

[CORPORATE TAXPAYER] AND AFFILIATES,

Petitioners

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

I. Background

[Corporate Taxpayer] and Affiliates¹ (collectively, the “Taxpayers”) appeal from an assessment of corporate income tax made by Maine Revenue Services (“MRS”) for tax years [one] through [three].² An Appeals Conference was held on [date], at which the Taxpayers were represented by [Taxpayer Representatives], with MRS represented by [MRS Representatives]. Appeals Officer [] presided.

The issue presented on appeal is whether, as MRS contends, certain business activities conducted by independent contractors on behalf of the Taxpayers exceeded protections afforded by federal law under P.L. 86-272 (15 U.S.C. §§ 381-84), which allows a nonresident seller of tangible personal property to solicit orders for sales in a given state without subjecting itself to the income tax jurisdiction of that state. These activities at issue, according to MRS, subjected the Taxpayers to liability for Maine income tax. The Taxpayers have the burden of proof to show that it is more likely than not that MRS erred in making the assessment. 36 M.R.S. § 151-D(10)(F).

¹ [Footnote omitted].

² [Footnote omitted].

II. Facts

At all relevant times, the Taxpayers were producers and distributors of tangible personal property for sale in Maine and elsewhere. The Taxpayers had no real estate or tangible personal property located in Maine and, with one exception not at issue here, had no employees in Maine during the period at issue. The Taxpayers employed independent brokers (hereinafter “Brokers”) to solicit orders for sales that would then be sent out of Maine for approval and fulfillment. The Brokers performed other tasks for the Taxpayers, all of which arguably increased the sales of the Taxpayers’ products.

Every 2-4 weeks, [Broker employees] visited each assigned retail location where the Taxpayers’ products were sold, and used handheld devices to scan and enter information about the display of the Taxpayers’ products. The types of information gathered by [the Brokers] included the amounts of the Taxpayers’ products displayed for sale, whether and how the products were displayed, and whether any remedial action was needed or taken. [The Brokers] compiled the information from the handheld devices and provided it to the Taxpayers. According to statements made by [a Broker’s] supervisor, both during the audit and at the Appeals Conference, [Broker employees were] the “eyes and ears” of the Taxpayers in the State of Maine.

[Early in the audit period, Broker employees used the handheld devices to record and report whether one of the Taxpayers’ products had lost shelf space to a competitor’s product. The Broker’s employees also gathered and reported information regarding the display of the products of Taxpayers’ competitors. Later in the audit period, again using the handheld devices, Broker employees reported whether Taxpayers’ products, displayed for sale on retailers’ shelves, were observably defective. Later, the Broker’s employees corrected certain significant visible defects

in Taxpayers' products located on the shelves.] [Broker] employees also gathered and reported marketing information regarding [one of] Taxpayers' competitor[s] . . . in all three tax years—including pricing information in [years two and three].

[Broker employees] also affixed coupons and tags containing information and/or coupons to the Taxpayers' products on the retailers' shelves in order to promote merchandise turnover. [The Brokers] offered product display suggestions to the retailers in order to increase sales and, to a lesser extent, alerted the retailers when the Taxpayers' products were damaged, defective, expired, or out-of-stock on store shelves. The Brokers also advocated with retailers regarding shelf placement, positioning, and display of the Taxpayers' products. In the case of a retailer that utilized planograms—diagrams showing shelf placement of products—the results of the Brokers' advocacy were committed to writing and made subject to further monitoring by the Brokers. [The Brokers] were compensated for their services by the Taxpayers on a sales commission basis.

. . . .

The Taxpayers' [year one] Maine return reflected an alleged overpayment . . . of [amount] because, as computed by them, their estimated payments had exceeded their Maine income tax liability by that amount. On that return, the Taxpayers requested that the alleged overpayment be applied to their [year two] Maine income tax liability. The Taxpayers subsequently filed a [year two] Maine return showing no income tax liability, and requested a refund of [amount], which is the amount of the overpayment carried over from [year one] plus an additional estimated tax overpayment of [amount] that they paid for [year two]. The Taxpayers also subsequently filed a Maine income tax return for [year three] showing no payments and no liability for that tax year.

Maine Revenue Services (“MRS”) conducted a nexus audit of the Taxpayers and determined that, due to their activities in Maine, each of the affiliated companies had Maine income tax nexus and was liable for Maine income tax. . . . On th[is] bas[is], MRS issued the subject assessment . . . for tax of [amount], interest of [amount], and substantial understatement penalties of [amount], a total of [amount]. Because the [year one] period was beyond the 3-year statute of limitation provided by 36 M.R.S. § 141(1), MRS made the assessment for that year relying on section 141(2)(A), which extends the time within which an assessment may be made to “6 years from the date the return was filed if the tax liability shown on the return . . . is less than 1/2 of the tax liability determined by the assessor.”

