

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ERIE

HODGSON RUSS LLP
140 Pearl Street
Buffalo, New York,

Petitioner,

Index No. _____

*Hybrid proceeding/action for judgment
pursuant to Articles 78 and 30
of the CPLR and 42 U.S.C. § 1983*

v.

MINNESOTA DEPARTMENT
OF REVENUE
600 North Robert St.
St. Paul, MN 55101

MYRON FRANS, IN HIS OFFICIAL
CAPACITY AS COMMISSIONER OF
THE MINNESOTA DEPARTMENT
OF REVENUE,
600 North Robert St.
St. Paul, MN 55101

Respondents.

VERIFIED PETITION AND COMPLAINT

Petitioner, Hodgson Russ LLP (“Hodgson”), alleges for its verified petition:

Parties

1. Hodgson is a New York limited liability partnership engaged in the practice of law with its principal office at 140 Pearl Street, Buffalo, New York 14202.

FILED
06/26/2014/ 16:22:55
ERIE COUNTY CLERK
RCPT # 14098983
I 2014000097

2. The Minnesota Department of Revenue (“Revenue”) is an administrative agency of the State of Minnesota with its principal office at 600 North Robert Street, St. Paul Minnesota, 55101. According to its website, www.revenue.state.mn.us, Revenue “manages the state’s revenue system and administers state tax laws.” Upon information and belief, Revenue sends auditors into New York State to perform field audits.

3. Myron Frans (“Frans”) is the Commissioner of Revenue. He is a party to this matter in his official capacity only.¹

Jurisdiction and Venue

4. This Court has personal jurisdiction over the Respondents under CPLR § 301 because, upon information and belief, Revenue, under Frans’ direction, has directed its employees to travel into New York to audit taxpayers, and Revenue is therefore doing business in New York.

5. This Court also has personal jurisdiction over the Respondents under CPLR § 302 because, upon information and belief, under Frans’ direction, Revenue is transacting business in New York, the subject of which is at issue in this lawsuit (as articulated more fully below).

6. Venue is proper in this Court under CPLR §§ 503(a) and 503(c) because Hodgson resides and has its principal place of business in Erie County; and, separately, under CPLR § 506(b), because, upon information and belief, the material events took place in Erie County.

¹ Revenue and Frans are sometimes referred to collectively as “Respondents” or “Revenue.”

Summary of the Parties' Dispute

7. This is a hybrid proceeding for declaratory, injunctive, and other relief pursuant to New York Civil Practice Law and Rules ("CPLR") Articles 30 and 78, and 42 U.S.C. § 1983.

8. This proceeding stems from the Respondents' illegitimate, fraudulent, and constitutionally impermissible attempts to subject Hodgson to tax in Minnesota.

Background

9. By letter dated March 25, 2014, Revenue sent Hodgson a letter asserting that Hodgson "has been conducting business in [Minnesota]" and that Revenue has "determined" that Hodgson has nexus with Minnesota. A true and accurate copy of that letter is attached as **Exhibit 1**.

10. "Nexus" is generally viewed as the quantity and quality of contacts an out-of-state business must have within a state before that state may assert its jurisdiction to tax. According to Revenue's March 25 letter, Revenue's determination of nexus is sufficient to satisfy Minnesota Statute 290.015 ("Minimum contacts required for jurisdiction to tax trade or business"), and that Hodgson is thus taxable in Minnesota. The letter concludes with a demand that Hodgson prepare and file returns in Minnesota for the tax years ended December 31, 2009 through December 31, 2012.

11. By letter dated April 23, 2014, Hodgson responded to Revenue's nexus determination advising that: (a) Hodgson is not conducting business in Minnesota; (b) generally, Hodgson's attorneys are licensed to practice law only in those United States jurisdictions in which Hodgson has offices; (c) Hodgson does not solicit or regularly obtain

business in Minnesota; and (d) to the extent Hodgson performs legal services for Minnesota clients, as a general matter and in principal, those services are in the nature of attorney services performed in New York or Florida, not Minnesota. A true and accurate copy of Hodgson's April 23, 2014 letter is attached as **Exhibit 2**.

12. In an email dated May 7, 2014, Revenue responded by citing some inapposite cases and statutes and stating, again, that Revenue has determined that Hodgson has nexus to Minnesota without regard to whether Hodgson has any physical presence in Minnesota. Based on the correspondence, Revenue's view appears to be that the provision of local counsel services in New York and Florida to a few clients with mailing addresses in Minnesota is enough to make Hodgson taxable in Minnesota.² A true and accurate copy of Revenue's May 7, 2014 e-mail is attached as **Exhibit 3**.

