

**United States House of Representatives  
Committee on the Judiciary  
Subcommittee on Commercial and Administrative Law**

**June 24, 2008**

**State Nexus Testimony**

Ms. Chairwoman and Members of the Subcommittee, thank you for holding a hearing on H.R. 5267, the "Business Activity Tax Simplification Act of 2008."

In understanding and discussing our position on state taxing authority our obligation to pay appropriately mandated taxes are not in question, however, our ability to compete in our industry requires us to pass along these costs in the pricing of our product. When the taxing arm of each state does not consistently apply the law or provide clear guidance on activities requiring registration as an out of state corporation and potential tax obligation we are at a distinct disadvantage, not only with domestic manufacturer's but foreign manufacturer's as well.

Our first experience with state Nexus occurred in Michigan. State sent us a detailed questionnaire inquiring about our activities within the state. Being unfamiliar with Nexus issue and naïve regarding the state's agenda, we inquired to other boat manufacturer's their experience with state's assessing income and sales tax on out of state corporations. Some manufacturer's had not received any contact from states, others had similar experience and still others received inquiries from states we had no contact with. Since we do not have property or payroll and sales occur outside the state, we deemed our exposure to Michigan assessing tax non-existent. However, in further discussions with Michigan state agent, very few follow up questions were asked regarding our responses to the questionnaire. As if the question on whether or not we owed Michigan Single Business Tax was a foregone conclusion and the questionnaire was a formal process having little

significance in determining whether or not we owed any tax. We subsequently determined agent(s) from the state were contacting dealers domiciled in the state posing as interested customers to inquire regarding how we delivered the product, do we have sales representatives in the state, how often they visited the dealer, do we assist in unloading product, and how was the warranty process handled. Based on the dealer's responses it was deemed by the state we had an obligation to register, pay tax and the burden was on us to disprove comments made by our dealer's. Regardless of whether or not the dealer could have made incorrect responses, didn't understand the basis of the question, or confused us with one of their other product lines.

Our experience with the State of New Jersey is nothing short of extortion. We received a phone call on October 6, 2004 from someone purporting to be an agent with the New Jersey Division of Taxation and agent indicated he was in possession of our truck with a load of boats destined for delivery in the state. Agent subsequently indicated the truck is to be impounded, along with the boats, unless we immediately remitted \$27,500. Investigative agent claimed nexus arose because we deliver product into the state on trucks owned by Monterey, however, at the time the trucks were leased through a California entity. We also determined the \$27,500 figure was determined based on a "field formula" having no basis or relation to property, payroll or sales. After refusing to remit any funds for tax based on a field formula, we engaged an attorney to intervene on our behalf with the state. On the afternoon of October 6<sup>th</sup> our attorney negotiated the release of the truck and boats. However, on October 7<sup>th</sup> we received a Warrant of Execution Jeopardy Assessment demanding payment for \$176,000, again based on some unexplainable "field formula." In addition, the state placed a lien by levy on funds due to us from New Jersey dealers' finance company. Subsequently, on October 13<sup>th</sup> we provided

detailed sales information for the years 1998 through 2004 and were assessed income tax of \$52,000 and \$5,200 for the cost of collection.

On December 21<sup>st</sup> 2004 we filed a petition to protest and request for refund with the conference & appeals branch. On April 12<sup>th</sup> 2006, we received a letter notifying us our conference hearing was scheduled for July 6, 2006. Included in the notification letter, was a list of items the state wanted us to provide to them prior to the hearing. The first 6 (six) items on the list entailed questions regarding the warranty policy for Monterey and no follow up questions regarding use of or delivery of boats on Monterey owned or leased trucks. Appearing as if the reason for New Jersey having authority to impose tax, delivery of product on Monterey owned trucks, no longer applied.

On October 3<sup>rd</sup>, 2006 we met with the Conference and Appeals branch to resolve the issue and clarify our responsibility with the state. Subsequent to that hearing we submitted a proposed resolution and to date no response has been received.

Lastly, our experience with Washington State included receipt of Washington Business Registration application and the state's position regarding warranty repairs and delivery via common carrier. Consistent with other states, Washington contacted independent dealer's in the state, posing as interested customers, and inquiring about the relationship of dealer with the manufacturer.

Due to small amount of sales in Washington we determined litigation was not a cost effective approach and remitted the tax, interest and penalties for 1999 through 2006 of \$44,597. We continue to prepare and remit quarterly combined excise tax returns.

Our sales are down 13% year to date, full time employee count is down approximately 15%. Whether we can attribute the decrease to competitive pricing pressure or to other factors is difficult to say. However, at the very least we are

experiencing an unprecedented amount of pricing pressure in the boating industry requiring us to offer more and higher incentives. In the short term, we consider rebates and incentives an investment in establishing or increasing our market share. However, in the long term, the continued pressure on profitability has consequences, as you know, profound layoffs, decreased competition and possibly bankruptcy.

Monterey is the largest employer in the surrounding geographic area and the loss of jobs has a profound and rippling effect through the local economy. In order to establish consistent application of “doing business in a state,” we need clear guidance through legislation.

Thank you,

Mark Ducharme

CFO

Monterey Boats