

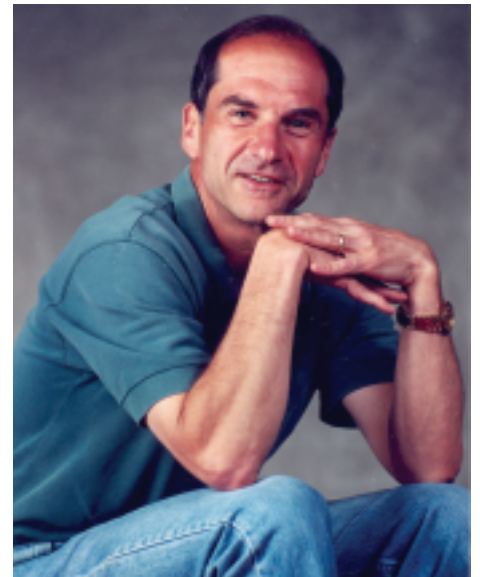
STATE & LOCAL TAX COMMENTARY

WALTER HELLERSTEIN • JOHN A. SWAIN

ISSUE 1 • MARCH 2009

The attached newsletter is the latest in a series written by noted scholar **Walter Hellerstein**, the country's leading authority on state taxation, and **John A. Swain**, Associate Professor of Law at the University of Arizona, who collaborates with Hellerstein in producing Hellerstein's classic treatise, **State Taxation**. Professors Hellerstein and Swain are also co-authors of **Streamlined Sales and Use Tax** (2008/2009), which appears as Chapter 19A in **State Taxation**. The newsletter provides a preview of important new developments that are covered in the tri-annual supplement to **State Taxation**, Third Edition, scheduled for release in April 2009. In this newsletter, Professors Hellerstein and Swain examine a New York case rejecting a taxpayer challenge to New York's "Amazon" nexus statute, a Maine Supreme Court decision adopting an expansive view of a "unitary business," and a recent Missouri Supreme Court ruling addressing the sales tax treatment of Section 1031 exchanges.

State Taxation, available as a two-volume treatise and on the Web, is regularly cited by the U.S. Supreme Court and state courts throughout the nation and is generally regarded as the "bible" of state taxation. **State Taxation** provides comprehensive, in-depth coverage and expert analysis of the entire field of state taxation, covering both income and sales taxes and constitutional and statutory issues.



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CHALLENGE TO NEW YORK STATUTE ESTABLISHING PRESUMPTION OF NEXUS WITH ONLINE RETAILERS WHO PAY COMMISSIONS TO STATE RESIDENTS WHO POST LINKS ON THEIR WEB SITES

It is no secret that revenue-hungry states are eager to find lawful ways to impose use tax collection obligations on Internet and mail-order retailers. The Streamlined Sales and Use Tax Agreement (SSUTA), for example, is motivated in large part by this desire, as is the legislation that has been introduced in Congress in recent years to, in effect, repeal *Quill*'s physical-presence test of nexus in states that have embraced streamlining. Many states, however, are not SSUTA members, and other states, whether SSUTA member states or not, are continuing to test the outer limits of *Quill* rather than staking their entire hopes on Congressional action.

New York, a non-SSUTA member state, recently adopted legislation providing that

a person making sales of [taxable] tangible personal property or services ... shall be presumed to be soliciting business through an independent contractor or other representative if the seller enters into an agreement with a resident of this state under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an internet website or otherwise, to the seller.¹

In addition, the cumulative gross receipts from such referred sales to New York customers must exceed \$10,000 during the preceding four calendar quarters.²

Literally construed, the statute might be read to treat mere advertisers as "directly or indirectly refer[ring]" customers "for a commission or other consideration."³ The New York taxing authority, however, has advised that "an agreement to place an advertisement does not give rise to the presumption" of nexus and that the advertising exception includes an agreement by which the resident is compensated based on the number of clicks on a link to a Web site, provided that the compensation is not conditioned on or measured by actual sales.⁴

The statute goes on to provide that the presumption of nexus "may be rebutted by proof that the resident with whom the seller has an agreement did not engage in any solicitation in the state on behalf of the seller that would satisfy the nexus requirement of the United States constitution...."⁵ In construing this provision, the New York taxing authority has stated that it will "deem the presumption rebutted" if

the seller is able to establish that the only activity of its resident representatives in New York State on behalf of the seller is placing a

¹ NY Tax Law § 1101(b)(8)(vi) (Westlaw 2009).

