

Executive Committee Meeting

May 3 & 4, 2001

Multistate Tax Commission Memorandum

DRAFT**DRAFT**DRAFT

To: State Tax Administrators, Compact Member States of the Multistate Tax Commission
From: Dan R. Bucks, Executive Director
Date: May __, 2001
Subject: MTC Bylaw 7 Survey of Member States regarding the Proposed Adoption of Amendment to the MTC Statement of Information Concerning Practices of the MTC and Signatory States Under Public Law 86-272

This memorandum includes an official survey required by the Commission's Bylaws as an essential part of developing a uniformity recommendation. Your response to this survey is requested by Thursday, July 21, 2000. We thank you in advance for your cooperation.

Enclosed please find a Bylaw 7 Survey Response Form—Proposed Adoption of Amendment to the MTC Statement of Information Concerning Practices of the MTC and Signatory States Under Public Law 86-272 (hereinafter referred to as the "guideline"). The Guideline was adopted by the Commission as a uniformity recommendation in 1986, and was amended in 1993 and again in 1994. Specifically, the Guideline lists the business activities that fall within the safe harbor created by the federal law, and also lists those activities falling outside P.L. 86-272's protection, thereby subjecting a business to net income tax. The current proposal deletes IV.A.20 from the list of unprotected activities, which states:

20. Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment of delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.

We request that if your State is an "affected State" within the meaning of Bylaw 7, that you return a completed survey response form to us by mail or fax on or before _____, 2001.¹ A brief description of the circumstances of this request follows for your information.

At its meeting held May __, 2001, the Executive Committee of the Commission authorized the conduct of a Bylaw 7 survey with respect to the proposal to adopt the amendment to the Guideline. The proposal, if adopted by the Commission, would bring the Guideline into agreement with current law. Pursuant to the requirements of Bylaw 7 of the Commission, the Executive Committee has referred the proposal to all Compact Member States of the Commission "to determine if the affected members will consider adoption of the recommendation within their respective jurisdictions." If a majority of the "affected members" indicate that they will consider adoption of the proposal, the amended Guideline

¹Attached to this memorandum is a *List of Affected and Unaffected MTC Member States* that reflects our best understanding of which Member States are appropriately classified as "affected members" within the meaning of Bylaw 7 and which are not. If you believe we have erroneously classified your State on the *List of Member States*, please advise us of that fact and the basis upon which you have reached the contrary conclusion. If you are an "affected member," State regardless of how your State is classified on the *List of Member States*, please be sure to return your survey in all events.

DRAFT**DRAFT**DRAFT

will be presented for the vote of the Member States of the Commission during the Commission's regularly scheduled meeting to be held July 27, 2001, in Bismarck, North Dakota. If, during the meeting, a majority of the Commission membership votes in the affirmative, the Guideline, as amended will become a uniformity recommendation of the Commission. If your State is an "affected member," your vote on the attached survey is an important step to bringing the proposal to the vote of the Commission. Your State's response to the survey is requested on or before _____, 2001.

Please do not hesitate to contact the MTC headquarters office at 202-624-8699 if you have any questions about the proposal or the procedure that is being followed in this instance.

(Response Requested by _____, 2001)
MULTISTATE TAX COMMISSION—BYLAW 7 SURVEY RESPONSE FORM

*Proposed Adoption of Amendment to the MTC Statement of Information Concerning
Practices of the MTC and Signatory States Under Public Law 86-272*

From: _____
Name of Tax Agency Official

Jurisdiction: _____

The MTC Hearing Officer for the Public Hearing on the proposed amendment to the MTC Statement of Information Concerning Practices of the MTC and Signatory States Under Public Law 86-272 has recommended the conduct of a Bylaw 7 survey to determine the Member States' interest in considering adoption of the amendment. The recommended amendment is attached to this Survey Response Form as *Exhibit A*. Should you wish a copy of the Hearing Officer's final report, please contact Ms. Teresa Nelson at the Commission's headquarters office at 202-624-8699.

The purpose of this survey is to determine how many affected Multistate Tax Compact Member States would consider adopting the proposed amendment, if the proposal were adopted as a uniformity recommendation by the Commission.

The question for your consideration and response is as follows:

If the Commission were to recommend to its affected Member States the adoption of the amendment to the Guideline" (which is attached hereto as Exhibit A), would your agency consider adoption of the proposal?

[] YES

[] NO

If you have marked "NO" as your answer above, but a change in the proposal would change your answer to "YES", please note such changes or other comments that you might have in the space provided on the next page.

EXHIBIT A

Proposed Amendment to the MTC Statement of Information Concerning Practices of the MTC and Signatory States Under Public Law 86-272 (amending the Guideline by deleting IV.A.20):

A. UNPROTECTED ACTIVITIES:

The following in-state activities (assuming they are not of a *de minimis* level) are not considered as either solicitation of orders or ancillary thereto or otherwise protected under P.L. 86-272 and will cause otherwise protected sales to lose their protection under the Public Law:

1. Making repairs or providing maintenance or service to the property sold or to be sold.

2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise. employees or agent(s) of the company in their representative status.

* * * * *

19. Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee within the state.

20. [RESERVED]

21. Conducting any activity not listed in paragraph IV.B. below which is not entirely ancillary to requests for orders, even if such activity helps to increase purchases.

