

STATEMENT OF

R. BRUCE JOHNSON
COMMISSIONER, UTAH STATE TAX COMMISSION

ON BEHALF OF
THE FEDERATION OF TAX ADMINISTRATORS

BEFORE THE

SUBCOMMITTEE ON COURTS, COMMERCIAL AND
ADMINISTRATIVE LAW
OF THE COMMITTEE ON THE JUDICIARY
UNITED STATES HOUSE OF REPRESENTATIVES

ON

H.R. 1439
THE BUSINESS ACTIVITY TAX SIMPLIFICATION ACT

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Chairman Coble, Vice-Chairman Gowdy, Ranking Member Cohen and Members of the Subcommittee, thank you for the opportunity to address the Subcommittee concerning H.R. 1439, the Business Activity Tax Simplification Act (BATSA). I am Bruce Johnson, Commissioner of the Utah State Tax Commission. Today, I am testifying on behalf of the Federation of Tax Administrators (FTA). FTA is an association of the tax administration agencies in each of the 50 states, the District of Columbia, and New York City.

FTA strongly opposes H.R. 1439 because the bill would:

- Result in very significant revenue losses for the states at a time states can least afford to see their revenues shrink;
- Reverse years of judicial precedent that are the basis for state taxation; and
- Create tax-planning opportunities for large businesses to eliminate state taxation of revenues earned in a state, by substantially narrowing states' authority to tax entities operating in the state.

In addition, the proponents of the bill have failed to demonstrate a need or a plausible purpose for the legislation.

What is the effect of BATSA on state revenues?

The Congressional Budget Office (CBO) estimated in 2005 that the predecessors of the current BATSA bill, which imposed fewer restrictions on states' taxing authority, would result in a \$3 billion annual revenue loss, the largest unfunded mandate CBO has ever measured. In 2005 the National Governors Association estimated an annual range of lost state tax revenues from \$4.7 billion to \$8 billion, with a best single estimate of \$6.6 billion.

The revenue loss estimates are currently being updated. The information available to date continues to indicate that the very substantial revenue losses estimated in 2005 will result if the current legislation is enacted into law.

Eight states have reported revenue loss estimates for 2010 based on the last version of this Act introduced in 2009. Due to the uncertainty of the actual revenue impact on their state, four of the responding states have provided estimates of the minimum impact and the maximum impact as well as their "best" estimate of the impact of the Act. The ranges of the annual revenue loss of the states are as follows:

Estimated Revenue Loss From Prior H.R. 5267 Fiscal Year 2010			
Responding States	Minimum Impact	Best Estimate	Maximum Impact
	(millions)		
California	\$45.0	\$45.0	\$45.0
Idaho	20.0	20.0	20.0
Illinois	90.0	100.0	110.0
Kansas	43.3	43.3	43.3
Minnesota	60.0	66.0	73.0
New Jersey	366.4	366.4	366.4
New York	589.8	613.4	766.8
Oregon	65.8	163.4	263.4

In addition, the revenue loss over time appears to repeat the pattern of a rapid increase as businesses take advantage of the BATSA tax planning techniques. Two of these eight states, California and New Jersey, have been able to estimate the revenue loss through 2013.

Fiscal Year	California	New Jersey
	(millions)	
2011	\$135.0	\$459.5
2012	339.0	559.1
2013	614.0	665.7

How do states tax businesses now?

States levy various forms of business activity taxes today. The most common is the corporation net income tax imposed in 44 states and D.C. These taxes are similar to federal income tax, but the rates imposed are much lower than federal, with top marginal rates currently ranging from 3-12%.¹ Other types of business activity taxes that would presumably be affected by the bill include the Washington State Business and Occupation Tax, Ohio Commercial Activity Tax, Michigan Business Tax and Texas “Margin Tax.” which are general business taxes levied on gross receipts (or a variant thereof) sourced to a state, as well as the New Hampshire Business Enterprise Tax (a value added tax).²

Current law requires a state to establish that a business has a sufficient connection with the state before it may exercise its jurisdiction to impose a business activity tax. The state’s tax must bear a relation to the level of activity of the business in the state.³ The U.S. Supreme Court has held that a company meets the jurisdictional standard of sufficient contacts (“substantial nexus” in the words of the Court) if it is “doing business” in the state or otherwise engaged in “establishing and maintaining a market” in the state. It has also held that the tax is fairly related to the level of activity in the state if the multistate income of the company is apportioned among states in which the business is operating in a fashion that reasonably reflects the taxpayer’s activity in the state.

