



This Week in State Tax (TWIST)

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New York: Trade Group Challenges P.L. 86-272 Examples in New Regulations

On December 27, 2023, the New York Department of Taxation and Finance (Department) adopted regulations to implement the sweeping Article 9-A corporate franchise tax reforms first enacted almost a decade ago. Part 1 of the new regulations addresses when corporations are subject to New York tax and provides examples of activities that are, and are not, protected under P.L. 86-272. Importantly, the newly adopted regulations incorporate aspects of the Multistate Tax Commission's revised Statement on P.L. 86-272, which addresses businesses that conduct activities over the Internet. Notably, per examples in the regulations, a business that provides post-sales assistance to customers via email or chat will not be protected under P.L. 86-272 because these activities are not entirely ancillary to solicitation of orders for sales of tangible personal property. Other activities that exceed the scope of P.L. 86-272 protection include a corporation receiving branded credit card applications over its website and allowing prospective employees to submit an electronic application over a website for non-sales positions. The regulations also incorporate the MTC's guidance on the use of cookies by Internet sellers. Cookies placed on customer devices to gather information that will be used to adjust production schedules and inventory amounts, develop new products, or identify new items to offer customers are not protected activities under P.L. 86-272.

On April 5, 2024, the American Catalog Mailer's Association filed a complaint seeking to invalidate the New York regulations interpreting P.L. 86-272 (hereinafter the P.L. 86-272 regulations). The American Catalog Mailer's Association (ACMA) is not an Internet seller itself but is a non-profit trade organization that advocates for the interests of catalog, online, direct mail and other remote sellers. The ACMA filed a similar lawsuit in California after the Franchise Tax Board incorporated aspects of the MTC's revised statement in certain FTB publications (TAM 2022-01 and FTB Publication 1050). The ACMA prevailed in that lawsuit, but on the grounds that the FTB improperly incorporated the MTC's guidance into publications that were not adopted under the state's Administrative Procedures Act.

Recall, P.L. 86-272 prevents a state from imposing a net income tax on a person if the person's only business activities in the state are soliciting orders for sales of tangible personal property. In its complaint, the ACMA asserts that the P.L. 86-272 regulations effectively rewrite the federal statute to include as activities performed in New York activities performed by employees of an Internet seller outside of New York using computers outside New York. Under these rules, if a Virginia-based employee of a Virginia retailer using computer equipment in Virginia receives and responds to an email or electronic chat; a credit card application, a job application, or a request for technical assistance, that employee has engaged in a business activity in New York without ever leaving their desk in Virginia. The ACMA alleges that these provisions effectively rewrite P.L. 86-272, which only Congress is empowered to do. The ACMA further argues that because the Department announced its intention to apply the new regulations in their entirety retroactively, its members "that have relied in good faith on the plain text of P.L. 86-272, not to mention decades of settled law and practice, could suddenly find themselves at risk of audits by the Department stretching back nearly a decade." The ACMA seeks a judgment declaring that the P.L. 86-272 regulation is invalid as it conflicts with P.L. 86-272. In the alternative, the ACMA seeks a judgment that the P.L. 86-272 regulation cannot be applied to any time periods prior to the publication date. Please stay tuned to TWIST for future updates.

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