The Taxpayers argue that all activities conducted on their behalf in Maine consisted of solicitations of orders for sales to be approved and filled outside of Maine. Thus, according to the Taxpayers, no activities were conducted on their behalf outside the protections contained in P.L. 86-272 to establish Maine income tax nexus for the subject period. The Taxpayers therefore contend that the assessment must be vacated.

III. Law

Annually, a tax is imposed on the Maine net income of “each taxable corporation and [of] each group of corporations that derive income from a unitary business carried on by two or more members of an affiliated group.” 36 M.R.S. § 5200(1). In relevant part, for any corporate taxpayer, the term “Maine net income” means

the taxable income of that taxpayer for that taxable year under the laws of the United States as modified by section 5200-A and apportionable to this State under [36 M.R.S. §§ 5210-12]. To the extent that it derives from a unitary business carried on by 2 or more members of an affiliated group, the Maine net income of a corporation is determined by apportioning that part of the federal taxable income of the entire group that derives from the unitary business.

36 M.R.S.A. § 5102(8).

Under Maine tax law, the State Tax Assessor may make an assessment “within 3 years from the date the return was filed or 3 years from the date the return was required to be filed, whichever is later,” except

[a]n assessment may be made within 6 years from the date the return was filed if the tax liability shown on the return, after adjustments necessary to correct any mathematical errors apparent on the face of the return, is less than 1/2 of the tax liability determined by the assessor. In determining whether the 50% threshold provided by this paragraph is satisfied, the assessor may not consider any portion of the understated tax liability for which the taxpayer has substantial authority supporting its position.

36 M.R.S. § 141(2)(A). After issuing an assessment, the Assessor must waive or abate penalties for “reasonable cause,” on any of the grounds enumerated in 36 M.R.S.A. § 187-B(7), including when “[t]he taxpayer has supplied substantial authority justifying the failure to file or pay” the tax owed. 36 M.R.S.A. § 187-B(7)(F).

Limiting Maine’s ability to subject corporations to tax, however, is Public Law 86-272 (“P.L. 86-272”) (15 U.S.C. §§ 381-84³). This federal statute prohibits a state from imposing

³ **15 U.S.C. §381. Imposition of net income tax**

(a) Minimum standards

No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following:

- (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and
- (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).

(b) Domestic corporations; persons domiciled in or residents of a State

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to-

- (1) any corporation which is incorporated under the laws of such State; or
- (2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

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). Rather than describing activities that will expose a taxpayer to income tax liability, P.L. 86-272 sets forth certain specific activities that do not expose them to taxation. Among these “safe harbor” activities are sales and solicitations of orders for sales of tangible personal property on the taxpayer’s behalf by an independent contractor, and the maintenance of an office by such contractor in the state proposing to subject the person to income taxation. *Id.* § 381(c).

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

(c) Sales or solicitation of orders for sales by independent contractors

For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, or [sic] tangible personal property.

(d) Definitions

For purposes of this section-

- (1) the term “independent contractor” means a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities; and
- (2) the term “representative” does not include an independent contractor.

additional connection with the taxing State.” *Wisconsin Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 228-29, 232 (1992).

IV. Analysis

A. Liability for the assessed tax.

Under P.L. 86-272, a nonresident seller of tangible personal property may solicit orders for sales of the property in Maine without establishing Maine income tax nexus, as long as the orders are sent outside Maine for approval, and shipment or delivery is from a point outside Maine. 15 U.S.C. § 381(a). Where the seller employs an independent contractor, the contractor may also make sales, and may maintain an office in Maine without establishing Maine income tax nexus for the seller. 15 U.S.C. § 381(c). In *Wrigley*, the United States Supreme Court described the parameters of the protection afforded by P.L. 86-272 as follows:

Providing a car and stock of free samples to salesmen is part of the “solicitation of orders,” because the only reason to do it is to facilitate requests for purchases. Contrariwise, 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. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into “solicitation” by merely being assigned to salesmen.

Wrigley at 229 (emphasis in original).

