

# State Law & State Taxation Corner

By *John A. Biek*

## Establishing State Tax Nexus Through Telecommuting Employees

### Introduction

A recent New Jersey case has refocused attention on the question of whether a company may unwittingly establish income tax or sales and use tax nexus in a state where the company otherwise does not have any business operations by accommodating an employee's request to work from his or her home in that state for the employee's convenience. This is a common phenomenon in the American workplace due, for example, to an employee's spouse needing to relocate to another state to start a new job or to a newly hired employee not wanting to relocate to the company's state for lifestyle reasons. However, there is remarkably little legal authority addressing the state tax nexus consequences of such telecommuting arrangements.

Many state tax practitioners and state tax administrators have concluded that telecommuting employees who interact with customers, such as salespersons and service technicians, may cause their company to have taxable nexus in the state where the employee resides because his or her job activities help the company exploit the state's marketplace for the company's products or services. In addition, employees who help produce the company's product or provide its service to customers from the employee's home office probably create taxable nexus for the company in the state where the employee engages in such activities. On the other hand, common wisdom has been that telecommuting employees who perform administrative or other "back office" duties for their company from a home office should *not* create taxable nexus for their company.



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The recent decision of the New Jersey Superior Court, Appellate Division in *Telebright Corp. v. Director, Division of Taxation*,<sup>1</sup> has further developed this issue by finding that a Maryland-based software company became subject to the New Jersey corporation business tax (the “CBT”) as a result of one of its employees moving to New Jersey and writing software code on her computer at home. The Appellate Division acknowledged that the employee had no contact with Telebright customers, but the court found it significant that the employee’s work duties in New Jersey were continuous and that the software code that she created was incorporated into the software products that Telebright sold to its customers. As a result, the Appellate Division determined that Telebright was doing business in New Jersey and could constitutionally be subjected to tax on its New Jersey net income.

This is only one case, but it does illustrate the potential perils of companies allowing their employees to telecommute, particularly if such employees are performing an operational function for the company. The relevant legal analysis is discussed below.

## State Tax Nexus Principles

Under longstanding case law, a company generally acquires income tax or sales/use tax nexus in a state if (among other factors) the company maintains a place of business or has employees or other representatives visibly conducting business activities in the state on behalf of the company. The place of business or personnel will give the company a physical presence in the state, which is what the “substantial nexus” prong of the Commerce Clause requires, at least for sales/use tax collection purposes, according to the U.S. Supreme Court’s opinion in *Quill Corp. v. North Dakota*.<sup>2</sup> The Supreme Court clarified in its *Quill Corp.* opinion that the Due Process Clause does not require a company to maintain a physical presence in the state in order to be taxable there, but the taxing state does have to be able to show “some definite link, some minimum connection” between the taxpayer and the state to satisfy the Due Process Clause.<sup>3</sup> That minimum connection will exist if the company has purposefully availed itself of the benefits of an economic market in the taxing state.<sup>4</sup>

It is not surprising, then, that the Supreme Court has long considered the physical presence of a place of business or sales employees in the taxing state to subject a company to the taxing powers of the state

under the Due Process Clause and the Commerce Clause. In *Northwestern States Portland Cement Co. v. Minnesota*,<sup>5</sup> the Supreme Court upheld Minnesota’s assessment of income tax against an out-of-state manufacturer of cement that maintained a sales office staffed by a district manager, two salesmen and a secretary in Minnesota. In the companion case of *Williams v. Stockham Valves & Fittings, Inc.*,<sup>6</sup> an Alabama-based manufacturer of valves and pipe fittings was subject to Georgia income tax because of its maintenance of a sales office with one salesman and a secretary in Georgia. The Supreme Court remarked that “[i]t strains reality to say, in terms of our decisions, that each of the corporations here was not sufficiently involved in local events to forge ‘some definite link, some minimum connection’ sufficient to satisfy due process requirements.”<sup>7</sup>

As far back as 1939, the Supreme Court determined, in *Felt & Tarrant Manufacturing Co. v. Gallagher*, that the presence of sales employees in a state allowed the state to require the taxpayer to collect its use tax on interstate sales of goods to customers in the state.<sup>8</sup> Six years later, the Supreme Court held in *International Shoe Co. v. Washington* that the presence of 11 to 13 resident sales employees working out of their homes in the state of Washington gave International Shoe Company due process nexus in that state and obligated the company to pay Washington unemployment tax on the compensation that the company paid to those sales employees.<sup>9</sup>

In *West Publishing Co. v. McColgan*, the taxpayer maintained four sales employees in offices of California attorneys in return for their use of West law books stored in those offices.<sup>10</sup> West advertised these law firm offices as being local West offices. Based on these facts, the Supreme Court affirmed an assessment of California franchise (income) tax against West.

