

[CORPORATE TAXPAYER],

Petitioner

v.

DECISION

MAINE REVENUE SERVICES,

Respondent

## I. Introduction

[Corporate Taxpayer (the “Company”)], appeals from a decision of Maine Revenue Services (“MRS”) upholding an assessment of Maine corporate income tax for [year one] through [year four] in the amount of \$[amount], and also the interest thereon. The sole issue presented on appeal is whether, as [the Company] contends, the activities of [the Company]’s contractor in Maine during the years at issue did not exceed the protection afforded by Public Law 86-272 (codified at 15 U.S.C. §§ 381-84) (“P.L. 86-272”), which allows a nonresident seller of tangible personal property to solicit orders for sales of tangible personal property in a given state without subjecting itself to that state’s income tax jurisdiction. It is [the Company]’s burden to show that it is not liable for the tax. 36 M.R.S. § 151-D(10)(F). Because we find that [the Company] has not met its burden, we uphold the assessment in full.

## II. Background

An Appeals Conference was held on [date], at which [the Company] was represented by [Company’s Representative] and MRS was represented by [MRS’s Representative]. Appeals Officer [ ] presided. Based upon the evidence submitted, the Appeals Officer found the facts as follows:

At all relevant times, [the Company] was a producer and distributor of [ ] items for sale to retail stores (hereinafter “[the Company]’s Customers” or the “Retailers”) located in Maine and elsewhere. During the subject period, [the Company] was headquartered in [State], it neither owned nor leased Maine real estate, did not maintain a store of goods in Maine, and had no Maine employees. Rather, [the Company] contracted with [an independent contractor] (hereinafter [the “Broker”]), an “independent contractor” as that term is defined and used in P.L. 86-272, to solicit [the Company]’s Customers in Maine for orders of [the Company]’s products. [The Broker] sent all orders received from [the Company]’s Customers out of Maine for approval and fulfillment by [the Company]. Because [the Company] believed that its business activities in Maine did not give rise to Maine income tax nexus, it did not file or pay Maine income tax for the years at issue. Following an audit of [the Company]’s business activities in Maine, MRS determined that [the Company] was liable for Maine income tax and issued the subject assessment.

Duties that [the Broker] was required to perform for [the Company] were described in a certain “[Contract]” dated [date] (the “Contract”), a copy of which was made part of the record on appeal.<sup>1</sup> Among other activities, the Contract required that [the Broker] “[s]olicit orders for Products from Customers,” “[m]aintain good relations with Customers,” “[i]mplement final retail plan-o-grams<sup>2</sup> for Products at Customer locations once approved,” “[u]se best efforts to maximize and maintain Product positions on Customer shelves and in cases in accordance with [the Company]’s standards,” and “[r]eport competitive product activity to [[the Company]’s] designated representative.” Contract at [reference 1], [reference 2], [reference 3], [reference 4],

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<sup>1</sup> [The Company] concedes that the provisions contained in the Contract dated [date], were in effect for all periods at issue in this appeal.

<sup>2</sup> A plan-o-gram is a diagram dictating where each product in a store is placed.

and [reference 5], respectively. As described in the Contract, [the Broker] was paid for its services on a percent-of-sales commission basis.

In performing its obligations under the Contract, [the Broker] assisted the Retailers to develop plan-o-grams by giving them advice on the optimal shelf location for increasing retail sales of [the Company]’s products.<sup>3</sup> [The Broker] also regularly verified that [the Company]’s products were on display in accordance with the plan-o-grams established by each respective Retailer, and reported any discrepancies to the Retailer for correction. [The Broker] accomplished this verification and reporting function by sending its field employees directly into the retail establishments of [the Company]’s Customers, equipped with hand-held data entry/data display devices (the “Hand-held Devices” or the “Devices”), and having the field personnel collect the inventory information and record it on the Devices. In the course of MRS’s audit of [the Company], [the Broker] provided MRS with a spreadsheet containing the Hand-held Device data detail, consisting of [number of] lines of information collected during [year one] through [year four].<sup>4</sup>

