

**TENNESSEE DEPARTMENT OF REVENUE
LETTER RULING #95-22**

WARNING

Letter rulings are binding on the Department only with respect to the individual taxpayer being addressed in the ruling. This presentation of the ruling in a redacted form is informational only. Rulings are made in response to particular facts presented and are not intended necessarily as statements of Department policy.

SUBJECT

Whether the Tennessee activities of [THE TAXPAYER] create sufficient nexus to subject the corporation to Tennessee corporate franchise, excise taxes.

SCOPE

This letter ruling is an interpretation and application of the tax law as it relates to a specific set of existing facts furnished to the department by the taxpayer. The rulings herein are binding upon the department, and are applicable only to the individual taxpayer being addressed.

This letter ruling may be revoked or modified by the commissioner at any time. Such revocation or modification shall be effective retroactively unless the following conditions are met, in which case the revocation shall be prospective only:

- (A) The taxpayer must not have misstated or omitted material facts involved in the transaction;
- (B) Facts that develop later must not be materially different from the facts upon which the ruling was based;
- (C) The applicable law must not have been changed or amended;
- (D) The ruling must have been issued originally with respect to a prospective or proposed transaction; and
- (E) The taxpayer directly involved must have acted in good faith in relying upon the ruling and a retroactive revocation of the ruling must inure to his detriment.

FACTS

[THE TAXPAYER] is located in [CITY AND STATE - NOT TENNESSEE] and has no plant or office elsewhere. The corporation manufactures and sells [PRODUCTS], primarily to [CUSTOMERS]. This is accomplished by mailing catalogs from [CITY AND STATE - NOT

TENNESSEE] to customers and prospects. [CUSTOMERS] then order by mail, fax, or telephone. [PRODUCTS] ordered are shipped to customers by common carrier from [CITY AND STATE - NOT TENNESSEE]. The corporation has no property in Tennessee and has no Tennessee telephone listing.

The corporation has hired a new Regional Sales Manager who is a salaried employee and does no work on commission. He does not accept orders on behalf of the company. All bids and orders are submitted directly by the customer to the corporation's [CITY AND STATE - NOT TENNESSEE] office for processing. Although the corporation does not require him to do so, he has, for his own personal convenience, chosen to relocate and live in Tennessee. He does not maintain an office in his home and is not reimbursed for any expenses, supplies, or equipment for a home office. He is encouraged to be on the road in his territory as much as possible. He is responsible for customer relations in four states, including Tennessee. The duties of the new Regional Sales Manager are described as follows:

Determining which prospective customers have the greatest potential to place an order based on such things as [CUSTOMER] size, patron base, and budget for [PRODUCT] purchases.

Making visits to current and prospective customers to make them aware of the company's product, distribute catalogues and brochures, explain how to do business with the company, and make sure they have all the materials they need to place an order.

Attend [CUSTOMER] conventions where he maintains a [PRODUCT] display, provides product information, answers questions, and distributes catalogues and brochures from a booth which the corporation rents for the two (2) to three (3) days the convention lasts.

Handles customer complaints about damaged shipments, orders incorrectly processed, or other product matters when such complaints cannot be handled from the home office.

The Regional Sales Manager carries a portable [PRODUCT] display which he displays at [CUSTOMER] conventions and may also carry a few sample [PRODUCTS] to show to prospective customers. The corporation's Chief Financial Officer estimates that each year, on the average, the Regional Sales Manager visits as many as two hundred (200) customers, or prospective customers in his four state territory. In addition, it is estimated that he attends eight (8) [CUSTOMER] conventions during the year, with two (2) of those conventions being in Tennessee. Most customer complaints are handled from the home office in [CITY - NOT IN TENNESSEE] without the Regional Sales Manager's assistance, but it is estimated that the Regional Sales Manager may handle an average of two (2) to three (3) complaints each year

involving customers spread over a territory of four states. Some of these complaints may, or may not, be from customers in Tennessee.

Most of the corporation's sales will be to public entities that are exempt from sales tax. However, the corporation will register, as needed, for purposes of collecting sales tax and will file any necessary sales tax returns.

ISSUE

Do the Tennessee business activities of [THE TAXPAYER] constitute doing business in Tennessee so as to subject it to state corporate franchise, excise tax?

RULING

No.