² NY Tax Law § 1101(b)(8)(vi) (Westlaw 2009).

³ NY Tax Law § 1101(b)(8)(vi) (Westlaw 2009) (emphasis supplied). The nexus implications of independent contractors performing in-state advertising for out-of-state customers is discussed in the treatise at ¶ 19.02[2][c].

⁴ TSB-M-08(3)(S) (NY Dep't Tax'n & Fin. May 8, 2008), available at www.checkpoint.riag.com.

⁵ NY Tax Law § 1101(b)(8)(vi) (Westlaw 2009).

link on the resident representatives' Web sites to the seller's Web site. In addition, none of the resident representatives may engage in any solicitation activity in the state targeted at potential New York State customers on behalf of the seller.⁶

The taxing authority further explains that mere contract language forbidding the resident representative from engaging in any additional solicitation is not enough and that the seller must also demonstrate that all its in-state residents are actually complying with this contract term. Thus, a seller may, for example, rebut the presumption by meeting two conditions: (1) including appropriate contract language in all of its contracts with resident representatives, and (2) obtaining from all of its resident representatives an annual certification of compliance with those terms.⁷

Amazon.com (Amazon) brought an action challenging the statute on various constitutional grounds.⁸ Amazon had implemented an "associates program" under which participants were paid a commission for generating Amazon sales and/or a "bounty" for each new Amazon enrollee. The associates generated these sales and new enrollments by providing links to various Amazon sites and pages on their Web sites.⁹ While conceding that its "associates program" met the statutory nexus requirements by generating more

than \$10,000 in annual sales to New York customers, Amazon alleged that the statute is facially invalid because it imposes a tax collection obligation based on activities that are insufficient to create a substantial nexus under the dormant Commerce Clause. Additionally, Amazon alleged that the statute is unconstitutional as applied because neither the activities of Amazon nor its associates are sufficient to justify the imposition of a use tax collection obligation.¹⁰

The trial court dismissed Amazon's complaint. With regard to Amazon's claim that the statute is facially unconstitutional, the court ruled that the statute "is carefully crafted to ensure that there is a sufficient basis for requiring collection of New York taxes and, if such a basis does not exist, it gives the seller an out."¹¹ It does this by (1) requiring that the seller enter into a contract with a New York resident, (2) mandating that the New York resident refer customers to the seller, (3) requiring that the contract involve payment of a commission or similar consideration for the referral, and (4) requiring that the seller receive in excess \$10,000 from New York customers through this arrangement.¹² Further, the statute provides the "added safeguard" of allowing the seller "the opportunity to prove that none of its contractors actively sought sales on its behalf in New York."¹³ The trial court rejected Amazon's assertion "that the statute would bring within its

⁶ TSB-M-08(3.1)(S) (NY Dep't Tax'n & Fin. June 30, 2008), available at www.checkpoint.riag.com.

⁷ TSB-M-08(3.1)(S) (NY Dep't Tax'n & Fin. June 30, 2008), available at www.checkpoint.riag.com (providing sample contract and certification language).

⁸ *Amazon.com, LLC v. New York State Department of Taxation and Finance*, No. 601247/08 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

⁹ *Amazon.com*, No. 601247/08, slip op. at 2-4 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

¹⁰ *Amazon.com*, No. 601247/08, slip op. at 6 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

¹¹ *Amazon.com*, No. 601247/08, slip op. at 9 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

¹² *Amazon.com*, No. 601247/08, slip op. at 9 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

¹³ *Amazon.com*, No. 601247/08, slip op. at 10 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

ambit 'simple advertising by in-state advertisers,'" observing that a tax collection obligation is imposed only "on sellers who contractually agree to compensate New York residents for business that they generate and not simply for publicity."¹⁴

With regard to Amazon's contention that the statute is unconstitutional as applied, the court observed:

Amazon contracts with thousand of Associates that provided it with a New York address.... It does not matter ... that Associates do not solicit New York business at Amazon's direct behest or that Amazon contractually prohibits them from engaging in certain limited specified conduct such as offering its customers money back for Amazon purchases made through Associates links. Amazon chooses to benefit from New York Associates that are free to target New Yorkers and encourage Amazon sales, all while earning money for Amazon in return for which Amazon pays them commissions.... Amazon should not be permitted to escape tax collection indirectly, through use of an incentivized New York sales force to generate revenue, when it would not be able to achieve tax avoidance directly through use of New York employees engaged in the very same activities.¹⁵

