No Shade for Cloud Computing Income Under P.L. 86-272

by Richard L. Cram

Richard L. Cram is the director of the Multistate Tax Commission's National Nexus Program, which offers a multistate voluntary disclosure program. He thanks Michael Fatale, Brian Hamer, and Helen Hecht for their helpful suggestions concerning this article.

This article states the author's own views, which are not necessarily those of the MTC.

In this viewpoint, Cram responds to a recent State Tax Notes article by Martin Eisenstein and Nathaniel Bessey, arguing that Public Law 86-272 implicitly preempts states' ability to impose net income tax on a cloud computing service provider's income if the provider has no in-state business activities. Cram writes that the federal statute contains no implicit preemption and is unlikely to protect cloud computing service providers' income.

In their recent article concerning federal constraints on state taxation of cloud computing income, Martin I. Eisenstein and Nathaniel A. Bessey1 contend that Public Law 86-2722 implicitly preempts states' ability to impose net income tax on a cloud computing service provider's income if the provider has no in-state business activities. Cram writes that the federal statute contains no implicit preemption and is unlikely to protect cloud computing service providers' income.

Cloud computing essentially involves providing the customer with remote access to computer software, hardware, or both. The language of P.L. 86-272, its legislative history, and court decisions construing it do not support the authors' contention. P.L. 86-272 protects an out-of-state seller from a state or local net income tax when the seller's activities are limited to in-state solicitation of orders for the sale of tangible personal property if the orders are sent out-of-state for acceptance and delivery of the items occurs from a point outside the state.4 P.L. 86-272 has no apparent application to cloud computing.

Eisenstein and Bessey wrote their article while South Dakota v. Wayfair Inc.5 was pending, but they nonetheless claimed their implicit preemption argument stands, regardless of the outcome in that case.6 Wayfair has been decided. The U.S. Supreme Court, in reviewing South Dakota v. Wayfair Inc.7

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3 Supra note 1, at 770.
4 15 U.S.C. section 381(a)(1). “Missionary sales” or independent contractor solicitation activities, addressed in 15 U.S.C. section 381(a)(2) and (c), are beyond the scope of this article.
6 Supra note 1, at 770 (“We believe that P.L. 86-272 provides a defense to the imposition of an income tax when the service is all performed remotely and the service provider itself performs no activities within the taxing state.”).
Dakota’s economic nexus statute, S.B. 106, overruled Quill and National Bellas Hess, disposed of the physical presence nexus standard for requiring remote sellers to collect use tax, and determined that substantial nexus under the commerce clause existed as to the internet retailer respondents. The Court remanded the case to the South Dakota Supreme Court to determine the statute’s constitutionality. The Court acknowledged that an internet seller’s “economic and virtual contacts” in the market state may be considered in determining whether the substantial nexus prong of the four-part Complete Auto commerce clause test is satisfied. Although Wayfair dispensed with the Quill physical presence nexus requirement for imposing a use tax collection duty on an out-of-state seller, that decision also applies to income tax nexus analysis. Before Wayfair, with rare exception, state courts consistently held that the now-overruled Quill physical presence requirement did not apply to income tax nexus.

The first section of this article reviews the background and language of P.L. 86-272 to show that its preemption is narrowly limited to state taxation of income from sales of tangible personal property under some circumstances. The second section reviews the legislative history of P.L. 86-272 and interpretive court decisions, showing the lack of any implicit preemption of state taxing authority. The third section explains that the P.L. 86-272 elements needed to protect cloud computing income from taxation are unlikely to be present. The fourth section discusses Wayfair’s impact on income tax nexus analysis applicable to cloud computing income: physical presence in the market state is not necessary for substantial nexus.

I. P.L. 86-272 Preemption

Congress enacted P.L. 86-272 as a stop gap measure in reaction to and only a few months after Northwestern States Portland Cement. That case upheld Minnesota’s imposition of its apportioned net income tax on an out-of-state manufacturer whose operations in the state were limited to sales solicitation (the company had permanent sales staff and an office in the state).