Once jurisdiction to tax is established, state corporate income taxes generally operate as follows. The state tax base is federal taxable income of the taxpayer in all states, plus and minus certain modifications (e.g., to exclude certain income that states may not constitutionally tax). The income from activities in all states is then “apportioned” or divided among the states in which the company operates according to a formula that usually compares the corporation’s payroll, property and sales (the factors) in the state with the company’s payroll, property and sales “everywhere” or in all states.⁴

¹ “*State Corporate Income Tax Rates 2000-2011, State Corporate Income Tax Rates, 2011*,” The Tax Foundation, <http://www.taxfoundation.org/taxdata/show/230.html>, March 1, 2011.

² BATSA defines a business activity tax as (1) a “a net income tax” defined as the term is used in P.L. 86-272, as well as “Other Business Activity Tax – (A) IN GENERAL – The term ‘other business activity tax means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in a state.” Other taxes that would fall under the bill include the franchise/capital stock taxes levied in a number of states, the Delaware gross receipts tax, and certain other “doing business” taxes. These are of lesser importance from a revenue standpoint than the corporate income tax and other taxes enumerated above.

³ See *Complete Auto Transit v. Brady* 430 U.S. 274 (1977). This case sets out two other tests for state taxes that do not come into play in the context of BATSA.

⁴ Gross receipts taxes are subject to the same “substantial nexus” requirement as corporate income taxes, but they are not apportioned according to a formula. Instead, the various transactions to which the tax is applied are “sourced” to a single jurisdiction according to certain rules, and that determines which state has the right to tax the transaction, provided the jurisdictional standard is met. Gross receipts and other non-net income taxes are specifically not subject to P.L. 86-272 today.

Once the income attributable to an individual state is determined, the state's rates, credits and other adjustments are applied to determine the final tax owed.

What is being proposed?

BATSA would greatly curtail the in-state business activity that a state can tax, primarily in two ways: (1) it significantly narrows state taxing jurisdiction by requiring that an entity must have one or more of certain specifically enumerated types of physical presence in a state before that state could impose a business activity tax on the entity;⁵ and (2) it expands the reach and coverage of Public Law 86-272, a 1959 law intended to provide temporary restrictions on the ability of states to levy net income taxes on certain multistate businesses. This version also interferes with the recognized ability of states to calculate income derived from the state where the income is attributable to members of a unitary business group. The combination of the changes would establish a new framework in federal law that reverses current law. The new Federal framework would allow large, multi-state businesses to engage in tax structuring and planning that would enable them to avoid a significant part, if not all, of their state tax liabilities.

How does BATSA affect current law regarding the states' jurisdiction to tax businesses operating in the state?

BATSA is often described as "codifying the current physical presence standard" for state tax jurisdiction. Despite the many statements to the contrary, the physical presence test has never been the standard for imposing business activity taxes on corporations. The U.S. Supreme Court has never held that a physical presence is required to meet "substantial nexus" requirement for the imposition of a state business activity tax. Instead, the Court has focused on requirements that the tax not discriminate, that income derived from the state be fairly apportioned, and that the method used reflect the benefits derived from the state.⁶ In the only case, the 1992 *Quill* case, where the Supreme Court has used a physical presence test, the Court did so in order to be able to require the collection of state sales taxes from in-state customers by out-of-state sellers. In *Quill*, the Court specifically said it was not establishing such a requirement for other taxes. The BATSA legislation would, for the first time, prohibit a state from imposing a business activity tax on a company doing business in the state unless the company has specifically enumerated types of physical presence in the state.

Further, since *Quill*, the vast majority of state appellate courts that have addressed the question of whether the physical-presence requirement of *Quill* applies outside of the context of sales and use taxes have ruled that it does not. Those court decisions include: *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 114 S.Ct. 550 (1993); *Comptroller of the Treasury v. SYL, Inc.*, and *Comptroller of the Treasury v. Crown Cork & Seal Co. (Delaware), Inc.*, 825 A.2d 399 (Md. 2003),

⁵ It accomplishes this by first establishing a physical presence requirement and then expanding the list of activities "protected" (i.e., to be disregarded in determining whether a company has a substantial nexus with the state) under P.L. 86-272.