Much of the activity conducted on behalf of the Taxpayers in the present case, however, does not constitute solicitation of orders for sales.⁴ For example, under certain circumstances, the examination of a retailer’s inventories is an activity protected under P.L. 86-272. *See, e.g.*, 18-125 C.M.R. 808 § .04(D)(9) (“checking of customers’ inventories without charge therefor (*for re-order, but not for other purposes such as quality control*)”) will not cause the loss of

⁴ P.L. 86-272 permits independent contractors to make sales—as distinguished from solicitation of orders for sales—without establishing income tax nexus for the principal seller. 15 U.S.C. § 381(c). There is no argument or evidence in this case, however, that the Brokers made or attempted to make sales of the Taxpayers’ products in Maine.

protection for otherwise protected sales that occur in the State of Maine) (emphasis added). In the present case, however, the Taxpayers assert that the Brokers did not check retailers' inventory levels, and that the "[Broker's] handheld devices played no role whatsoever in monitoring inventory." Taxpayers' Post-Hearing Brief dated [date] at page 4. Thus, [the Broker's] gathering of information on the types and quantities of products displayed and the manner of exhibition—including whether or not competitors' products are displayed—and reporting that information to the Taxpayers, does not constitute checking of retailer inventory for re-order purposes. This gathering and reporting of information did not directly stimulate orders for sales, and the Taxpayers would have a separate business purpose for that reported information apart from solicitation of orders, such as identifying marketing opportunities and problems; generating and evaluating marketing actions; and assessing and monitoring marketing performance. *See Skagen Designs, Ltd. v. Comm'r of Revenue*, No. 8168-R, 2012 Minn. Tax LEXIS 25 at *14 (Minn. T.C. Apr. 23, 2012) (information in photographs and reports made by merchandisers served the independent business purpose of allowing the taxpayer to collect valuable market data). Similarly, the observation and reporting of [defects in] a product's condition, such as [occurred in this case], does not directly stimulate orders for sales, yet the information collected is of obvious quality-control value to the Taxpayers. Finally, although the actual manipulation of products displayed on the retailers' shelves, such as [correcting significant visible defects in Taxpayers'] products or affixing coupons and tags to products to make them more attractive, may actually increase sales, such actions are not ancillary to *requesting purchases*. *See Wrigley* at 233 (a manufacturer "would wish to attend to the replacement of spoiled product whether or not it employed a sales force"); *see also Kennametal, Inc. v. Comm'r of Revenue*, 686 N.E.2d 436, 441 (Mass. 1997) (seller not protected under P.L.

86-272 where activities served independent business purposes *in addition to* solicitation of orders for sales). Certainly, the Taxpayers had good reason to resolve the [visible defects in their] products whether or not they had a sales force; common sense dictates that a purchaser is less likely to purchase an abnormal-appearing product, all other factors being equal. The Taxpayers also had good reason to stimulate sales of products already on retailers' shelves by affixing coupons and tags to the products, but this is not the same activity as soliciting orders for sales, and it serves a separate economic function, i.e., to increase the retailers' sales of those products. To qualify for P.L. 86-272 protection, however, "the activities must facilitate the actual solicitation of orders; they may not merely serve to increase general sales." *Kennametal* at 441 (citing *Wrigley* at 233).⁵ Such activities cannot be converted into "solicitation" by merely being assigned to salesmen.⁶

Alternatively, the Taxpayers argue that any activity engaged in by the Brokers that does not fit squarely within the safe harbor of P.L. 86-272 or that is not entirely ancillary to solicitation of orders for sale as allowed under *Wrigley* is *de minimis* in nature and insufficient to bring the Taxpayers within the nexus jurisdiction of the State of Maine. The *Wrigley* court did recognize a *de minimis* exception to the strict application of P.L. 86-272, noting

"the venerable maxim *de minimis non curat lex* ("the law cares not for trifles") is part of the established background of legal principles against which all enactments are adopted, and which all enactments (absent contrary indication) are deemed to accept.

Wrigley at 231.

⁵ The manipulation of products on retailers' shelves in this case does not invoke protection under 15 U.S.C. § 381 (a)(2). That provision allows a seller or representative to solicit a retailer's customers for orders, which orders are then sent outside the state by the retailer for approval and fulfillment. These have been referred to as "missionary" requests. *Wrigley* at 233. Similarly, because the manipulation of products on retailers' shelves serves the separate business purpose of increasing general sales, the manipulation is not an activity that is protected by P.L. 86-272 as "entirely ancillary" to sales by an independent contractor.

⁶ [Footnote omitted].