List of Affected and Unaffected Multistate Tax Compact Member States

| Affected Member States | Unaffected Member States |
|----------------------------------|--------------------------|
| Alabama | Michigan |
| Alaska | South Dakota |
| Arkansas | Washington |
| California (Franchise Tax Board) | |
| Colorado | |
| District of Columbia | |
| Hawaii | |
| Idaho | |
| Kansas | |
| Maine | |
| Minnesota | |
| Missouri | |
| Montana | |
| New Mexico | |
| North Dakota | |
| Oregon | |
| Texas | |
| Utah | |

Through the resolution authorizing this survey, the Executive Committee has determined that an affected State within the meaning of Bylaw 7 is any full Member State that has a corporate income tax, a franchise tax based on income or a similar tax. This list reflects our best understanding of which Member States are appropriately classified as an "affected State" within the meaning of Bylaw 7 and which are not. **If you believe we have erroneously classified your State in the *List of Member States*, please advise us of that fact and the basis upon which you have reached the contrary conclusion. If you are an "affected State," regardless of how your State is classified on the *List of Member States*, please be sure to return your survey in all events**

Report of the Hearing Officer
On the
Public Hearing to Amend the
MTC Statement of Information
Concerning Practices of the MTC and
Signatory States Under Public Law 86-272

I. Executive Summary

The Multistate Tax Commission Statement of Information Concerning Practices of the MTC and Signatory States Under Public Law 86-272 was the subject of a public hearing on March 15, 2001. Specifically at issue is whether IV.A.20 of the guideline should be deleted as it is contrary to current state law.

The Hearing Officer recommends deletion of IV.A.20 from the guideline, and further recommends the authorization of a By-law 7 survey of the States for consideration in adopting the proposed deletion as a uniformity measure.

II. Report of the Hearing Officer

In 1986, the Multistate Tax Commission developed the Statement of Information Concerning Practices of Multistate Tax Commission and Signatory States Under Public Law 86-272, as amended 1/22/93 and as further amended 7/29/94. The purpose of the guideline is to assist states and corporate taxpayers to determine potential liability for a net income tax on income derived within the states borders from interstate commerce. P.L. 86-272 (15 U.S.C. §381) is the federal law that prohibits states from imposing net income taxes on a multistate enterprise's business activity in the state, if that activity consists only of the solicitation of orders for sales of tangible personal property, which are forwarded out of state for acceptance or rejection, and are filled by shipment or delivery from a point outside the state (Exhibit 1). The guideline lists specific activities that are considered solicitation and therefore protected by the federal law, as well as those activities that are not solicitation, and therefore fall outside the safe harbor provided by P.L. 86-272.

When the guideline was amended in 1993, one of the unprotected activities listed was the shipment or delivery of goods into a state by means of a private or contract carrier. The federal law is silent on whether the shipment or delivery must be accomplished via a common carrier, the Postal Service or other means of delivery. The provision in the guideline reads in its entirety:

20. Shipping or delivering goods into this state by means of private vehicle, rail, water, air or other carrier, irrespective of whether a shipment or delivery fee or other charge is imposed, directly or indirectly, upon the purchaser.

The statement was included because at least two states were litigating the issue at the time the provision was drafted.

Since then, a number of state courts have considered the question of whether shipment or delivery in the seller's own trucks or by contract carrier falls outside the federal law's protection, and all have rendered opinions that are contrary to the statement in the guideline.¹ (Exhibit 2) The legal reasoning in all of these cases is similar. Essentially, the courts found that because P.L. 86-272 is silent on the method of delivery or shipment, states cannot read more into the statute than what is there. Nothing in the statutory language or the legislative history permits an interpretation limiting delivery or shipment to common carrier; therefore, Congress must have intended the safe harbor to apply regardless of whether delivery or shipment is made by common or private carrier or in the seller's own trucks.

In light of these court decisions, the MTC Uniformity Committee requested the Executive Committee to authorize a public hearing to amend the guideline by deleting IV.A.20. Dan Bucks, MTC Executive Director, appointed Roxanne Bland, MTC Counsel, as Hearing Officer.

The public hearing was held on March 15, 2001. California and Oregon were present at the hearing via teleconference. Other attendees included René Blocker, Deputy Director, and Frank Katz; Deputy General Counsel (via telephone). No members of the public were present. The hearing officer stated the purpose of the hearing, i.e., whether IV.A.20 of the Guideline should be deleted. She also advised that all comments on the Guideline itself would be welcome, but would have no bearing on her final recommendation with respect to IV.A.20.

Oregon advised the hearing officer that IV.A.20 as it appears in the Guideline is not the law in that state. When it adopted the Guideline, it did not include IV.A.20 as a non-protected activity, because the Oregon courts had already ruled that such activity fell within the safe harbor afforded by P.L. 86-272.

California stated that its law was in compliance with the deletion of IV.A.20 from the Guideline.

The Hearing Officer advised that she would hold the period for public comment open until March 31, 2001. The hearing was adjourned.

The Hearing Officer received one written public comment before the hearing. By letter dated March 2, 2001, the Assistant Secretary, Taxes for the Vesper Corporation indicated support for the deletion of IV.A.20 from the Guideline (Exhibit 3). No other written comments were received.

¹ See, e.g., *Revenue Cabinet v. Rohm and Haas Kentucky, Inc.*, 929 S.W.2d 741 (1996); *National Private Truck Council v. Commissioner of Revenue, Massachusetts*, Civ. A. No. 93-5467-H (1997); and *Commonwealth of Virginia v. National Private Truck Council*, 253 Va. 74, 480 S.E.2d 500 (1997).

III. Recommendation

The Hearing Officer recommends that IV.A.20 be deleted from the Guideline. A Bylaw 7 survey should be conducted to determine whether Compact Member States would consider adopting the deletion of IV.A.20 as a uniformity measure.

§ 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.

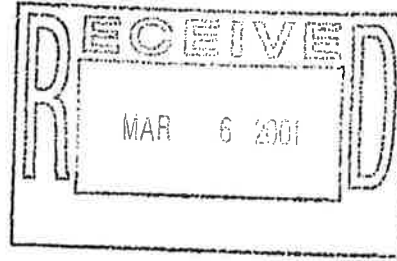
- (c) Sales or solicitation of orders for sales by independent contractors

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 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.



March 2, 2001

Ms. Roxanne Bland
Hearing Officer
Multi-State Tax Commission
444 North Capital Street NW Suite 425
Washington DC 20001

Re: MTC Guideline
Public Law 86 272

Dear Ms. Bland,


I am writing in support of the deletion of IV.A.20, the shipping and delivering of goods in the state by private vehicle as an unprotected activity. I believe this will go a long way in the realization in today's economy that the shipment of goods by one's own truck is just an extension of the solicitation of orders.

