

Summary of Revenue Administrative Bulletins (RABs) 2007-6 and 2008-4

To view the full text of RABs 2007-6 and 2008-4, visit www.michigan.gov/treasury

Michigan Business Tax (MBT)

The Michigan Business Tax (“MBT”) is comprised of four components: a business income tax, a modified gross receipts tax, a gross direct premiums tax, and a franchise tax. The gross direct premiums tax and franchise tax apply only to insurance companies and financial institutions respectively.

Persons have nexus with Michigan and are subject to the MBT if “the taxpayer has a physical presence in this state for a period of more than 1 day during the tax year or if the taxpayer actively solicits sales in this state and has gross receipts of \$350,000 or more sourced to this state.” In other words, there are two alternative nexus standards under the MBT. First, a person has nexus with the state if that person has physical presence in the state for more than one day during the tax year. Alternatively, a person has nexus with the state if the person actively solicits sales in this state and has Michigan gross receipts of \$350,000 or more.

In addition, the business income tax is levied on taxpayers with Michigan business activity “unless prohibited by 15 USC 381 to 384.” 15 USC 381 to 384 more commonly known as PL 86-272, is a federal law that prohibits a state from imposing a business income tax if the only in-state business activity of the out-of-state person is the solicitation of orders for sales of tangible personal property where the orders are sent outside the state for approval or rejection and are filled by shipment or delivery from a point outside the state. A person whose activities are limited to those protected by PL 86-272 is not subject to the business income tax portion of the MBT. However, such a person otherwise having sufficient nexus with Michigan will be subject to the modified gross receipts tax portion of the MBT.

Physical Presence Nexus Standard

A taxpayer has nexus with Michigan for MBT purposes if that taxpayer “has a physical presence in this state for a period of more than 1 day during the tax year. Physical presence” means:

any activity conducted by the taxpayer or on behalf of the taxpayer by the taxpayer’s employee, agent, or independent contractor acting in a representative capacity. Physical presence does not include the activities of professionals providing services in a professional capacity or other service providers if the activity is not significantly associated with the taxpayer’s ability to establish and maintain a market in this state.

Physical presence is determined on a facts and circumstances basis. A taxpayer will have physical presence in Michigan and be subject to the MBT when – for a period of 2 or more days in a tax year – the taxpayer or on behalf of the taxpayer its employees, agents, or independent contractors acting in a representative capacity:

1. Conducts business activity in Michigan. In-state business activity includes, but is not limited to:

a. Performing services.

- b. Selling, renting, or leasing property, whether real, personal, or mixed, tangible or intangible.
 - c. Soliciting sales.
 - d. Making repairs, doing warranty work, or providing maintenance or service to property sold or to be sold.
 - e. Collecting current or delinquent accounts related to sales of tangible personal property through assignment or otherwise.
 - f. Installing or supervising installation at or after shipment or delivery.
 - g. Conducting training, seminars, or similar events for employees, agents, representatives, independent contractors, brokers or others acting on its behalf, or for customers or potential customers.
 - h. Providing customers any kind of technical assistance or service including, but not limited to, engineering assistance, design service, quality control, product inspections, or similar services.
 - i. Investigating, handling, or otherwise assisting in resolving customer complaints.
 - j. Providing consulting services.
 - k. Soliciting, negotiating, or entering into franchising, licensing, or similar agreements.
2. Owns, rents, leases, maintains, or has the right to use and uses tangible personal or real property permanently or temporarily located in Michigan, including offices or other establishments.
3. Delivers goods to Michigan in vehicles it owns, rents, leases, uses, or maintains.
4. If the taxpayer’s only activities in Michigan are strictly limited to the activities listed below for less than 10 days, such activity will not constitute physical presence resulting in nexus. To the extent that any activity listed below is identified elsewhere in RAB 2008-4 or RAB 2007-6 as establishing nexus, then the activity shall establish nexus. Conducting any of the activities listed below for 10 days or more will not necessarily constitute physical presence resulting in nexus. In that case, whether nexus has been established will depend on the facts and circumstances of the in-state activity.
- a. Meeting with in-state suppliers of goods or services.
 - b. In-state meeting with government representatives in their official capacity.
 - c. Attending occasional meetings (e.g., board meetings, retreats, seminars and conferences sponsored by others, etc.).
 - d. Holding recruiting or hiring events.
 - e. Advertising in the state through various media.
 - f. Renting to or from an in-state entity customer list.
 - g. Attending and/or participating at a trade show at which no sales are solicited or made.

