

~~810-27-1-4-19~~ 810-27-1-19 Public Law 86-272 Exemption from Income Tax.

(1) **Scope.**

(a) Public Law 86-272, 15 U.S.C. 381-384, (hereafter "P.L. 86-272") restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term "net income tax" includes a franchise tax measured by net income. If any sales are made into a state which is precluded by P.L. 86-272 from taxing the income of the seller, such sales remain subject to throwback to the appropriate state which does have jurisdiction to impose its net income tax upon the income derived from those sales.

(b) Signatory State is a state which has signed the Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States under Public Law 86-272, as amended, from time to time.

(c) It is the policy of Alabama hereto to impose its net income tax, subject to Alabama and Federal legislative limitations, to the fullest extent constitutionally permissible. Interpretation of the solicitation of orders standard in P.L. 86-272 requires a determination of the fair meaning of that term in the first instance. The United States Supreme Court has recently established a standard for interpreting the term "solicitation" and this **regulation rule** has been revised to conform to such standard. Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. \_\_\_, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992). In those cases where there may be reasonable differences of opinion between Alabama and a Signatory State as to whether the disputed activity exceeds what is protected by P.L. 86-272, Alabama will apply the principle that the preemption of state taxation that is required by P.L. 86-272 will be limited to those activities that fall within the "clear and manifest purpose of Congress." See Department of Revenue of Oregon v. ACF Industries, Inc., et al., \_\_\_ U.S. \_\_\_, 114 S.Ct. 843, 127 L. Ed.2d 165 (1994), Cipollone v. Liggett Group, Inc., 505 U.S. \_\_\_, 112 S.Ct. 2608, 120 L. Ed.2d 407, 422 (1992); Heublein, Inc. v. South Carolina Tax Com., 409 U.S. 275, 281-282 (1972).

(d) The following **regulation guideline** reflects Alabama's practice with regard to:

1. whether a particular factual circumstance is considered under P.L. 86-272 or permitted under this **regulation rule** as either protected or not protected from taxation by reason of P.L. 86-272 under Secs. 40-18-31 or 40-27-1, Article IV.2; and

2. the jurisdictional standards which will apply to sales made in another state for purposes of applying a throwback rule with respect to such sales under Sec. 40-27-1, Article IV.16(b).

(2) **Nature of Property Being Sold**

(a) Only the solicitation to sell personal property is afforded immunity under P.L. 86-272; therefore, the leasing, renting, licensing or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trade marks, service marks and the like, or any other type of property are not protected activities under P.L. 86-272.

(b) The sale or delivery and the solicitation for the sale or delivery of any type of service that is not either (i) ancillary to solicitation or (ii) otherwise set forth as a protected activity under the subsection (5)(b) below is also not protected under Public Law 86-272 or this **regulation rule**.

(3) **Solicitation of Orders and Activities Ancillary to Solicitation.**

(a) For the in-state activity to be a protected activity under P.L. 86-272, it must be limited solely to solicitation (except for *de minimis* activities described in paragraph (4) and those activities conducted by independent contractors described in paragraph (6) below).

(b) Solicitation means

1. speech or conduct that explicitly or implicitly invites an order; and
2. activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.

(c) Ancillary activities are those activities that serve no independent business function for the seller apart from their connection to the solicitation of orders. Activities that a seller would engage in apart from soliciting orders shall not be considered as ancillary to the solicitation of orders. The mere assignment of activities to sales personnel does not, merely by such assignment, make such activities ancillary to solicitation of orders. Additionally, activities that seek to promote sales are not ancillary, because P.L. 86-272 does not protect activity that facilitates sales; it only protects ancillary activities that facilitate the request for an order. The conducting of activities not falling within the foregoing definition of solicitation will cause the company to lose its protection from a net income tax afforded by P.L. 86-272, unless the disqualifying activities, taken together, are either *de minimis* or are otherwise permitted under this **regulation rule**.