13. Minnesota has not yet issued any notice or other documentation that would give Hodgson a right to an administrative remedy in Minnesota. And in any event, Hodgson should not be compelled to contest these matters in Minnesota given its lack of contacts with that state. Accordingly, Hodgson has turned to the courts of New York for relief. The relief sought includes injunctive relief to prohibit Revenue from issuing any notices to Hodgson asserting tax liability, a declaration that Hodgson did not have nexus with Minnesota during the periods at issue, and damages, as well as attorneys' fees, for Revenue's illegal and improper assertion of nexus against Hodgson.

² It is worth noting that, under Revenue's overly-expansive theory of nexus, any local counsel hired to represent Respondents in this case will be subject to income tax in Minnesota *even if Respondents' counsel has never, ever, been to the Land of 10,000 Lakes*.

14. Hodgson is engaged in the practice of law out of its offices in Albany, NY, Buffalo, NY, New York City, NY, Saratoga Springs, NY and Palm Beach, FL. Certain Hodgson attorneys are licensed as foreign legal consultants in Canada, and Hodgson also maintains an office in Toronto, Ontario, Canada. Hodgson is prohibited from providing anything other than U.S. legal counsel and representation to its Canadian clients. Hodgson does not provide Canadian legal counsel or representation.

15. Hodgson has about 200 lawyers. It practices in most of the fields in which bigger law firms practice, and considers itself to be a “full service” law firm.

16. Through the provision of legal representation, counsel, and advice, Hodgson supports clients in a manner consistent with services provided by “full-service” law firms.

17. Hodgson also has established a reputation for providing out-of-state clients with high-value local-counsel services to facilitate litigation or transactions that fall within Hodgson’s New York-centric footprint. To a lesser extent, Hodgson also provides attorney services in Florida.

18. Hodgson has never had an office in Minnesota.

19. Hodgson does not have and has not had any attorneys stationed even temporarily in Minnesota.

20. Hodgson does not own or rent and has not owned or rented any real or tangible personal property in Minnesota.

21. Hodgson does not target and has not targeted Minnesota for receipt of any of its marketing initiatives.

22. Hodgson does not intentionally use any of its intellectual property in Minnesota and has not done so in the past.

23. Hodgson's attorneys are not licensed to practice law in Minnesota and do not generally, or on any consistent or routine basis, travel to Minnesota to perform legal services.

24. Hodgson simply does not have nexus with Minnesota.

25. When a non-corporate business entity receives non-wage compensation for the provision of services, a record of the compensation is supposed to be made by the payer and submitted to the United States Internal Revenue Service ("IRS"). The form series the IRS requires to be used to report this compensation is the 1099 form series.

26. During the years at issue (i.e., 2009-2012), certain of Hodgson's clients submitted Forms 1099 to the IRS to report payments made to Hodgson for legal services. Some of those clients reporting payments had mailing addresses in Minnesota.

27. Revenue has not performed an audit of Hodgson other than to identify that certain businesses with mailing addresses in Minnesota submitted Forms 1099 to Hodgson.

FIRST CAUSE OF ACTION
(Declaratory Judgment — No Nexus)

28. Hodgson repeats the allegations in paragraphs 1 through 27.

29. Revenue's letter dated March 25, 2014 was false and misleading with respect to the assertion of nexus against Hodgson. In that letter, Revenue states, unequivocally,

that Revenue has “determined” that Hodgson has nexus with Minnesota. However, the basis for that determination appears to be nothing more than a recognition that Hodgson received compensation reported on Forms 1099 from clients with mailing addresses in Minnesota.

30. In its letter of April 23, 2014 to Revenue, Hodgson clearly takes issue with the concept that the mere receipt of legal fees from clients within Minnesota creates nexus for an out of state law firm (i.e., Hodgson), and gave Revenue the opportunity to recant on its conclusion. Instead, in its email of May 7, 2014 Revenue reasserts its improper and illegal “determination” of nexus, and with the full might of the State of Minnesota — and under explicit threat of the imposition of penalties and assertion of tax liability for years prior to 2009 — seeks to coerce Hodgson into filing tax returns there for the 2009-2012 tax years.

31. Upon information and belief, Revenue knows that its analysis of nexus is untenable; and in its May 7, 2014 email acknowledges both that Revenue has the burden of proof on the issue, and that “[t]he idea of substantial nexus is at present an ill-defined idea.” *See* Exhibit 3. Nonetheless, Revenue attempts to strong-arm Hodgson into filing returns that Revenue knows, upon information and belief, would not be required but for its attempted coercion.

