



## Pacific Northwest Regional State Tax Seminar

# State Tax Cases and Issues to Watch in 2012 & Beyond

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COST



# AGENDA

**THE SUPREME COURT**

**NEXUS**

**COMBINED REPORTING**

**APPORTIONMENT**

**BUSINESS/NONBUSINESS**

**DIVIDENDS/INTEREST ADDBACK**

**MORE NEXUS**

**CREDITS**

**CALIFORNIA LOCAL TAXES**



## DUE PROCESS RISES

***Goodyear Dunlop Tires Operations, S.A. v. Brown***, 131 S.Ct. 2846 (2011) - Due Process requires “continuous and systematic general business contacts”

***J. McIntyre Machinery, Ltd. V. Nicastro***, 131 S.Ct. 2780 (2011)  
- Majority opinion holds defendant must “purposefully avail itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”



## THE *OTHER* CLAUSES

### The Equal Protection Clause is Neither

- *Armour v. City of Indianapolis, Dkt. No. 11-161*  
(6/4/2012)

### Wherefore Art Thou Commerce Clause?

- *DIRECTV, Inc. v. Levin, Dkt. No. 10-1322*  
(5/23/2012)



# IT'S ALWAYS NEXUS IN PHILADELPHIA

- **WV State Tax Comm. v. ConAgra Brands**  
No. 11-0252 (5/24/2012)
- **In Re Scioto Insurance Co.**, 2012 OK 41 (5/1/2012)
- **Telebright Corp. v. Division of Taxation** (NJ Super Ct.) Dkt. No. A-5096-09T2, March 2, 2012)
- **UTELCOM, Inc. v. Bridges**, 77 So. 3d 39 (La. App. 1st Cir. Sept. 12, 2011)
- **BIS LP, Inc. v. Division of Taxation**, Docket No. A-1172-09T2 (N.J. Super. Ct. 2011)
- **Jack Daniels Properties, Inc. v. Department of Revenue**, Iowa Department of Inspections and Appeals, July 28, 2011, released March 2012



# COMBINED REPORTING

## Key

- Combined reporting/consolidated return required prior to 2004
- Combined reporting/consolidated return adopted for 2004 or later
- Combined reporting legislation proposed in 2012
- Separate return state
- No income tax

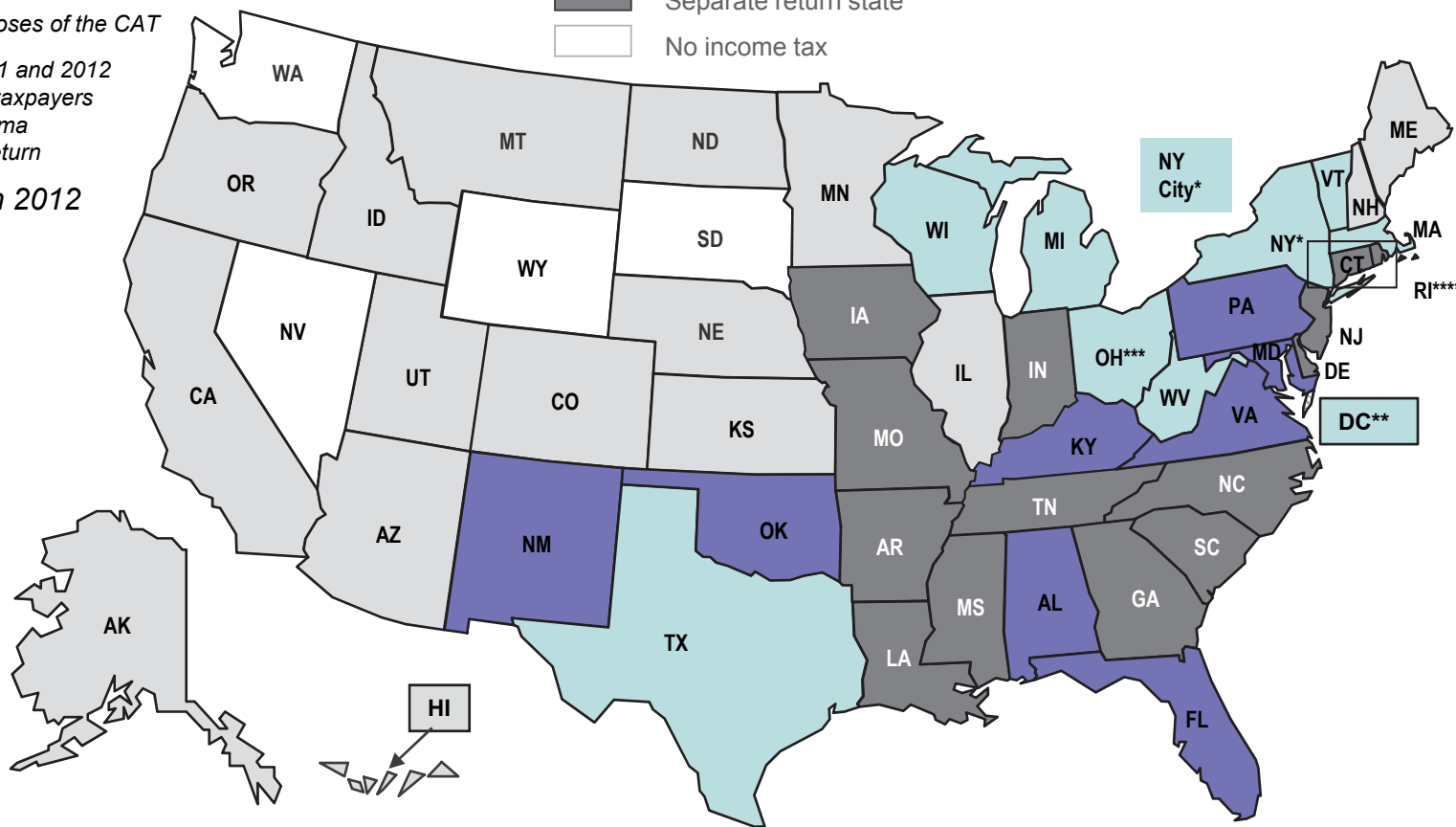
\* NY state and city requires combined reporting when there are substantial intercorporate transactions

