

A Chat with Mark Nachbar

By Bruce M. Nelson and Mark L. Nachbar

Continuing the JOURNAL's series of interviews with state and local tax (SALT) leaders, Bruce M. Nelson talks with Mark L. Nachbar in the National Tax office of Ryan, LLC. Both an attorney and a CPA, Mark specializes in providing multijurisdictional SALT consulting services across a wide array of industries. In addition, he is a well-known lecturer on SALT issues for a variety of organizations, including the Council on State Taxation, the Institute for Professionals in Taxation, the Tax Executives Institute, and many others.

Bruce: All right, so the first thing I always ask is how we manage to ruin our lives and get into state and local tax, but seriously, you grow up, you go to college, Tulane, right?

Mark: Yes, I went to Tulane, and I studied business management. The school had just started its undergraduate business school during my sophomore year, so I applied and got into its undergraduate business program for my junior and senior years, and absolutely loved it. Originally, my thought in going to college was that I wanted to go to law school. Frankly, I had no idea what lawyers did, but it sounded like a cool job to me. I wanted to be Perry Mason.

Bruce: Okay, now, you're dating yourself, Mark. (*Perry Mason was a television series that starred Raymond Burr, Barbara Hale, and William Hopper and ran on CBS from 1957 to 1966. The plots almost always involved an innocent person wrongly charged with murder and Perry always got them off in a courtroom drama.*)

Mark: I know, I can't help it. But I loved business school. I was shocked, and I loved it. I debated going to a graduate business program, law school, or a joint program. I ultimately decided to go to law school and unfortunately I hated it.

The one course that I really loved as a 1L was constitutional law. My first summer, I clerked at a law firm in Chicago, and I did a little bit of tax work, and I found that it really combined my interest in business and the law. The projects I had in corporate law dealt largely with contracts, I was more interested in how a business worked, and what made it tick, and all the different aspects of, how do you sell the product, make the product, *etc*, And that's not really corporate law, I chose to go to Arthur Andersen as my first job, and I got extremely lucky in that the head of the tax department took a liking to me and put me on consulting projects straight away.

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My first project was an intangible issue involving a purchase acquisition. Our client had purchased a company. They overpaid for it, and the partner asked me to go to the law and business libraries and see if I could identify additional deductions to make this transaction more palatable. Among the assets were some trademarks and trade names so I suggested we amortize these names we bought, because without advertising, the names disappear. So that was the first project I ever worked on.

The first project I ever worked on in state and local was a fantastic one. Do you remember the 1982 consent decree with respect to AT&T, where the FCC broke the company up into seven different regional telephone companies?

Bruce: Now I am dating myself. Yes, I remember that.

Mark: And the project that I worked on was to establish Great Lakes Bell, which then turned into Ameritech. It involved all sorts of state tax considerations, like, where do you house the inventory? How do you do the purchasing, which were sales tax questions, and there were income tax apportionment issues. It was great. You really had to know how the business planned its operations, and gave us the opportunity to set up those operations in the most tax-efficient manner. And that's when I fell in love with state and local tax.

I was also very lucky, because back in 1983, if you remember, none of the Big Eight firms really had a specialization, other than maybe Cooper's, in state and local tax. But I was the first of four people at Arthur Andersen who specialized in state and local taxation, and that was in 1984.

I loved what I did, because it's so much more business oriented than federal taxation. I left Arthur Andersen in 1991, and after a very brief stint owning my own business, I was hired by Deloitte and Touche in 1992. At that time, they were at the very beginning of building their full-time state and local group. That was an incredible year, you know, if you think about it, to go and start a practice. Because that's the year four huge Supreme Court cases were decided: *Quill*, *Allied-Signal*, *Kraft*, and *Wrigley*.

So, that's how I got involved in the area, and I have loved it ever since.

Bruce: You said you liked con law in law school; you go into state and local tax and that's all it is—constitutional law.

Mark: That's right. It is constitutional limitations all the time—Commerce Clause, Due Process.

Bruce: So, I can see the attraction to state and local tax—you got to wrestle with constitutional issues all the time.