32. Upon information and belief, Revenue knows that the cost to Hodgson to challenge nexus in Minnesota would be prohibitive and disproportionate compared to the actual amount of tax allegedly due. So instead of actually bearing its burden of proof, Revenue has simply asserted, wrongfully and with full knowledge that Revenue has not done an audit or otherwise satisfied its burden of proof, that Hodgson has nexus to Minnesota. Upon information and belief, Revenue has done so under the callous supposition that Hodgson would rather just

wilt, file returns, and pay Minnesota taxes than seek a legally-correct remedy the pursuit of which may well cost more than the tax sought by Minnesota.

33. Hodgson has no office, no employees, no partners and no property (tangible or intangible) in Minnesota. Hodgson does not target Minnesota for its marketing initiatives.

34. Hodgson performs legal services in New York State and, to a lesser extent, in Florida and Ontario, Canada, for its clients. A few of its out-of-state clients have mailing addresses in Minnesota. But the services Hodgson performs are performed principally in New York and Florida — and, most relevant here, not in Minnesota. In fact, Hodgson does not provide legal services in Minnesota on any regular, routine, or consistent basis; and none of the lawyers in its fold are licensed to practice law there.

35. Hodgson's activities do not create a "substantial nexus" with Minnesota under any reasonable reading of the Commerce Clause jurisprudence currently existing. U.S.C.S. Const. Art. I, § 8, Cl 3. Upon information and belief, no published court decision has found substantial nexus to exist based on nothing more than the receipt by an out-of-state business entity of compensation paid by an in-state customer. And in *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999), the Tennessee Court of Appeals found that the Bank at issue did not have substantial nexus to Tennessee even though it had over 11,000 cardholders in Tennessee, its parent company had several J.C. Penney retail stores in Tennessee, and engaged in significant mail-solicitation in Tennessee.

36. In order to lay this dispute to rest and to accurately reflect the relationship between Minnesota and Hodgson, it is respectfully requested that this Court declare that:

(a) Hodgson did not have nexus in Minnesota during the tax years ended December 31, 2009 through December 31, 2012; (b) earning receipts from Minnesota clients, without more, is not nexus under the Constitution; (c) Hodgson was not taxable in Minnesota at any time prior to December 31, 2012; and (d) Hodgson is entitled to an injunction prohibiting Respondents from issuing any notices to Hodgson asserting tax liability for such years.

37. In addition, as a result of Minnesota's illegal actions and strong-arm tactics, Hodgson has been damaged and forced to incur lost attorney time, out-of-pocket expenses, and other costs to prosecute this action and/or defend against Respondents' wrongful "determination" of nexus, for which it demands judgment.

SECOND CAUSE OF ACTION
(Judgment under Article 78)

38. Hodgson repeats the allegations in paragraphs 1 through 37.

39. In falsely and wrongly issuing a determination of nexus between Hodgson and Minnesota under Minnesota Statute 290.015, Respondents have acted both in excess of their jurisdiction, and in an arbitrary and capricious manner.

40. More specifically, Respondents' actions are arbitrary and capricious in that they have established no reasonable or legitimate basis for the nexus determination reached by Revenue; and, accordingly, the request that Hodgson file tax returns for the tax years ended December 31, 2009 through December 31, 2012 exceeds Respondents' jurisdiction.

41. As such, Hodgson requests a judgment: (a) annulling Respondents' determination of Hodgson's purported nexus to Minnesota; (b) enjoining and prohibiting Respondents from asserting through the issuance of notices or assessments or in any other

medium that Hodgson is subject to tax in Minnesota for years prior to 2013; (c) granting Hodgson such other and further relief to which it is entitled under CPLR § 7806; and (d) restitution/damages for lost attorney time, out-of-pocket expenses, and other costs and disbursements incurred by Hodgson to prosecute its claims and/or defend against Respondents' "determination" of nexus, for which it demands judgment.

THIRD CAUSE OF ACTION

(Violation of 42 U.S.C. § 1983 — Against Respondent Frans)

42. Hodgson repeats the allegations in paragraphs 1 through 41.

43. In falsely and wrongly issuing a determination of nexus between Hodgson and Minnesota under Minnesota Statute 290.015 — and attempting to coerce Hodgson to file tax returns in Minnesota on the basis of this wrongful determination — Respondent Frans, acting under color of state law, has deprived Hodgson of its civil rights under the U.S. Constitution and federal law.

44. In particular, Respondent Frans' actions violate the Commerce Clause of the United States Constitution, and thus are in breach of Hodgson's constitutional rights thereby proximately causing it damage.