Many small companies are caught in this situation where their customer base lies in two separate states and, to provide good customer service, they deliver products across a state line for the purpose of filling an order. Many times these orders take place in a company showroom but good customer service calls for the delivery to the person's place of business or home.

I commend the Multi-State Tax Commission for recognizing these situations and for taking a proactive stance in giving many small businesses a much welcome and needed reprieve from this onerous section.

I thank the commission for letting people respond. Thank you for your attention in this matter.

Very truly yours,


Allan L. Lyons
Assistant Secretary, Taxes

ALL:abl

F:\Users\Abl\ALLal568.doc



rights as a matter of law. *Quinton Vespa*, 343 Mass. at 552 ; *Saphier v. Devonshire Street Fund, Inc.*, 352 Mass. 683, 685 (1967) .

The issue of law before this court is whether 830 Code Mass. Regs. 63.39.1(5), as construed and applied here by the Commonwealth, is preempted by ◀ P.L. 86-272 ▶ .

CONCLUSIONS OF LAW

The regulation was promulgated under the authority of G.L. c. 63 § 39 (1990) , which provides in pertinent part:

Except as otherwise provided herein, every foreign corporation ... actually doing business in the commonwealth, or owning or using any part or all of its capital, plant or any other property in the commonwealth, shall pay [excise tax].... A foreign corporation shall not be subject to tax under this chapter if the foreign corporation is engaged in the business of selling tangible personal property and taxation of that foreign corporation under this chapter is precluded by the Constitution or laws of the United States.

The regulation "describes the circumstances under which a foreign corporation is subject to the tax jurisdiction of Massachusetts under M.G.L. c. 63 § 39 ." 830 Code Mass.Reg. 63.39.1(1)(a) (1993). The regulation expressly recognizes that the Commonwealth's tax jurisdiction is limited by federal laws, including ◀ P.L. 86-272 ▶ . Under 830 Code Mass.Reg. 63.39.1(5), foreign corporations are immune from Massachusetts' income tax if they fall within ◀ P.L. 86-272 ▶ 's ambit. In relevant part, 830 Code Mass.Reg. 63.39.1(5)(a) states:

A foreign corporation whose activities fall within those described in G.L. c. 63 § 39 and 830 C.M.R. 63.39.1(4) [listing those activities that subject a corporation to taxation] nevertheless is not subject to Massachusetts taxation if Massachusetts is precluded from exercising its jurisdiction by ◀ P.L. 86-272 ▶ ... ◀ P.L. 86-272 ▶ currently precludes the imposition of the excise under M.G.L. c. 63 § 39 , upon a foreign corporation if the sole activity of the corporation in Massachusetts is the solicitation by the corporation's representatives (in the name of the corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside Massachusetts for approval or rejection, and provided that the orders are filled by shipment or delivery by common carrier or contract carrier from a point outside of Massachusetts.

The regulation goes on to define which activities constitute solicitation for the purposes of the Commonwealth's tax jurisdiction, tracking the language of *Wisconsin Dept. of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214 (1992) . In that case, the United States Supreme Court defined what constituted "solicitation" for purposes of ◀ P.L. 86-272 ▶ .³

◀ P.L. 86-272 ▶ itself provides in pertinent part that:

No State ... shall have the 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 ... are either, or both, of the following:

Preemption analysis arises in three situations. First, a state law will be preempted if, in the text of the federal legislation itself, Congress has explicitly provided that all state laws to the contrary are preempted. *Sawash*, 407 Mass. at 314 ; *E.E.O.C. v. Commonwealth of Mass.*, 987 F.2d 64, 67 (1st Cir.1993) . That is not the case here.

◀ P.L. 86-272 ▶ contains no statement of preemption. Rather, the text of the legislation recognizes that states may determine when an income tax will be imposed. It does not specifically preempt the enactment of such state laws.

In the absence of an express statement, preemption may be implied when, based on the totality of the circumstances, Congress has "occupied the field," creating a pervasive and comprehensive scheme of regulation which leaves no room for state legislation. *Brown*, 400 Mass. at 828 ; *Sawash*, 407 Mass. at 314 ; *Arthur D. Little, Inc. v. Comm'r of Health and Hospitals of Cambridge*, 395 Mass. 535, 548 (1985) ; *Building and Construction Trades Council of the Metro. Dist. v. Assoc. Builders and Contractors of Mass/Rhode Island, Inc.*, 507 U.S. 218, 224 (1993) ; *Tart v. Commonwealth of Mass.*, 949 F.2d 490, 500 (1st Cir.1990) . ▶ P.L. 86-272 ▶ is inconsistent with an exclusive federal scheme, however, in that it "envisions state participation" in the taxation of foreign corporations by expressly acknowledging state legislation. See, *MacInnes v. Comm'r of Public Welfare*, 412 Mass. 790, 796 (1992) .

Third, "if Congress has not displaced state regulation entirely, it may nonetheless preempt state law to the extent that it actually conflicts with the federal law." *Sawash*, 407 Mass. 311 ; *Brown*, 400 Mass. at 829 ; *Tart*, 949 F.2d at 500 . Actual conflicts arise when "compliance with both state and federal law is impossible or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Sawash*, 407 Mass. at 314 ; *Brown*, 400 Mass. at 829 .

Here, compliance with both statutes is not physically impossible. Some NPTC members use common carriers to ship or deliver goods into Massachusetts. Statement/5. By doing so, the corporation will be immune from taxation under the regulation; thus, it is possible for a corporation to comply with both the federal and state laws in such a way as to avoid taxation.

However, in this court's view, the regulation here does "stand as an obstacle to the purposes and objectives of the federal legislation." To determine what the Congressional purposes and objectives of ▶ P.L. 86-272 ▶ were, Congressional intent is the cornerstone. *Cipollone*, 504 U.S. at 516 ; *College Pro*, 418 Mass. at 728 . See also, *Sawash*, 407 Mass. at 317 .

