

June 24, 2008

Chairwoman Linda Sanchez
Ranking Member Chris Cannon
United States House of Representatives
House Committee on the Judiciary
Commercial and Administrative Law Subcommittee
Washington, DC 20515-3804

MASSACHUSETTS
MARINE TRADES
ASSOCIATION



Re: Support for H.R. 5267
Business Activity Tax Simplification Act [BATSA]

Dear Chairwoman Sanchez and Representative Cannon:

On behalf of the Massachusetts Marine Trades Association and the 27,000 men and women employed by the recreational marine industry in the Commonwealth, I write to urge your support for and co-sponsorship of H.R. 5267, the Business Activity Simplification Act, as means to establishing a bright line of jurisdictional clarity in the imposition of business activity taxes nationwide. Enactment of the bill is necessary to restore order to the states' current "Wild, Wild West" approach in applying nebulous economic nexus standards, resulting in severe economic consequences for Massachusetts businesses.

Business-owning citizens of the Commonwealth have been "held up" by other states and compelled to pay tax assessments based on "economic nexus" theories that are legally shaky at best. Payment of such assessments were based not on acquiescence to the economic nexus standard asserted, but rather on a rational business decision that the cost to fight the tax assessment, including interest, fines and corresponding legal expenses, exceeded the amount assessed. Sadly, there are many Massachusetts business owners who are too scared to speak out on this topic for fear that other states will go after them based on the same renegade economic nexus claims.

The marine industry in Massachusetts is experiencing firsthand the negative effects of the current economic climate. We appreciate that the states have been similarly affected. Nonetheless, it is economically counterproductive for a state to assert vague and unconstitutional nexus standards in an effort to address its economic problems. To do so on the backs of small businesses, which can ill afford the regulatory, compliance or defense costs, is disproportionately unfair. In fact, if businesses are forced to engage accountants and lawyers to investigate, advise or defend against such claims and/or pay such unwarranted tax assessments, their overall profits will decline and the businesses' growth will slow or stop entirely. As corporate profits decline the home states of affected companies – the ones in which they do have a physical presence and which provides them with the benefits of services and protections for which those companies rightfully pay tax will receive less revenue because the overall corporate profit pie has been reduced. The bottom line is that application of overreaching nexus standards by other states on Massachusetts businesses is taking money away from the Commonwealth.

Here are some illustrations:

- 1) The State of Maine imposed a business activity tax on a Boat Builder headquartered outside of and with no physical presence in Maine. Maine asserted that nexus had been established simply and only because the Boat Builder paid a warranty claim to its authorized dealer within the State of. The Authorized Dealer in Maine pays corporate income tax to Maine and collects and remits applicable sales tax on all retail sales of Boat Builder products it sells.
- 2) The State of Washington imposed business activity tax on a Boat Builder headquartered outside of and with no physical presence in Washington. Washington cited economic nexus due to: a) Membership in a state marine trade association, and b) the Boat Builders' occasional (fewer than 5 days annually) staff visits to the in-state dealer. Because the Boat Builder paid a few hundred dollars to support a state trade association (for boat show exhibition discounts) and periodically sent a sales representative into the state to check on the dealer's product presentation, Washington State found grounds for a tax assessment on the Boat Builder.
- 3) The State of New Jersey imposed a "jeopardy assessment tax" on a Boat Builder headquartered outside of and with no physical presence in New Jersey and further threatened to impound a truckload of boats passing through its borders en route to Massachusetts if the tax was not paid in full by wire transfer within a few hours. In this case, the goods bound for a Massachusetts dealer and its customers were effectively held hostage while New Jersey sought to determine IF the Boat Builder had any nexus to NJ and what the scope of that activity was. New Jersey asserted that simply having a dealer in that state (to whom the Boat Builder sold wholesale) was sufficient for the state to claim economic nexus to the Boat Builder. New Jersey assessed and demanded immediate payment of \$46,200 in back taxes. Held up at the New Jersey border, the Boat Builder had to choose between delaying delivery to a Massachusetts dealer, and expending time and legal fees to object, or paying the "ransom" exacted by New Jersey. Without enough time or money to engage in the argument, and fearing a loss of revenue and customers in Massachusetts, the Boat Builder paid the "toll" and the truckload of product was allowed to proceed to its intended destination in Massachusetts.
- 4) State Y initially assessed a small Massachusetts business \$36,228 for seven years retroactive business activity taxes it reasoned were due simply because the Massachusetts business had an independent agent situated within State Y who represented their product to retailers. After 300 hours of arguing the matter (time that the small business owner could have spent on his business) and payment of \$12,000 in legal and advisory fees, the parties agreed to a negotiated settlement.

Utilizing economic nexus standards to generate revenue from out-of-state businesses might seem like a logical solution to the economic problems faced by cash strapped states. However, in addition to running afoul of the U.S. Constitution's Commerce Clause by unduly burdening interstate trade, such approach inevitably will sink smaller businesses and, along with them, a significant engine of the American economy.

Failure to act enact the Business Activity Tax Simplification Act will compound and exacerbate the negative effects already permeating the business community as a result of over-reaching tax authorities including:

- Creating a business climate that is unfair, inconsistent, and unpredictable;
- Increasing business compliance costs which will inevitably be passed on to consumers;

- Hindering appetite for business expansion due to lack of certainty of tax implication;
- Risking business viability due to burdens of duplicative over-taxation;
- Imperiling continued development of electronic commerce;
- Threatening the revenue collections of states that fully comply with constitutional nexus requirements;
- Thwarting the intent of accounting reporting rules for publicly traded companies;
- Insuring a chilling effect on the national economy by causing tax burdens, compliance costs, litigation and uncertainty to escalate as companies doing business across state lines reassess the value of doing so when measured alongside the costs of doing so in an uncertain, inconsistent regulatory environment.

Your support of H.R. 5267 will not permit businesses with a physical presence in a state to pay one dime less in taxes lawfully assessed or due. Your support will insure that 1) no state may impose business activity tax on any entity that lacks a physical presence in that state, 2) Public Law 86-272 is modernized to better reflect today's commerce by applying equally to the solicitation of sales of intangible goods, and 3) businesses will continue to pay full and fair taxes to those states in which they have a physical presence and which provide the businesses with the benefits and protections afforded to its corporate citizens.

The Massachusetts Marine Trades Association thanks you for holding a hearing to examine this important issue, and request that you quickly follow this hearing with a markup so that it can be reported to the House. We are at your service to provide additional information or to answer any questions you or your staff may have.

Respectfully Submitted,



Kurt Saunders
President

Cc: National Marine Manufacturers Association
Leona S. Roach, MMTA Executive Director

Established in 1964, the MMTA is the statewide, representative body for over 1,200 marine trades businesses in the Commonwealth. Our businesses employ over 27,000 men and women and generate an estimated \$1.7 billion in annual economic activity for Massachusetts. The mission of the Association is to further the interests of the marine trades and the boating public through the promotion of boating, participation in legislation and professional improvement programs.

The Association also seeks to stem the exodus of recreational boating businesses from the Commonwealth and the loss of water's edge usage for recreational boating purposes. The Association acts as a source of information about recreational boating and boating businesses for the general public, via its website at www.boatma.com; for the Massachusetts Legislature, where the Association is a frequent participant in public hearings and in the 50-member Legislative Boating Caucus; and for executive branch agencies and authorities with regulatory and economic development responsibilities.