45. Respondent Frans' misconduct is actionable, and the relief sought by Hodgson is permitted, under Section 1983 jurisprudence (*see* 42 U.S.C. § 1983), including the Supreme Court's determination in *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 109 S. Ct. 2304 (1989), because, among other reasons, it seeks prospective relief in the form of an injunction, and damages and attorneys' fees incurred in connection with prosecuting its claims.

46. Upon information and belief, the violation of Hodgson's federal rights is attributable to Respondent Frans' improper enforcement of a Minnesota policy or practice. *See* Exhibit 3.

47. In light of Respondent Frans': (a) disregard for Hodgson's Due Process rights; (b) intentional obfuscation and improper application of the proper nexus standards under the Commerce Clause; and (c) heavy-handed, illegal, and improper attempts to coerce Hodgson to file returns and pay taxes in Minnesota even though Respondents have not established that Hodgson had nexus there for the periods at issue, Hodgson is entitled to an injunction prohibiting Respondents from asserting through the issuance of notices or assessments or in any other medium that Hodgson is subject to tax in Minnesota for years prior to 2013, and for damages incurred as a result of this litigation, including attorneys' fees.

FOURTH CAUSE OF ACTION

(Attorneys' Fees Under 42 U.S.C. § 1988 — Against Respondent Frans)

48. Hodgson repeats the allegations in paragraphs 1 through 47.

49. Respondent Frans' misconduct, under color of state law, has infringed upon Hodgson's civil rights in violation of 42 U.S.C. § 1983 and the United States Constitution.

50. Hodgson is thus entitled to the recovery of its attorneys' fees and other costs and disbursements under 42 U.S.C. § 1988.

WHEREFORE, Hodgson respectfully demands judgment:

1. On its first cause of action:

a. Declaring: (i) that Hodgson did not have nexus in Minnesota during the tax years ended December 31, 2009 through December 31, 2012, (ii) earning receipts from Minnesota clients, without

more, is not nexus under the Constitution; (iii) Hodgson was not taxable in Minnesota at any time prior to December 31, 2012;

- b. Enjoining and prohibiting Respondents from issuing any notices to Hodgson asserting tax liability for such years;
 - c. Awarding Hodgson damages for lost attorney time, out-of-pocket expenses, and attorneys' fees and costs incurred in prosecuting this action and/or defending against Respondents' wrongful "determination" of nexus; and
 - d. Granting Hodgson such other and further relief as the court deems just and proper.
2. On its second cause of action:
- a. Annuling Respondents' determination of Hodgson's purported nexus to Minnesota;
 - b. Enjoining and prohibiting Respondents from asserting through the issuance of notices or assessments or in any other medium that Hodgson is subject to tax in Minnesota for years prior to 2013;
 - c. Granting Hodgson such other and further relief to which it is entitled under CPLR § 7806; and
 - d. Awarding Hodgson restitution/damages for lost attorney time, out-of-pocket expenses, and other costs and disbursements incurred in prosecuting its claims and/or defending against Respondents' wrongful "determination" of nexus.
3. On its third cause of action:
- a. Enjoining and prohibiting Respondent Frans, or others at his direction, from asserting through the issuance of notices or assessments or in any other medium that Hodgson is subject to tax in Minnesota for years prior to 2013;
 - b. Awarding Hodgson damages incurred as a result of this litigation and/or defending against Respondents' wrongful "determination" of nexus, including attorneys' fees; and
 - c. Granting Hodgson such other and further relief as the court deems just and proper.

4. On its fourth cause of action:
- a. Awarding Hodgson attorneys' fees and other costs and disbursements under 42 U.S.C. § 1988; and
 - b. Granting Hodgson such other and further relief as the court deems just and proper.

Dated: June 26, 2014

HODGSON RUSS LLP

By 

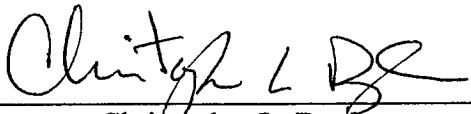
Stephen W. Kelkenberg
Christopher L. Doyle

The Guaranty Building
140 Pearl Street
Buffalo, New York 14202
Telephone: (716) 856-400

VERIFICATION

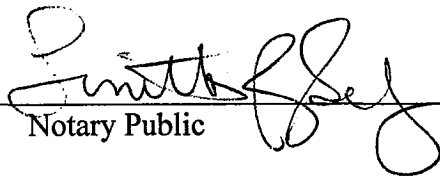
STATE OF NEW YORK)
) ss.:
COUNTY OF ERIE)

Christopher L. Doyle, Esq., being duly sworn, deposes and says that he is a Member of the Petitioner herein, that he has read the foregoing Verified Petition and knows the contents thereof, and that the same is true to his own knowledge, except as to the matters herein stated upon information and belief, and as to those matters he believes them to be true.