Mark: Yes, that combined with the fact that in state and local tax you need to know how a business procures its ingredients, how they make their product, how they sell their product, how they account for their product, how they organize different divisions, *etc.* You have to totally understand the business operations, which is the piece that I loved in business school.

Bruce: I remember that *Quill* was the first court case that I downloaded electronically. And what software did I have? It was Prodigy. [Prodigy Communications was a major Internet service provider from 1984 to 2001.] I was at a conference, the Supreme Court handed down *Quill*, and that night, I was actually able to download the case and read it in my hotel room. And at the time, I thought that was so cool, because I could talk about it the next day at the conference. Of course, (Bruce laughing) now I think it horrible because you have eight clients call you 10 minutes after a decision is released and want to know what they should do now.

Mark: So true. Because the funny thing is, when I was at Arthur Andersen, we didn't even have computers on our desks. It wasn't until I started at Deloitte that I actually had a computer in my possession that I could use for doing work.

Bruce: I remember when I first went to work for Ernst and Young, they had this huge office library, with a glass wall that went down the whole length of a hallway with those big stuffed chairs and oak desks filled with tax books. And I remember when I left Ernst and Young, I think we had a small closet that had maybe a couple of dozen books in it, everything was online.

Mark: Well, that is the story of Ryan, LLC. Brint Ryan, Ryan's founder and CEO, was a new senior at PWC in 1991. The firm gave him two CCH Texas reporters, put him in his car, and sent him out to the middle of nowhere in Texas to see if he could save this client, who was undergoing a sales tax audit, some money. And he saved that company a half-million dollars and on the way back, he said to himself, this is a pretty darn good business. I am going to do this on my own. And that's when he started Ryan. Genius. He has built a firm from the ground up in only 34 years to a full-service tax and technology-only firm generating over \$1 billion in 13 countries!

Bruce: That's great. That's great. But you know, when we started, state and local tax was like the poor country cousin to federal tax.

Mark: Yeah, that's right.

Bruce: Some people have suggested to me that there were two things that catapulted SALT into the hot area that it has become, and that is Ronald Reagan and worldwide combined reporting.

Mark: That's absolutely true. California starts applying worldwide combined reporting in Container,¹ the application to Barclay's Bank, a British institution. Margaret Thatcher calls Reagan, and puts an end of that.

Bruce: Yes, and when Reagan became President, he started moving things off the federal plate and back onto the states, who discovered they needed to become more rigorous and efficient in their tax administration and collection. And speaking of changes, I think I saw something the other day where a firm started some work on tariffs. It isn't state and local tax, but is this going to be the next big thing?

Mark: I think it's going to be very interesting. For example, one, are tariffs included in the base for sales tax? And secondly, it's double taxing. You have the tariff and then a tax on the tariff. I mean, there are a zillion things you can say about that, because you included the tax on your raw materials that come from overseas, and you tax it again when you sell to the consumer. It's crazy. And then there's the income tax question, are the tariffs included in your price when you're computing your apportionment factors? And how does that factor into your basis for your materials for property tax? I mean, it impacts every tax type.

Bruce: Yeah, that's true. I hadn't even thought about the impact on the apportionment factor.

Mark: And the one that I hadn't thought of until somebody told me about it was property taxes. Think about it. You have a house. It was built before tariffs, right? Somebody builds the exact same house next door after tariffs. It costs them 20% more. Is that house worth 20% more, or is it only worth the price of the house next door? Things are going to get interesting.

Bruce: Mark, yes, things are going to get interesting.

Mark: This is the part that's hard for me. I am seeing issues that I don't think will be resolved before I am dead or retired.

Bruce: [Laughter]

Mark: On the other side of the coin. I'm seeing new technologies, the use of AI and things of that nature. You

know, automation. It is changing everything. So, you know, my new philosophy is that change is inevitable. You must embrace it.

Bruce: Yeah, that's right. We don't have a choice. It's going to be there.

Mark: But it's not going to replace anybody, I don't think, because you still have to evaluate it, read it, make sure it's right, make sure it's logically connected. I mean, a machine cannot think like a consultant can. It'll be able to put tax returns together and things of that nature. But in terms of the overall—does this make sense? What looks right? Are there any other ways to look at something? That has to be done by humans.