In addition to reviewing the Retailers’ stock and placement of [the Company]’s products for purposes of plan-o-gram conformity, [the Broker] also used the Devices to record the amount of [the Company]’s product inventory in stock and on-display. [The Broker’s] field employees reported the information thus collected directly to [the Broker], who then made the information available to both [the Company] and the respective Retailers. [The Broker] used the inventory information to identify and alert Retailers of the need to replenish their supplies of [the Company]’s products and to “correct voids”<sup>5</sup> of [the Company]’s products, although the

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<sup>3</sup> Unless otherwise indicated, the “[Company] products” referred to in this decision were the property of the Retailers, having already been purchased by them from [the Company].

<sup>4</sup> Each line of data contains information such as (1) the date of the store visit, (2) the name and location of the store, (3) the question to be answered by the [Broker’s] employee in the field, and (4) the [Broker’s] employee’s response to the question.

<sup>5</sup> A “void” means that an item is out of stock or not on the shelf.

evidence does not show that “correcting voids” involved anything other than [the Broker]’s notifying the respective Retailer of the voids and requesting orders for additional sales.

According to [the Company], such checking of Retailer inventory

was done to ensure that the goods listed in the retailer’s records actually existed and were on the shelves. Often a retailer’s records will show that there are products in stock, but when the shelves are inspected, the products are not there. In such as [sic] situation the only way to have the retailer order more product is to inform them that the product is not there or that the actual stock on the shelves is lower than the retailer’s inventory indicates.

Affidavit of [the Company’s Officer] at ¶ 7.

On occasion, [the Broker] notified Retailers of shipping delays, and would sometimes physically place or arrange [the Company]’s products on the Retailers’ shelves,<sup>6</sup> although the Retailers did not permit [the Broker] to move products to the shelves from the Retailer storage rooms. In [year 4], [the Broker] “ensured” that the stock of a certain [Company] item was rotated, although there is no evidence that this involved anything more than [the Broker]’s notifying the Retailers of the need to rotate the stock. [the Broker] also solicited orders for additional sales of [the Company]’s products and attempted to secure “bunker”<sup>7</sup> display space in connection with periodic freestanding insert (“FSI”)<sup>8</sup> advertisements of [the Company]’s products. On such occasions, [the Broker] required its field personnel to take photographs of any bunker displays obtained in support of an FSI.<sup>9</sup> [The Broker] also requested its field staff to obtain photographs and pricing information regarding [the Company]’s products under other circumstances, but it does not appear that this was ever done.

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<sup>6</sup> Such shelf work is referred to as “resetting” when a new product is brought in on schedule and as “cutting-in” when a new product is brought in off-cycle.

<sup>7</sup> A “bunker” is a refrigerated, open display case.

<sup>8</sup> Free Standing Insert: Advertising brochure, card, or leaflet inserted in a newspaper or magazine, usually to serve as a reply coupon or discount voucher. BusinessDictionary.com, <http://www.businessdictionary.com/definition/free-standing-insert.html> (visited February 23, 2015).

<sup>9</sup> According to the data detail spreadsheet, only one display was photographed (in year 4).

Another function that [the Broker] performed was recording and reporting whether Retailers were offering [the Company]’s products for sale at discounted sales prices, variously called [discounts]. Occasionally, [the Broker] set up sale display “flags” on a Retailer’s shelves, indicating that the Retailer had reduced the price of a [Company] product. In addition to monitoring the Retailers’ discount sales of [the Company]’s products, [the Broker] also recorded and reported whether Retailers were selling the products of [the Company]’s competitors at a discount during the period at issue. According to a summary of the Hand-held Device data detail (the “Summary”)—prepared by MRS’s auditor and submitted to the Appeals Officer by [the Company]—[the Broker] visited [the Company]’s Customers for the purpose of gathering competitor information [number] times in [year 1], [number] times in [year 2], [number] times in [year 3], and [number] times in [year 4].<sup>10</sup> According to MRS, these visits involved [a number of] different Maine stores.<sup>11</sup>

On appeal, [the Company] contends that the above-described activities of [the Broker] do not exceed the protections afforded by federal law under P.L. 86-272, and that [the Company] is therefore not subject to the income tax jurisdiction of the State of Maine and the liability set forth in the assessment.