Christopher L. Doyle

Sworn to before me this 26th day
of June, 2014.



Notary Public

LINETTE H. SCHWARTZ
Notary Public, State of New York
Qualified in Erie County
My Commission Expires **July 15, 2015**

EXHIBIT 1

MINNESOTA REVENUE

March 25, 2014

HODGSON RUSS LLP
ATTN: CONTROLLER
140 PEARL ST
SUITE 100
BUFFALO, NY 14202-4014

In Re: Minnesota Corporation Franchise Tax

A corporation or partnership is required to file a Minnesota franchise tax return for every taxable year in which it transacts business within Minnesota. According to information available to this office, your firm has been conducting business in our state, but has not filed any Minnesota franchise tax returns. Your corporation or partnership is required to file all missing returns, unless your business activities in Minnesota qualify for exemption from the state income tax, under the minimum standards set forth in Public Law 86 - 272 as cited in U.S.C.A. section 381.

Under Minnesota statute, a trade or business that performs services of any kind or nature to customers in this state, which are performed from outside this state but the services are received in this state are subject to the taxes imposed by this chapter. Statute 290.015 - Minimum contacts required for jurisdiction to tax trade or business.

Under Minnesota Statute 290.191 - Subd (5j) - Determination of sales factor, Minnesota requires that receipts from the performance of services must be attributed to the state where the services are received. We are aware that federal forms 1099's have been issued to your firm, showing that your firm has provided services to Minnesota clients who have received services within Minnesota for the tax years of 12/31/2004 forward.

We now request that Minnesota Corporation or Partnership tax returns be submitted for 12/31/2009 - 12/31/2012. Please carefully review the revenue received from all Minnesota companies and remember that once nexus to Minnesota has been determined, as it has with your company, all Minnesota property, payroll and sales must be apportioned to Minnesota. All appropriate tax returns and additional information at our website: www.taxes.state.mn.us. Remember to include a copy of your federal tax returns with each corresponding Minnesota tax return. All future tax returns can be filed directly to our office in St. Paul, MN when they are due.

Please complete the return and send it with your payment of amounts due by April 25, 2014 to myself at the address shown below. If you have any additional questions or need further assistance, please feel free to give me a call or email me at sheila.davidson@state.mn.us. Thank you for your cooperation.

Sincerely,


Sheila M. Davidson
Revenue Tax Specialist Intermediate

Corporate & Sales Tax Division
612 Pierce St
Eveleth, MN 55734-1611

Tel: 218-735-3142
Fax: 218-744-7421

An equal opportunity employer

EXHIBIT 2



Christopher L. Doyle
Partner
Direct Dial: 716.848.1458
Direct Facsimile: 716.819.4658
cdoyle@hodgsonruss.com

April 23, 2014

VIA EMAIL: sheila.davidson@state.mn.us

Sheila M. Davidson
Revenue Tax Specialist Intermediate
Minnesota Department of Revenue
Corporate & Sales Tax Division
612 Pierce Street
Eveleth, MN 55734-1611

Dear Ms. Davidson:

Re: Hodgson Russ LLP

This is in response to your letter dated March 25 (copy attached). Hodgson Russ LLP (the "Firm") has asked me to be the contact person with respect to your inquiry.

We need more information to be able to determine our tax compliance obligations in Minnesota. The letter states that "[a]ccording to information available to this office, your firm has been conducting business in our state..." This is contrary to our understanding. Please provide us copies of the information upon which Minnesota-Revenue has based this conclusion.

The letter paraphrases Minn. Stat. 290.015.1(b) and states that "a trade or business that performs services...from outside of the state but the services are received in this state are subject to the taxes imposed by this chapter." That statutory analysis is not comprehensive. Under the subsection of the statute referred to in the letter, the tax is imposed only if the entity "obtains or regularly solicits business from within the state." So, please also provide the copies of the evidence upon which the Department has based its conclusion that the Firm has performed "services received in [Minnesota]", and evidence that the Firm "obtains or regularly solicits business from within [Minnesota]". It is our belief that the Firm "obtains or regularly solicits business" only in those jurisdictions in which it maintains offices. But if Minnesota has information indicating something contrary, please provide it.

Regarding the Firm's sales factor (assuming, for arguments sake, that it is subject to tax in Minnesota), please understand that the Firm is a law firm with offices in New York, Ontario, and Florida, and with few exceptions our lawyers are licensed to practice law only in New York and Florida. If we perform work for Minnesota clients, I have been told that work is generally performed in our offices or in the courts of New York or Florida and not in Minnesota. Please clarify where, under those circumstances, Minnesota believes the services are "received" for purposes of Minn. Stat. 290.191(5j).

