

# Missouri enacts new income tax sourcing election and sales tax affiliate nexus

July 24, 2013

## In brief

On July 12, 2013, Missouri enacted [H.B. 128](#), which provides taxpayers with a new single sales factor apportionment election. Missouri taxpayers should be aware of this additional election when apportioning income for Missouri corporate income tax purposes.

Additionally, on July 5, 2013, Missouri enacted [S.B. 23](#), which provides affiliate and click-through nexus standards for sales and use tax purposes. Out-of-state vendors selling taxable products or services to Missouri customers should review whether activities of in-state affiliates or third parties create a sales and use tax registration and filing obligation with the state.

## In detail – Income tax sourcing election

Missouri generally provides taxpayers with the option to apportion income using an equally-weighted three factor formula of sales, property, and payroll or a statutory single sales factor method. Under the statutory single sales factor method, the Missouri numerator consists of: (1) sales transactions wholly within Missouri and (2) one-half of sales that are partly within Missouri. For tangible personal property, a sale is partly within Missouri when the transaction has an in-state shipping point and out-of-state destination point, or vice-versa.

H.B. 128 provides a taxpayer with another single sales factor apportionment election, which provides that:

- sales of tangible personal property are included in the numerator if the purchaser's destination point is in Missouri (without regard to the FOB point or other conditions of the sale)
- sales of tangible personal property are not included in the numerator if the destination point is outside Missouri, regardless of the shipping point location
- investment or reinvestment of a taxpayer's own funds, or the sale of any such

investment or reinvestment, is excluded from the sales numerator and denominator.

## In detail – Sales tax

### Affiliate and click-through nexus

Under current law, a person is 'engaged in business' in the state for purposes of sales and use tax if that person: (1) exploits the state's market through certain media-solicited means such as direct mail, television, radio, or other electronic media; or (2) is owned or controlled by the same interests that own or control any seller engaged in the same of similar line of business in Missouri. Effective

August 28, 2013, [S.B. 23](#) repeals these two meanings of ‘engaged in business.’

Also effective August 28, 2013, S.B. 23 creates two new presumptions that a vendor is engaged in business in Missouri. A vendor is presumed to engage in Missouri business activities if any person, other than a common carrier acting in its capacity as such, that has substantial nexus with the state:

- sells a similar line of products as the vendor and does so under the same or a similar business name
- maintains a Missouri office, distribution facility, warehouse, storage place, or similar place of business to facilitate the delivery of property or services sold by the vendor to its customers
- delivers, installs, assembles, or performs maintenance services in Missouri for its customers
- facilitates the vendor's delivery of property to Missouri customers allowing the vendor's customers to pick up property sold by the vendor at an office, distribution facility, warehouse, storage place, or similar place of business

maintained by the person in Missouri; or

- conducts any other activities in Missouri that are significantly associated with the vendor's ability to establish and maintain a market in the state.

This presumption may be rebutted by demonstrating that the person's activities in Missouri are not significantly associated with the vendor's ability to establish or maintain a market in the state.

A second presumption is created, which is generally referred to as ‘click-through’ nexus. A vendor is presumed to engage in Missouri business activities if the vendor enters into an agreement with a Missouri resident to refer customers to the vendor and when the sales generated by the agreement exceed \$10,000 in the preceding twelve months. This presumption may be rebutted by showing that the Missouri resident did not engage in activity within Missouri that was significantly associated with the vendor's market in Missouri in the preceding twelve months.

#### ***Repeal of safe harbor exemptions***

Under current law, Missouri provides for a use tax exemption when a vendor: (1) had Missouri gross

receipts equal to or less than \$500,000 or total US gross receipts equal to or less than \$12,500,000 in the preceding calendar year; (2) maintains no place of business in Missouri; and (3) has no selling agents in the state. Effective August 28, 2013, S.B. 23 repeals this exemption.

#### ***The takeaway***

While the income tax legislation is effective August 28, 2013, the law is silent regarding the first tax year in which the new single sales factor method may be available. Additionally, the law is silent regarding how to source sales of services and intangibles. We expect that future guidance from the state may clarify these issues.

With S.B. 23, Missouri joins the increasing number of states enacting affiliate and click-through nexus legislation. Retailers may continue to experience uncertainty and aggressive state scrutiny as states find new methods for subjecting out-of-state retailers to their taxing power. Out-of-state vendors should review whether activities of in-state affiliates and third parties create a sales and use tax registration and filing obligation with Missouri.

### ***Let's talk***

If you have any questions regarding how these changes may affect your business, please contact:

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