### III. Analysis

Annually, a tax is imposed on the Maine net income of “each taxable corporation.” 36 M.R.S. § 5200(1). In relevant part, for any corporate taxpayer, the term “Maine net income” is defined as

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<sup>10</sup> Although the parties raise no disagreement as to the correctness of the auditor’s Summary, the Hand-held Device data detail does not appear to support the Summary information on this point for [year 4].

<sup>11</sup> The auditor’s Summary lists the number of stores at [a higher number].

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].

36 M.R.S.A. § 5102(8).

Limiting Maine's ability to subject a corporation to tax, however, is P.L. 86-272 (15 U.S.C. §§ 381-84).<sup>12</sup> This federal statute prohibits a state from imposing income tax on a taxpayer engaged in interstate commerce if the business activities of the taxpayer within the state

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<sup>12</sup> **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.

**(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.

constitute *no more than* the solicitation of orders for the interstate sales of tangible personal property, 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). That is, rather than describing activities that will subject a corporation to the income tax jurisdiction of a state, P.L. 86-272 sets forth those activities that *will not* expose it to taxation. Included in 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, as well as the maintenance of an office by the independent contractor in the subject state. *Id.* § 381(c).

Business activities within the ambit of P.L. 86-272 protection include not only “explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order.” *Wisconsin Dep’t of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223 (1992). Also within the purview of P.L. 86-272 are “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.” *Wrigley* at 228-29. In *Wrigley*, the United States Supreme Court described the confines 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). There is, however, “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, Inc. v. Comm’r of Revenue*, 686 N.E.2d 436, 441

(Mass. 1997). The *Wrigley* court further recognized that a company does not necessarily forfeit its tax immunity under P.L. 86-272 by performing *some* in-state business activities that go beyond solicitation of orders if those activities are *de minimis* in nature—that is, if the activities are insufficient to “establish[ ] a nontrivial additional connection with the taxing State.” *Id.* at 232. We address the solicitation issue and the *de minimis* issue in turn.

A. Entirely ancillary to solicitation.

[The Company] contends that [the Broker]’s activities consisted solely of soliciting orders for sales and activities entirely ancillary thereto, both of which are protected by P.L. 86-272.

[The Company] first argues that [the Broker] did not exceed the protection afforded by P.L. 86-272 by checking inventories of [the Company]’s products, both in stock and on display, and that because Retailers’ inventory records are frequently deficient, such inventory checks are necessary to ensure that [the Company] products are timely reordered without leaving “voids.” [The Company]’s argument on this point is in accord with 18-125 C.M.R. 808 § .04(D)(9) (“MRS Rule 808”), which provides that “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 protection for otherwise protected sales that occur in the State of Maine. (Emphasis added). Furthermore, we find no significant difference between [the Broker]’s alerting a Retailer that a [Company] product is not on-hand or [the Broker]’s alerting a Retailer that the product is on-hand but is not being displayed for sale. Under either circumstance, there is no independent business function to be served from the activity other than the solicitation of orders for further sales.