(4) ***De Minimis* Activities**

(a) *De minimis* activities are those that, when taken together, establish only a trivial connection with the taxing State. An activity conducted within a taxing State on a regular or systematic basis or pursuant to a company policy (whether such policy is in

writing or not) shall normally not be considered trivial. Whether or not an activity consists of a trivial or non-trivial connection with the State is to be measured on both a qualitative and quantitative basis. If such activity either qualitatively or quantitatively creates a non-trivial connection with the taxing State, then such activity exceeds the protection of P.L. 86-272. Establishing that the disqualifying activities only account for a relatively small part of the business conducted within the taxing State is not determinative of whether a *de minimis* level of activity exists. The relative economic importance of the disqualifying in-state activities, as compared to the protected activities, does not determine whether the conduct of the disqualifying activities within the taxing State is inconsistent with the limited protection afforded by P.L. 86-272.

**(5) Specific Listing Of Unprotected And Protected Activities**

(a) Unprotected Activities. The following in-state activities (assuming they are not of a *de minimis* level) are not considered as either solicitation of orders or ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under P.L. 86-272:

1. Making repairs or providing maintenance or service to the property sold or to be sold.
2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
3. Investigating credit worthiness.
4. Installation or supervision of installation at or after shipment or delivery.
5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.
6. Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders.
7. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
8. Approving or accepting orders.
9. Repossessing property.
10. Securing deposits on sales.

11. Picking up or replacing damaged or returned property.
12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
13. Using agency stock checks or any other instrument or process by which sales are made within Alabama by sales personnel.
14. Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the state during the tax year.
15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
16. Owning, leasing, using or maintaining any of the following facilities or property in-state:
  - (i) Repair shop.
  - (ii) Parts department.
  - (iii) Any kind of office other than an in-home office as described as permitted under subsection (5)(a)18 and (5)(b)2.
  - (iv) Warehouse.
  - (v) Meeting place for directors, officers, or employees when done on a regular or systematic basis during the tax year.
  - (vi) Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
  - (vii) Telephone answering service that is publicly attributed to the company or to employees or agent(s) of the company in their representative status.
  - (viii) Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.
  - (ix) Real property or fixtures to real property of any kind.
17. Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.
18. Maintaining, by any employee or other representative, an office or place of business of any kind

(i) Other than an in-home office located within the residence of the employee or representative that (1) is not publicly attributed to the company or to the employee or representative of the company in an employee or representative capacity, and (2) so long as the use of such office is limited to soliciting and receiving orders from customers; for transmitting such orders outside the state for acceptance or rejection by the company; or for such other activities that are protected under Public Law 86-272 or under subsection (6)(b) of this **regulation rule**.

(ii) A telephone listing or other public listing within the state for the company or for an employee or representative of the company in such capacity or other indications through advertising or business literature that the company or its employee or representative can be contacted at a specific address within the state shall normally be determined as the company maintaining within Alabama an office or place of business attributable to the company or to its employee or representative in a representative capacity . However, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers and affiliation with the company shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the company or its employee or representative.

(iii) The maintenance of any office or other place of business in Alabama that does not strictly qualify as an "in-home" office as described above shall, by itself, cause the loss of protection under this **regulation rule**.

(iv) For the purpose of this subsection it is not relevant whether the company pays directly, indirectly, or not at all for the cost of maintaining such in-home office.

19. Selling or otherwise transferring intangible personal property which is neither an isolated or transient event nor intrinsic in the related tangible personal property sold or transferred within the state.

20. Conducting any activity not listed in subparagraph (5)(b) below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

(b) Protected Activities. The following in-state activities will not cause the loss of protection for otherwise protected sales:

1. Soliciting orders for sales by any type of advertising.
2. Soliciting of orders by an in-state resident employee or representative of the company, so long as such person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in subsection (5)(a)18 above.
3. Carrying samples and promotional materials only for display or distribution without charge or other consideration.

4. Furnishing and setting up display racks and advising customers on the display of the company's products without charge or other consideration.
5. Providing automobiles to sales personnel for their use in conducting protected activities.
6. Passing orders, inquiries and complaints on to the home office.
7. Missionary sales activities; i.e., the solicitation of indirect customers for the company's goods. For example, a manufacturer's solicitation of retailers to buy the manufacturer's goods from the manufacturer's wholesale customers would be protected if such solicitation activities are otherwise immune.
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either prior or subsequent to the placement of an order.
9. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control).
10. Maintaining a sample or display room for two weeks (14 days) or less at any one location within the state during the tax year.
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel.
12. Mediating direct customer complaints when the purpose thereof is solely for ingratiating the sales personnel with the customer and facilitating requests for orders.
13. Owning, leasing, using or maintaining personal property for use in the employee or representative's "in-home" office or automobile that is solely limited to the conducting of protected activities. Therefore, the use of personal property such as a cellular telephone, facsimile machine, duplicating equipment, personal computer and computer software that is limited to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by this **regulation rule** under subparagraph (5)(b) shall not, by itself, remove the protection under this **regulation rule**.

