STATE OF MAINE
KENNEBEC, ss.

MAINE BOARD OF TAX APPEALS
DOCKET NO. BTA-2022-9

[CORPORATE TAXPAYER]

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

[Corporate Taxpayer] (the "Company") appeals from a decision on reconsideration issued by Maine Revenue Services ("MRS") upholding the assessment of Maine corporate income tax and interest for the period [date], through [date]. According to the Company, the assessment is improper because its activities are protected by Public Law 86-272 and the Commerce Clause. The Company further complains certain MRS employees violated its rights under Maine law. Based on the facts and law, we uphold the assessment in full.

I. Background

At all relevant times, the Company was a [non-Maine] corporation headquartered in [non-Maine state], and it marketed and sold tangible personal property (the "Products") throughout the United States including Maine. For the period at issue, the Company realized Maine sales of $[amount]. However, the Company had no real estate or tangible personal property located in Maine, and it had no employees in Maine during this time. The Company sold the Products to sellers for resale to consumers for installation by service providers. Along with the Products, the Company provided consumers with an express warranty. In relevant part, that warranty provided:

> [If the warranty period has not ended, contact the service provider that installed the Product for assistance with warranty repairs, or replacement, required. In the alternative, you may also select a service provider to assist you.]

The warranty further promised to provide customers with compensation for the work of service providers selected by the customers. In addition to the express warranty provided by the Company, federal and state law imposed other warranty obligations upon the Company.

According to conversations between MRS employees and Maine retailers memorialized in correspondence between MRS and the Company, the warranty replacement process for Products purchased from a particular seller often proceeded as follows: The consumer contacted the Company and received an authorization to return the Product. The consumer then provided the authorization to the seller. The seller would contact a service provider and arrange to have the defective Product removed and a new one installed. The service provider would install the new Product and return the defective Product to the seller for recycling.

In preparing its tax returns, the Company determined that the activities described above did not create income tax nexus with the State of Maine. Based on this determination, the Company did not file Maine corporate income tax returns for the period at issue. On [date] MRS initiated a corporate income tax audit of the Company. As part of that audit, MRS employees made inquiries of various sellers of the Company's Products regarding the warranty repair process, as discussed above. On [date], MRS issued a formal demand to file Maine corporate income tax returns to the Company. The Company did not file returns in response. Thereafter, MRS assessed the Company Maine corporate tax, interest, and penalties in the total amount of $[amount]. The Company requested reconsideration. On reconsideration, MRS abated the

penalties but upheld the tax and interest. This appeal followed. It is the Company's burden to show that it is entitled to relief. 36 M.R.S. § 151-D(10)(F). We consider the matter de novo as to facts and law. *Id.* § 151(2)(G).

II. Discussion

A. Divulging of Protected Information

The taxpayer first argues that the assessment should be canceled because, during the audit, MRS employees violated its rights by disclosing protected information to sellers that sold the Company's Products. Under Maine Law, certain tax information is confidential, and it is unlawful for:

> any person who, pursuant to this Title, has been permitted to receive or view any portion of the original or a copy of any report, return or other information provided pursuant to this Title to divulge or make known in any manner any information set forth in any of those documents or obtained from examination or inspection under this Title of the premises or property of any taxpayer. This prohibition applies to both state tax information and federal tax information filed as part of a state tax return.

36 M.R.S.A. § 191(1). However, there are numerous exemptions explicitly provided for in the statute. *See, id.* § 191(2)(A)-(RRR). Included amongst these exemptions is when

> [t]he disclosure by employees of [MRS], in connection with their official duties relating to any examination, collection activity, civil or criminal tax investigation or any other offense under this Title, of return information to the limited extent that disclosure is necessary in obtaining information, which is not otherwise available, with respect to the correct determination of tax, liability for tax or the amount to be collected or with respect to the enforcement of this Title.

Id. § 191(2)(M).

Here, the parties agree that MRS employees communicated with the sellers. However, the substance of those communications is unclear. Further, even if the communications at issue were a violation of the Company's statutory protections, section 191 provides no relief from taxation. Instead, section 191 provides for the criminal prosecution and dismissal of the

offending employee, and such proceedings are outside the statutory jurisdiction of the Board. *See id.* §§ 191(4), 151-D. No adjustment to the assessment is warranted on this basis.

B. Nexus

Annually, a tax is imposed on the Maine net income of "each taxable corporation." 36 M.R.S. § 5200(1). A "taxable corporation" means a corporation that has nexus with Maine. *Id.* § 5102(10). MRS "construes Maine law to assert the tax jurisdiction of Maine to the full extent permitted by the Constitution and laws of the United States." 18-125 C.M.R. ch. 808 § .02. Maine's ability to subject corporations to tax is limited by Public Law 86-272 ("P.L. 86-272") (15 U.S.C. §§ 381-84), and the Company argues its activities are protected thereby.