Bruce: There is, in my own mind, an overreaction to all that sort of nonsense. I remember when TurboTax came out. I was at my wife's company holiday party. By the way, I hate those parties because sooner or later, once someone discovers what you do for a living—they (1) want to either tell you about the audit from hell that they went through; (2) how we can replace the income tax with a postcard; or (3) and this is the worst, "Say, I have a quick question for you?" Anyway, I remember a guy asking me at the party, "What are you going to do for a living now that we have TurboTax? I excused myself by saying that I thought I needed another drink.

But seriously, it shows a real, fundamental misunderstanding of what attorneys and CPAs do. For example, nexus and combined reporting. Two factually driven issues surrounded by legal ambiguities and constant technological change.

Mark: I just had a call today, same thing. Are we covered by Public Law 86-272?

Bruce: Let me ask you about that. What do you think of Multistate Tax Commission's newly revised interpretation of Public Law 86-272? I will tell you quite candidly, I think they're trying to rewrite history. In my mind, the position that they've taken essentially guts Public Law 86-272, making it null and void.

Mark: Yes, it is overreaching, but that's why there was a proposal in Congress as part of One Big Beautiful Bill to go against what the MTC is proposing. Unfortunately, this provision was not contained in the final legislation. Under the MTC interpretation, you have nexus everywhere. I mean, it's impossible to say you don't have a nexus because everybody interacts through the computer. The world just changed. But you can't then say the protections that Congress intended back in 1959 are simply gone, because the way people do business has changed. They still were

protecting businesses from this overreaching harm. That's just not what was ever intended.

Bruce: I agree. In fact, I just don't think the change in technology is substantive. For example, if I bought a Dell computer online in the 1980s or 1990s, and I called Dell with a question about my new machine, that didn't trigger a filing obligation for Dell when I made a phone call. Why does it make a difference today if I make the same call online instead of on my phone?

Mark: I hate to say I am being old, but I try to call places today, and that is not an option; the only way to communicate is through chats or emails.

Bruce: There is that, yes, it's true.

Mark: I will tell you that one of the other things that makes this profession so wonderful is that people are so wonderful. Everybody I have worked with over the years, whether they've been a colleague or worked at another firm, everybody is friendly, everybody shares information. Yeah, it's really a wonderful, collegial body of people in the state and local tax field. You just couldn't ask for better people.

Bruce: I think that's really true. I spent my career in Denver, a small market really. All the state and local folks knew each other and often shared thoughts and ideas with each other. Yes, we were competitors but we were also all friends, and there was plenty of work for everybody.

Okay, we've talked about artificial intelligence, changes in technology, 86-272, and tariffs. What are we going to be talking about in the next five or ten years?

Mark: As most of my career was in income tax, I will focus on that area. The original impetus behind apportionment came in because you had separate accounting. It accurately reported income for companies doing business in one state, but did not really reflect how income was earned in multiple jurisdictions. And then companies really began doing business in more than one state. They came up with formulary apportionment to approximate the presence and usage of government services that needed to be paid for, and that's where they came out with payroll, property, and sales apportionment strategy.

I don't know if you've ever had a chance to read the Willis report [Congress' analysis as to whether it should impose a nationwide apportionment formula for state income tax purposes], but back in 1966 when the Willis report came out, had they not included the sales factor in the apportionment formula, there was only one state

whose revenues would have changed by more than 5% and that was the state of Utah.

But what has taken place since then, since we've gone to 100% sales apportionment? We have no semblance, of reality, of how income is earned. The sales-only strategy is really an incentive to bring business into a state, while imposing an income tax on everybody else to pay for the services that the state's residents are receiving. So, one of the issues we will be dealing with is alternative apportionment due to market sales sourcing and single-sales factor apportionment.

Bruce: Really interesting. Something you just said really struck me and that is that there's no real resemblance of how income is earned anymore with respect to income taxes. And you know, we've seen that on the federal side, for example, with depreciation. Depreciation used to be, there used to be some sort of connection between an item's useful life and depreciation costs. That went away with the Economic Recovery Tax Act of 1981 and now we don't even call it depreciation anymore. We call it cost recovery, because it has nothing to do with how long something's going to last.