ANALYSIS

APPLICABLE STATUTORY AND CASE LAW

T.C.A. sections 67-4-806(a) and 67-4-903(a) impose Tennessee corporate franchise, excise taxes on "All corporations, . . . organized for profit under the laws of this state or any other state. . . and doing business in Tennessee . . .". Tennessee law does not define the term "doing business in Tennessee", but Title 15 U.S.C.A. § 381(a) prohibits imposition of a net income tax when the taxpayer's only business in the taxing state is solicitation of sales of tangible goods in interstate commerce. The federal statute reads as follows:

"(a) No State . . shall have power to impose . . . 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 or 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)."

The issue in *Wisconsin Department of Revenue v. William Wrigley, Jr. Co.*, 112 S.Ct. 2447 (1992) was the scope of Title 15 U.S.C.A. § 381 and the activities it protects. In *Wrigley* the U.S. Supreme Court held that “solicitation of orders” protected includes not only any speech or conduct that explicitly or implicitly invites or proposes an order, but also covers those activities that are entirely ancillary to requests for purchases and serve no independent business function apart from their connection to soliciting orders.

Although the entire process associated with the invitation of an order is protected, the phrase “solicitation or orders” does not embrace all activities that are routinely or even closely associated with solicitation or customarily performed by salesmen. *Id.* at 2455 and 2456. Activities that a company would have reason to engage in anyway, apart from solicitation or orders, but chooses to allocate to its in-state sales force are not protected from state corporate taxation by federal law. *Id.* at 2456.

For example, providing a car and a 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. However, 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. Some activities, such as repair and servicing of products after they are sold to the customer, may indirectly help increase future purchases, but such activities are not ancillary to requesting purchases and cannot be converted into “solicitation” by merely being assigned to a salesman. Even if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the state by a company, or on its behalf, goes beyond the “solicitation of orders” and will subject the company to taxation in the state where the office is maintained. Activities that take place after a sale will ordinarily not be entirely ancillary to requests for purchases, but there may be exceptions. *Id.* at 2457.

However, under the old and well established maxim *de minimis curat lex* (“the law cares not for trifles”), the *Wrigley* court held there is a *de minimis* principle applicable in construing Title 15 U.S.C.A. § 381. A corporation may engage in certain *de minimis* activities without incurring corporate tax liability even though such activities, were they not *de minimis*, would ordinarily create sufficient nexus to impose the tax. Whether an in-state activity, other than solicitation of orders, is sufficiently *de minimis* to avoid loss of tax immunity conferred by Title 15 U.S.C.A. § 381 depends upon whether the activity establishes a nontrivial additional connection with the taxing state. *Id.* at 2458.

APPLICATION OF STATUTORY AND CASE LAW TO FACTS PRESENTED

In order to determine whether [THE TAXPAYER] is “doing business in Tennessee” so as to be subject to corporate franchise, excise taxes, we must carefully examine each of its activities

in Tennessee in the light of the immunity provisions set fourth in Title 15 U.S.C.A. § 381 and the criteria set fourth by the U.S. Supreme Court in *Wrigley*.

Title 15, U.S.C.A. § 381(a) (1) prohibits the imposition of a state income tax when the only activity in the state is solicitation of orders for sale of tangible personal property when such orders are sent outside the state for approval or rejection and approved orders are shipped and delivered from a point outside Tennessee. [THE TAXPAYER] solicits purchases from Tennessee customers by mailing catalogs from a point outside Tennessee to customers and prospects in Tennessee and by visits from its regional sales manager who lives in Tennessee. Neither the corporation nor its regional sales manager who lives in Tennessee has an office in Tennessee. No orders are approved, or even taken in Tennessee, as all bids and orders are submitted directly by the customer to the corporation's [CITY AND STATE - NOT TENNESSEE] office by mail, fax, or telephone. These activities, in and of themselves, do not subject the company to Tennessee corporate franchise, excise taxes.

Activities performed by the Regional Sales Manager such as customer relations, providing of product information, distribution of materials and the carrying and showing of a portable [PRODUCT] display and [PRODUCT] samples are all ancillary to the solicitation of sales. Otherwise, there would be no reason to perform such activities. Thus, they do not, in and of themselves, create sufficient nexus in Tennessee to subject the corporation to franchise, excise taxes.