April 23, 2014
Page 2



The letter states, unequivocally, that the Firm has been "determined" to have nexus with Minnesota. Please send us a copy of that determination and the evidence upon which it was based. We understand nexus to be a US Constitutional question. Please provide us the legal authority upon which Minnesota relies when it asserts nexus against a business that has no physical presence in the state and does not intentionally solicit business there. In particular, we are interested in seeing the analysis that the assertion of nexus under such situations is not a violation of the Interstate Commerce and Due Process Clauses of the US Constitution (Art. I, Sec. 8 and Amdnt. IX, Sec. 1, respectively).

Electronic copies of documents are preferred. But I will take them however Minnesota wants to deliver them.

Once we receive your response, we will review it promptly and then take the steps necessary to comply if required by law. The letter provided us a month to respond. I'll assume that a one-month response time is viewed as customary and appropriate. Accordingly, we will expect a response to this e-mail by May 25.

Feel free to contact me with any questions you might have or any additional inquiries.

Very truly yours,

A handwritten signature in black ink, appearing to read "Christopher L. Doyle". The signature is fluid and cursive.

Christopher L. Doyle

Attachment

000160.00265 Business 12720695v1

EXHIBIT 3

Doyle, Christopher

From: Davidson, Sheila (MDOR) <sheila.davidson@state.mn.us>
Sent: Wednesday, May 07, 2014 4:08 PM
To: Doyle, Christopher; Schwartz, Linette
Subject: Hodgson Russ LLP
Attachments: Hodgson Russ.xml; MN Law Firms Agreement.doc

Dear Mr. Doyle:

Thank you so much for your response received on April 23, 2014 regarding the State of Minnesota's requests of your company.

Hodgson Russ LLP is receiving 1099 Income from Minnesota customers as detailed in our attachment. Hodgson Russ LLP is providing legal services for customers/clients located in Minnesota. While it may be true that some of this income is being derived through a central processing office or home office located in Minnesota, that burden of proof must come from the taxpayer. We would not have access to this information.

Your firm is one of many law firms contacted by the Minnesota Department of Revenue. Please feel free to review the attached agreement from the Minnesota Department of Revenue in regards to this initiative.

The only federal statute that would protect an out-of-state business providing services for Minnesota customers and clients is Statutory Jurisdiction Public Law 86-272. PL 86-272 only protects tangible personal property, and since Hodgson Russ LLP is providing a service to Minnesota customers; we can prohibit protections allotted by this statute. Minnesota is only required to prove due process nexus and commerce clause nexus to a business to tax an activity that isn't protected by PL 86-272. Given no protections under PL 86-272 that state would apply Minnesota constitutional nexus statutes under 290.015 and apportionment statute 290.191.

All that is required to establish nexus activity to an unprotected act is to establish Due Processes' "Purposeful Availment" and pass the commerce clause "4 Prong Test". The most applicable case in this situation as far as "Purposeful Availment" under Due Process laws would be Zippo Manufacturing co. V. Zippo Dot Com, Inc (1997). The Supreme Court Ruled.

"If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the internet, then personal jurisdiction is proper."

"The intended object of the transactions had been the downloading of electronic messages that formed the basis of suit in Pennsylvania."^[3] These contacts constituted purposeful Availment under the three-prong test as Dot Com freely chose to sell its services to residents of Pennsylvania.^[3] Therefore, the Court denied Dot Com's motion to dismiss for lack of jurisdiction".

Geoffrey Inc v. South Carolina Tax Commission (1993),

*"It is well settled that the taxpayer need not have a **tangible, physical presence** in a state for income to be taxed there. The presence of intangible property alone is sufficient to establish nexus."*

Additionally,

Miller Brothers Court's finding that due process requires something more than a slight physical presence within the taxing jurisdiction has not survived *Quill*, 504 U.S. at 308, 119 L. Ed. 2d at 104, 112 S. Ct. at 1911, **which held that due process may be satisfied even where the taxpayer had no physical presence within the taxing state.** *Brown's Furniture*, 171 Ill. 2d at 426.

Lastly, *CompuServe Inc. V. Patterson* (1998). The appellate court held that Patterson had purposefully directed his business activities toward Ohio by knowingly entering into a contract with an Ohio resident and then **"deliberately and repeatedly" transmitted files to Ohio.**

Minnesota must prove Commerce Clause Nexus with Hodgson Russ LLP in applying the "4 Prong Test" to Hodgson Russ' activity.