Here, you have identified the same issue. We have single-sales factor apportionment, which is completely disconnected with the impact, or the connection between what the company does and how and where they do it. For example, we have Coors Brewing here in Colorado. So, if Coors were to build another brewery in Colorado, next to my house preferably, and hire 2,000 more people, their tax liability in Colorado wouldn't increase at all, unless their sales in Colorado increased (which it would if it were next to my house).

Mark: In fact, their tax liability would most likely go down, because they will contact the state for incentives.

Bruce: Exactly. And so, my question is, how long is that really going to last? Are we going to see more and more litigation on alternative apportionment, because either states or taxpayers, or somebody is going to say, "Wait a minute, it doesn't seem fair that we have to absorb all these other costs in terms of schools, roads, housing, police, fire, and utilities and your taxes are not going up." So maybe, maybe we will see alternative apportionment going back to include property and payroll. Are you thinking that won't happen?

Mark: That's the fourth prong of Complete Auto,² which is, how do the taxes fairly relate to the benefit being received by the taxpayer? And to me, the silly answer that has been proposed for that question by the courts is that

the benefit being received is that you are being able to operate in an organized society.

I'm not saying you have to trace it exactly, but it's all been turned on its head. I mean, all the apportionment factors are now incentives. They have no reality to the income earned in a state. And remember how I started out the conversation, which is the thing that I love about state and local tax is you really have to understand how a business operates and how it works, and this has nothing to do with that.

Bruce: Yes, the move to single-sales factor apportionment is one of the biggest changes in state and local tax since I've started.

Mark: Everybody hangs their hat on *Moorman*,³ but when you read *Moorman*, it's very factually specific, and there were factors missing that allowed the court to reach the conclusion that single-sales factor was appropriate in that circumstance. But it doesn't mean it's always appropriate. That fact pattern must be retried at some point, but I don't think it's going to happen in my lifetime.

Bruce: Or in mine.

Mark: Another thing that will not happen in my lifetime, but I wish I had more time for it, and I'm very passionate about it, is educating young people. I am talking about junior high, high school students. What accounting is about. What taxes are about.

I don't know if you're familiar with this organization, Court Appointed Special Advocates (CASA). We work with kids who are in foster care. I've also been involved, slightly more tangentially, with a company in California called Homeboy Industries.

I have come to the conclusion, which anybody will tell you, what everybody wants. They want a house, they want food on the table, and they want a family, and to be able to provide for them. And the accounting tax profession is a wonderful way to do that. I would like to be more proactive in getting that community to understand what

is available in this profession. Are you familiar with this program called Florida First?

Bruce: Vaguely, I've heard of it, but no.

Mark: So what they do is, instead of paying your tax directly to the state of Florida, you can pay your tax to this organization that then provides funds for underprivileged children to go to school. It's about a company saying we'd rather provide an education for underprivileged youth than give our money directly to the state. The state is giving a benefit for it, and explains to them how interesting this area can be and that it's something they should think about as they pursue their education.

Bruce: And the other thing that I think people don't get about our work, particularly auditing, is that they think it is boring. I thought auditing was fascinating because you get to go out and see how things are built, constructed, made, or manufactured. I remember working on an audit of a potato chip company, and I got to see how potato chips were made from beginning to end.

Mark: That's my favorite part, when I get to go out and see how something's made.

Bruce: Okay, old guy talking again, but in my accounting textbook, they defined accounting as the language of business. And now you go to a textbook and it has some convoluted, academic sort of definition which misses the whole point that it is all about communication.

Mark: I was just going to say that. That's exactly what accounting is. It's the language of business, and that is so important for whatever you do in the business world.

Bruce: Well, Mark, thanks for the chat and letting me be the grumpy, old guy I have become with my occasional rants. I wish you the best.

Mark: I love what I do. It's been a lot of fun.

ENDNOTES

¹ *Container Corp. v. Franchise Tax Bd.*, SCT, 463 US 159, 103 Sct 2933 (1983).

² *Complete Auto Transit, Inc. v. Brady*, SCT, 430 US 274, 97 Sct 1076 (1977).

³ *Moorman Manufacturing v. Bair*, SCT, 437 US 267, 98 Sct 2340 (1978).



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