B. Congressional Intent

To determine Congressional purpose and intent, the court must "examine the explicit statutory language and the structure and purpose of the statute." *College Pro*, 418 Mass. at 728. ▶ P.L. 86-272 ▶ . "[T]he unambiguous language of [▶ P.L. 86-272 ▶] ... is the principal source of insight into congressional purpose, and is to be applied as written." *Comm'r of Revenue v. Kelly-Springfield Tire Co.*, 419 Mass. 262, 267 (1994) .

▶ P.L. 86-272 ▶ was enacted in response to a series of Supreme Court decisions allowing states to levy income tax on foreign corporations. See, *Id.* at 265; *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 279 (1972) . In 1959, the Supreme Court held that the net income from a corporation transacting interstate business was taxable by states under a non-discriminatory, fairly apportioned levy. *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450 (1959) . The Court subsequently denied certiorari in two Louisiana cases, in which the lower courts upheld

Louisiana's tax on the income foreign corporations made on interstate business. ⁴

The business community reacted strongly to the impact these decisions would have, particularly on small businesses transacting commerce across state lines. 105 Cong.Rec. 16,359 (1959), quoted in Timothy J. Sweeney, *State Taxation of Interstate Commerce Under Public Law 86-272: "A Riddle Wrapped in an Enigma Inside a Mystery"*, 1984 B.Y.U. L.Rev. 169, 173 n. 25-26, 182 (1984); Paul J. Hartman, "Solicitation" and "Delivery" Under Public Law 86-272: An Uncharted Course, 29 Vand.L.Rev. 353, 357 (1976). There was concern that as a result of soliciting orders within a state, out-of-state corporations would be exposed to income tax liability. Sweeney, 1984 B.Y.U. L.Rev. at 172; Heublein, 409 U.S. at 280 .

As a result, ◀ P.L. 86-272 ▶ was enacted, purportedly as a temporary stop-gap to maintain the status quo pending further study. Id. at 281; Sweeney, 1984 B.Y.U. L.Rev. at 181-182; Hartman, 29 Vand.L.Rev. at 362. ◀ P.L. 86-272 ▶ "substantially limited the power of the states to tax income from interstate commerce." Hirshberg & Nedry, 46 Va.L.Rev. at 1241. It was designed to "define clearly a lower limit for the exercise" of a state's power to tax the local activities of foreign corporations, Heublein, 409 U.S. at 280, 281 n. 7 , by defining what "minimum activities would not be subject to state taxation." Sweeney, 1984 B.Y.U. L.Rev. at 180.

Thus, ◀ P.L. 86-272 ▶ was intended as a provision for "tax immunity" for businesses engaged solely in certain activities, rather than a grant of authority under which a state may levy a tax. Hirshberg & Nedry, 46 Va.L.Rev. at 1242 n. 12.

The general effect of Public Law 86-272 is to provide guidelines, established by Congress, as to what constitutes 'doing business' within a state for the purpose of determining that state's power to impose a net income tax on income derived from Interstate commerce.... [Public Law 86-272] specifies certain minimum activities which can be carried on within a state by a person engaged exclusively in interstate commerce with the assurance that none of his income can be taxed by such state or political subdivision.

Id. at 1242. From this, it is discerned that the congressional intent and purpose behind ◀ P.L. 86-272 ▶ "was to remove from the ambit of harassment those businesses having few, if any, real roots in the importing or market state." Id. at 1255.

C. Taxation of Private Truck Deliveries in Other Jurisdictions

Other states also levy income tax on foreign corporations immune from taxation under ◀ P.L. 86-272 ▶ but for their use of private trucks to deliver the solicited goods. The results have varied, even within the same state. In 1992, Florida found that a corporation whose only activities within the state were solicitation of orders filled by shipment or delivery from a point outside the state by private trucks was exempt from corporate income tax. Fla. Tech. Assistance Advisement No. 92(M)-008 (October 15, 1992), Pl.'s Memo. in Supp. Summ. J. at Appendix C. Three years later, however, Florida treated the shipment and delivery of goods by company-owned vehicles as unprotected, taxable activity. Fla. Tech. Assistance Advisement No. 95(c) 1-004 (March 17, 1995), attached to Def.'s letter to court of June 14, 1995.

In 1992, the Virginia Department of Taxation revoked its prior policy, and began taxing corporations who delivered goods into Virginia using private trucks. Corporation Income Tax – Ruling Req. PD 92-230 (November 9, 1992), attached to Def.'s Memo. in Opp'n Pl.'s Summ. J. at 12 n. 3. The Virginia Circuit Court, however, overturned this policy,

holding that the Virginia regulation violated ◀ P.L. 86-272 ▶ : "the clear and plain meaning of 15 U.S.C. § 381 is that States may not impose a net income tax on out-of-state corporations whose only contact with the taxing state consists of soliciting orders for goods and delivering the goods into the State in the corporations' own vehicles." Order, Alexandria Circuit Court, dated December 18, 1995, exhibit to Pl.'s Memo. in Supp. of Mo. to File Supplemental Authority.

New York found that delivery using private vehicles was protected under ◀ P.L. 86-272 ▶ . Advisory Op. TSB-A-84(11)C (September 14, 1984), Pl.'s Memo. in Supp. Summ. J. at Appendix A. New Jersey tax authorities also have decided that a manufacturer or wholesaler who merely delivers their own goods into the state in their own trucks is protected under ◀ P.L. 86-272 ▶ . New Jersey State Tax News, Spring 1996, attached to Pl.'s Memo. in Supp. of Second Mo. to File Supplemental Authority in Supp. of Pl.'s Summ. J.

D. Definition of "Delivery"

The term "delivery" is not expressly defined in ◀ P.L. 86-272 ▶ , and the lack of federal or state caselaw interpreting the term leaves this court without a clear statutory directive regarding whether delivery of goods into Massachusetts by private truck is immune from taxation under ◀ P.L. 86-272 ▶ . The legislative history indicates that the congressional committee evaluating ◀ P.L. 86-272 ▶ believed that delivery of goods in a company-owned vehicle was protected from taxation. See, Fla. Tech. Assistance Advisement No. 92(M)-008 (October 15, 1992), *supra.*, citing the Willis Committee Report.