In *Standard Pressed Steel Co. v. Department of Revenue*, the Supreme Court held the taxpayer liable for payment of the Washington business and occupation tax (the “B&O tax”) based on the regular presence of a single resident employee at an office of The Boeing Company, Standard Pressed Steel’s biggest customer in Washington.<sup>11</sup> This Standard Pressed Steel employee regularly consulted with Boeing personnel to facilitate sales of Standard Pressed Steel fastener products to Boeing. The Supreme Court dismissed Standard Pressed Steel’s argument that the physical presence of this one employee in Washington was constitutionally insufficient to subject the company to B&O tax on its Washington gross receipts: “We think

the question in the context of the present case verges on the frivolous. For appellant's employee ... with a full-time job within the State, made possible the realization and continuance of valuable contractual relations between appellant and Boeing."<sup>12</sup>

Under a logical extension of these principles, the physical presence of independent sales representatives in a state will give a taxpayer sales/use tax nexus in that state.<sup>13</sup> Although these independent sales representatives are not employees of the taxpayer, their solicitation activities help the taxpayer to purposefully avail itself of the benefits of the market in the state for the taxpayer's products or services, thereby satisfying the nexus requirements of the Due Process Clause and the Commerce Clause.

One significant exception to this rule that customer-oriented business activity can create taxable nexus is provided by the Interstate Commerce Tax Act, commonly referred to as "Public Law 86-272."<sup>14</sup> Enacted by Congress in 1959 in response to the *Northwestern States Portland Cement* case discussed earlier, Public Law 86-272 prohibits a state or local government from imposing a tax on, or measured by, net income derived from interstate commerce if the taxpayer's only business activities in the taxing state consist of the solicitation of orders by the taxpayer (or his or her representative) for sales of tangible personal property, which orders are then sent outside the state for approval or rejection and, if approved, are filled by shipment or delivery from a point outside the state. P.L. 86-272 will allow a taxpayer to maintain a phalanx of resident sales employees within the taxing state without becoming subject to the state's income tax, provided those sales employees engage only in activities that are ancillary to the solicitation of orders for sales of tangible personal property, and the sales employees do not work out of an office or other place of business of the taxpayer in the state.<sup>15</sup> The Multistate Tax Commission's model regulation regarding P.L. 86-272 does *not* treat a home office of a sales employee as being an *office of the taxpayer* that would disqualify it from the income tax protection of P.L. 86-272 if the home office is not represented to the public as being an office of the taxpayer.<sup>16</sup>

## Do Activities of Employees or Representatives Who Do Not Interact with Customers Create Nexus?

All of the cases discussed so far involved salespersons who clearly were helping their company to establish or enhance a market for its products or services in the state through their solicitation activities. Consequently, the Supreme Court found that the in-state solicitation activities of the salespersons gave the company nexus in the state for purposes of having to collect the state's use tax or having to pay a business activity tax like the Washington B&O tax that is not covered by P.L. 86-272. What would be the result, however, if the in-state employee or representative did *not* interact with customers or otherwise engage in business activities that enhance the company's sales in the state? Surprisingly, there is limited legal authority on this question.

In Florida Technical Assistance Advisement No. 09A-058,<sup>17</sup> the Florida Department of Revenue determined that a mail-order seller's use of a Florida-based independent contractor consultant to provide process improvement services to personnel

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of the company at its corporate headquarters located outside Florida did *not* cause the company to have sales/use tax nexus in Florida. Working out of her Florida home, the consultant helped the company to research and select new products that it would offer for resale in its mail-order business. The consultant did not have any contact with customers of the company, nor did she provide any services that were detectable by the company's customers. The Department of Revenue agreed with the company that the term "transaction of business" in the Florida use tax nexus statute "generally ... includes activities that further 'the taxpayer's ability to establish and maintain a market in this state.'" Finding that the consultant's process improvement activities were provided directly to the company's corporate headquarters personnel rather than to customers in Florida, the Department ruled that the company was not required to collect and remit Florida use tax on its mail-order sales of merchandise.