⁶ ² See *Complete Auto Transit v. Brady* 430 U.S. 274 (1977).

cert. denied, 124 S.Ct. 961 (2003); *A&F Trademark, et al. v. Tolson*, 605 S.E.2d 187 (N.C. Ct. App. 2004), *review denied* (N.C., 2005), *cert. denied*, 126 S.Ct. 353 (2005); *General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App. 2001), *cert. denied*, 122 S.Ct. 1915 (2002); *Kmart Properties, Inc. v. Taxation and Revenue Dept.*, No. 21,140 (N.M. Ct. App. 2001), *cert. quashed* (N.M., 12/29/05); *Lanco, Inc. v. Director, Division of Taxation*, 908 A.2d 176 (N.J. 2006), *cert. denied*, 127 S.Ct. 2974 (U.S., 6/18/07); *Geoffrey, Inc. v. Oklahoma Tax Commission*, 132 P.3d 632 (Okla. Ct. Civ. App., 12/23/05), *review denied* (Okla., 3/20/06); *Borden Chemicals and Plastics, L.P. v. Zehnder*, 726 N.E.2d 73 (Ill. App. Ct. 2000), *appeal denied*, 731 N.E.2d 762 (Ill. 2000); *Commissioner v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W.V. 2006), *cert. denied*, *FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 127 S.Ct. 2997 (U.S., 6/18/07); *KFC Corp. v. Iowa Dept of Revenue*, 792 N.W.2d 308 (Iowa 2010) *Lamtec Corporation v. Dept of Revenue of the State of Washington*, __ P.3d __, 2011 WL 206167 (Wash. 2011). These decisions indicate that the vast weight of the case law, from both the U.S. Supreme Court and state appellate courts, is that the physical-presence requirement of *Quill* does not apply outside of the context of sales and use taxes.⁷

⁷ A few states' appellate courts have gone the other way: *Gillette Co. v. Dept. of Treasury*, 497 N.W.2d 595 (Mich. Ct. App. 1993) (ruling that P.L. 86-272 did not apply to the single business tax, but rather, the proper test was that of *Quill*); *Rylander, et al. v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. Ct. App. 2000), *review denied* (Tex., 2001); *Acme Royalty Co. and Brick Investment Co. v. Director of Revenue*, and *Gore Enterprise Holdings, Inc. v. Director of Revenue*, 96 S.W.3d 72 (Mo. 2002); and *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), *appeal denied* (Tenn. 2000), *cert. denied*, 121 S.Ct. 305 (U.S. 2000). The latter two matters, however, each had a peculiar twist with regard to the nexus issue. In *Acme Royalty Co. and Gore Enterprise Holdings*, the Missouri Administrative Hearing Commission had determined that the physical-presence requirement of *Quill* did not apply in an income tax case, and ruled that the income of entities holding trademarks licensed for use in Missouri was subject to the state's income tax. The state Supreme Court then reversed those decisions with an opinion that did not use the word "nexus" or mention any constitutional issue, instead deciding the case on the basis of the state statute. And, in Tennessee, the Court of Appeals later reversed a decision that was based on the *J.C. Penney* decision's determination regarding *Quill*, and indicated that it did not rule in *J.C. Penney* that nexus could only be supplied by the physical presence of the taxpayer, stating, "Perhaps it would have been more accurate to say that the Supreme Court had rejected state taxes on interstate commerce where no activities had been carried on in the taxing state *on the taxpayer's behalf*." The court stated, "We know that a substantial nexus may be established by activities carried on within the state by affiliates and independent contractors. [Citing *Tyler Pipe Industries v. Washington*, 107 S.Ct. 281 (1987), and *Scripto v. Carson*, 80 S.Ct. 619 (1960)]. In fact, the only situation where we know that a substantial nexus does not exist is where the only contact with the state is by the Internet, mail and common carriers [*Quill, Bellas Hess*]. Where, on the other hand, activities are "being conducted in the taxing state that substantially contribute to the taxpayer's ability to maintain operations in the taxing state," a substantial nexus does exist." *America Online, Inc. v. Johnson*, No. M2001-00927-COA-R3-CV (Tenn. Ct. App. 2002).