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13. S.B. 106 requires sellers with no physical presence making sales to South Dakota customers exceeding either $100,000 in sales or 200 or more transactions in the prior year to collect and remit its use tax.
14. Complete Auto Transit Inc. v. Brady, 430 U.S. 274, 279 (1977) (The Court will sustain a tax so long as it applies to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services the state provides). 7
15. 138 S. Ct. at 2099. Before Wayfair, with rare exception, state courts consistently held that the now-overruled Quill physical presence requirement did not apply to income tax nexus. The Court has repeatedly denied review of that issue. Wayfair permits a determination of substantial nexus regarding a cloud computing service provider when the provider derives net income from customers — regardless of the provider’s physical presence in the market state.
After that decision, multistate businesses expressed concern about the burden of complying with several states’ income tax laws, based solely on their solicitation activities in those states.16

P.L. 86-272 provides that no state or political subdivision shall have the power to impose a net income tax on an out-of-state seller deriving income from interstate commerce if the seller’s only business activities within the state are:

the solicitation of orders by such person, or his representative, in such State for sale 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.19

Under this language, P.L. 86-272 protection applies only when there is in-state solicitation of orders for sales of tangible personal property, assuming the other statutory criteria are met. Eisenstein and Bessey acknowledge that P.L. 86-272 limits the categories of protected activities to solicitation of sales of tangible personal property in a state, but argue that the law “does not limit the categories of income from interstate commerce that are immune from taxation.”20 Thus, they claim, “it does not follow that if a company sells services, but engages in no activities in a state, the state has the power to tax income arising from those sales.”21 However, nothing in the language of P.L. 86-272 indicates that it preempts state taxation of an out-of-state seller’s interstate income derived from the sale of services.22

A state may voluntarily apply the P.L. 86-272 preemption to taxation of income from services.23 Absent such a voluntary application, however, state taxing agencies generally view the P.L. 86-272 preemption as applying only to taxation of income from sales of tangible personal property.24 Tax scholars and commentators have also long noted that the P.L. 86-272 preemption applies only to taxation of income from sales of tangible personal property — not services. For instance Paul J. Hartman and Charles A. Trost wrote:

Public Law 86-272 exempts from net income taxation only sales of tangible personal property. It has no application to the activities connected with the sale of services. . . . Presumably, therefore, there would be no tax relief in Public Law 86-272 from an otherwise valid tax on net income of such businesses as trucking companies, taxicabs, pipelines, newspapers, radio and television broadcasting, telephone and telegraph companies, railroad, airline and water transportation, and insurance.25


See Virginia Department of Taxation Ruling of Commissioner P.D. 10-252 (Nov. 10, 2010) (“Virginia applies P.L. 86-272 to sales of services and intangibles, although P.L. 86-272 only applies to sales of tangible personal property.”).

Similarly, California Franchise Tax Board, FTB Publication 1050, June 2017 (adopting the MTC statement).


19 Supra note 1, at 772.

20 Id., n.18. The authors cite a footnote in MBNA Bank, 640 S.E.2d at 229 n.6 (discussing unsuccessful efforts to amend P.L. 86-272 to expand its preemption to other forms of property and services). Those efforts would have been unnecessary if the P.L. 86-272 preemption applied beyond the taxation of income from sales of tangible personal property.

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26 Id., n.18. The authors cite a footnote in MBNA Bank, 640 S.E.2d at 229 n.6 (discussing unsuccessful efforts to amend P.L. 86-272 to expand its preemption to other forms of property and services). Those efforts would have been unnecessary if the P.L. 86-272 preemption applied beyond the taxation of income from sales of tangible personal property.
II. No Implicit Preemption of State Taxing Authority

Under federalism principles, the power to tax is “central to state sovereignty.” A court considering federal preemption of state taxing authority assumes no preemption absent a “clear and manifest purpose of Congress.” Defining the preemptive reach of a statute implies no preemption beyond that reach. When a federal statute unambiguously forbids states from imposing a particular kind of tax, “courts need not look beyond the plain language of the federal statute to determine whether a state statute that imposes such a tax is pre-empted.”

Eisenstein and Bessey contend that congressional intent for implicit preemption in P.L. 86-272 can be “explicitly stated in the statute’s language or implicitly contained in its structure and purpose.” They also quote language from Heublein to the effect that P.L. 86-272 was designed to define a lower limit for the exercise of state taxing power, noting that this same language was quoted in Wrigley. They argue that when a company has no in-state business activities, it evidently falls below that “lower limit” and has protection under P.L. 86-272. Thus, the statute somehow implicitly preempts the state’s power to tax the company’s income regardless of whether that income derives from sales of tangible personal property or services.

