



# This Week in State Tax (TWIST)

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## New York: Trial Court Approves Adoption of P.L. 86-272 Changes by Regulation; May Not Apply Retroactively

A state trial court recently upheld the “Internet Activities Rule” promulgated by the New York Department of Taxation and Finance (Department). The regulation adopts parts of the updated statement regarding the application of Public Law 86-272 as articulated by the Multistate Tax Commission (MTC) in the most recent version of their Statement of Information Concerning Practices of Multistate Tax Commission and Supporting States Under Public Law 86-272 (MTC Statement). P.L. 86-272 is a federal law which prevents a state from imposing a net income tax on a person whose sole activity in the state is the solicitation of orders for tangible personal property. Under the MTC Statement, certain activities exceed the solicitation of orders for tangible personal property and therefore disqualify a business from P.L. 86-272 immunity. A few specific examples provided under the MTC Statement include a business placing “cookies” on a user’s computer, assisting customer’s after a sale via email or electronic chat, and online applications for employment or credit cards among other similar activities conducted over the Internet. When it adopted the Internet Activities Rule, the Department indicated it would apply retroactively to tax years beginning on or after the effective date of the underlying corporate tax reform legislation--January 1, 2015. A taxpayer group sought to have the Internet Activities Rule declared invalid for various reasons. The court set forth two issues: (1) general invalidity, due to federal preemption by Public Law 86-272; and (2) violation of the Due Process Clause of the Fourteenth Amendment because of its retroactive application.

On the first issue, the court ruled that the Internet Activities Rule was a valid interpretation of P.L. 86-272. In that the court’s view, P.L. 86-272 does not prohibit states from enacting laws that identify and regulate which internet activities “constitute more than solicitation of orders.” Additionally, the court explained that the Internet Activities Rule does not impermissibly expand on the exemptions from state taxation provided by P.L. 86-272, as internet activities deemed to be ancillary to solicitation are still exempt from taxation, even if the activities are not performed within the state.

With respect to the retroactivity challenge, the court ruled that the Internet Activities Rule could not be applied to any tax period before the date the regulation was published (December 2023). The court determined that taxpayers had “no opportunity to alter their behavior in anticipation of the impact of the retroactive application” and that the length of the retroactivity (nearly nine years) was excessive. The court also questioned whether there was a valid public purpose for retroactive application of the regulation. For questions about *American Catalog Mailers Association v. Department of Taxation and Finance*, please contact [Russell D. Levitt](#) or [Aaron Balken](#).

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