BATSA would also negate U.S. Supreme Court decisions that found a company meets the “substantial nexus” requirement by virtue of activities performed on its behalf by others. Specifically, the Court’s 1987 decision in *Tyler Pipe Industries, Inc. v. Washington State Dept of Revenue* would be reversed. In *Tyler Pipe*, the Supreme Court upheld the imposition of Washington's business and occupation tax based on the use of an in-state sales representative, characterized as an independent contractor, to establish and maintain a market in the state. BATSA provides that using the services of a representative to establish or maintain a market in a state would constitute a sufficient physical presence only if such representative were an “agent” of the entity and only “if such agent does not perform business services in the State for any other person...” BATSA effectively knocks the legs out from under *Tyler Pipe* by allowing a company to avoid taxation in a state simply by using someone else to do its work in the state, as long as that contractor performs services for at least one other entity. The contractor may, in fact, be a wholly owned subsidiary of the taxpayer, so long as it performs work for someone else.

Finally, the bill expands the reach of Public Law 86-272 – which now prohibits states from imposing a net income tax on an entity whose only contact with the state consists of the solicitation of sales of tangible personal property – to include all business activity taxes (gross receipts, value added, franchise, etc.,) and to broaden the scope of protected activities to include all sales, including sales of other than tangible personal property, such as intangible property and services. It also extends the list of activities excluded from state tax under P.L. 86-272 to include the “coverage of events or other gathering of information” in the state if the information is used or disseminated from a point outside the state and activities directly related to the actual or potential purchase of goods and services in the state, if the purchase is approved outside the state.

Creating a heretofore non-existent physical presence standard and expanding the reach of P.L. 86-272 represent a substantial narrowing of state jurisdiction to tax entities operating in the state.

How will BATSA create tax planning opportunities for large businesses?

There are several features of BATSA that will be used by multistate entities to structure and plan their operations and transactions to avoid state tax liability. These features include requiring certain types of physical presence in the state, prohibiting consideration of the activities of contractors in the state, and expanding the scope of activities excluded under P.L. 86-272. These provisions have particularly insidious effects when coupled with certain existing state laws such as single sales factor apportionment, which distributes income to the state based on the percentage of sales in that state compared to the company’s sales in all states.⁸

⁸ Traditionally, states assigned equal weight to each of the three apportionment factors – property, payroll and sales. At the present time, 12 states employ (or allow on an optional basis) a single factor (sales) formula (i.e., sales are apportioned among the states based solely on the proportion of a company’s sales in

Together, these provisions provide a road map that a multi-state company can use to structure its business operations so as to avoid any state business activity tax liability. That is, to the extent that a company can insure that its activities within a state are performed by someone else, do not step over the physical presence boundaries of BATSA or exceed the scope of protected activities under the expanded P.L. 86-272, a company can eliminate or reduce its tax liability in that state. A company can avoid tax in a single sales factor state by locating its physical assets in that state, but making sales into the state through another company.

By establishing the tax planning opportunities so clearly in Federal law, BATSA may effectively require a company to begin engaging in certain planning activities, that its managers currently consider too risky or inappropriate, out of a fiduciary duty to shareholders. Here are several specific examples of avoidance opportunities that BATSA condones.

Examples of the manner in which this can be accomplished are presented below.

What are examples of BATSA tax planning techniques large companies will use?

No Physical Presence Business Operations. Larger businesses in certain industries are particularly well suited to conducting business in high volumes in a state without having physical presence as required under BATSA. As a result, they will be able to avoid state taxation if BATSA is enacted. Every service a bank offers – including savings accounts, loans, and investment services – can be offered while still having limited physical presence in a state. Under BATSA, large banks will be able to add to their economies of scale advantages, relative to local banks, by operating tax-free in many states even if they do hundreds of millions of dollars of business in those states. In fact, it is precisely this type of financial services operation (credit card issuance and servicing) that was carried on without a physical presence in the state and that was found to constitute a sufficient nexus in the *MBNA* case in West Virginia.⁹ BATSA would overturn that case and similar statutes in several other states that apply an economic presence test to the instate activities of financial institutions.

Intangible Holding Company. A strategy used by a number major retailers is to create a holding company that is a wholly owned subsidiary to own the intangibles (patents, trademarks, service marks, etc.) of the retailer. Those intangibles are then licensed back to the retail entity, and each retail store is then required to pay a license fee (often just about equivalent to the profit earned by the store) to the intangible holding company. The holding company subsidiary is customarily located in a state that does not

the state), 25 states employ a formula that has three factors but super-weight the sales factor, and 9 states use the traditional equally-weighted three factor formula.