Tennessee Letter Ruling No. 97-04<sup>18</sup> presented the question of whether an out-of-state computer software manufacturer had acquired Tennessee corporate franchise tax and excise (income) tax nexus as a result of one of the company's officers working from his home for his own personal reasons. According to representations made in the ruling request, the officer had gone to college in Tennessee and had experienced some crisis that caused him to want to return to Tennessee to reestablish old friendships. The company strongly opposed the officer's request to telecommute from Tennessee, but agreed to this arrangement so as to retain the officer's services.

The officer's business development position with the software manufacturing company involved strategic planning, mergers and acquisitions transactions and related activities. The officer traveled approximately half of the time, spending the remainder of his work time at his Tennessee home, where he reviewed "big picture" documents and business plans. The officer regularly communicated with his colleagues at the company's headquarters in another state by cellular telephone. The company did not reimburse the officer for the costs of maintaining his home office.

The Tennessee Department of Revenue concluded in Letter Ruling No. 97-04 that the activities of the officer at his home in Tennessee did *not* cause the company to be doing business in Tennessee so as to be subject to the state's corporate franchise tax and excise tax. Because the Department's analysis nicely tracks the legal principles discussed so far, that analysis deserves a lengthy recitation:

The Taxpayer has no office or place of business in Tennessee. The Taxpayer's corporate officer does have an office in his home in Tennessee, but, since the Taxpayer does not own any of the furniture or equipment in the office and does not reimburse the officer for any office expenses he incurs, it appears the office is the individual property of the officer and is maintained at his election and entirely at his own personal expense. Except for the cellular phone used by the officer who lives here, the Taxpayer has no property of any type in Tennessee.

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The Taxpayer does not have a Tennessee telephone listing and *does not list the corporate officer's home phone or his cellular phone on the business card of the corporate officer who lives in Tennessee*. The Taxpayer does not have letterhead with a Tennessee address. The Taxpayer does own the cellular phone used by the officer living in Tennessee and pays for the calls he makes thereon. In addition, the Taxpayer also reimburses the officer for his mileage to and from the airport, his airport parking, and his airline ticket. However, under the circumstances described, the Taxpayer does not appear to have Tennessee activities which create sufficient nexus for Tennessee to impose its corporate franchise, excise taxes under the "doing business" standard set forth in T.C.A. §§ 67-4-806 and 67-4-903. This is especially true since the cellular phone is not used to conduct

any of the Taxpayer's business with Tennessee contacts and none of the mileage, parking or airline expenses paid by the Taxpayer are associated with business contacts in Tennessee. The Taxpayer does not hold itself out to the public as being available for any business purpose in Tennessee.

Other than activities which the Taxpayer states are protected from state taxation by Public Law 86-272, the Taxpayer does not carry on any business activity in Tennessee or earn any income from Tennessee sources.<sup>19</sup>

In short, aside from activities protected by Public Law 86-272, the Taxpayer has no connection or contacts with Tennessee. *It has an employee who lives in Tennessee, but derives no corporate income, benefits or protections from Tennessee as a result. The Taxpayer has not purposely directed its business activities (other than business activities protected by Public Law 86-272) at Tennessee's economic market and has not availed itself of any Tennessee benefits or protections.*

Tennessee Letter Ruling 97-04 does a nice job of applying the established nexus principles, concluding that the nexus analysis turns on whether

the in-state activities of a taxpayer's employees or representatives are designed to help the taxpayer develop or enhance the market for its products or services in the state. Because that was not the case with the company that was the subject of Letter Ruling 97-04, the Department correctly determined that the company had not established income tax or franchise tax nexus in Tennessee.