On infrequent occasions, the Regional Sales Manager also has responsibility for handling customer complaints after sales are made. If such complaints are about inferior quality [PRODUCTS] or [PRODUCTS] damaged in shipment to the customer and are made immediately upon the customer's receipt of the inferior quality or damaged merchandise, the handling of the complaints may be ancillary to solicitation of sales, since customers will not pay for the inferior or damaged merchandise unless their complaints are handled to their satisfaction. Thus, without satisfactory handling of these type complaints, the sales involved cannot be salvaged. However, handling of other types of complaints which are made some time after sale and delivery of the merchandise would not be ancillary to solicitation of sales because the sales have already been made. The handling of these type complaints may help increase purchases, but are not ancillary to requesting purchases and therefore would ordinarily create sufficient nexus to tax.

However, under the facts given in this particular situation, the Regional Sales Manager is rarely called upon to handle any type customer complaint. He is estimated to handle only two (2) to three (3) customer complaints each year over a four (4) state area. The handling of customer complaints on such an infrequent basis would fall within the *de minimis* exception and would not operate to destroy [THE TAXPAYER]'s Tennessee corporate tax immunity under Title 15 U.S.C.A. § 381. However, at some point the Regional Sales Manager's handling of customer

complaints could reach a volume and frequency where the *de minimis* exception no longer applies and nexus for Tennessee corporate franchise, excise taxes results.

The Regional Sales Manager also attends two [CUSTOMER] conventions in Tennessee each year. Each convention lasts only two (2) to three (3) days during which the Regional Sales Manager maintains a portable [PRODUCT] display in a rented booth, answers questions, provides product information and distributes catalogues and brochures. He neither solicits orders nor makes sales. All of the activities of the Regional Sales Manager at the [CUSTOMER] sales conventions facilitate requests for purchases. Such activities are thus ancillary to the solicitation of orders, since they serve no independent purpose apart from their connection to soliciting orders.

The only remaining issue is whether maintenance of the rented booth at the two (2) Tennessee [CUSTOMER] conventions held for two (2) to (3) days each year creates sufficient nexus for Tennessee to impose corporate franchise, excise taxes. Booths of the nature described do not appear to rise to the level of “offices”. They have no telephone listing and are maintained for only two (2) to (3) days twice a year. Such booths have no permanency and would not provide the corporation a regular or continuing presence in Tennessee in which to transact company business.

The Multistate Tax Commission (MTC) offers some guidance as to whether a rented convention booth establishes nexus in a taxing jurisdiction. The MTC has issued a statement entitled “Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272.” (P.L. 86-272 is the name under which Title 15 U.S.C.A. § 381 is commonly known.) This statement has been adopted in whole or in part by states that are members of the Multistate Tax Compact and it has identified activities considered directly related to solicitation in the light of the *Wrigley* decision. W. Raabe and K. Boucher, *Multistate Corporate Tax Guide*, I 42 (1994)

The Multistate Tax Commission has taken the position that maintaining a sample or display room for two weeks (14 days) or less at any one location during the tax year is an activity protected by Public Law 86-272. *Id.* at I-42. The Multistate Tax Compact created the Multistate Tax Commission in the interest of uniform corporate income taxation. Member states may subscribe to the Compact and its joint audit program. The Compact adopts the Uniform Division of Income for Tax Purposes Act (UDITPA) as an optional method of apportionment by member states. Currently there are seventeen (17) member states and the District of Columbia. Twenty-four (24) other states, including Tennessee, have adopted MTC regulations or similar provisions. *Multistate Corporate Income Tax Guide*, (CCH) paragraphs 145 and 401 (1994) Tennessee is not a member of the Multistate Tax Compact, but is an associate member and has adopted rules similar to the Compact’s Rules on UDITPA Allocation and Apportionment. *Id.* at paragraphs 426 and 4162.01.

Under the facts presented in this particular situation, the corporation does not maintain a sample or display booth at a Tennessee [CUSTOMER] convention for more than two weeks. Using the Multistate Tax Commission's position for guidance on this issue, Tennessee will not impose its corporate franchise, excise taxes on [THE TAXPAYER] as a result of its maintenance of a rented sample display booth for two (2) to (3) days at two (2) Tennessee [CUSTOMER] conventions each year.

CONCLUSION

None of [THE TAXPAYER]'s present Tennessee activities create sufficient nexus in Tennessee to subject it the Tennessee corporate franchise, excise taxes. Should the corporation's Tennessee activities expand or change in the future, the new facts created by such changes or expansions would have to be evaluated to determine if the nexus for corporate taxation exists.

Arnold B. Clapp, Special Counsel

APPROVED: Ruth Johnson
Commissioner of Revenue

DATE: 6/2/95