DOR interprets "delivery", in conjunction with the U.C.C, to mean that title passes outside the Commonwealth through the use of a common carrier. Thus, DOR argues, if a foreign corporation delivers goods into Massachusetts in its own trucks, title passes inside Massachusetts, and ◀ P.L. 86-272 ▶ does not protect the corporation from Massachusetts' income tax.

However, "delivery" also may be defined as the "act of putting property into the legal possession of another," Webster's Unabridged New International Dictionary 597 (3d ed.1967), regardless of where that transaction occurs. Black's Law Dictionary defines "delivery" as "the act by which the res or substance thereof is placed within the actual or constructive possession or control of another." Black's Law Dictionary 428 (6th ed. 1990).

A general rule of statutory construction is that "where the language of the statute is plain, it must be interpreted in accordance with the usual and natural meaning of the words." *Comm'r of Revenue v. AMIWoodbroke, Inc.*, 418 Mass. 92, 94 (1994) . A court should not construe a statute in such a way that produces an absurd or unreasonable result when a sensible construction otherwise is readily available. *Manning v. Boston Redevelopment Auth.*, 400 Mass. 444, 453 (1987) .

A reasonable, sensible construction of the term "delivery" in the context of ◀ P.L. 86-272 ▶ would thus not limit it solely to deliveries occurring out-of-state. ◀ P.L. 86-272 ▶ is clear on its face. Under its explicit language, Massachusetts may not tax a corporation whose only business activity within the Commonwealth consists of soliciting orders for tangible goods, provided that "the orders are sent outside the State for approval and the goods are delivered from out-of-state." *Wrigley*, 505 U.S. at 215 . As long as the solicited goods are shipped or delivered from a point outside the state, the corporation is immune from income tax based on that transaction. *Hartman*,

Vand.L.Rev. at 360-361. If Congress had intended to define "delivery" to include only those transfers of title occurring outside the taxing state, it would have inserted language to that effect. See, *Kelly-Springfield*, 419 Mass. at 267 .

DOR also argues that delivery in private vehicles creates a separate and significant service in Massachusetts, creating a business presence within the Commonwealth and subjecting the corporation to Massachusetts' income tax. The court is unpersuaded. The deliveries at issue are directly connected to the solicitation activities protected under ◀ P.L. 86-272 ▶ .

DOR also contends that ◀ P.L. 86-272 ▶ is unconstitutional because it impairs the sovereign power of Massachusetts to tax commerce within their borders. This contention is without merit. The constitutionality of ◀ P.L. 86-272 ▶ was upheld in *International Shoe Co. v. Corcreham*, 164 So.2d. 314 (La.), cert. denied, 379 U.S. 902 (1964) . Furthermore, ◀ P.L. 86-272 ▶ only provides immunity from net income taxes. It does not prevent Massachusetts from taxing foreign corporations based on unprotected activities, such as an out-of-state corporation maintaining an office or place of business within the Commonwealth, or engaging in activities beyond the scope of ◀ P.L. 86-272 ▶ .

E. Conclusion

The regulation imposes income taxes on corporations who have made a business decision to conduct transactions across interstate lines using private trucks, instead of common carriers, to deliver their goods into Massachusetts. Approximately 45% of corporations using private trucks are engaged in manufacturing. Private Fleet Profile/15. These corporations may have decided to use private trucks, for example, because the use of a private truck may be more appropriate for short hauls of heavy goods, or longer hauls of lighter goods. Private Fleet Profile/15.

Congress enacted ◀ P.L. 86-272 ▶ to protect corporations from being taxed by a state when its only contact with that state was solicitation of goods, and shipment or delivery of those goods from a point outside the taxing state. NPTC has met its burden of proof by demonstrating that the regulation places tax liability on a foreign corporation which would otherwise be immune under ◀ P.L. 86-272 ▶ . This exercise of the Commonwealth's tax jurisdiction conflicts with the purpose and policies behind the enactment of ◀ P.L. 86-272 ▶ .

ORDER

For the foregoing reasons, it is hereby ORDERED that a declaration shall enter DECLARING that:

Regulation 830 Code Mass.Reg. 63.39.1(5) (1993) violates 15 U.S.C. § 381 (P.L. 86-272) by reducing the scope of tax immunity the federal statute affords to foreign corporations whose only contact with Massachusetts consists of soliciting orders for tangible personal property, and delivering such property into the Commonwealth from a point outside Massachusetts in the corporation's private vehicles.

Judgment to enter accordingly.

1.

Since this court finds that the regulation is preempted by federal law, the court will not reach plaintiff's other claims regarding the regulation.

2.

The statement contains three separate documents which will be referred to as follows: "[Document name]/[page number]".

3.

The Wrigley case did not address what constitutes "delivery", specifically the facilities employed for delivery, for purposes of tax immunity under ◀ P.L. 86-272 ▶ .

4.

Brown-Forman Distillers Corp. v. Collector of Revenue, 101 So.2d 70 (La.1958), cert. denied, 359 U.S. 28 (1959) ; and International Shoe Co. v. Fontenot, 107 So.2d 640 (La.1958), cert. denied, 359 U.S. 984 (1959) .

Next doc ▶

© Copyright 2001. RIA. All rights reserved.

Results ▶

Database List: Document List: Document

Document Location:Kentucky 1Cases 1Appellate court 11996 1

- REVENUE CABINET, Commonwealth of Kentucky, Appellant, v. ROHM AND HAAS KENTUCKY, INC., Appellee., 929 SW2d 741, 09/20/1996

◀ Prev doc [Go to first keyword](#) ▶**REVENUE CABINET, Commonwealth of Kentucky,
Appellant, v. ROHM AND HAAS KENTUCKY, INC., Appellee.****Case Information:****Docket/Court:** 95-CA-2861-MR Court of Appeals of Kentucky**Date Issued:** 09/20/1996**Tax Type(s):** Corporate Income Tax, Corporate license**Cite:** 929 SW2d 741**Case Information:** aff'g 94-CA-398, rev'g BTA K91-R-77-**Counsel**

Kenton L. Ball. Frankfort, for Appellant.

