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SUBJECT: Application and interpretation of Public Law ("P.L.") 86-272 in the context of delivering goods by company owned delivery vehicles.

QUESTION PRESENTED

Is delivery of tangible personal property via private vehicles, instead of a common carrier, considered a protected activity under P.L. 86-272?

CONCLUSION

Delivery via a private delivery truck is protected activity under P.L. 86-272. However, any activity that goes beyond the scope of delivery, such as backhauling, is not protected activity.

LAW

Public Law 86-272 (15 U.S.C. § 381) states in pertinent part:

(a) No State, or political subdivision thereof, shall have the power to impose . . . a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

(1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State;

ANALYSIS AND DISCUSSION

The intent of Congress in enacting Public Law 86-272 ("P.L. 86-272") was to address the uncertainty encountered by businesses engaged in interstate commerce regarding the amount of contact necessary to support the imposition of state taxes based upon income. (Sen.Rep. No. 658, 86th Cong., 1st Sess., p. 2549 (1959).) P.L. 86-272 was enacted in 1959 in response to the U.S. Supreme Court's decision in *Northwestern States Portland Cement Co. v. Minnesota* (1959) 358 U.S. 450, which upheld the constitutional authority of states to impose income taxes on out-of-state corporations. The court in *Northwestern* did not adequately specify what local activities were enough to create a sufficient nexus to establish a state's jurisdiction to tax. Congress enacted P. L. 86-272 to provide guidance.

Additionally, five years before the enactment of P.L. 86-272, the Supreme Court recognized that "delivery" could be effected by private truck. In *Miller Bros. Co. v. Maryland* (1954) 347 U.S. 340, the Court held that Maryland did not have sufficient nexus with a company in Delaware to require that company to collect Maryland use taxes on that company's sales to Maryland residents even though "some [of the goods] are delivered to (the purchasers) in Maryland by common carrier, and others by appellant's own truck." *Id.* at 341 (emphasis supplied). Congress enacted P. L. 86-272 against the background of *Miller Bros.* and did not choose to limit the application of the statute to shipments by common or contract carrier. Instead, it used the broader language protecting activities "by or on behalf of" the out-of-state company, including "shipment or delivery" from a point outside the state. Congress had the opportunity to specify the mode of delivery; however, it chose not to.

The Supreme Court recognized that P.L. 86-272 did not clearly define the minimum standard for protection. In *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.* (1992) 505 U.S. 214, the Court found that the term "solicitation" is "not merely the ultimate act of inviting an order but the entire process associated with the invitation is suggested by the fact that § 381 describes "the solicitation of orders" as a subcategory, not of in-state acts, but rather of in-state "business activities"- a term that more naturally connotes courses of conduct." *Id.* at 225-226. The Court held that "solicitation of orders" covers more than what is strictly essential to making requests for purchases, which are those activities that are entirely ancillary to requests for purchases. However, there is a distinction between those activities that serve no independent business function apart from their connection to the soliciting of orders and those activities the company would have reason to engage in anyway and chooses to allocate to its in-state sales force to accomplish. *Id.* at 229-230. Activities, such as providing a car and samples to a salesman, are considered part of the "solicitation of orders" because these activities do not serve any independent business function aside from helping to facilitate orders. However, repair or service activities are not ancillary to soliciting purchases even though they may help increase purchases. Repairs and service activity fulfill an independent business function aside from the delivery of goods to customers. Based on the Supreme Court's analysis in *Wrigley*, the use of private vehicles for the sole purpose of delivery of goods is within the bounds of solicitation of orders. If the private vehicles are used for any other business activity along with the delivery, such as backhaul of goods, this activity would go beyond the solicitation of orders and would no longer be protected. Furthermore, backhauling in the form of the pickup and delivery of

goods on behalf of another business represents a separate and distinct revenue stream from that of the product being sold. As such, this is a service activity which is unprotected by P.L. 86-272 because the law only applies to tangible personal property.

This exact issue was litigated in the Supreme Courts of Massachusetts and Virginia. See *Commonwealth v. Nat'l Private Truck Council* (1997) 253 Va. 74 and *Nat'l Private Truck Council, Inc. v. Mass. Comr. of Rev.* (1997) 426 Mass. 324. Massachusetts enacted a regulation in which out-of-state entities that sold tangible personal property into its state would not be liable for the Massachusetts excise tax so long as the goods were delivered by a common carrier or contract carrier from a point outside of the state. However, similarly situated entities that used their own vehicles to bring their goods into Massachusetts were subject to the state excise tax and exceeded the protections of P.L. 86-272. The state argued that the term delivery refers to a transaction in which title passes from shipper to customer at a point outside of the state. However, the Massachusetts Supreme Judicial Court rejected the state's arguments and held that delivery via private vehicles is protected under P.L. 86-272. The Supreme Court in Virginia also held that delivery via private vehicles was a protected activity. The court held that in enacting 15 U.S.C section 381, Congress did not identify any specific manner of delivery to qualify for income tax immunity. The Court held that in the absence of a qualification in the federal statute, Virginia may not add conditions to, or otherwise limit the protections offered, under P.L. 86-272.

See also the *Appeal of Foothill of Foothill Publishing Co. and the Record Ledger, Inc.*, 86-SBE-013, where the Board of Equalization held that P.L. 86-272 applied to require sales factor throw-back for a publishing company that delivered newspapers to customers in Arizona and Nevada using its own delivery trucks.

Accordingly, delivery via a company's own vehicles is considered protected activity under P.L. 86-272. The protection only extends to the delivery of goods. If the company goes beyond delivery, this activity would exceed the protections of P.L. 86-272.

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