While the trial court's conclusions may be sound, the court's reasoning is troublesome in that it blurs an important distinction: the distinction between the *residency* of an independent contractor or

sales representative and the *location of that person's relevant activities*. This may be best illustrated by an old economy example. Consider *B*, a New York resident that operates a restaurant chain in the Northeast. *B* leaves flyers on its tables with tear-out order cards for *A*'s catalogs. The cards are coded so that *B* gets a commission for sales generated by the catalogs that its customers order and use to place orders with *A*. In case 1, *B* places those flyers on the tables in all of its restaurants, including its New York restaurants. In case 2, *B* places those flyers only on tables in its New Jersey restaurants, but many orders are placed by New Yorkers who eat at those restaurants. In case 1, *B*'s physical presence in New York is probably enough to cause *A* to have a substantial nexus with New York. In case 2, however, New York taxing authorities would be hard pressed to contend successfully that *B*'s physical presence in New York could be attributed to *A* for sales and use tax nexus purposes.

In essence, Amazon's New York resident associates are performing the same function as *B* in the preceding example, except that the "flyers" are being placed in cyberspace rather than on New York and/or New Jersey restaurant tables. Probably, many of these "flyers" (links) are being developed and entered from the associate's home or place of business in New York, which may be sufficient to attribute the associate's New York presence to Amazon. Still, a more thorough exploration of these issues would have been helpful and may well be forthcoming if the trial court's decision is appealed to a higher court.

¹⁴ *Amazon.com*, No. 601247/08, slip op. at 11 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641 (emphasis in original).

¹⁵ *Amazon.com*, No. 601247/08, slip op. at 12-13 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

Indeed, perhaps the key issue raised by the case was the constitutionality of the presumption that any seller who contracts with a New York resident to refer potential customers to the seller and whose cumulative receipts from such referrals exceed \$10,000 has substantial nexus with New York. One can certainly imagine cases in which the presumption would be true (e.g., if the active in-state solicitation activity of the New York resident “associates” generated the \$10,000 in sales). One can equally well imagine cases in which the presumption would be questionable (e.g., if the New York resident “associates” did nothing more than post a link to Amazon on their Web sites, serving, in effect, as a digital billboard, which generated \$10,000 in New York sales). Because we doubt that an out-of-state vendor has substantial nexus in New York from posting advertisements on a New York resident’s property, resulting in \$10,000 of sales to New York customers, we doubt that the digital analogue to such an arrangement should create nexus.

In fact, Amazon did allege that the presumption violated the Due Process Clause, because “there is no rational relationship between facts triggering the presumption—contracts with in-state residents and more than \$10,000 of New York revenue from such arrangements—and the facts presumed—that motivated New York residents will solicit business for Amazon from other New York residents.”¹⁶ The trial court rejected this contention on the ground that the

presumption satisfied not only the federal “rational connection” standard between the “fact proved and the ultimate fact presumed,”¹⁷ but even the higher New York standard “requiring “a reasonably high degree of probability” that the presumed fact follows from those proved directly.”¹⁸ The court believed that there was a “reasonably high degree of probability” that New York residents who are compensated for referring customers to Amazon will solicit business from those with whom they are familiar and, in any event, that the statutory presumption is rebuttable. Moreover, out-of-state sellers can shield themselves from a tax collection obligation by prohibiting their associates from engaging in in-state solicitation if the New York contractors attest to their compliance. As for the burden of this requirement, the court dismissed this as simply a cost of doing business in New York.

At the end of the day, we believe that it is the presumption or burden of proof issue, rather than the substantive Commerce Clause issue, that will be dispositive in resolving this case, unless it is remanded for further factual inquiry, because, as explained above, there are plausible factual scenarios under which substantial nexus will exist. Although the issue is by no means free from doubt, the court would seem to be on solid ground in suggesting that New York’s presumption meets the federal standard of “rationality,” one of the most forgiving standards of review known to the law.

¹⁶ *Amazon.com*, No. 601247/08, slip op. at 13–14 (NY Sup. Ct. County of NY Jan. 12, 2009), available at Tax Analysts, Doc. No. 2009-641.