The Indiana Department of Revenue went a step farther in Letter of Finding No. 09-0930, by concluding that although the taxpayer had Indiana resident sales employees and technical advisors, their activities did not create sales tax nexus for the company in Indiana because those activities were directed at customers in states other than Indiana.<sup>20</sup>

This is not a universally held view, however, as some state tax agencies have provided written guidance that in-state business activities of telecommuting employees do give rise to nexus for their companies. Most of this guidance has been quite general.<sup>21</sup> However, in General Information Letter No. IT-99-0058-GIL, the Illinois Department of Revenue, after stating that it does not provide prospective nexus determinations, implied that the taxpayer would acquire income and sales/use tax nexus in Illinois as a result of the presence of a single employee in Illinois who acted as the company's webmaster and developer of software for internal use and sale to customers.<sup>22</sup> The Department of Revenue did not offer any rationale for ascribing nexus to the webmaster and software development activity conducted in Illinois, but the Department may have viewed these as operational functions of the taxpayer's business.

## ***The Telebright Corp. Case***

This was clearly the rationale of the New Jersey Tax Court and Superior Court, Appellate Division in *Telebright Corp. v. Director, Division of Taxation*.<sup>23</sup> Telebright Corporation was a Delaware corporation that developed software at its principal place of business in Rockville, Maryland.<sup>24</sup> Telebright did not maintain any office or bank accounts in New Jersey, nor did the company engage in any sales solicitation activity in the state.<sup>25</sup> In 2001, Telebright hired an employee named Srisathaya Thirumalai to develop and write software code for the "ManageRight" web application that Telebright sold to its customers. Three years later, Ms. Thirumalai's husband started a new job in New Jersey and the couple moved to that state from their home in Silver Spring, Maryland.<sup>26</sup> In order

to retain Ms. Thirumalai's services, Telebright allowed her to work from her residence in New Jersey, providing her a laptop computer for that purpose. Ms. Thirumalai later replaced that computer with a newer one that she purchased with her own funds.<sup>27</sup>

Ms. Thirumalai began each workday at about 9:00 a.m., when she accessed email messages from her Boston-based project manager on her laptop computer at home. Ms. Thirumalai received daily work assignments from her project manager by email or telephone, and she performed those assignments mostly by writing software code on her computer at her home. Ms. Thirumalai delivered her completed assignments by uploading them to the Telebright server in Maryland.<sup>28</sup> She submitted timesheets for her 40-hour workweeks via her computer.<sup>29</sup>

Ms. Thirumalai did not solicit customers or have any sales responsibilities at Telebright.<sup>30</sup> She traveled approximately twice a year to companywide meetings at Telebright's headquarters in Maryland, where the company maintained an office for her. The company did not reimburse Ms. Thirumalai for her home office expenses or her travel to the company meetings in Maryland.<sup>31</sup> Telebright withheld New Jersey gross income tax from Ms. Thirumalai's paychecks, but the company did not file New Jersey CBT returns because it took the position that it was not doing business in New Jersey as a result of Ms. Thirumalai's activities in that state.<sup>32</sup>

The New Jersey CBT is imposed on domestic and foreign corporations that do business or employ property in New Jersey.<sup>33</sup> The CBT regulations define the term "doing business" as encompassing "all activities which occupy the time or labor of men for profit," including the employment in New Jersey of agents, officers and employees.<sup>34</sup> The New Jersey Supreme Court held more than 40 years ago that the CBT applies "as far as could constitutionally be done."<sup>35</sup>

The New Jersey Tax Court granted summary judgment to the Division of Taxation in the *Telebright* case in an opinion issued in March 2010. As an initial matter, the Tax Court held that Telebright was doing business within the meaning of the CBT Act, finding:

It cannot be disputed that plaintiff satisfies factor 4 of N.J.A.C. 18:7-1.9(b) by employing Ms. Thirumalai in New Jersey. Since 2004, she has continually received daily work assignments from plaintiff at her New Jersey home. She has performed those assignments in New Jersey, communicated with her employer and supervisor

via computer and telephone from New Jersey, and made her work product available to her employer, supervisor and Telebright customers from her computer in New Jersey. Although Telebright maintained an office for Ms. Thirumalai in Maryland, she traveled to that State for business purposes only approximately twice a year. On all other work days, Ms. Thirumalai performed her duties in this State.<sup>36</sup>

The Tax Court declared that “[t]his consistent contact with New Jersey was not sporadic, occasional or intermittent. While it is true that Telebright has never maintained an office in New Jersey, nor solicited business here, its daily contact with the State through its employee is sufficient to trigger application of the CBT Act.”<sup>37</sup>