In *Wrigley* itself, for example, the taxpayer was engaged in the business of manufacturing and selling chewing gum. The taxpayer’s sales representatives made unprotected sales of gum in Wisconsin through “agency stock checks”⁷ (approximately 0.00007% of its in-state sales—seven one-hundred thousandths of one percent (several hundred dollars per year)) and maintained a stock of chewing gum in Wisconsin worth several thousand dollars for the purpose of exchanging that stock for stale gum held by retailers. Although the relative magnitude of those activities was not large when compared to Wrigley’s other operations in Wisconsin, the court concluded that the activities were not *de minimis* but constituted a “nontrivial additional connection” with that state. *Wrigley* at 235 (stating “[w]e need not decide whether any of the nonimmune activities was *de minimis* in isolation; taken together, they clearly are not.”). See also *Skagen* at 20 (“we must decide if [the non-immune activities] were *de minimis* when taken together”) and *Kennametal* at 440 n. 5 (“To qualify for a *de minimis* exception, a court must consider the activities of the taxpayer within the State as a whole.”).

Similarly, in *Peterson v. State Tax Assessor*, 1999 ME 23, 724 A.2d 610, the taxpayer, a New Hampshire partnership, was engaged in the business of selling dental supplies. MRS determined that the taxpayer had income tax nexus with the State of Maine and issued an assessment on that basis. The activities engaged in by the taxpayer in *Peterson* included delivering items in Maine, picking up items from Maine customers, and accepting payment from customers in Maine, all of which did not constitute solicitation of orders. *Peterson* ¶ 11. The Law Court found that these activities were not *de minimis* when viewed in the aggregate because

⁷ The term “agency stock check” is not defined. The term appears in *Wrigley* in the following context:

The representative would issue an “agency stock check” to the retailer, indicating the quantity supplied; he would send a copy of this to the Chicago office or to the wholesaler, and the retailer would ultimately be billed (by the wholesaler) in the proper amount.

Wrigley at 218.

they occurred regularly and consistently over the audit period, thereby establishing a “nontrivial additional connection” with the State of Maine. *Id.* (quoting *Wrigley* at 232). *See also Wrigley* at 235 (activities were not *de minimis* where conducted on a continuing basis as a matter of regular company policy); *Skagen* at 20 (merchandisers’ activities of generating and submitting weekly reports and monthly photographs, combined with their submission of floor maps and conducting training presentations, were not *de minimis*).

In the present case, the activities engaged in by the Brokers [. . .] of monitoring and reporting the amounts of the Taxpayers’ products displayed, the manner of display, and whether remedial action was needed or taken, occurred with regularity throughout the entire period at issue. Although some activities, such as inspecting the Taxpayers’ products for defects and gathering competitor pricing and marketing information, occurred infrequently, other activities, such as affixing coupons and tags directly on products to improve salability, were performed more often.⁸ In and of themselves, these activities are not solicitation of orders under P.L. 86-272 and are not entirely ancillary thereto. When viewed in the aggregate, the activities establish a “nontrivial additional connection” of the Taxpayers with the State of Maine. The activities are not *de minimis*. No adjustment to the assessment is warranted on this basis.

B. Penalties

As part of their argument, the Taxpayers also contend that the penalties assessed against them should be waived or abated pursuant to 36 M.R.S. § 187-B(7). As mentioned above, this statute provides that the Assessor “shall waive or abate” any penalty if the taxpayer supplies “reasonable cause” for doing so. One of the enumerated examples of “reasonable cause” is

⁸ The frequency with which [Broker] representatives engaged in certain activities during the period at issue is detailed in a spreadsheet containing [thousands of] lines of data, consisting of questions, instructions, and responses sent to and from the [Broker’s] handheld devices.

“substantial authority justifying the failure to file or pay.” 36 M.R.S. § 187-B(7)(F). Substantial authority, in turn, may consist of a well-reasoned construction of the statute at issue, in this case P.L. 86-272. See Treas. Reg. § 16662-4(d)(3) (cited by *John Swenson Granite, Inc. v. State Tax Assessor*, 685 A.2d 425, 429 n.3 (Me. 1996)).

Here, although we find that the Taxpayers did engage in activities that are not protected by P.L. 86-272, we also find that the line between the activities engaged in by the Taxpayers and those protected under P.L. 86-272 is not so clear that the Taxpayers did not have substantial authority for their filing position, even though that position was erroneous. The line between activities that are protected by that statute and those that are not can be difficult to discern. As the Supreme Judicial Court of Massachusetts noted in *Kennametal*, “[t]here exists no bright line to distinguish those activities that are entirely ancillary to the solicitation of orders from those that also serve an independent business function.” *Kennametal* at 441. Although some guidance on this issue is available, such as MRS’s Rule 808 on corporate income tax nexus, in many situations these materials do not make this line easier to draw. Additionally, the only ruling of which the Board is aware concerning the use of independent contractors to perform activities argued to be protected under 86-272 was decided after the due date and filing of the Taxpayers’ returns in this case. See *Ann Sacks Tile and Stone, Inc., v. Dep’t of Revenue*, 2011 Ore. Tax LEXIS 403, ¶ 16 (holding that “activities by independent contractors conducted for a taxpayer but beyond those set out in the statute lead to a taxpayer losing the protection of Pub L No 86-272.”).