¹⁷ *Amazon.com*, No. 601247/08, slip op. at 13–14 (NY Sup. Ct. County of NY Jan. 12, 2009) (quoting *Mobile, Jackson & Kansas City RR v. Turnipseed*, 219 US 35, 43, 35 S. Ct. 136 (1910)), available at Tax Analysts, Doc. No. 2009-641.

¹⁸ *Amazon.com*, No. 601247/08, slip op. at 14 (NY Sup. Ct. County of NY Jan. 12, 2009) (citation omitted), available at Tax Analysts, Doc. No. 2009-641.

Only if the taxpayer can demonstrate that the policies underlying the Commerce Clause call for a more exacting standard of review—requiring, for example, a “demonstrable connection” rather than a mere “rational relationship” between the facts triggering the presumption and the facts presumed—is a court likely to second-guess the legislative determination.¹⁹

In the meantime, it is apparent that legislators in other states are not waiting for the final outcome of the New York litigation to embrace legislation piggybacking the New York approach. Such legislation already has been introduced in California, Hawaii, and Minnesota, and we would not be surprised to see a proliferation of similar bills in other states as they grapple to meet budget shortfalls precipitated by the recent economic downturn.

MAINE ADOPTS EXPANSIVE VIEW OF THE UNITARY BUSINESS PRINCIPLE

The Maine Supreme Court adopted an expansive view of the unitary business principle in holding that a taxpayer’s multinational newspaper and broadcast television business was unitary with its cable television business, which the taxpayer sold at a substantial gain.²⁰ Prior to 1995, Gannett and its affiliates were engaged in the newspaper and broadcast television business in Maine and other states. In 1995, Gannett sought to purchase newspaper and broadcast television businesses owned by Multimedia, Inc. Multimedia refused to sell

those businesses without selling its cable television systems, security alarm business, and entertainment production business. Although Gannett agreed to purchase all of Multimedia, soon after the acquisition Gannett sold the entertainment and security alarm businesses. However, for tax and other reasons, Gannett chose not to sell its cable television systems (Cable Division). From 1995 to 2000, Gannett continued to own and operate the Cable Division, which distributed cable television services to residential subscribers in Kansas, Oklahoma, and North Carolina. Five years after acquiring the Cable Division, Gannett disposed of it for a taxable gain of \$2.54 billion.

During the period that it owned and operated the Cable Division, Gannett filed tax returns in Maine and other states reporting the Cable Division as part of a single unitary combined group with the newspaper and broadcast television divisions. It also included the gain from the 2000 sale in its initial Maine return. Subsequently, however, Gannett had a change of heart and took the position that the Cable Division was not part of its unitary business, and it filed a claim for refund of approximately \$700,000 on the ground that the gain from the disposition of the Cable Division was not includable in Gannett’s Maine apportionable tax base. The trial court agreed. It found “weak evidence that the cable activities were integrated with the communications and media businesses,”²¹ and it was not persuaded that “cable was dependent upon the remaining corporate activities.”²² The trial court observed:

¹⁹ Amazon’s complaint also alleged that the statute violated the Equal Protection Clause because it targeted Amazon.com. The trial court rejected this claim.

²⁰ *Gannett Co. v. State Tax Assessor*, 959 A2d 741 (Me. 2008).

²¹ *Gannett*, 959 A2d 741 (Me. 2008) (quoting the trial court).

²² *Gannett*, 959 A2d 741 (Me. 2008) (quoting the trial court).

While it could be said that cable, in some limited respects, is in the same business as newspapers, radio and television, there does not appear to be strong centralized management. While there is some evidence that some financing took place for the cable company by the petitioner, the evidence is meager that purchasing, advertising and research were an integrated activity.²³

On appeal, the Maine Supreme Court reversed. Invoking both the Maine statutory and federal constitutional definitions of a unitary business, which in all essential respects were identical,²⁴ and delineating

the familiar contours of that doctrine articulated by the U.S. Supreme Court,²⁵ the court found that application of these principles to Gannett's facts justified the conclusion that the Cable Division was part of its unitary business. The court noted that, as in *Container*, "the Cable Division formed part of a single business enterprise with Gannett's newspaper and broadcast television operations so that the production of income by the Cable Division in Kansas and elsewhere was integrated with Gannett's newspaper and broadcast television operations in Maine."²⁶ However, in pointing to specific facts that justified this conclusion, the Maine court relied largely on factors that do not reflect operational

²³ *Gannett*, 959 A2d 741 (Me. 2008) (quoting the trial court).