\*\* DC combined reporting effective for tax years beginning after 31 December 2010

\*\*\* For purposes of the CAT

\*\*\*\* For 2011 and 2012 RI requires taxpayers file a pro forma combined return

As of 28 March 2012





## COMBINED IF YOU DO, COMBINED IF YOU DON'T

- ***Delhaize America, Inc. v. Lay***, (N.C. Super. Ct. 2011).
- ***Indiana Dept. of Rev. v. Rent-A-Center East, Inc.***,  
**No. 49S10-1112-TA-683** (3/9/2012).



## APPORTIONMENT: 1+1=5

- ***AT&T Corp. v. Department of Revenue***, 2011 Ore. Tax LEXIS 270 (2011)
- ***AT&T Corp. v. Commissioner of Revenue***, Docket No. C293831 (June 8, 2011)
- ***Whirlpool Properties, Inc. v. Director, Division of Taxation***, 26 A.3d 446 (N.J. 2011)





# ALTERNATIVE APPORTIONMENT

- ***CarMax Auto Superstores West Coast, Inc. v. S.C.***  
*Department of Revenue, S.C. Ct. App., Docket No. 4953*  
(March 14, 2012)
- ***Pfizer v. Tennessee***, M2011-01359-COA-R10-CV (Tenn. Ct. App. June 22, 2012)
- ***General Mills v. FTB***, 172 Cal. App. 4<sup>th</sup> 1535 (2009), SFSC No. CGC05-439929 (Nov. 1, 2010), *appeal pending*, No. A131477 (Cal. 1st App. Dist.). Oral argument July 19, 2012.
- ***Microsoft Corporation v. FTB***, SFSC No. CGC08471260 (March 21, 2011), *appeal pending*, No. A131964
- ***Weyerhaeuser Company***, SBE Nos. 104355 & 246164



## ELECTIVE 3 FACTOR AND THE NON-COMPACT COMPACT

- ***Gillette Co. & Subsidiaries, et. al. v. FTB***, No. A130803 (Cal. App., First. Dist.). Awaiting decision.
- **Texas Comptroller Hearing No. 104,752 (2011)**
- ***IBM Corp. v. Dep 't of Treasury, Michigan***, No. 11-33-MT (Ct of Claims July 20, 2011)



# BUSINESS / NONBUSINESS INCOME

(AKA "HEADS WE WIN, TAILS YOU LOSE")

- ***Reynolds Metals Co. LLC v. Dep't of Treasury***, No. 300001, 2012 WL 954278 (Mich. Ct. App. Mar. 20, 2012)
- ***Oracle Corp. v. Dept. of Rev.***, No. MD 070762C (Or. Tax Ct. Jan. 19, 2012)
- ***Glatfelter Pulpwood Co. v. Commonwealth of Pennsylvania***, 19 A.3d 572 (Pa. Commw. Ct. 2011), *oral arguments before the Pa. S.Ct.* May 8, 2012)
- ***Levi Strauss***, SBE No. 547505 (Classification of interest expense)
- ***Comcast***, SBE No. 424198 (Termination fee)
- ***Pacific Bell Telephone***, SBE No. 521312 (Foreign investments)



