Bloomberg Law News 2025-06-05T09:47:13121663933-04:00

New York Ruling on Out-of-State Online Retailers Misses the Mark

By Russell Levitt and Aaron Balken

In *American Catalog Mailers Association v. Department of Taxation and Finance*, the Albany County Supreme Court (a state trial court) upheld the Internet Activities Rule under the New York State's corporate tax reform regulation. Subject to appeal, the court ruled that the regulation was a valid interpretation of Public Law 86-272, allowing states to determine which non-solicitation internet activities exceed mere solicitation and thus establish state income tax jurisdiction—despite being conducted remotely online.

In essence, the court's rationale mentioned "this evolving virtual world" in relying on the expanded state tax jurisdictional analysis set forth in the US Supreme Court's 2018 *South Dakota v. Wayfair* sales tax decision, relative to the commerce and due process clauses. However, the court found that the regulation couldn't be retroactively applied to tax periods before its publication date in December 2023, citing due process concerns given the nearly nine-year retroactive period.

The court seems to miss the mark by analyzing PL 86-272 through the lens of what is constitutionally allowable for state tax jurisdiction, even if one assumes that *Wayfair* generally would support remote nexus jurisdiction for corporate income tax jurisdiction.

We believe the real issue is what Congress intended back in 1959 when the phrase "activities within a state" was used as a key forfeiture part for the protection afforded by PL 86-272.

In that context, did the 86th Congress foresee a future in which a business could be deemed to be conducting non-solicitation activities "within such state" when those activities are conducted remotely? Or did that Congress intend for "activities within such state" to encompass only the physical presence standard then prevailing for state tax (and civil long-arm) jurisdiction?

The latter was the longstanding constitutional case law tenet, from *Pennoyer v. Neff* in 1878, right on through *Int'l Shoe v. Washington* in 1945, and even continuing, as it turned out, eight years later in *Natl. Bellas Hess Inc. v. Dept. of Revenue of Illinois* (which was overturned by *Wayfair* in 2018). It shouldn't be overlooked that in 1959, the telephone was ubiquitous.

Yet it seems incontrovertible that the 1959 Congress didn't intend remote telephone contacts with customers, for non-solicitation purposes, to constitute "activities within such state" for purposes of PL 86-272, causing a taxpayer to forfeit the nexus immunity of that preemption law. Why, then, should remotely conducted internet activities be viewed as forfeiting that immunity?

Of note, too, is the Congress' effort to include, as a component of the Budget Reconciliation Bill language, an addition to the definition of "solicitation of orders" to include "any business activity that facilitates the solicitation of orders even if that activity may also serve some independently valuable business function apart from solicitation.''

Presumably, such expansion of PL 86-272 would encompass internet activities embodied in certain state tax regulations, such as those of New York.

While the Albany court's decision clarifies the constitutional permissibility of the Internet Activities Rule, the decision fails to provide any analysis as to the meaning and relevance of the original intent of PL 86-272, specifically its phrase concerning activities within a state. We can only hope that an appellate court chooses to address the issue.

The case is American Catalog Mailers Association v. Department of Taxation and Finance, N.Y. Sup. Ct., 903320-24, 4/25/25.

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