⁹ See *Tax Comm'r of the State of West Virginia v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W.V. 2006), cert. denied, *FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 127 S.Ct. 2997 (U.S., 6/18/07).

tax income from the licensing of intangibles. The retail stores take a deduction as a current expense for the licensing fee paid to the holding company. This transaction has the effect of shifting income from the state where it is earned (i.e., where the stores are) to a state where the income is not taxable – even though the holding company and the retail stores are all part of one corporate group and the holding company commonly has little in the way of actual operations.

While this was done extensively in the past, it is currently considered risky tax planning. Many companies do not engage in such arrangements because a number of states have issued assessments against such holding companies that have been affirmed by the courts.”¹⁰ If BATSA becomes law, a state would be prohibited from taxing the holding company to which the income was shifted because the holding company would not have any of the specifically enumerated types of physical presence in the state. BATSA would prevent states where the retail stores are located from taxing the holding company even though the income came from the retail operations in that state. The physical presence rule in BATSA would likely result in many more companies using an intangible holding company structure to try to minimize their taxes because of the fiduciary duty they owe to their shareholders.

In-state retailers (or other companies using this same strategy) can further reduce their state tax liabilities by borrowing back the funds paid to the holding company. The interest on the loans will also be deductible from income earned in the state. The loans to in-state companies can be made out of payments for the use of the holding company’s intangible assets made by the same in-state subsidiaries. Loans with deductible interest payments also could be made to other subsidiaries of the parent corporation. This, in effect, is a double blow to the states from aggressive tax planning under BATSA.

Using a Contractor. Another simple tax avoidance strategy under a BATSA regime involves the use of contractors in a state to perform activities necessary for a seller to maintain a market in the state. Assume, for example, an out-of-state retailer of computers or other electronic devices markets its products into a state via the Internet, sales people operating within the confines of P.L. 86-272, and other direct sales methods. Also assume that the sale of computers and electronic devices includes warranty contracts and that the out-of-state retailer sets up a separate affiliated entity (independent contractor) to provide the warranty service to its customers that it would otherwise have to provide. Assume further that the independent contractor affiliate provides similar services to other out-of-state retailers, all of which could be affiliates of one another.

¹⁰ Those cases are numerous and include, but are not limited to: *Tax Comm’r of the State of West Virginia v. MBNA America Bank, N.A.*, 640 S.E.2d 226 (W.V. 2006), *cert. denied*, *FIA Card Services, N.A. v. Tax Commissioner of West Virginia*, 127 S.Ct. 2997 (U.S., 6/18/07) (franchise and corporate net income taxes); *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C. 1993), *cert. denied*, 114 S.Ct. 550 (1993) (income tax); *Comptroller of the Treasury v. SYL, Inc.*, and *Comptroller of the Treasury v. Crown Cork & Seal Co. (Delaware), Inc.*, 825 A.2d 399 (Md. 2003), *cert. denied* (U.S., 2003) (income tax); *General Motors Corp. v. City of Seattle*, 25 P.3d 1022 (Wash. Ct. App. 2001), *cert. denied*, 122 S.Ct. 1915 (2002) (business and occupation tax); *Kmart Properties, Inc. v. Taxation and Revenue Dept.*, No. 21,140 (N.M. Ct. App. 2001), appeal pending (income tax); and, *Borden Chemicals and Plastics, L.P. v. Zehnder*, 726 N.E.2d 73 (Ill. App. Ct. 2000), appeal denied, 731 N.E.2d 762 (Ill. 2000) (replacement income tax).

Under BATSA, the out-of-state retailer would not be subject to a business activity tax in the state into which it sold the computers because the activities of the affiliate contractor, though essential to sale of the computers and performed on behalf of the seller, could not be attributed to the seller.

What is wrong with the justifications of BATSA by its proponents?

Assertion: States use abusive tactics in collecting taxes by seizing goods in transit and claiming that transporting goods through a state is doing business in a state.

Response: The most common complaint we have encountered comes from large corporations that are not in compliance with state laws. These large multi-state corporations fail to pay business activity taxes, resulting in liabilities. When their property is identified in a state, the state institutes a jeopardy assessment. The object of the jeopardy assessment can be merchandise in transit. The property is seized to satisfy a pre-existing tax liability. It is not the transit of the merchandise in a state that creates the tax liability or the jurisdiction to subject the company to a state's business activity tax. Rather the merchandise is being seized to satisfy a tax liability, that the taxpayer is not willing to pay, for conducting business in the state in a manner that satisfies the substantial nexus standard for taxation required by the U.S. Supreme Court.