P.L. 86-272 prohibits a state from imposing income tax on a taxpayer engaged in interstate commerce if the activities of the taxpayer within the state constitute no more than the solicitation of orders for interstate sales of tangible personal property, provided the orders are sent outside of the state for approval and the goods are delivered from out of state. 15 U.S.C. § 381(a). In addition, the United States Supreme Court has identified certain other activities that, if engaged in by or on behalf of a taxpayer, do not subject the taxpayer to income taxation These are: (1) "those activities that are entirely ancillary to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders—[as opposed to] those activities that the company would have reason to engage in anyway, but chooses to allocate to its in-state sales force," and (2) those activities that, although not solicitation of orders, are sufficiently *de minimis* so as to avoid "establish[ing] a nontrivial additional connection with the taxing State." *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 228-29, 232 (1992); *see also* 18-125 C.M.R. ch. 808 § .04(D)-(E)

At issue here is whether the warranty repair and replacement related activities of the sellers and service providers were undertaken on behalf of the Company and, if so, whether these activities are protected activities not subjecting the Company to nexus. We note, if the Company had done the warranty work itself, there would be no question that those business activities exceeded the narrow protections afforded by P.L. 86-272. *See Wrigley*, 505 U.S. at 229 ("employing salesmen to repair or service the company's products is not part of the 'solicitation of orders,' since there is good reason to get that done whether or not the company has a sales force"). Further, if the Company hired a third party to do the warranty work, we would reach the same result. 18-125 C.M.R. ch. 808 § .06; *see also*, *Cheng Shin Rubber USA, Inc. v. Dep't of Rev.*, 2017 WL 1194517, at *4-6 (Or. Tax 2017); *Ann Sacks Tile & Stone, Inc. v. Dep't of Rev.*, 2011 WL 5967187, at *3-6 (Or. Tax 2011) (imputing the activities of an independent contractor to the taxpayer).

Here, we have been provided with insufficient evidence to establish whether the warranty repair and replacement related activities of the sellers and service providers were undertaken on behalf of the Company or not, and it is the Company's burden to establish it is entitled to the relief it seeks. 36 M.R.S. § 151-D(10)(F). Specifically, the language of the warranty does not establish the nature of the Company's relationship with the sellers or the service providers, and assertions made by the Company in its brief, when unsupported by other evidence, are insufficient to meet the Company's burden. No adjustment to the assessment is warranted on this basis.

B. Constitutional Claims

We reach constitutional questions last. *See, e.g.*, Dobbins v. Dobbins, 2020 ME 73, ¶ 15, 234 A.3d 223. In addressing constitutional claims, the Maine courts have observed,

> A person challenging the constitutionality of a statute bears a heavy burden of proving unconstitutionality, since all acts of the Legislature are presumed constitutional. To overcome the presumption of constitutionality, the party challenging the statute must demonstrate convincingly that the statute and the Constitution conflict. All reasonable doubts must be resolved in favor of the constitutionality of the statute.

Goggin v. State Tax Assessor, 2018 ME 111, ¶ 20, 191 A.3d 341 (cleaned up).

The Constitution grants Congress the power to regulate interstate commerce. *See* U.S. Const. art. I, § 8, cl. 3. This explicit grant of power to Congress has been found to implicitly limit the power of the states to make laws affecting interstate commerce in what is known as the Dormant or Negative Commerce Clause. *See Comptroller of the Treasury v. Wynne*, 575 U.S. 542, 549 (2015). We evaluate state tax statutes using a test articulated by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*. 430 U.S. 247 (1977). First, the tax must be "applied to an activity with a substantial nexus to the taxing state." *Id*. at 279. Further, the tax must be fairly apportioned, not discriminate against interstate commerce, and be fairly related to the services provided by the taxing state. *Id*. According to the Company, the imposition of Maine corporate income tax is violative of all parts of the *Complete Auto* test except that the Company does not argue that the tax in question is not fairly apportioned. We cannot agree.

As discussed above, the Company has provided insufficient evidence to establish the true extent of its relationships with the sellers and service providers. Accordingly, the Company has not shown that the activities in question did not create nexus.

The Company next argues that the tax in question discriminates against interstate commerce. A tax statute discriminates against interstate commerce where it results in a foreign corporation paying a higher rate of tax to a state than its domestic competitors. *See Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 24, 191 A.3d 341; *see also Comptroller of the Treasury v.*

Wynne, 575 U.S. 542, 562 (2015) (discussing the internal consistency test). Here, the Company has not shown that Maine has imposed a higher rate of tax upon it than similarly situated domestic corporations.

The Company finally argues that the tax in question is not fairly related to the services provided by the State of Maine. Courts have long held a fair relationship between the tax imposed and the services provided by a state does not require a dollar-for-dollar relationship between the amount of tax imposed and the value of the benefits conferred to the taxpayer. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 628-629 (1981). Indeed, such an analysis would be cost prohibitive. Instead, a tax must represent the taxpayer's just share of the expense related to the operation of the jurisdiction. Here, in exchange for taxes of $[amount] the Company realized the substantial benefit of doing business in an organized society, established and safeguarded by the application of tax dollars to public purposes which, in turn, allowed the Company to realize sales of $[amount]. The Company has not shown that the tax at issue is not fairly related to the services provided by the State of Maine.

The Company has not shown that the tax at issue violates the Commerce Clause of the Constitution. No adjustment on this basis is warranted. We uphold the assessment in full.

III. Decision

Based upon the evidence presented and the applicable law, we uphold the assessment of Maine corporate income tax and interest for the period at issue.

The Board may, in limited circumstances, reconsider its decision on any appeal. If either party wishes to request reconsideration, that party must file a written request with the Board within 20 days of receiving this decision. Contact the Appeals Office at 207-287-2864 or see the Board's rules, available at http://www.maine.gov/boardoftaxappeals/lawsrules/, for more

information on when the Board may grant reconsideration. If no request for reconsideration is filed within 20 days of the date of this proposed decision, it will become the Board's final administrative action. If either party wishes to appeal the Board's decision in this matter to the Maine Superior Court, that party must do so within 60 days of receiving this decision. During the 60-day period in which an appeal may be filed with the Superior Court, the taxpayer may contact Maine Revenue Services at 207-624-9595 for a statement of the amount then due. After that 60-day period has expired, Maine Revenue Services will contact the taxpayer with an updated statement of the amount or amounts due at that time.

Issued: August 8, 2023.