Turning to Telebright’s constitutional arguments, the New Jersey Tax Court concluded that Ms. Thirumalai’s home office in New Jersey and the daily software code writing activities that she performed there satisfied the Due Process Clause’s requirement that there be “some definitive link, some minimum connection, between a state and the person, property or transaction it seeks to tax.”<sup>38</sup> The Tax Court further held that the physical presence of Ms. Thirumalai in New Jersey on a daily basis for the purpose of performing work assignments for Telebright “is strong evidence of a substantial nexus for Commerce Clause purposes.”<sup>39</sup>

On March 2, 2012, the Appellate Division of the New Jersey Superior Court affirmed the Tax Court’s summary judgment order on all grounds. First, the Appellate Division agreed with the Tax Court that:

Telebright is doing business in New Jersey. We add only that Telebright’s full-time New Jersey employee “carr[ies] out the purpose of its organization” here, by creating computer code that becomes part of Telebright’s web-based service. See N.J.A.C. 18:7-1.9(a)(1). For purposes of applying the CBT, that is no different than a foreign manufacturer employing someone to fabricate parts in New Jersey for a product that will be assembled elsewhere.<sup>40</sup>

**Appellate Division concluded that Telebright had established the minimum connection with New Jersey that the Due Process Clause required in order for Telebright to be taxable in the state.**

This analogy of Ms. Thirumalai’s software code writing activities to the manufacturing of widgets brought the court’s “doing business” analysis within well-established case law. Turning to the Due Process Clause and Commerce Clause issues in the *Telebright Corp.* case, the Appellate Division remarked that the “‘broad inquiry’ subsumed in both constitutional requirements is ‘whether the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state’—that is, ‘whether the state has given anything for which it can ask in return.’”<sup>41</sup> The Appellate Division observed that Ms. Thirumalai was physically producing computer code for Telebright in New Jersey, that she was entitled to the legal protections that New Jersey affords its residents and that if she were to violate the restrictive covenants in her employment contract with Telebright, the company would be able to file an action in the New Jersey courts to enforce the contract.

For all of these reasons, the Appellate Division concluded that Telebright had established the minimum connection with New Jersey that the Due Process Clause required in order for Telebright to be taxable in the state.<sup>42</sup>

Telebright did not fare any better with its Commerce Clause arguments that its employment of one person in New Jersey did not give it substantial nexus with New Jersey and that allowing states to assert nexus over businesses based on the location of telecommuting employees in the state would impose “unjustifiable local entanglements” and “an undue accounting burden” on such businesses.<sup>43</sup> The Appellate Division observed that in the *Standard Pressed Steel* case discussed previously, the Supreme Court had upheld a Washington B&O tax assessment based solely on the physical presence of a single employee working full time at a customer’s office.<sup>44</sup> The Appellate Division also professed puzzlement that Telebright did not find its withholding of New Jersey income tax from Ms. Thirumalai’s payroll checks to be unduly burdensome, yet Telebright asserted that requiring it to prepare and file annual CBT returns would constitute an undue burden on interstate commerce.<sup>45</sup>

At the end of its opinion, however, the Appellate Division returned to the linchpin of its analysis:



The fact that Telebright's full-time employee works from a home office rather than one owned by Telebright is immaterial for purposes of the first prong of the *Complete Auto* test. She is producing a portion of the company's web-based product here, and the company benefits from all of the protections New Jersey law affords this employee.

For those reasons alone, the Appellate Division believed that New Jersey was justified in taxing Telebright's income.

## State Taxation of Telecommuting Employees

It is ironic that some states apply the "convenience of the employer" test to tax telecommuting employees on their compensation as though it was earned for work performed at *the employer's office* rather than at the employee's home office. For example, in *In the Matter of Huckaby v. New York State Division of Tax Appeals*,<sup>46</sup> the taxpayer, Thomas Huckaby, was a Tennessee resident who worked as a computer programmer for the National Organization of Industrial Trade Unions ("NOITU"), a labor organization based in Jamaica, New York. Mr. Huckaby's duties included supporting the software programs that a former Tennessee-based client had developed for NOITU, assisting the NOITU computer department's manager in selecting new information technology and otherwise assisting with NOITU's computer programming requirements.<sup>47</sup> NOITU agreed that Mr. Huckaby could work primarily from his home in Tennessee, setting up a long-distance data line and dedicated voice telephone line to Huckaby's home office to help him perform his duties for NOITU.<sup>48</sup> Mr. Huckaby ended up spending approximately 75 percent of his workdays at his home in Tennessee, with the remainder of the workdays being spent in New York.<sup>49</sup> Mr. Huckaby acknowledged that he performed most of his work for NOITU in Tennessee solely for his personal reasons and that NOITU would have been quite willing for him to perform all of his duties at NOITU's office in New York.<sup>50</sup>