Additionally, physical presence does not include “the activities of professionals providing services in a professional capacity

or other service providers if the activity is not significantly associated with the taxpayer's ability to establish and maintain a market in this state. In other words, lawyers, accountants, investment bankers, and other similar professionals that are not employees of the out-of-state taxpayer who perform services in Michigan in their professional capacity for that out-of-state taxpayer shall not be considered to be conducting business activity in Michigan on behalf of the out-of-state taxpayer so long as those services are not intended to establish or maintain a market on behalf of the taxpayer. Similarly, other service providers that are not employees of the out-of-state taxpayer that perform services in Michigan for an out-of-state taxpayer shall not be considered to be conducting business activity in Michigan on behalf of the taxpayer so long as those services are not intended to establish or maintain a market for the taxpayer.

Corporations incorporated – or entities or persons organized – within the state have physical presence in Michigan.

Finally, physical presence exists for one day when physical presence is established for any portion of a day. Physical presence of more than one day is established when the presence of the taxpayer or its employees, agents, or independent contractors extends beyond a single day or occurs in more than one day. For example, an out-of-state taxpayer that drives into Michigan to perform repair services for two hours on March 1 does not have physical presence in Michigan for more than one day. If that same taxpayer returns to Michigan on March 2 – or any other day within the tax year – to complete the repair job, then the taxpayer will have physical presence in Michigan for two or more days and will have nexus under the physical presence nexus standard.

Active Solicitation w/ Substantial Michigan Gross Receipts Nexus Standard

A taxpayer has nexus with Michigan and is subject to the MBT if “the taxpayer actively solicits sales in this state and has gross receipts of \$350,000 or more sourced to this state.”

Under RAB 2007-6, and pursuant to MCL 208.1200(2), “actively solicits” means purposeful solicitation of persons within this state. Solicitation means (1) speech or conduct that explicitly or implicitly invites an order; and (2) activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order. Solicitation is purposeful when it is directed at or intended to reach persons within Michigan or the Michigan market.

Active solicitation includes, but is not limited to, solicitation through (1) the use of mail, telephone, and e-mail; (2) advertising, including print, radio, internet, television, and other media; and (3) maintenance of an internet site over or through which sales transactions occur with persons within Michigan.

Examples of active solicitation include sending mail order catalogs; sending credit applications; maintaining an internet site offering online shopping, services, or subscriptions; and soliciting through media advertising, including internet advertisements. In evaluating whether acts of solicitation are sufficient to establish “active solicitation,” the Department looks to the quality, nature, and magnitude of the activity on a fact and circumstances basis.

Active solicitation, coupled with \$350,000 in Michigan gross receipts, constitutes nexus under the MBT.

PL 86-272

Generally, PL 86-272 restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term “net income tax” includes the business income tax component of the MBT, but does not include the modified gross receipts tax, gross direct premiums tax, franchise tax or surcharge portions of the MBT. In other words, even if a taxpayer has nexus with Michigan, that taxpayer may be protected from the imposition of the business income tax under PL 86-272, but still be subject to the modified gross receipts tax and the surcharge.

The protection afforded by PL 86-272 does not apply to any person incorporated or organized within this state or to any individual who is a resident of or domiciled in this state.

Duration

The protection afforded under PL 86-272 and the provisions of RAB 2008-4 shall be determined on a tax year by tax year basis. Therefore, if at any time during a tax year the company conducts activities that are not protected under PL 86-272 or RAB 2008-4, no sales in this state or income earned by the company attributed to this state during any part of said tax year shall be protected from taxation under PL 86-272 or RAB 2008-4.

What time periods are covered once nexus is established?

Once nexus is established by a taxpayer during a tax year for MBT purpose, nexus shall exist for that taxpayer for the entire tax year.

Unitary Business Groups

A taxpayer under the MBT includes a unitary business group. A unitary business group is comprised of two or more U.S. persons. So long as one member of a unitary business group has nexus with Michigan, all members of the unitary business group must be included when calculating the taxpayer's business income and modified gross receipts tax bases and apportionment formula. Furthermore, so long as one member of a unitary group business group has nexus with Michigan and exceeds the protections of PL 86-272, all members of the unitary business group - including members protected under PL 86-272 – must be included when calculating the taxpayers business income tax base and apportionment formula.

When will a taxpayer with nexus be required to file an MBT return?

Taxpayers, other than insurance companies or financial institutions taxed under chapters 2A or 2B of the MBT, must file an MBT return if the taxpayer's apportioned or allocated gross receipts equal or exceed \$350,000.

When are the RAB's effective?

RAB 2007-6 and RAB 2008-4 are effective January 1, 2008.