Joseph L. Ardery, Christa Foster Crawford, Louisville, for Appellee.

Before GUDGEL, HUDDLESTON and SCHRODER, JJ.

OPINION

GUDGEL, Judge.

OPINION

This is an appeal from a judgment entered by the Franklin Circuit Court in an appeal from the Kentucky Board of Tax Appeals (KBTA). The court adjudged that the KBTA erred by finding that certain "dock sales" of products by appellee Rohm and Haas of Kentucky, Inc. (taxpayer) to its nonresident parent, Rohm and Haas Company, Inc. (parent), which products were delivered to the parent in Kentucky and shipped to other states on trucks provided by the parent, should be assigned as Kentucky sales for purposes of determining the taxpayer's liability for Kentucky corporate income taxes. On appeal, appellant Revenue Cabinet, Commonwealth of Kentucky (cabinet) contends that the court erred (1) by relying upon evidence which is not in the record in determining that the applicable statutes, KRS 136.070(3)(d)(1) and KRS 141.120(8)(c)

(1) , are ambiguous, (2) by finding that the KBTA erred by concluding that the "dock sales" at issue were properly apportioned to the taxpayer's Kentucky income as having been made within this state, and (3) by failing to find that the taxpayer's position is factually incorrect and legally unsupported. We disagree with all of the cabinet's contentions. Hence, we affirm.

Because the facts of this matter were stipulated by the parties and are well known to them, they need not be recited in detail herein. Briefly, however, we note that the taxpayer, a wholly-owned subsidiary of the parent, has its tax status in Louisville. The taxpayer manufactures certain products which, for income tax purposes, are statutorily classified as tangible personal property. For the purposes of this appeal, all of these products in question are sold to the nonresident parent, are picked up at the taxpayer's docks in the parent's own trucks, and are shipped to customers and locations outside of Kentucky.

This dispute arises from the fact that the cabinet takes the position that, for purposes of KRS 136.070(3)(d)1 and KRS 141.120(8)(c)1 , the taxpayer's sales to its parent constitute sales of tangible property within this state when the parent's own trucks are used to ship the products out of state. These statutes provide that a sale of tangible personal property is deemed to be in this state if "[t]he property is delivered or shipped to a purchaser, other than the United States government, or to the designee of the purchaser within this state regardless of the f.o.b. point or other conditions of the sale." KRS 136.070(3)(d)1 and KRS 141.120(8)(c)1. The parties in essence agree that, as drafted, the statute presents a narrow issue of statutory construction, i.e. whether the statutory phrase "within this state" modifies the word "delivered" or the word "purchaser." If the phrase modifies the word "delivered" as the cabinet contends, the dock sales involved herein are Kentucky sales for purposes of the corporate income tax statutes because they involved in-state deliveries. On the other hand, if the phrase "within this state" modifies the word "purchaser" as the taxpayer contends, then the dock sales are not Kentucky sales for purposes of the corporate income tax statutes since the products were delivered or shipped to an out-of-state purchaser.

KRS 136.070(3)(d)1 and KRS 141.120(8)(c)1 are, with one exception, copied verbatim from Section 16(a) of the Uniform Division of Income for Tax Purposes Act (UDITPA).¹ Fortunately for our analysis, the pertinent language of this uniform statute has previously been interpreted by appellate courts in several other jurisdictions.

In the first such case, Department of Revenue v. Parker Banana Co., 391 So.2d 762 (Fla.App.1980) , a Florida taxpayer imported bananas and sold some of them to out-of-state wholesalers, shipping them either by common carriers or by trucks owned or rented by the wholesalers. As in Kentucky, Florida's applicable statute is copied from Section 16(a) of the UDITPA. In concluding that the sales to out-of-state wholesalers who picked up bananas dockside other than by common carrier were not sales for Florida corporate income tax purposes, the appellate court stated as follows:

In the phrase "property delivered or shipped to a purchaser within this state" to what do the words "within this state" refer? That is the simple question which confronts us, and neither party has cited to us any authority which specifically addresses that question. Our own extensive research has produced none.

The Department reaches its position in this case by applying the words "within this state" to the word "delivered." The Department contends that those out-of-state purchasers from Parker Banana who arrange to pick up their bananas other than by common carrier take delivery as a matter of

law at dockside in Tampa. Therefore, says the Department, in each such case there is a delivery within this state and the sale is within this state.

We disagree with the Department's construction of the statute. In our view, the words "within this state" must refer to the word "purchaser" if the legislative intent is observed. Under our construction of the apportionment statute, a sale is in this state if the sale is to a Florida purchaser and that, in turn, depends on the destination of the goods sold. It matters not whether delivery or shipment occurs in Florida or out of Florida. Our interpretation of the statute accords with the legislative intent to assign to Florida for tax purposes a portion of net income attributable to sales by the taxpayer *in the Florida market* as determined by the destination of the goods.

Id. at 763.

Next, in *Olympia Brewing Co. v. Commissioner of Revenue*, 326 N.W.2d 642 (Minn 1982), the Minnesota Supreme Court held that beer sold by a Minnesota brewery, and picked up dockside by out-of-state distributor-purchasers in their own trucks for sale outside Minnesota, were not sales within the state for purposes of apportioning liability for state income taxes. In reaching that conclusion, the court stated:

C. To sum up, neither the legislative history nor the uniform act specifically resolves the question of how dock pickup sales should be treated but they tend to support the view that such sales are not "within this state." Certain practical considerations decide the issue conclusively.

1. We believe the fatal weakness in the commissioner's position is his inability to justify treating differently a sale where the out-of-state distributor picks up the goods in his own trucks from a sale where the same distributor has a common or contract truck carrier pick up the goods at the same dock, f.o.b. seller's place of business. True, the statute says the f.o.b. point or other conditions of sale should not be considered; nonetheless, the anomaly which inheres in the commissioner's argument makes such a consideration necessary. Assume the commissioner's position to be correct: that "within this state" modifies "delivered or shipped" so that the triggering event is the purchaser's taking physical possession within Minnesota. When delivery is made f.o.b. seller's place of business, physical delivery is tendered within Minnesota to the same extent as for a dock pickup sale. The buyer in an f.o.b. seller's place-of-business transaction in effect takes delivery through his agent, the carrier. Yet the commissioner concedes that an f.o.b. seller transaction is an out-of-state sale where a common or contract carrier is used. This result makes the selection of mode of transportation dispositive, which, as even the commissioner concedes, would be contrary to the statutory language.