The New York Department of Taxation and Finance treated all of Mr. Huckaby's compensation from NOITU as New York-source income under New York's "convenience of the employer" test, which provides that when a nonresident is employed by a New York employer, income earned from work performed in another state is taxable by New York *unless that work was*

*performed in the other state for the necessity of the employer.* Huckaby challenged the New York personal income tax assessment on Due Process Clause, Commerce Clause and Equal Protection Clause grounds. The New York Court of Appeals rejected Huckaby's constitutional arguments, observing that:

As the Commissioner argues, the convenience test is, in effect, a surrogate for interstate commerce. *Where work is performed out of state of necessity for the employer, the employer creates a nexus with the foreign state* and essentially establishes itself as a business entity in the foreign state. ... The convenience test stands for the proposition that New York will not tax a nonresident's income derived from a New York employer's participation in interstate commerce because in such a case, the nonresident's income would not be derived from a New York source.<sup>51</sup>

On the other hand, if the nonresident performed his work out of state for his own convenience, the convenience of the employer test would consider the nonresident's income to be derived from New York sources.

Applying its holding two years earlier in *In the Matter of Zelinsky v. Tax Appeals Tribunal of State of New York*,<sup>52</sup> the Court of Appeals concluded that New York's convenience of the employer test comported with the Due Process Clause and Commerce Clause because the state was only taxing income sourced to New York.<sup>53</sup> Indeed, the Court of Appeals had remarked in its *Zelinsky* opinion that allowing that taxpayer, a law professor at Cardoza School of Law in New York City, "to allocate his income to Connecticut when he stays home to do his work in connection with his teaching activity would enable him to avoid paying taxes that his colleagues who do that work at home in New York—or at the law school—pay."<sup>54</sup>

Of course, Telebright Corporation made a similar argument that Ms. Thirumalai was performing her computer code writing duties at her New Jersey home for her own convenience and, for that reason, the company ought not to establish taxable nexus in New Jersey. There is undeniable tension between the corporate nexus claim that New Jersey successfully advanced in the *Telebright Corp.* case and the convenience of the employer test that states like New York utilize to tax the compensation paid to out-of-state telecommuting employees as earned in the state of the employer's office.

## Conclusion

The *Telebright Corp.* case presents a cautionary tale about the potential state tax consequences of telecommuting arrangements. Telebright Corporation did not maintain any place of business in New Jersey and, until it agreed to allow Ms. Thirumalai to begin performing her job at her new home in New Jersey, it appears that Telebright did not maintain any employee or representative in New Jersey. The company probably believed that its telecommuting arrangement with Ms. Thirumalai did not enlarge the company's limited nexus profile because Ms. Thirumalai was performing her software code writing duties out of sight in her New Jersey home. She had no contact with Telebright customers and engaged in no solicitation activities. It does not appear that Ms. Thirumalai's home was ever represented to be an office of Telebright.

The Appellate Division's analogy of Ms. Thirumalai's home-based software code writing activities to the manufacturing of widgets is a bit of a stretch because such manufacturing activity typically takes place in a factory or other place of business that the public associates with the taxpayer. That was not the case with Ms. Thirumalai's home. Nor was it the case with the Florida-based consultant or the Tennessee-based corporate officer in the Florida and Tennessee rulings discussed earlier. In those Florida and Tennessee rulings, nexus was not found to exist because the consultant and the corporate officer's business activities were not directed at customers so as to develop the company's market in the state. Much of the Appellate Division's nexus analysis in the *Telebright Corp.* case turned on the fact that

Ms. Thirumalai was helping to produce the software products that Telebright sold to its customers.

