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Oklahoma: Tax Commission Concludes That Public Law 86-272 Protection Extends To Goods Seller-Owned Or Leased Trucks

Stephen G. Harris
Dallas
(214) 969-5277

Labry Welty
Dallas
(214) 969-4842

In a May 10, 2005 precedential decision, the Oklahoma Tax Commission (the "Commission") ruled that Public Law 86-272 (codified at 15 U.S.C.A. §§ 381-384) protection extended to goods delivered into Oklahoma in a company owned or leased vehicle.¹ According to the Commission, the Audit Division's attempt to limit application of the federal statute to instances where goods are shipped or delivered into the state by common or contract carrier violated the plain meaning of the statute.

The Facts

In late 2002, the Audit Division of the Commission assessed 1998 Oklahoma income tax against a Texas partnership and individually against the partners. The partnership had its principle place of business in Texas and had no permanent offices in Oklahoma. Both partners were Texas residents.

During 1998, the partnership held an Oklahoma sales tax permit, an Oklahoma motor fuel license (bonded importer, eligible purchaser, exporter), and an Oklahoma gasoline and diesel distributor's license.

Throughout 1998, the partnership received orders at its Texas place of business from Oklahoma customers for sales of propane, motor fuel, oil, oil filters, car batteries, and other similar items. The orders were received either in person or by phone in Texas and were subsequently accepted, filled, and shipped from Texas. Approximately 84% of the sales delivered to Oklahoma addresses were made in partnership-owned trucks by either an employee of the partnership or one of the partners.

Total 1998 Oklahoma sales exceeded \$500,000, or approximately 31% of the partnership's total gross sales. The partnership reported and paid sales tax on the sales; however, neither the partnership nor the partners filed an Oklahoma income tax return.

¹ Oklahoma Tax Commission Decision No. 2005-05-10-22 (May 10, 2005). Precedential decisions are applicable to a broad spectrum of taxpayers and the interpretation of law embodied in the holding may appropriately be relied upon prospectively by the Commission and the public. Okla. Admin. Code § 710:1-3-72(c).

The Federal Immunity

P.L. 86-272 prohibits a state from imposing a net income tax on income derived in the state by any person whose business activity in the state is limited to the solicitation of orders by such person, or his representative, for sale of tangible personal property, provided that the orders are sent outside the state for approval, and are filled by shipment or delivery from a point outside the state.²

The Audit Division argued that the regular delivery of products by the partnership to Oklahoma customers in partnership-owned trucks is an unprotected activity under P.L. 86-272. To support its argument, the Audit Division cited Okla. Admin. Code § 710:50-17-3(a)(12), which provides, in part, that a corporation that engages in “the delivery of merchandise in a company owned or leased vehicle to a destination within the state from a source outside the state, in connection with the solicitation of sales” has nexus with the state and is subject to Oklahoma income tax. Having established nexus under the regulation, the Audit Division assessed income tax on the partnership’s Oklahoma sales.

The Commission agreed that the delivery of goods into Oklahoma by company-owned trucks or leased vehicles is a valid factor for determining tax nexus with the state. However, the Commission did not agree with the Audit Division’s position that P.L. 86-272 protection was limited to the shipment or delivery of goods by common or contract carrier, or that delivery in the seller’s vehicle is an unprotected activity under the federal statute.

The Commission’s Decision

The Commission explained that “Congress specified that the protection would extend to solicitation of orders within the state, approval of those orders outside the state, and filling of those orders by delivery from a point outside the state’s borders.” Accordingly, the Commission concluded that to the extent Okla. Admin. Code § 710:50-17-3 could be read to limit P.L. 86-272 protection to those instances where the shipment of the seller’s goods is accomplished by common or contract carrier, or to deny P.L. 86-272 protection if the seller’s goods are delivered in a company owned or leased vehicle, it violates the plain meaning of the federal statute and is invalid.

To support its decision, the Commission cited rulings from courts in other states which collectively hold that Congress did not intend to limit the scope of “delivery” activities protected by P.L. 86-272. In particular, the Commission cited *National Private Truck Council, Inc. v. Commissioner of Revenue*,³ where the Supreme Judicial Court of Massachusetts held that a Massachusetts regulation that exempted an out-of-state entity from income tax only if its orders were delivered by common or contract carriers was preempted by P.L. 86-272. The Court noted that neither the language of the federal

² 15 U.S.C.A. § 381(a).

³ *National Private Truck Council, Inc. v. Commissioner of Revenue*, 688 N.E.2d 936 (Mass. 1997), cert. denied, 523 U.S. 1137 (1998)

statute nor its legislative history suggests that Congress intended the specialized and restrictive meaning of delivery that the state urged. In addition, the Commission cited *Commonwealth, Dept. of Tax'n v. National Private Truck Council*,⁴ in which the Virginia Supreme Court held that in enacting P.L. 86-272, Congress did not specify any manner of delivery necessary to qualify for the immunity and, in the absence of such a qualification, the state could not add conditions to, or otherwise limit, the statutory protection, and *Atlas Foundry & Machine Co. v. State Tax Com'n*,⁵ in which the Oregon Tax Court held that a Washington company's delivery of its products to Oregon in its own trucks did not deny it the protection of P.L. 86-272.

State Licenses Not Determinative

Finally, the Commission dismissed the importance of the various permits and licenses held by the partnership, finding that without evidence showing that the partnership engaged in any activities in Oklahoma pursuant to those permits or licenses other than delivering products from Texas to fill orders from Oklahoma customers, the Commission was forced to conclude that the partnership's purpose in securing the permits and licenses was to enable it to legally solicit orders from Oklahoma customers.■



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⁴ *Commonwealth, Dept. of Tax'n v. National Private Truck Council*, 480 S.E.2d 500 (Va. 1997)

⁵ *Atlas Foundry & Machine Co. v. State Tax Com'n*, 2 Or. Tax 200, 1965 WL 154 (1965).