With this in mind, we find that the Taxpayers had substantial authority at the time they filed their Maine returns for their position that they did not have Maine income tax nexus, even though that position was incorrect. In particular, we note that the Taxpayers’ construction of 86-

272 as protecting many of the activities performed on their behalf in Maine by their brokers as being solicitation, ancillary to solicitation, or *de minimis* in nature is sufficiently well-reasoned to constitute substantial authority. Accordingly, we abate the substantial understatement penalties contained in the assessment regarding tax years [two] and [three]. Also, on the same basis as set forth above, this finding of substantial authority dictates that the extended statute of limitation under 36 M.R.S. § 141(2)(A) is not applicable here, and that the assessment for tax year [one] is cancelled in full as beyond the limitation set forth in section 141(1).⁹

C. Interest

Finally, the Taxpayers contend that they are entitled to the waiver or abatement of interest pursuant to 36 M.R.S.A. § 186. Unlike the penalty waiver provisions in section 187-B(7), however, section 186 “confers broad discretion on the [A]ssessor because it does not require a waiver or abatement of interest upon a showing of reasonable cause.” *Victor Bravo Aviation, LLC v. State Tax Assessor*, 2012 ME 32 ¶ 10, 39 A.3d 65. Instead, under section 186, the Assessor “*may abate or waive the payment*” of interest “[i]f the failure to pay a tax when required *is explained to the satisfaction of the assessor.*” 36 M.R.S. § 186 (emphasis added). This language “indicates a highly discretionary standard that is not easily met by the taxpayer.” *Victor Bravo Aviation, LLC*, 2012 ME 32 ¶ 14, 39 A.3d 65. Thus, grounds or authority that may provide “reasonable cause” warranting the waiver or abatement of penalties under section 187-B do not “*ipso facto*” provide a satisfactory explanation for the waiver or abatement of interest. *Id.* This higher standard serves to:

⁹ The Taxpayers also argued that the penalties contained in the assessment must be abated on the ground that “MRS failed to provide notice to the industry that it would be systematically targeting out-of-state [producers and distributors of tangible person property] and denying them the protection under P.L. 86-272 if they used local brokers to conduct their sales activities in Maine.” The evidence presented does not support the Taxpayers’ claim.

support[] the reasonable purpose of most statutory and contractual interest payment requirements to assure that the investment value of money inures to the benefit of the party that should have been paid the money when the payment obligation arose. *Id.*

Here, we find that although the Taxpayers presented reasonable cause for the waiver of penalties, those grounds do not meet the higher standard of constituting a satisfactory explanation of the Taxpayers' failure to pay the tax at issue such that interest should be waived and the State lose the investment value of the tax. We therefore uphold the assessment of interest for the [year two] and [year three] tax years.

V. DECISION

Insufficient evidence has been presented to show that the Taxpayers are not liable for the tax amounts contained in the assessment, and the Taxpayers have not established a basis for abatement of interest. However, the Taxpayers had substantial authority for their treatment of the tax at the time they filed their returns. Accordingly, the substantial understatement penalties for [year two] and [year three] are abated in full. The assessment for [year one] is cancelled in full as beyond the statute of limitation for assessment. No further relief is warranted on the facts presented.

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 motion 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 Taxpayers may contact Maine Revenue Services at 207-624-9725 for the amount of tax that is currently due, together with any interest or penalties owed. After that 60-day period has expired, Maine Revenue Services will contact the Taxpayers with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: April 2, 2014

DISSENT by Board Member [Name].

I respectfully dissent from the decision reached by the Board and would instead cancel the entire assessment of tax, interest, and penalties at issue here. I find that the activities the Taxpayers' Brokers performed in Maine on behalf of the Taxpayers constituted solicitation, were ancillary to solicitation or were *de minimis* in nature, and thus protected by P.L. 86-272 as interpreted by the U.S. Supreme Court in *Wrigley*. This is especially true when the facts of this case are viewed in the context of today's highly competitive retail sales industry.

Dissent issued: April 2, 2014