The *Telebright Corp.* case might well have been decided differently if Ms. Thirumalai had performed administrative or corporate management duties within Telebright rather than contributing a component to the software products that it sold to customers. Hopefully that is the case, or else the state tax nexus ramifications of the *Telebright Corp.* case are rather frightening. Such administrative functions often can be performed anywhere, and they generally do not assist a company in developing the market for its products and services. If that is true, a state tax agency should find it difficult to contend that the company is benefiting strategically from allowing an employee to perform such administrative functions at home on a telecommuting basis rather than at the company's offices. State tax nexus should not be fashioned out of such administrative telecommuting arrangements.

However, the *Telebright Corp.* decision will be of concern to Internet-based businesses and consulting businesses, which often allow their operational employees to set up telecommuting arrangements for the employee's convenience. Such arrangements may be good for employee morale, and they may save the company business expenses, but possibly at the cost of enlarging the company's nexus footprint. It will be interesting to see if the New Jersey *Telebright Corp.* case is picked up on by other state tax agencies and their courts. Hopefully, it will prove to be an outlier in the state tax nexus case law.

## ENDNOTES

<sup>1</sup> *Telebright Corp. v. Director, Division of Taxation*, NJ Super. Ct. App. Div., Dkt. No. A-5096-09T2, [NJ] ST. TAX REP. (CCH) ¶ 401-626 (Mar. 2, 2012), *aff'g* 25 N.J. Tax 333, [NJ] ST. TAX REP. (CCH) ¶ 401-501 (2010).

<sup>2</sup> *Quill Corp. v. North Dakota*, SCt, 504 US 298, 112 SCt 1904 (1992). The substantial nexus requirement of the Commerce Clause is set forth in *Complete Auto Transit, Inc. v. Brady*, SCt, 430 US 274, 97 SCt 1076 (1977).

<sup>3</sup> *Id.* at 306 (quoting *Miller Brothers Co. v. Maryland*, SCt, 347 US 340, 344-45, 74 SCt 535 (1954)).

<sup>4</sup> *Quill Corp.*, 504 U.S. at 312 (citing *Burger King Corp. v. Rudzewicz*, SCt, 471 US 462 (1985)).

<sup>5</sup> *Northwestern States Portland Cement Co. v. Minnesota*, SCt, 358 US 450 (1959).

<sup>6</sup> *Williams v. Stockham Valves & Fittings, Inc.*, SCt, 358 US 450 (1959).

<sup>7</sup> *Northwestern States*, SCt, 358 US at 465.

<sup>8</sup> *Felt & Tarrant Mfg. Co. v. Gallagher*, SCt, 306

US 62 (1939). See also *General Trading Co. v. State Tax Commission of Iowa*, SCt, 322 US 335 (1944).

<sup>9</sup> *International Shoe Co. v. Washington*, SCt, 326 US 310 (1945).

<sup>10</sup> *West Publishing Co. v. McColgan*, SCt, 328 US 823 (1946), *aff'g per curiam* 166 P2d 861 (Cal. 1946).

<sup>11</sup> *Standard Pressed Steel Co. v. Department of Revenue*, SCt, 419 US 560 (1975).

<sup>12</sup> *Id.* at 562.

<sup>13</sup> See *Scripto, Inc. v. Carson*, SCt, 362 US 207 (1960); *Tyler Pipe Industries, Inc. v. Washington Department of Revenue*, SCt, 483 US 232 (1987).

<sup>14</sup> Act Secs. 381-384 of the Interstate Commerce Tax Act of 1959 (P.L. 86-272).

<sup>15</sup> In *Wisconsin Department of Revenue v. William Wrigley, Jr., Co.*, SCt, 505 US 214 (1992), the Supreme Court addressed what "solicitation of orders" means for purposes of Public Law 86-272.

<sup>16</sup> Multistate Tax Commission, *Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272*, IV.A.18 (unprotected activities under Public Law 86-272 include "maintaining, by any employee or other representative, an office or place of business of any kind (other than an in-home office located within the residence of the employee or representative that (i) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity, and (ii) as long as the use of such office is limited to soliciting and receiving orders from customers; for transmitting such order outside the state for acceptance or rejection by the company; or for such other activities as are protected under P.L. 86-272 ...").

<sup>17</sup> Florida Technical Assistance Advisement No. 09A-058 (Nov. 9, 2009).