State and Federal authorities use the jeopardy assessment procedure as a last recourse. States use a variety of means to generate voluntary compliance with their tax laws, such as tax amnesties and jeopardy assessment suspensions when industry groups cooperate to encourage voluntary compliance. It is only when there is no other option to collect a tax liability and the property is likely to leave the state that a jeopardy assessment is used. The jeopardy assessment also is subject to the appeal rights that the taxpayer otherwise has.

Assertion: The bill is necessary to establish a "bright line" so that a company will know when it is subject to tax.

Response: The many, mostly arbitrary, physical presence requirements in the bill are far from "bright lines." BATSA carves out from the physical presence that might be attributed to a company in a state a number of instate activities. For example, one company could have 100 employees in a state for 14 days (1,400 person-days) and not have nexus, while another company could have 1 person in a state for 16 days (16 person-days) and have nexus. In addition, a company must have certain types of physical presence that are not protected by the expanded P.L. 86-272 and that do not fall within the *de minimis* exceptions of BATSA or the "limited or transient" exception in BATSA. The various limitations and carve-outs from physical presence will create confusion, uncertainty and litigation as companies attempt to move up to the line of BATSA, but not cross over it. Repeal of P.L. 86-272 and a fair, simple presence rule that includes all activities in the state would be a bright line. BATSA is not a bright line.

Assertion: BATSA is designed to protect small businesses from being subject to tax in every state in which it might make a sale.

Response: The physical presence requirements of BATSA are not designed to assist small businesses. A small business with little presence outside its own state is unlikely to incur other state business tax liabilities since 1) the business likely has modest income, 2) the income, in any case, would have to be apportioned and 3) state tax rates are generally relatively low. BATSA, instead, intends to provide opportunities for large multi-state, multi-national corporate groups to structure and plan in order to avoid state taxes. The U.S. Constitution and due process considerations require more than a single sale before a state could exercise its tax jurisdiction. States are willing to work with the business community to structure *de minimis* standards that will provide clarity for small businesses, if that is what is really wanted. BATSA does not provide an appropriate framework for such a standard.

Assertion: Companies with no physical presence in a state do not use services in the state and should not be subject to tax.

Response: The assertion that an out-of-state seller derives no benefits from a state in which it has no physical presence (and thus should not be subject to tax) is “indefensible.” Two noted scholars in the field of state and local taxation responded to that argument as follows:

This line of reasoning is indefensible, whether the benefits corporations receive are defined broadly, to mean the ability to earn income, or defined more narrowly to mean specific benefits of public spending, one of which is the intangible but important ability to enforce contracts, without which commerce would be impossible. A profitable corporation clearly enjoys both types of benefits. It is true that in-state corporations may receive greater benefits than their out-of-state counterparts, for example, because they have physical assets that need fire and police protection. But that is a question of the magnitude of benefits and the tax that is appropriate to finance them -- something that is properly addressed by the choice of apportionment formula and the tax rate, not the type of yes/no question that is relevant for issues of nexus. The answer must clearly be a resounding yes to the question of whether the state has given anything for which it can ask in return.¹¹

Assertion: Taxing entities that have only a physical presence in a state amounts to “taxation without representation.”

Response: While “no taxation without representation” is a catchy slogan, the Supreme Court has long upheld the right of states to impose taxes on nonresidents (individuals and corporations) doing business in a state. Moreover, the companies

¹¹ Charles McLure and Walter Hellerstein, “Congressional Intervention in State Taxation: A Normative Analysis of Three Proposals,” *State Tax Notes*, February 26, 2004.

supporting BATSA have found plenty of avenues for making their desires known to state elected and appointed officials. Most importantly, the issue here is whether large businesses that can adopt complex corporate structures should be able to plan around any state tax liability. This would prevent the states from ever being able to achieve a fair system of taxation. States should be allowed to promote a system that taxes in-state and out-of-state businesses equally. If that is achieved, the in-state representatives will also effectively represent the interests of out-of-state businesses.¹²

Conclusion

Thank you Mr. Chairman for the opportunity to testify on the important subject of business activity tax nexus legislation. The current system of state taxation has developed over many years and we believe it is fundamentally sound. Legislation like H.R. 1439 turns the system upside down and would create massive revenue losses for the states. We urge you to reject the legislation.

¹² For a more complete discussion, see McLure and Hellerstein, *op. cit.*, p. 735.