict a state from imposing a tax on or measured by income derived within the state’s borders if the only business activity of the nonresident within the state consists of the solicitation of orders for sale of tangible personal property. This restriction is limited to orders sent outside the state for acceptance or rejection and, if accepted, filled by shipment or delivery from a point outside the state.

* An information release does not create legal obligations by its own force. Only an administrative rule can “confer the force of law on a requirement.” See Progressive Plastics, Inc. v. Testa, 133 Ohio St.3d 490, 2012-Ohio-4759.
P.L. 86-272 does not prohibit Ohio from asserting that a nonresident has nexus; in fact, P.L. 86-272 acknowledges that said nonresident does have nexus with the state. Instead, P.L. 86-272 exempts certain income from state taxation, even though nexus exists. In determining what activities are protected by P.L. 86-272 and what activities are still subject to Ohio’s taxing power (i.e., “unprotected activities”), Ohio follows the Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272, last revised on July 27, 2001.

**Guidance**

**Nexus.** An Ohio resident always has nexus with Ohio. Based on R.C. 5747.02, a nonresident individual has nexus with Ohio when s/he engages in one or more of the following activities:

- The nonresident earns compensation (e.g., wages, salary, tips, bonuses) for services performed in Ohio;
- The nonresident has real, tangible, or intangible property in Ohio;
- The nonresident, either directly or indirectly (e.g., via an investment in a pass-through entity) engages in a trade or business operating in Ohio.

A business is “operating in Ohio” if it has property, payroll, and/or sales in the state. See R.C. 5733.05(B)(2) via R.C. 5747.21.

Activities performed in Ohio on behalf of a nonresident individual by a non-employee professional (e.g., lawyer, accountant, investment banker) will not, in and of themselves, create nexus for the nonresident individual. However, it is important to note that the activities performed in Ohio will create Ohio nexus for the non-employee professional.

Once a nonresident has nexus for a given tax year, s/he is generally required to file returns and pay the appropriate tax for that tax year. The taxpayer(s) would file the Ohio income tax return starting with all of his/her/their federal adjusted gross income. A nonresident is entitled to a “nonresident credit” for any income “that is not allocable or apportionable to this state pursuant to sections 5747.20 to 5747.23 of the Revised Code.” R.C. 5747.05(A). **Nexus is determined on a tax year by tax year basis; if the taxpayer has nexus for a given tax year, then filing and payment is generally required.**

**Safe Harbor Provisions.** Even if a nonresident individual has nexus with Ohio, if the nonresident individual’s only contacts with Ohio are limited to the contacts listed below, the Department of Taxation will not require the filing of a return and/or the payment of the individual income tax. Generally, unless otherwise cited below, safe harbors are not mandated by statute or case law. Instead, they are provided for the purposes of administrative convenience.

A. The individual has property or representatives on the premises of a commercial printer in Ohio. See R.C. 5747.30.

B. The individual is a resident of Kentucky, Indiana, Michigan, Pennsylvania and West Virginia for tax purposes and earns wage or salary income in Ohio. Based on “reciprocity agreements” that the state of Ohio has with these states, the wages and salary income of such nonresidents are subject to tax in the individual’s state of residence. All non-wage and salary income earned in Ohio is still subject to Ohio’s filing and payment requirements.

C. The individual owns or uses in Ohio intangible property, but the use of such property in Ohio does not develop, maintain or enlarge the marketplace for the individual.
D. The individual grants a license to use software in Ohio, but only if the individual and his/her agents or representatives do not provide from or at a location in Ohio any technical assistance or other support.

E. The individual maintains a website on a server or similar electronic equipment in Ohio, unless the equipment itself is owned, leased or rented by the individual.

F. The individual conducts meetings in Ohio with suppliers of goods or services.

G. The individual conducts meetings in Ohio with government representatives in their official capacity.

H. The individual enters Ohio for the purposes of bringing or defending a lawsuit in a court of law in Ohio.

I. The individual has employees or others acting on the individual’s behalf attend meetings, retreats, seminars, conferences, schools or other training in Ohio, sponsored by others.

J. The individual holds, for the benefit of his/her employees, retreats, seminars, conferences or other training in Ohio.

K. The individual holds recruiting or hiring events in Ohio.

L. The individual advertises in Ohio through various electronic or print media.

M. The individual rents customer lists to or from an entity located in Ohio.

N. The individual has a presence in Ohio for no more than 20 days, which need not be consecutive, in a calendar year and the individual’s activities in Ohio generate no more than $10,500 in gross income in that same calendar year.

O. The individual participates in one or more trade shows in Ohio as an exhibitor provided that the individual does not have employees present in Ohio for more than 20 days in a calendar year and the individual’s activities in Ohio generate no more than $10,500 in gross income in that same calendar year.

P. The individual attends trade shows in Ohio as a consumer.

Q. The individual engages in activities that, when considered in the aggregate, are protected under P.L. 86-272.

Please note, if a taxpayer voluntarily files a return and/or pays tax, even though one or more safe harbors apply, then the safe harbors are considered waived as to that filing or payment. The taxpayer cannot later use the safe harbor provisions to request a refund of taxes previously paid or to negate a billing based on the filing.

**Voluntary Disclosure Program.** A nonresident with a filing responsibility under these nexus guidelines who has failed to file and who has not been contacted by the Department with respect to an unpaid liability is eligible to participate in the Voluntary Disclosure Agreement (VDA) program. The VDA guidelines for each of the respective taxes are available at [https://www.tax.ohio.gov/other/voluntary Disclosure.aspx](https://www.tax.ohio.gov/other/voluntary Disclosure.aspx).

**Questions?**

Taxpayers may visit [www.tax.ohio.gov](http://www.tax.ohio.gov). Questions may be submitted by clicking on the “Contact” link found at the top right of the page and then choosing the “Email Us” option. Taxpayers with additional questions regarding this subject may contact Individual Income Taxpayer Services at 1-800-282-1780, or at 1-800-750-0750 for the hearing impaired.