

New Mexico – Out-of-state internet retailer has nexus due to activities of in-state retailer affiliate

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In brief

The New Mexico Supreme Court held that an affiliate's in-state activities were sufficient to create a substantial nexus between an out-of-state retailer and New Mexico for gross receipts tax (GRT) purposes. Such activities included promotion and use of gift cards, sharing of customer data, a shared loyalty program and return policy, and in-state use of logos and trademarks. [[New Mexico Taxation and Revenue Department v. BarnesandNoble.com LLC, New Mexico Supreme Court No. 33,627 \(6/3/2013\)](#)].

In detail

The following facts existed during the 1998 to 2005 audit period:

- Barnes & Noble, Inc. indirectly owned between 40% and 100% of Barnesandnoble.com LLC (BNC), which sold books, movies, and other media over the internet.
- Barnes & Noble, Inc. also owned Barnes & Noble Booksellers Inc. (Booksellers), which operated three in-state stores.

Following an audit assessment and subsequent appeal, the New Mexico Court of Appeals determined that BNC had substantial nexus with New

Mexico because the goodwill generated by Booksellers, an in-state licensee of Barnes & Noble trademarks, was imputed to BNC, another licensee of the same trademarks, which allowed BNC to establish and maintain a New Mexico market. Please read our summary of the appellate court decision [here](#).

Benefit from in-state goodwill

On appeal, the New Mexico Supreme Court (Court) observed that both BNC and Booksellers used Barnes & Noble trademarks. The Court recognized that customers likely thought of the two companies as one and therefore BNC benefitted from brand loyalty established by the New Mexico branches of Booksellers. BNC benefitted from the goodwill

associated with Booksellers by using similar trademarks. Accordingly, the Court found that "Booksellers' in-state activities assisted [BNC's] efforts to establish and maintain a market in New Mexico.

Booksellers' New Mexico activities were performed on behalf of BNC

The Court acknowledged that its decision did not rest exclusively on BNC's use of Barnes & Noble trademarks. The Court found that Booksellers performed the following activities for BNC's benefit, which supported BNC's substantial nexus with New Mexico:

- selling gift cards that included BNC's web address printed on the cards, usable at Booksellers or BNC

- using trademarks, market data and similar logos with BNC to establish and maintain a market
- advertising a return policy allowing in-store returns that was noted on BNC's website
- developing name recognition and loyalty for BNC.

Also, the Court determined BNC performed the following activities to establish a connection with Booksellers:

- advertising Booksellers' store locations on BNC's website
- sharing customer data, including email addresses, with Booksellers.

The Court noted that Barnes & Noble, Inc.'s partial ownership of BNC was not relevant to a substantial nexus inquiry.

Although BNC had no physical presence in New Mexico, the Court stated Booksellers' activities "were significantly associated with [BNC's] ability to establish and maintain a market here, [BNC] had a substantial nexus with the State of New Mexico." As a result, the court held that New Mexico may collect gross receipts tax on BNC sales without offending the Commerce Clause of the US Constitution.

The takeaway

New Mexico courts have upheld the department in several recent nexus cases. However, the Court's decision here offers some insight for online retailers with in-state affiliates that sell to New Mexico customers. In-state activities such as providing an out-of-state affiliate's web address on gift cards or sharing store locations on

website links could be attributed to an out-of-state entity for purposes of supporting a nexus determination with the state. The Court's position may seem aggressive in the separate evaluation of each activity that contributed to the decision.

It should be noted that separate from this case involving affiliate nexus, the New Mexico legislature recently passed legislation, H.B. 539, that would have expanded the definition of 'engaged in business' to include selling goods or products delivered directly or indirectly to a customer located in New Mexico. This bill was subsequently vetoed by Governor Susana Martinez. This bill, coupled with the department's prevailing position in the *BarnesandNoble.com* decision, reflects the trend of aggressive nexus positions taken by states.

Let's talk

For a deeper discussion of how this issue might affect your business, please contact:

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