## DIVIDENDS & INTEREST EXPENSE DEDUCTION/ADDBACK

- ***Apple, Inc. v. FTB***, 199 Cal. App. 4<sup>th</sup> 1 (2011)
  - LIFO ordering of dividends for purposes of RTC 25106
  - Interest expense not disallowed under RTC 24425
- ***Beneficial New Jersey, Inc. v. Director, Div. of Taxation***, CCH NJ Tax Rptr. ¶401-530 (2010)
  - Interest paid to parent finance company met “unreasonable exception” and not subject to addback



## **METAPHYSICAL NEXUS**

- ***Scholastic Book Clubs, Inc. v. Comm’r of Revenue Servs.***, 38 A.3d 1183 (Conn. 2012)
- ***Scholastic Book Clubs, Inc. v. Farr***, No. M2011-01443-COA-R3-CV, 2012 WL 259979 (Tenn. Ct. App. Jan. 27, 2012)
- ***In re Barnesandnoble.com LLC***, No. 31,231 (N.M. Ct. App. Apr. 18, 2012)
- ***Harley Davidson, Inc v. FTB***, SDSC No. 37-2011-00100846 (CA Corp. Code §191(d))



# WHITE WHALE NEXUS

## ***Amazon Statutes in 17 States***

- *Click Through – In-state sales facilitator*
- *Affiliate – Related in-state affiliate in similar LOB*
- *Group – In-state member of controlled group.*

## ***Challenges***

- *Amazon.com LLC v. New York State Dep't of Taxation and Finance, 81 A.D.3d 183 (N.Y. App. Div. 1st Dept. 2010).*
- *The Direct Marketing Ass'n v. Huber, No. 10-cv-1546, 2012 WL 1079175 (U.S.D.Ct. Colo; 3/30/12). Appeal filed.*
- *Performance Marketing Ass'n v. Hamer, No. 2011-CH-26333 (Ill. Cir. Ct. May 7, 2012).*



# FEDS TO THE RESCUE

## 1. Main Street Fairness Act (“MSFA”) [H.R. 2701]

- Introduced on July 29, 2011.
- Referred to the Subcommittee on Courts, Commercial and Administrative Law on August 25, 2011.
  - Independent from, but somewhat parallel with, SST.

## 2. Marketplace Equity Act (“MEA”) [H.R. 3179]

- Introduced on October 13, 2011.
- Referred to the Subcommittee on Courts, Commercial and Administrative Law on October 24, 2011.

## 3. Marketplace Fairness Act (“MFA”) [S.B. 1832]

- Introduced on November 9, 2011.
- Hybrid of MSFA and MEA.

## 4. Equity in Sales Tax Collection Act (“ESTCA”) (Overstock.com Bill)

- Not yet introduced.
- MSFA +++++



# ENTERPRISE ZONE CREDITS

- ***Dicon Fiberoptics, Inc. FTB, \_\_\_ Cal 4<sup>th</sup> \_\_\_ (2012)***
  - FTB may conduct audit to determine whether taxpayer entitled to EZ hiring credits and is not required to accept a voucher as prima facie proof
- ***Taiheiyo Cement USA v. FTB, 204 Cal App. 4<sup>th</sup> 254 (2012)***
  - FTB's disallowance of EZ sales and use tax credits for property which taxpayer expensed upheld





# CALIFORNIA LOCAL TAXES (PROPERTY)

- ***Elk Hills v. State Board of Equalization***, Cal. SCt., No. S194121, pending oral arguments.
- **Schmeer v. Los Angeles County**, Cal. Ct. App. 2d Dist, B240592.



# CALIFORNIA LOCAL TAXES (SALES/USE)

- ***City of Palmdale v. SBE***, 206 Cal. App. 4<sup>th</sup> 329 (2012)
  - Local sales/use tax allocation case in which the Court issued a scathing rebuke of SBE's procedures in local tax matters and refused to allow a settlement by the parties
  - "This appeal deserves particular attention because, according to the judgment, the Board displayed a repeated lack of concern for the statutory and constitutional procedures that restrict its decisionmaking authority."



# CALIFORNIA LOCAL TAXES (CITY)

- ***Chevron v. City of Richmond***, Contra Costa Superior Court, No. C09-00491 (2009)
  - Trial court invalidated the City's business tax under the internal consistency test
- ***The Roman Catholic Archbishop of SF v. City and County of SF***, SFSC, No. CGC10498795
  - Trial court concluded that the transfer of 232 properties within the Archdiocese in an internal restructuring was not subject to the transfer tax
- ***Proposed Gross Receipts Tax in San Francisco***
  - Worldwide unitary tax at the local level



# QUESTIONS?

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