**(6) Independent Contractors**

(a) P.L. 86-272 provides protection to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the company or its employees or other representatives. Independent contractors may engage in the following limited activities in the state without the company's loss of immunity:

1. Soliciting sales.
2. Making sales.
3. Maintaining an office.

(b) Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as those provided under P.L. 86-2722 and this **regulation rule**.

(c) Maintenance of a stock of goods in the state by the independent contractor under consignment or any other type of arrangement with the company, except for purposes of display and solicitation, shall remove the protection.

#### (7) **Application Of Destination State Law In Case Of Conflict**

(a) When it appears that Alabama and another Signatory State, due to the use of a throwback rule, have included or will include the same receipts from a sale in their respective sales factor numerators, at the written request of the company mailed to both states, Alabama may confer in good faith with the other state to determine which state should be assigned said receipts. Such conference may identify what law, **regulation rule** or written guideline, if any, has been adopted in the state of destination with respect to the issue. The state of destination shall be that location at which the purchaser or its designee actually receives the property, regardless of f.o.b. point or other conditions of sale.

(b) In determining which state is to receive the assignment of the receipts at issue, preference may be given to any clearly applicable law, **regulation rule** or written guideline that has been adopted in state of destination. However, except in the case of the definition of what constitutes "tangible personal property", Alabama is not required by this **regulation rule** to follow any other state's law, **regulation rule** or written guideline should Alabama determine that to do so (i) would conflict with its own laws, **regulations rules**, or written guidelines and (ii) would not clearly reflect the income-producing activity of the company within Alabama.

(c) Notwithstanding any provision set forth in this **regulation rule** to the contrary, as between Alabama and any other Signatory State, Alabama will apply the definition of "tangible personal property" that exists in the state of destination to determine the application of P.L. 86-272 and issues of throwback, if any. Should the state of destination not have any applicable definition of such term so that it could be reasonably determined whether the property at issue constitutes "tangible personal property", then Alabama will treat such property in any manner that would clearly reflect the income-producing activity of the company within Alabama.

#### (8) **Miscellaneous Practices**

(a) Application of **Regulation Rule** to Foreign Commerce. Alabama will apply the provisions of Public Law 86-272 and of this **regulation rule** to business activities conducted in foreign commerce. Therefore, whether business activities are conducted by (i) a foreign or domestic company selling tangible personal property into a country outside of the United States from a point within Alabama or by (ii) either company selling such property into Alabama from a point outside of the United States, the principles under this **regulation rule** apply equally to determine whether the sales transactions are protected and the company immune from taxation in either Alabama or in the foreign country, as the case might be, and whether, if applicable, Alabama will apply its throwback provisions.

(b) Application to Corporation Incorporated in Alabama or to person resident or domiciled in Alabama. The protection afforded by P.L. 86-272 and the provisions of this **regulation rule**, except for purposes of applying a throwback rule, do not apply to any corporation incorporated within Alabama or to any person who is a resident of or domiciled in Alabama.

(c) Registration or Qualification to Do Business. A company that registers or otherwise formally qualifies to do business within Alabama does not, by that fact alone, lose its protection under P.L. 86-272. Where, separate from or ancillary to such registration or qualification, the company receives and seeks to use or protect any additional benefit or protection from Alabama through activity not otherwise protected under P.L. 86-272 or this **regulation rule**, such protection shall be removed.

(d) Loss of Protection for conducting unprotected activity during part of tax year. The protection afforded under P.L. 86-272 and the provisions of this **regulation rule** shall be determined on a tax year by tax year basis. Therefore, if at any time during a tax year the company conducts activities that are not protected under P.L. 86-272 or this **regulation rule**, no sales in Alabama or income earned by the company attributed to Alabama during any part of said tax year shall be protected from taxation under said Public Law or this **regulation rule**.

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