[The Company] next contends that [the Broker]’s use of inventory review to ensure that [the Company]’s products were displayed in conformance with Retailer plan-o-grams constitutes a business activity entirely ancillary to solicitations of orders for sales, within the protection of P.L. 86-272.<sup>13</sup> Although each Retailer developed its own store plan-o-gram, [the Broker] provided advice on optimal shelf location with an eye toward increasing retail sales of [the Company]’s products. In theory, then, by ensuring the placement of [the Company]’s products on store shelves in accordance with the plan-o-grams, [the Broker] furthered the sale of those [Company] products. According to [the Company], the only reason for [the Broker] to promote plan-o-gram compliance was to increase the turnover and subsequent reorders of [the Company]’s products; no other reason for [the Company]’s seeking plan-o-gram compliance has been suggested and we are not aware of any other reason.<sup>14</sup> Because no other business function is served by [the Broker]’s ensuring Retailer plan-o-gram compliance, apart from its connection to solicitation of orders, the activity is entirely ancillary to solicitation of orders for sales of [the Company]’s products and is within the protection of P.L. 86-272.

[The Company] next contends that [the Broker]’s activities of “resetting” and “cutting-in” its products to Retailer shelves was another activity entirely ancillary to solicitation of orders for sales and therefore within the scope of P.L. 86-272 protection. We agree. According to the evidence presented, [the Broker] placed and arranged [the Company]’s products on Retailers’ shelves with the object of increasing Retailer sales of those products and, consequently, increasing the Retailers’ reorders of them. Additionally, by assisting Retailers to display the

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<sup>13</sup> No evidence was presented showing that [the Company] entered into any contracts in the State of Maine, including any plan-o-gram agreements. By itself, conducting the business activity of executing a contract in Maine would establish [the Company]’s income tax nexus with this state. *See, e.g.* MRS Rule 808.03(A)(2).

<sup>14</sup> The fact that the contract between [the Company] and [the Broker] required [the Broker] to “[i]mplement final retail plan-o-grams for Products at Customer locations once approved” does not help identify any alternative business function to be served by the requirement beyond facilitating requests for reorders of [the Company]’s products.

products, [the Broker] likely ingratiated itself with [the Company]’s Customers, the Retailers—an activity that the United States Supreme Court has recognized as ancillary to solicitation of sales. *Wrigley* at 235. Furthermore, there is no other business function served by [the Broker]’s “resetting” and “cutting-in” [the Company]’s products, apart from solicitation of orders for sales. The activity does not exceed the protective scope of P.L. 86-272.

Likewise, [the Broker]’s “ensuring” that certain stock of [the Company]’s products were “rotated”—prioritized by age on Retailers’ shelves—does not amount to engaging in quality control activities in Maine regarding [the Company]’s products beyond the protection of P.L. 86-272. The evidence does not suggest that the stock rotation at issue involved any stale or “expired” products which [the Company] may have had good reason to want removed from display. *See, e.g., Wrigley* at 233 (a manufacturer “would wish to attend to the replacement of spoiled product whether or not it employed a sales force”). Rather, based on the evidence presented, the subject stock rotation appears to have been intended to minimize expiration and the consequent loss of products on the Retailers’ shelves. Because the Retailers were the owners of the products being rotated, it was they, not [the Company], who were the beneficiaries of rotating the stock. The only business function derived by [the Company] from ensuring the rotation of the Retailers’ stock “was to ingratiate the salesman with the customer, thereby facilitating requests for purchases.” *Wrigley* at 235. Because there was no other business function served by the activity, [the Broker]’s involvement in the rotation of the Retailers’ stock of [the Company]’s products was entirely ancillary to the solicitation of orders for sales, and was within the scope of P.L. 86-272 protection.

Similarly, on the facts presented, [the Broker]’s taking photographs of [the Company]’s products on display at Retailers’ stores was not an activity beyond the protection of P.L. 86-272.