²⁴ Maine defines a unitary business to mean "a business activity which is characterized by unity of ownership, functional integration, centralization of management and economies of scale." Maine Rev. Stat. Ann. tit. 36, § 5102(10-A) (Westlaw 2009). As the U.S. Supreme Court declared in *MeadWestvaco Corp. v. Illinois Dep't of Revenue*, ___ US ___, ___, 128 S. Ct. 1498 (2008), citing many of its precedents, "the 'hallmarks' of a unitary business relationship are 'functional integration, centralized management, and economies of scale.'"

²⁵ The court observed that "[a] unitary business is a functionally integrated enterprise whose parts are mutually interdependent such that there is a substantial flow of value between them," *Gannett*, 959 A2d 741, 748 (Me. 2008) (citing *Container Corp. v. Franchise Tax Bd.*, 463 US 159, 164–166, 103 S. Ct. 2933 (1983)); that "[t]he U.S. Supreme Court's test is not a bright-line rule" but "[r]ather, the issue of whether a business is unitary is determined on a case-by-case basis, after examining all of the relevant facts and circumstances," *Gannett*, 959 A2d 74, 748 (Me. 2008) (citing *Container*, 463 US 159, 166, 178 n.17, 103 S. Ct. 2933 (1983)); and that "[w]hile '[i]nvestment in a business enterprise truly 'distinct' from a corporation's main line of business' often serves as a passive investment, such as to diversify the parent's portfolio, in contrast:

[w]hen a corporation invests in a subsidiary that engages in the same line of work as itself, it becomes much more likely that one function of the investment is to make better use—either through economies of scale or through operational integration or sharing of expertise—of the parent's existing business-related resources."

Gannett, 959 A2d 741, 749 (Me. 2008) (quoting *Container*, 463 U.S. 159, 178 103 S. Ct. 2933 (1983)). The court further observed:

The Supreme Court's standard for establishing a unitary business requires a court to distinguish between entities that have significant operational connections and truly function as one business enterprise, and those that have some connections but do not function as a unitary business. There must be a flow of value, often characterized by substantial mutual interdependence, for a business to be unitary. No one fact necessarily determines whether functional integration, centralization of management or economies of scale exist. Rather, the totality of the facts are examined and weighed for cumulative effect.

Gannett, 959 A2d 741, 749 (Me. 2008) (citations to *Container*, *Exxon Corp., v. Wisconsin Department of Revenue*, 447 US 207, 100 S. Ct. 2109 (1980), and *F.W. Woolworth Co. v. Taxation & Revenue Department*, 458 US 354, 102 S. Ct. 3128 (1982) omitted).

²⁶ *Gannett*, 959 A2d 741, 749 (Me. 2008).

interdependence.²⁷ Thus, as evidence of “functional integration,” the court pointed to that fact that Gannett provided centralized tax, legal, internal audit, financial, and risk-management services to all affiliates, which were billed “at cost.”²⁸ It also relied on “the provision of intercompany services ... such as accounting, insurance, legal, tax, and financing,” as “a form of centralized management.”²⁹ Finally, the court found that these same services created a “flow of value.”³⁰

Other unitary factors to which the court adverted included legal services provided to the Cable Division by the general counsel of Gannett's Broadcasting Division; centralized provision of health and benefit plans; a system of interlocking directors and officers; and a centralized cash-management system, providing a common pool of cash from which any one of the more than 120 Gannett affiliates could draw (interest free) to pay for capital expenses or for their operating systems. To be sure, there were some suggestions of true operational integration of the Cable Division with Gannett's other operations. Thus, the court pointed to the fact that “one entity supplied technical expertise concerning production and performed key business functions critical to the generation of income by Gannett and its

affiliates, which included the Cable Division and Gannett's Maine operations.”³¹ Nevertheless, the court's own summary of the record underscores the lack of operational interdependence: “Gannett's provision of intercompany services, the sharing of expertise among affiliates, its centralized health and benefit plans, the interlocking directors and officers, and its cash management system all support our conclusion that Gannett operated a unitary business.”³²

In sum, while the court was certainly correct in observing that other courts had relied on similar factors as a basis for determining that businesses were unitary,³³ and we are not suggesting that the Maine court's analysis necessarily goes beyond constitutional bounds, its decision does reflect a relaxed view of the unitary business principle and places the Maine Supreme Court squarely in the category of courts that have adopted a broad approach to the unitary business principle.³⁴

SALES TAX TREATMENT OF SECTION 1031 EXCHANGE

Section 1031 of the Internal Revenue Code provides nonrecognition treatment for federal income tax purposes for certain exchanges of like-kind property.³⁵ These transactions are sometimes direct

²⁷ *Gannett*, 959 A2d 741, 749–750 (Me. 2008); see ¶ 8.09[4] of the treatise for a discussion of operational interdependence as a criterion for defining a unitary business.