"Under modern dormant commerce clause jurisprudence, in order for a state to tax an out-of-state corporation, the tax must be (1) 'applied to an activity with a *substantial nexus* with the taxing State,' (2) 'fairly apportioned,' (3) nondiscriminatory with respect to interstate commerce, and (4) 'fairly related to the services provided by the State.'"

The only applicable test would be whether a sufficient connection between Hodgson Russ LLP and Minnesota exists. The idea of substantial nexus is at present an ill-defined idea; however Minnesota has **no de minimis clause.** We understand that total income from Minnesota customers was less than \$500,000 for each of the years in question; however, this would not be considered de minimis. In addition, we ask that you review your client's Minnesota revenue not received via 1099 format for the years in question to determine if there is additional Minnesota income.

The state therefore cites the following Minnesota Constitutional Statutes;

290.015 MINIMUM CONTACTS REQUIRED FOR JURISDICTION TO TAX TRADE OR BUSINESS.

Sub Division 1. (b) Except as provided in subdivision 3, a person that conducts a trade or business not described in paragraph (a) is subject to the taxes imposed by this chapter if the trade or business obtains or regularly solicits business from within this state, without regard to physical presence in this state.

1) sales of products or services of any kind or nature to customers in this state who receive the product or service in this state;

(2) sales of services which are performed from outside this state but the services are received in this state;

(3) transactions with customers in this state that involve intangible property and result in receipts attributed to this state as provided in section 290.191, subdivision 5 or 6;

Please carefully review the revenue received from any Minnesota companies, customers, individuals or locations and remember that once nexus to Minnesota has been determined, as it has with your client's company, all Minnesota property, payroll and sales must be apportioned to Minnesota. We claim jurisdiction on all Minnesota sales, revenue received, fees assessed, etc.

Although your company may have begun providing services in Minnesota prior to 2004, we request that Minnesota income tax returns be submitted for 12/31/2009 - 12/31/2012. All appropriate tax returns and additional information at our website: www.taxes.state.mn.us. Please remember to include a copy of your federal tax returns, with each corresponding Minnesota tax return. All future Corporation tax returns can be filed directly to our office in St. Paul, MN when they are due. Your company will also need to register for a Minnesota Tax Identification Number and this can be done on our website as well.

We are willing to abate any related penalties, but ask that you be sure to give me a call before you send in the returns, so I can assist in the calculation of any interest that might be due. **Please complete the return and send it with your payment of amounts due by June 9, 2014 to myself at the address shown below.**

If you have any additional questions or need further assistance, please feel free to give me a call or email me at sheila.davidson@state.mn.us. Thank you for your cooperation.

Sincerely,

Sheila M. Davidson

Revenue Tax Specialist Intermediate

Corporate Franchise Tax

612 Pierce Street

Eveleth, MN 55734

Phone: 218-735-3142

Fax: 218-744-7421

Email: sheila.davidson@state.mn.us

Website: www.revenue.state.mn.us

MINNESOTA • REVENUE



This message and any attachments are solely for the intended recipient and may contain nonpublic/private data. If you are not the intended recipient, any disclosure, copying, use, or distribution of the information included in this message and any attachments is prohibited. If you have received this communication in error, please notify me by reply email and immediately and permanently delete this message and any attachments. Thank you.

Sheila M. Davidson

Revenue Tax Specialist Intermediate

AGREEMENT BETWEEN _____
AND
THE MINNESOTA COMMISSIONER OF REVENUE

This AGREEMENT entered into by and between _____ (the "Taxpayer"), and the Minnesota Commissioner of Revenue ("Commissioner"). The Commissioner enters into this Agreement pursuant to the authority granted by Minn. Statute §270C .

ARTICLE I

The Taxpayer represents the following is true to the best of its knowledge and belief for periods prior to the execution date of this Agreement:

1. The Commissioner conducted a preliminary review of Taxpayer and has determined that Taxpayer may have nexus for Minnesota Partnership Return filing purposes. While neither the Commissioner nor the Taxpayer has completed a full nexus review, each has determined that it is within their best interests to come to a mutually agreeable filing position.

ARTICLE II

The Taxpayer agrees to the following:

1. The Taxpayer will, within **60 days** of execution of this Agreement, submit partnership returns on a block filing basis, which include relevant Minnesota KPC and KPI information in lieu of filing multiple KPC and KPI schedules; and pay composite taxes for all partners, plus statutory interest as computed from the regular due dates of the returns, for the tax years ending **December 31, 2009, December 31, 2010 and December 31, 2011**. Taxpayer will apportion its income in accordance with Minnesota Statutes Section 290.191.
2. The Taxpayer will, within **60 days** of execution of this Agreement, pay any extension or estimated payments due for the tax year ending **December 31, 2012**. The Taxpayer will submit a partnership return on a block filing basis, which includes relevant Minnesota KPC and KPI information in lieu of filing multiple KPC and KPI schedules; and pay composite taxes for all partners by the extended due date for such return. In the event the extended due date for the return occurs before the payment required by this paragraph, the return shall also be due within **60 days** of execution of this Agreement.
3. The taxpayer will, within **30 days** of execution of this Agreement, submit any estimated payments due for the tax year ending **December 31, 2013**.
4. The Taxpayer(s) will, within **15** calendar days from the execution date of this Agreement, register with the Department for a Minnesota Business Identification number.