As [the Company's Officer] credibly stated in his [date] affidavit and at the Appeals Conference, the sole purpose of [the Broker]'s obtaining photographs of [the Company]'s products on display was for [the Broker]'s use in ensuring that those products were displayed in conformance with Retailer plan-o-grams, thereby furthering the sale of the products and, consequently, the Retailers' requests for reorders. Because the evidence shows that the *sole* business function served by [the Broker]'s taking photographs of [the Company]'s products on the Retailers' shelves was in connection with [the Broker]'s efforts to secure orders for sales, the activity is within the protection of P.L. 86-272 as being entirely ancillary to such solicitation.<sup>15</sup> *Cf. 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 taken by merchandisers on a monthly basis, together with weekly reports containing occasional comments about competitors' products and events, served the independent business purpose of allowing the taxpayer to collect valuable market data).

Further, [the Company]'s using [the Broker] to notify Retailers of the late delivery of certain [Company] products did not exceed the protection of P.L. 86-272. Admittedly, notifying Retailers of the status of their orders, already solicited and approved, does not amount to a solicitation of orders for sales, and it does not increase sales or orders for sales. Furthermore, [the Company] would want to notify Retailers that delivery of stock which they had ordered would be delayed whether or not it had a sales force in Maine. We hold, however, that the notification of shipping delays is part of the protected activity of filling solicited orders by "shipment or delivery from a point outside the State." 15 U.S.C. § 381(a)(1). This reading is

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<sup>15</sup> Although, according to information contained in the Hand-held Device data detail spreadsheet, [the Broker]'s field personnel were also requested to collect and report pricing information regarding [the Company]'s products, there is no evidence that this was ever done. We therefore do not consider whether the gathering and reporting of that information would have exceeded the protection of P.L. 86-272.

supported by MRS Rule 808 § .04(D)(8), which provides that “[c]oordinating shipment or delivery without payment or other consideration *and providing information relating thereto* either before or after the placement of an order” is an activity protected by P.L. 86-272. (Emphasis added). [The Broker]’s notifying Retailers of shipping delays does not exceed the protection of P.L. 86-272.

Finally, we consider whether [the Broker]’s activity of collecting and reporting marketing information in Maine regarding [the Company]’s competitors (“competitor marketing information” or “CMI”) during each of the years at issue is an activity outside the protective scope of P.L. 86-272, subjecting [the Company] to Maine’s income tax jurisdiction for those years. Specifically, [the Company]’s Contract with [the Broker] requires [the Broker] to “[r]eport competitive product activity to [the Company]’s designated representative,” Contract at [reference 5], while [the Broker] visited [the Company]’s Customers—the Retailers—for the purpose of gathering competitor information [number] times in [year 1], [number] times in [year 2], [number] times in [year 3], and [number] times in [year 4], noting and reporting whether Retailers sold [the Company] competitors’ products at a discount price during each tax year.

On this point, [the Company] does not contend that [the Broker]’s collection and reporting of CMI is in any way ancillary to solicitation of orders for sales. Rather, [the Company] argues that it did not ask [the Broker] to gather the CMI in Maine—or if it did ask [the Broker] to gather the CMI, that it only requested it at one point in time and not on an ongoing basis. In its written and oral presentations to the Board, [the Company] argued that its Contract with [the Broker] was a national contract which was not specific to Maine, and that the only other evidence presented on this issue on appeal shows that “[the Company] did not ask [the Broker] to provide [it] with market intelligence or report on [its] competitors *in Maine*.” [The

Company's Officer's] Affidavit at ¶ 4 (emphasis added). [The Company] speculates that [the Broker] may have collected the information in Maine for its own use or for use by the Retailers, but does not offer any possible explanation of how [the Broker] or a Retailer might use or benefit from the CMI collected. Nevertheless, [the Company] maintains that it should not be held responsible for an activity that it did not request [the Broker] to perform in this state.

By way of collateral argument, [the Company] contends that it had no use for the CMI because [it] relied on the Neilson Company, an information broker, for its market intelligence during the subject tax years. According to [the Company], the Neilson Company obtains its market information, in part, directly from the Retailers and makes the information available to [the Company] within one week. Thus, [the Company] argues, the lack of the CMI's value makes its collection and reporting not only unnecessary but also insufficient to establish [the Company]'s Maine income tax nexus. Furthermore, in its written and oral presentations to the Board, [the Company] argued that [the Broker] was only allowed 15 minutes per store per week to perform duties on behalf of [the Company], and that "there is no way that [the Company] would want [the Broker] sales people spending time looking at and logging useless CMI in Maine." *See* [the Company]'s Written Statement to the Board dated [date] at page 3.