We think that to distinguish between a sale within or without the state on the basis of the mode of transportation – whose truck does the transporting – is an untenable distinction. It is not in keeping with the general policies of the 1973 amendment. Further, there is nothing in the legislative history, regulations, articles of commentators or case law that compels the interpretation of the statute as urged by the commissioner.

Id. at 647.

Next, in *Pabst Brewing Co. v. Wisconsin Department of Revenue*, 130 Wis.2d 291 , 387 N.W.2d 121 (Wis.App.1986) , the Wisconsin court reached the same conclusion as the Minnesota court on substantially similar facts, although for different reasons. In *Pabst*, as in *Olympia*, a brewer sought to treat sales of beer to out-of-state wholesalers, who picked up the beer dockside at the brewery in their own trucks, as not being sales within the state for income tax liability apportionment purposes. The court held in favor of the brewer, stating as follows:

We conclude sec. 71.07(2)(c)2, Stats. ambiguously treats out-of-state purchasers. Two reasonable readings are possible. The phrase "within this state" may be read to modify "delivered or shipped." That reading makes the purchaser's physical possession of the product in Wisconsin the condition for a Wisconsin sale. The department and commission read the statute that way to conclude that Pabst's sales to out-of-state wholesalers who pick up the product in Milwaukee are sales "in this state." Alternatively, the phrase "within this state" may be read to modify "purchaser" rather than "delivered or shipped." If that is the reading, the purchaser's business location controls. Pabst argued and the circuit court accepted this position.

....

We conclude that the legislature intends "within this state" to modify "purchaser." Section 71.07(2)(c)2, Stats., provides that whether a sale occurs in this state is unaffected by "f.o.b. point or other conditions of the sale." The legislature's intent regarding the effect of those two factors is beyond dispute. Yet the department's approach makes a condition of the sale, the method of delivery, the central factor when determining Wisconsin sales, notwithstanding the contrary legislative intent expressed in sec. 71.07(2)(c)2. We therefore conclude that the location of the purchaser controls. That out-of-state wholesalers pick up Pabst's beer in Wisconsin rather than having it delivered is therefore immaterial. The department incorrectly relied on this distinction to impose additional franchise tax on Pabst.

387 N.W.2d at 122-23.

Recently, in *McDonnell Douglas Corporation v. Franchise Tax Board*, 26 Cal.App.4th 1789, 33 Cal.Rptr.2d 129 (1994) , a California appellate court held that sales of aircraft, which were delivered in California to purchasers although they were destined for out-of-state use, were not sales within the state for purposes of calculating franchise taxes due. In reaching this conclusion the court noted:

The Board attempts to distinguish each of these cases not only because of differences in each state's statute, but on a factual basis. The Board also argues that the adoption of a destination rule results in an administrative nightmare because of the difficulty in proving up the destination of each item sold.

....

In addition to being contrary to the rule adopted by several other states, an adoption of the rule urged by the Board would run completely against the primary purpose of UDITPA, that is to ensure uniformity among the states

in taxation matters.

UDITPA has been interpreted to provide that "sales of tangible personal property should be apportioned to the state or county of destination, provided the taxpayer is subject to tax in such state or country. If the taxpayer is not subject to tax in the state or country of destination, the sales are apportioned to the state or country from which shipped." (Keesling & Warner, California's Uniform Division of Income for Tax Purposes Act (1968) 15 U.C.L.A. L.Rev. 655, 671.) In UDITPA, "the drafters ... made a deliberate policy decision to recognize the contribution of the 'consumer' states to the production of income by allocating sales to those states that produce the buyer." (Reich, Dock Sales - The New State Income Tax Battleground (1982) 1 J.St.Taxation 42, 43.)

33 Cal.Rptr.2d at 132-33. Moreover, several other courts which have interpreted statutes patterned after Section 16(a) of the UDITPA have also reached similar conclusions. See, e.g. Lone Star Steel Co. v. Dolan, 668 P.2d 916 (Colo.1983) ; Texaco, Inc. v. Groppo, 215 Conn. 134, 574 A.2d 1293 (1990) ; Strickland v. Patcraft Mills, Inc., 251 Ga. 43 , 302 S.E.2d 544 (1983) .

As is made clear by a review of the foregoing authorities, those courts which have had opportunities to address the issue have adopted a "destination" rather than a "place of delivery" rule when interpreting statutory language like that set out in Section 16(a) of the UDITPA. Although we have considered the cabinet's arguments, we fail to perceive any valid reason why Kentucky, when interpreting the applicable Kentucky statutes, should adopt a minority view which is inconsistent with the destination rule uniformly adopted by other states. As noted by the California court, if we adopted the minority view we would undermine the UDITPA's purpose of ensuring uniformity among the states in taxation matters. This we decline to do, especially since we find that the cabinet's arguments in support of its contentions are far from compelling. Indeed, the cabinet cites no relevant or controlling authorities to support its position. In fact, its argument that an expired Kentucky regulation supports its position is specious, given the fact that the factual example set forth in subsection (4) of the regulation emphasizes that the key factor to be considered within determining whether a sale to a purchaser is within this state is whether the purchaser's permanent facility is located in this state, rather than whether the property is to be delivered to customers in this state.

Finally, we also note that there is no merit to the cabinet's argument that a "crucial" difference exists between the instant proceeding and the cases from other jurisdictions which are adverse to its position. In fact, contrary to the cabinet's contention, the cases which the taxpayer relies upon involve facts which are essentially the same as, rather than distinguishable from, those in the instant action. Moreover, while these decisions are not binding upon us, we certainly may embrace and apply their reasoning to the matter now before us. Further, the mere fact that some of the cited decisions from other jurisdictions rely upon documents which set out their own legislatures' intentions in adopting the UDITPA does not in any way impede our interpretation of the applicable Kentucky statutes, as obviously our legislature would not knowingly enact statutes patterned after a uniform act if those statutes were intended to be interpreted inconsistently with the accepted interpretation of the uniform act by other states.