²⁸ *Gannett*, 959 A2d 741, 749 (Me. 2008).

²⁹ *Gannett*, 959 A2d 741, 750 (Me. 2008).

³⁰ *Gannett*, 959 A2d 741, 750 (Me. 2008).

³¹ *Gannett*, 959 A2d 741, 749 (Me. 2008).

³² *Gannett*, 959 A2d 741, 751 (Me. 2008). The court also rejected the taxpayer's contention that even if Gannett's income was apportionable, taxation of the gain resulted in unconstitutional “distortion.” The court noted that “Maine's apportioned share of the larger amount of income in 2000, which amounts to approximately one-third of one percent, is not unreasonable or disproportionate.” *Gannett*, 959 A2d 741, 753 (Me. 2008).

³³ *Gannett*, 959 A2d 741, 750 (Me. 2008).

³⁴ See ¶ 8.09[3] of the treatise.

³⁵ See ¶ 7.09 of the treatise (generally discussing conformity issues associated with nonrecognition transactions).

two-party exchanges and are sometimes three-party exchanges that employ a qualified intermediary. When property that is subject to sales or use tax is involved in a Section 1031 exchange, the question arises as to whether the "trade-in" value of the exchanged property is includable in the measure of the tax. The Missouri Supreme Court addressed this question in a case involving an exchange of private aircraft.³⁶ The taxpayer, Great Southern Bank, had agreed to sell a Beechcraft airplane to Jet 1 for \$1,025,000 and to buy a Cessna airplane from Scag Engineering for \$1,925,000. In order to facilitate a Section 1031 exchange, the parties agreed that the purchases and sales would pass through an intermediary (Wachovia). Wachovia would buy the Beechcraft from the taxpayer and sell it to Jet 1, and it would simultaneously buy the Cessna from Scag Engineering and sell it to Great Southern. Great Southern reported use tax on its purchase of the Cessna, measured by its purchase price less the sales price of the Beechcraft, treating the Beechcraft as a trade-in for the Cessna.³⁷

The court held that the Missouri trade-in exclusion did not apply. It found that

the sale of the Beechcraft and the purchase of the Cessna were two separate transactions. ... Although Wachovia acted as an intermediary to facilitate a transaction under Section 1031 ..., it does not follow that there was a "trade" exempting Great Southern from paying Missouri use

taxes.... Wachovia could not keep the Beechcraft or the Cessna or sell the Beechcraft to someone other than Jet 1. Wachovia simply performed the duties assigned in its agreement with Great Southern. Wachovia never took the Beechcraft in trade for anything.³⁸

The Tennessee Supreme court reached the same result in a similar situation.³⁹ Hutton owned a Beech airplane and entered into an exchange agreement with Bell Aviation, which purchased the Beech from Hutton.⁴⁰ Hutton then contracted with Cessna to purchase another airplane. Hutton assigned his rights under his agreement with Cessna to Bell Aviation, Bell Aviation directed the funds from the Beech sale to Cessna, and Cessna then delivered the aircraft to Hutton.⁴¹ The court noted that neither transaction was dependent on the other. Thus, there were two independent transactions, and neither involved an aircraft "taken in trade."⁴²

³⁶ *Great Southern Bank v. Director of Revenue*, 269 SW3d 22 (Mo. 2008).

³⁷ *Great Southern Bank*, 269 SW3d 22, __ (Mo. 2008).

³⁸ *Great Southern Bank*, 269 SW3d 22, __ (Mo. 2008).

³⁹ *Hutton v. Johnson*, 956 SW2d 484 (Tenn. 1997).

⁴⁰ *Hutton*, 956 SW2d 484, 486 (Tenn. 1997).

⁴¹ *Hutton*, 956 SW2d 484, 486-487 (Tenn. 1997).

⁴² *Hutton*, 956 SW2d 484, 487 (Tenn. 1997).

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