5. The Taxpayer agrees to allow the Commissioner to examine/audit its books, records, and other documents as provided in Minnesota Statutes Section 270C.31 and other applicable law.
6. With regards to Minnesota Partnership Tax, the Taxpayer will comply with the provisions of Minnesota Statutes, 290 and 289A, and other applicable law governing such taxes for tax years ending December 31, 2013 and forward.

ARTICLE III

The Commissioner agrees to the following:

1. The Commissioner will not assess late filing penalties, late payment penalties, or additional penalties/charges for underpayment of estimated tax on returns filed pursuant to this Agreement, nor assess additional charges on estimated taxes paid pursuant to this Agreement.
2. The Commissioner will not assess the Taxpayer, its officers, nonresident partners, or other persons for any partnership taxes or any personal or entity level taxes based on income derived from this business entity for periods ending prior to **December 31, 2009** to the extent such taxes have not been paid, or any interest or penalties applicable thereto.
3. The Commissioner may reopen this matter in the event of fraud, malfeasance or misrepresentation of material fact in the procurement of this Agreement and filing of required returns, as provided under Minnesota Statute 270C.52, subdivision 1.
4. The department shall maintain the complete confidentiality of this Agreement in accordance with provisions of Minnesota Statute Chapter 270B and its procedures, and shall not discuss the Taxpayer's taxes or any of the terms and conditions herein set forth with any tax authorities of any state or governmental authority or with any person or party except as allowed by exchange of information agreements in effect with other States, other Minnesota state agencies, the Multistate Tax Commission and the Federal Government. Nothing herein shall prevent such internal communications within the Department as necessary to implement the terms and provisions herein. Nothing in this Agreement shall be construed to conflict with any Federal or State statutes.

ARTICLE IV

1. The execution date of this Agreement shall be the date the Taxpayer signs this Agreement.
2. This Agreement shall be executed in duplicate, one copy for the Commissioner, one copy for the Taxpayer.
3. Any provision of the Agreement may be superseded by an attached addendum, signed and dated by both parties, specifying the new provision.
4. Notwithstanding any provision contained herein to the contrary, this Agreement is limited solely to the rights and duties of the parties relating to the audit, assessment, reporting, remittance, and related requirements regarding partnership taxes, the enforcement and collection of which is administered by the State of Minnesota.
5. All returns filed in accordance with this Agreement shall be subject to audit and the assessment of additional tax or the refund of tax in accordance with the statute of limitations provided in Minnesota Statute Chapter 289A.
6. In the event the Commissioner and/or the Taxpayer determines that the Taxpayer has overpaid its taxes for tax returns filed pursuant to this Agreement, the Taxpayer may, in accordance with the statute of limitations, file a claim for refund for overpayment of such taxes. The aforementioned refund claims may relate to any issue, including but not limited to, such issues adjudicated in future litigation relating to nexus or apportionment.
7. The terms, provisions, interpretations, and enforcement of this Agreement shall be governed by the laws of the State of Minnesota.
8. Any and all judicial actions or proceedings which may be brought relating to the Agreement, including interpretation, performance and enforcement hereof, shall be brought in the appropriate state court of the State of Minnesota. The Taxpayer, its successors and assigns hereby agree to submit to the personal jurisdiction of the courts of the State of Minnesota for such limited purpose.
9. Neither the Taxpayer nor the Commissioner, by the execution of this Agreement, and the performance of its terms, shall be deemed to have made any admission or concession of fact or law of any kind whatsoever regarding the partnership tax responsibilities of the Taxpayer beyond what is stated in this Agreement.
10. Any Concessions given by, or limitations placed upon, the Commissioner through this Agreement will not apply to any person acquiring the Taxpayer, or being acquired by the Taxpayer, through a merger, acquisition, consolidation, buy-out or any other transition combining the Taxpayer with another person(s) after the execution date of this Agreement, except to the extent of the concessions or limitations as they pertained to the Taxpayer as it was organized as of the execution date of this Agreement. By way of example, and not limitation, if the Taxpayer were acquired by a