<sup>18</sup> Tennessee Department of Revenue, Letter



## ENDNOTES

- Ruling No. 97-04 (Feb. 19, 1997).
- <sup>19</sup> Tenn. Letter Ruling No. 97-04, slip op. at 3.
- <sup>20</sup> Indiana Department of Revenue, Letter of Finding No. 09-0939 (June 1, 2010).
- <sup>21</sup> See, e.g., South Carolina Revenue Ruling No. 03-4 (Dec. 9, 2003) (responding “yes” to question as to whether nexus is created if “Employees, while in South Carolina, telecommute from their homes located in South Carolina (assume that there are six or fewer such employees in South Carolina and all of these employees perform nonsolicitation activities)”; Oregon Department of Revenue, Foreign Corporations with Headquarters Outside Oregon (Jan. 1, 2008) (listing as an example of nexus creating activity having employees “telecommute from Oregon residences”).
- <sup>22</sup> Illinois Department of Revenue, General Information Letter No. IT 99-0058-GIL (May 24, 1999).
- <sup>23</sup> Note 1, *supra*.
- <sup>24</sup> 25 N.J. Tax at 340.
- <sup>25</sup> *Id.*
- <sup>26</sup> *Id.*
- <sup>27</sup> *Id.*
- <sup>28</sup> *Id.*
- <sup>29</sup> *Id.* at 341.
- <sup>30</sup> *Id.*
- <sup>31</sup> *Id.*
- <sup>32</sup> *Id.*
- <sup>33</sup> N.J. Rev. Stat. § 54:10A-2.
- <sup>34</sup> N.J. Admin. Code § 18:7-1.9(a) and (b).
- <sup>35</sup> *Roadway Express, Inc. v. Director, Division of Taxation*, 50 N.J. 471, 483 (1967), *app. dismissed*, 390 US 745 (1968).
- <sup>36</sup> *Telebright Corp.*, 25 N.J. Tax at 345–46 (Emphasis added).
- <sup>37</sup> *Id.* at 346. Earlier in the case, the Division of Taxation abandoned its position that Ms. Thirumalai’s home office constituted an office of *Telebright*, thereby providing a more direct basis for treating the company as doing business in New Jersey. Although the *Telebright Corp.* opinions do not explain why the Division made this tactical decision, it may well have been because the Division was apparently simultaneously taking the litigation position in other cases that employee home offices outside of New Jersey did not satisfy the requirement in N.J. Rev. Stat. § 54:10A-6 that a corporation “regularly maintain an office outside New Jersey” in order to apportion income under the CBT Act. See *New Jersey Natural Gas Co. v. Director, Division of Taxation*, 24 N.J. Tax 59 (2008) (Connecticut home office of employee was not a regularly maintained office of the corporation that would have allowed the corporation to apportion income on its CBT return).
- <sup>38</sup> *Telebright Corp.*, 25 N.J. Tax 348-49 (quoting *Miller Brothers Co. v. Maryland*, SCt, 347 US 340, 344–45 (1954)).
- <sup>39</sup> *Id.* at 350.
- <sup>40</sup> *Telebright Corp.*, *supra* note 1, slip op at 2 (emphasis added).
- <sup>41</sup> *Id.*, slip op. at 2 (quoting *MeadWestvaco Corp. v. Illinois Department of Revenue*, SCt, 553 US 16, 24–25 (2008)).
- <sup>42</sup> *Id.*, slip op. at 3.
- <sup>43</sup> *Id.*, slip op. at 4.
- <sup>44</sup> *Id.*, slip op. at 5.
- <sup>45</sup> *Id.*
- <sup>46</sup> *In the Matter of Huckaby v. New York State Division of Tax Appeals*, 4 N.Y.3d 427, 829 N.E.2d 276 (2005).
- <sup>47</sup> 4 N.Y.3d at 430.
- <sup>48</sup> *Id.* at 430–31.
- <sup>49</sup> *Id.* at 431.
- <sup>50</sup> *Id.*
- <sup>51</sup> *Id.* at 437 (emphasis added).
- <sup>52</sup> *In the Matter of Zelinsky v. Tax Appeals Tribunal of State of New York*, 1 N.Y.3d 85, 801 N.E.2d 840 (2003).
- <sup>53</sup> *Huckaby*, 4 N.Y.3d at 439.
- <sup>54</sup> *Zelinsky*, 1 N.Y.3d at 94.



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