For the reasons stated, the court's judgment is affirmed.

All concur.

1.

Our legislature added the phrase "or to the designee of the purchaser" to the pertinent language of the uniform statute. However, this amendment of the uniform is not relevant to the issues before us in this appeal.

Next doc ▶

© Copyright 2001. RIA. All rights reserved.

Results »

Database List Document List Document

Document Location:Virginia 1Cases 1Highest court / court of last resort 11997 1

- COMMONWEALTH OF VIRGINIA, DEPARTMENT OF TAXATION v. NATIONAL PRIVATE TRUCK COUNCIL., 253 Va 74 480 SE2d 500, 01/10/1997

◀ Prev doc [Go to first keyword](#) ▶**COMMONWEALTH OF VIRGINIA, DEPARTMENT OF TAXATION v. NATIONAL PRIVATE TRUCK COUNCIL.****Case Information:****Docket/Court:** 960575 Supreme Court of Virginia**Date Issued:** 01/10/1997**Tax Type(s):** Corporate Income Tax**Cite:** 253 Va 74, 480 SE2d 500

Present: All the Justices

Donald H. Kent, Judge.

OPINION

OPINION BY JUSTICE ELIZABETH B. LACY

In this declaratory judgment action, we determine whether a regulation issued by the Virginia Department of Taxation regarding corporate income taxation violates federal statutory law.

In 1959, Congress passed ◀ Public Law 86-272 ▶, codified as 15 U.S.C. Section(s) 381 (Section(s) 381). That statute provides, in pertinent part:

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 ... are ... :

(1) the solicitation of orders by such person ... 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. [Emphasis added.]

The Virginia Department of Taxation (the Department) maintains that the solicitation of

goods and the delivery of goods are two separate transactions and considers Section(s) 381 to provide immunity for solicitation only. Based on this premise, the Department adopted a regulation extending the immunity from state income taxation afforded under Section(s) 381 only to those instances in which the shipment or delivery of goods is accomplished by common carrier. Va. Reg. Section(s) 630-401(G) (1985) (the Virginia Regulation). Thus, under the Department's interpretation, any foreign company that solicits and approves orders for its merchandise under the conditions described in Section(s) 381, but delivers the merchandise to Virginia using its own vehicles, is subject to Virginia tax on the income derived from such sales.

The National Private Truck Council (the Council), a national trade association representing more than 1,000 companies that operate their own private truck fleets, filed a bill of complaint for declaratory judgment seeking a declaration that the Virginia Regulation violates Section(s) 381 because it limits immunity from state income taxation to those instances in which goods are delivered by common carrier. Cross motions for summary judgment were filed, and the trial court entered an order granting summary judgment to the Council. We awarded the Department an appeal and will affirm the judgment of the trial court. ¹ Section 381, by plain and clear language, extends immunity to a particular income-generating transaction. This transaction consists of soliciting orders, approving the orders, and shipping or delivering the goods ordered. To limit the tax immunity granted by Section(s) 381 to the activity of solicitation only, as the Department suggests, renders the protection intended by that section meaningless. Potentially taxable income is not generated within the taxing state until there has been a successful "shipment or delivery" of goods. Exempting merely "solicitation" is no exemption at all.

Whether a particular activity constitutes solicitation, approval, or delivery may require construction of those terms. *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, 505 U.S. 214, 223-231 (1992) (whether certain actions constitute solicitation). A joint congressional committee studying the matter of state taxation of interstate commerce has stated that, although Section(s) 381 "makes it clear that delivery of goods into a State does not deprive the selling company of statutory immunity, there can be doubt about the meaning of delivery." H.R. Rep. No. 88-1480, at 146 (1964). Thus, while the meaning of the word "delivery" may be disputed in a particular factual situation, delivery is a protected activity under Section(s) 381 when undertaken in conjunction with the other elements of the immunized income-producing transaction.

In this case, the Department has conceded that the use of company-owned trucks constitutes "delivery" of the goods as that term is used in Section(s) 381. The only issue is whether the Virginia Regulation, which defines the manner of delivery necessary to qualify for immunity from state taxation under Section(s) 381, violates federal law. Code Section(s) 58.1-205.

In enacting Section(s) 381, Congress did not identify any manner of delivery necessary to qualify for the immunity. Section 381 does not specify common carrier, contract or private carrier, or any other particular method of delivery. In the absence of a qualification in the federal statute, the Department may not add conditions to, or otherwise limit, the protection offered by Section(s) 381. See *Comm'r of Revenue v. Kelly-Springfield Tire Co.*, 643 N.E.2d 458, 461 (Mass. 1994). Therefore, the Virginia Regulation violates the plain meaning of Section(s) 381 because it limits the conditions under which a company is entitled to immunity from state taxation.

Accordingly, we will affirm the judgment of the trial court.

Affirmed.

1.

The Department initially filed a demurrer challenging the standing of the Council, see *Carnes v. Board of Supervisors of Chesterfield County*, 252 Va. 377, ___ S.E.2d ___ (1996) , but withdrew the demurrer prior to a ruling by the trial court. Therefore, that issue has been waived. *Princess Anne Hills Civic League, Inc. v. Susan Constant Real Estate*, 243 Va. 53, 59 n.1, 413 S.E.2d 599, 603 n.1 (1992) ; *Lynchburg Traffic Bureau v. Norfolk and Western Railway Co.*, 207 Va. 107, 108, 147 S.E.2d 744, 745 (1966) . Similarly, the Department did not assert a claim that its sovereign immunity had not been waived for declaratory judgment actions, see *Virginia Physical Therapy Ass'n v. Virginia Board of Medicine*, 245 Va. 125, 427 S.E.2d 183 (1993) , and, therefore, we do not address that issue.

Next doc ▶