



This Week in State Tax (TWIST)

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Multistate: Public Law 86-272 Developments

During the last weeks of 2023, there were a couple of state tax developments related to P.L. 86-272. In New Jersey, in *H&M Bay, Inc. v. Dir. Div. of Taxation*, the tax court denied cross motions for summary judgment in a case addressing whether a freight forwarding company was subject to Corporation Business Tax (CBT). The taxpayer had no physical presence in New Jersey but provided freight forwarding services to New Jersey customers through independently owned trucking companies/carriers and coordinated deliveries of freight to certain New Jersey locations. The taxpayer's position was that it did not meet any of the criteria to be considered subject to CBT. Notably, the taxpayer asserted that it was not exercising its corporate franchise in New Jersey, had de minimis revenues derived from New Jersey sources, and was not doing business in New Jersey, either itself or through an agent. The taxpayer also argued that it was immune from taxation under P.L. 86-272. The court did not agree with the last contention. Although the taxpayer coordinated shipments of freight—i.e., tangible property—for its customers, it was not the owner of the freight and was therefore not soliciting orders for sales of tangible personal property. The taxpayer, the court determined, was performing a service and its activities were outside the protections afforded by P.L. 86-272. Although the tax court confirmed that a corporation need not have a physical presence in New Jersey to be subject CBT, it determined that there were material issues of fact that remained unresolved in this matter and therefore the case could not be decided on a summary judgment motion. For instance, it was unclear as to whether the taxpayer's revenue from New Jersey sources was de minimis, or whether the independently owned trucking companies/carriers had an agency relationship with the taxpayer.

In other P.L. 86-272 news, on December 13, 2023, a California superior court struck down the California Franchise Tax Board's guidance (TAM 2022-01 and Publication 1050) that incorporated certain aspects of the Multistate Tax Commission's revised "Model Statement of Information Concerning Practices of Multistate Commission and Supporting States Under P.L. 86-272." In the judge's view, the TAM and Publication 1050 were regulations within the meaning of the Administrative Procedure Act (APA) and because neither was enacted in compliance with the APA requirements, both were void. As such, the judge granted the American Catalog Mailers Association's (ACMA) summary judgement motion. The FTB is now asking the judge to vacate the already-filed summary judgment motion that was drafted by the AMCA. The language in the judgement was not shared with the FTB before it was filed, as is required under California court rules. Further, the FTB is challenging the language in the judgement as being overly broad and inconsistent with the court's ruling. Notably, the judgment states that "the TAM and Publication 1050 are, accordingly, declared void and without force or effect, and their guidance may not be relied upon" The FTB asserts that the court did not find that the TAM and Publication 1050 were "without force and effect" nor that they "may not be relied upon." Further, the FTB argues that state precedent holds that rules voided due to failure to follow required procedures are void and not to be given deference, but are not necessarily wrong. Rather, a court should independently consider how the governing statute or regulation should be interpreted. The court has not ruled on the FTB motion.

Finally, the New York Department of Taxation and Finance recently finalized the 9-A corporate franchise tax regulations, which incorporate aspects of the MTC's revised Statement on P.L. 86-272. Please stay tuned to TWIST for additional P.L. 86-272 developments.

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