After careful consideration, we hold that the provisions of the written Contract between [the Company] and its subcontractor, [the Broker], is the better evidence on the issue of whether [the Company] requested [the Broker] to collect and report CMI in Maine. Clearly, [the Broker] collected and reported the CMI in Maine each of the four years at issue, and if, as [the Company] contends, it did not want [the Broker] sales people spending time looking at and logging the CMI, it only had to remove that provision from its Contract or tell [the Broker] in some other way to stop. It also seems reasonable to want an independent contractor to directly inspect the

Retailers' store shelves to collect CMI that may produce more accurate and meaningful information than that obtained from a third party—where, as here, the third-party intelligence is based in part on information provided by the Retailers, yet “a retailer’s records will [often] show that there are products in stock, but when the shelves are inspected, the products are not there.” [The Company’s Officer’s] Affidavit at ¶ 7. Consequently, we hold that [the Broker]’s collection and reporting of CMI in Maine was an unprotected business activity sufficient to establish [the Company]’s Maine income tax nexus for the period at issue, and that [the Company] has not met its burden to show that MRS’s nexus determination was erroneous. No adjustment to the assessment on this basis is warranted.

B. De minimis activities.

[The Company] lastly contends that any activity engaged in by [the Broker] that does not fit squarely within the safe harbor of P.L. 86-272 or is not entirely ancillary to solicitation of orders for sales, as allowed under *Wrigley*, is *de minimis* in nature and is therefore insufficient to bring [the Company] within the income tax nexus jurisdiction of the State of Maine.

In recognizing that any analysis under P.L. 86-272 must also contain a *de minimis* exception component, the *Wrigley* court first reasoned that “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. The court then determined that in light of the legislative purpose of P.L. 86-272, the test for whether an activity “is sufficiently *de minimis* to avoid loss of the tax immunity conferred by [P.L. 86-272] depends upon *whether that activity establishes a nontrivial additional connection with the taxing State.*” *Wrigley* at 232 (emphasis added). Thus, the analysis includes not only an examination of the quantity of the activity at issue, but also an

examination of the activity's nature. In the present case, the unprotected activity at issue is [the Broker]'s recording and reporting of CMI—whether Retailers were selling the products of [the Company]'s competitors at a discounted sales price during [year 1] through [year 4]. [The Company] argues that this recording and reporting activity was *de minimis* because the amount of the unprotected activity, in relation to all other activities performed by [the Broker] during the same period, was very small. This argument addresses only part of the analysis.

In *Wrigley*, 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"<sup>16</sup> (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. "Because Wrigley's business activities within Wisconsin were not limited to those specified in [P.L. 86-272], the prohibition on net-income taxation contained in that provision was inapplicable." *Wrigley* at 235. 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

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<sup>16</sup> 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.

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 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).

In the present case, the unprotected business activity of collecting and reporting CMI occurred across all tax years at issue. Furthermore, even though, according to the data detail spreadsheet, the unprotected activity represented a rather small percentage of all activities engaged in by [the Broker] ([number of] instances per [number of] total lines = 10.5%), when viewed in the aggregate, the activity established a “nontrivial additional connection” of [the Company] with the State of Maine. The activity is not *de minimis*. Accordingly, no adjustment to the assessment is warranted.

## V. DECISION

Based on the facts presented, [the Company] has not shown that it is not liable for the tax amounts contained in the assessment. Accordingly, we uphold the assessment of tax and interest in full.

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 Company] 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 [the Company] with an updated amount of tax and any interest or penalties due at that time.

Issued by the Board: June 15, 2015