



This Week in State Tax (TWIST)

November 25, 2024



Oregon: Tobacco Manufacturer Petitions Supreme Court for Review of P.L. 86-272 Protections

A tobacco manufacturing company has asked the U.S. Supreme Court to review an Oregon decision interpreting the scope of the protections offered by Public Law 86-272. In June, the Oregon Supreme Court upheld a Tax Court ruling that a tobacco manufacturer was not protected by P.L. 86-272 because when its salespeople participated in the “prebook order” process, they went beyond the mere solicitation of sales. Public Law 86-272 prohibits a state from imposing a net income tax on a taxpayer when the taxpayer’s only business activities in the state include (1) the solicitation of orders sent outside the state for approval and fulfillment; or (2) the solicitation of orders on behalf of a prospective customer, if that customer will fill the orders by purchasing items from the taxpayer, and the customer’s order will be sent outside the state for approval and fulfillment. In interpreting P.L. 86-272, the Supreme Court has recognized that the law protects activities that “facilitate the requesting of sales,” but not necessarily those activities that directly facilitate the sales themselves.

In this case, the taxpayer argued that its employees’ activities were protected by the second clause, because they solicited orders from retail tobacco sellers on behalf of wholesalers (who would fulfill these orders by making qualified purchases from the taxpayer). In the Oregon court’s opinion, some of the activities of the taxpayer’s salespeople (which it refers to as “sell sheet orders”) fell within this protection. However, a second category of activities, “prebook orders,” did not. The key distinction relied on by the court was that sell sheet orders formed only an initial contact between the retailer and the wholesaler, and either party had the option of ultimately rejecting the transaction, causing them to fall within the scope of “solicitation.” By contrast, prebook orders were described as “guaranteed orders,” and a wholesaler that ultimately rejected a prebook order entered into by the manufacturer’s salesperson would be contractually subject to the loss of rebate payments from the manufacturer (including repayment of prior rebates). The court noted that the first clause of P.L. 86-272 clearly distinguishes between the acceptance of orders (which must occur outside the state) and the solicitation of the order (which may occur within the state). With the financial penalties imposed on a wholesaler that rejected a prebook order, the act of making a prebook order was effectively accepting an order within the state, which exceeded mere solicitation. Furthermore, because the guarantee promised by a prebook order was not advertised to retail purchasers to entice them to make a purchase, it could not be considered part of the solicitation. Instead, the prebook order process effectively gave the taxpayer control over its products stored within the state, which the court ruled exceeds the scope of P.L. 86-272.

In its cert petition, the taxpayer rejects the Oregon court’s characterization of its prebook orders. In the taxpayer’s opinion, the Oregon court incorrectly attributes the activities of its wholesale customers to the taxpayer, which

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contradicts Supreme Court precedent. Focusing solely on the activities performed in Oregon by the taxpayer's salespeople, it argues that the only Oregon-based distinction between sell sheet orders and prebook orders is whether the retailer or the salesperson physically transmits an order to the wholesaler. The taxpayer further argues that, to the extent that elements of the prebook arrangements exceed solicitation, these activities occur exclusively outside Oregon. Contact [Nisha Mathew](#) for more information on [Santa Fe Natural Tobacco Co. v. Department of Revenue](#).

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