There are several problems with this argument. First, as discussed, the plain language in P.L. 86-272 provides only a narrow preemption. The law’s explicit preemption language applies only to taxation of income derived from sales of tangible personal property. Second, the legislative history of P.L. 86-272 also shows a lack of congressional intent for any implicit preemption of state taxing authority. Third, neither Heublein nor Wrigley concerned state taxation of income arising from sales of services. In fact, Heublein supports a narrow reading of the P.L. 86-272 preemption. To the extent that P.L. 86-272 established any lower limit of state taxing authority, that limit applies only to state taxation of income arising from sales of tangible personal property. Finally, state courts have not read P.L. 86-272 as containing any implicit preemption.

The legislative history of P.L. 86-272 shows congressional intent for only the narrow preemption. During the summer of 1959, both the House of Representatives and Senate passed separate preemption bills: H.R. J. Res. 450 and S. 2524. The House bill was time-limited to tax years ending after December 31, 1959, and beginning before January 1, 1961, and would have broadly preempted state taxation of not only interstate income from sales of tangible personal property, but also from services and intangibles. S. 2524 had no time limit but contained the much narrower preemption language, applying only to taxation of income from sales of tangible personal property. Describing the provisions of S. 2524, the committee report stated:

"Whether business activities other than those described in the bill constitute a sufficient basis for the imposition by a State or political subdivision thereof of a net income tax on income derived from..."
interstate commerce is left for future
determination by the Congress, or in the
absence of congressional action, to the
courts.36

This statement underscores the lack of
legislative intent for implicit preemption in the
Senate bill. Under the “minority views” section of
the report, then-Sens. Albert A. Gore Sr. and
Eugene McCarthy, commenting on the narrow
preemption language, observed that the bill
would “deny to States the power to tax net income
from certain types of transactions.” They added
that there were no solutions in the bill “for the
problems faced by trucking companies, railroads,
newspapers, pipelines, or radio and television
stations, just to name a few.” They were
obviously referring to the multistate service
industries, the concerns of which were left out of
the bill. The House acceded to the Senate bill on
those two differences in conference.37 Thus,
Congress deliberately chose in conference the
narrower preemption without a time limit over a
broad preemption of states’ taxing authority for
one year. It did not preempt any state taxing
authority of income from services or intangibles.

In Heublein, the U.S. Supreme Court affirmed
the South Carolina Supreme Court’s decision to
uphold the state’s income tax assessment against
an out-of-state liquor producer on income from
wholesale sales to South Carolina customers. The
state’s liquor laws required the out-of-state
producer to maintain an in-state representative to
accept product shipments and obtain state
permission before transferring them to the local
distributor. The statute caused the out-of-state
producer’s in-state activities to fall outside P.L. 86-
272 protection. The out-of-state producer argued
that the state evaded the intent of P.L. 86-272. The
Court disagreed, adopting a narrow
interpretation of P.L. 86-272 and refusing to read
the act as prohibiting such conduct, or even
addressing the problem of taxing a business that
undertook local activities to comply with a valid
regulatory scheme. The Court found no implicit
preemption of state liquor laws in P.L. 86-272,
quoting the familiar statutory interpretation
maxim: “unless Congress conveys its purpose
clearly, it will not be deemed to have significantly
changed the Federal-State balance.”

In Wrigley, the Court determined whether
some activities of salesmen for an out-of-state
company’s sales of chewing gum were considered
solicitation of orders or fell outside the scope of
protection of P.L. 86-272. The Court did not
consider any implicit preemption issue.

A state court determined that P.L. 86-272 did
not protect some interstate motor freight trucking
companies from New Jersey’s corporate income
tax on transportation services income in Roadway
Express.38 The taxpayers challenged the
constitutionality of the tax and assessments
against them. The New Jersey Supreme Court
upheld the assessments and constitutionality of
the tax. The court determined that the “limited
prohibition” in the P.L. 86-272 “obviously” did not
apply to the taxpayers and found that “no
inference” could be drawn from the law “as to the
power of the states to otherwise tax interstate
commerce.”39 The court read the law’s legislative
history as consistent with that view.

In Matter of Disney,40 the worldwide
entertainment conglomerate, a unitary business,
challenged a New York franchise tax assessment.
That assessment resulted from the department’s
inclusion in the sales factor numerator of the
combined group’s apportionment formula the
New York-destination sales of DVDs by its
subsidiary Buena Vista Home Video. In addition
to claiming constitutional violations, Disney
argued that inclusion of those sales violated P.L.
86-272, because Buena Vista’s only activities in the
state were solicitation of the DVD sales. Relying
on the legislative history of P.L. 86-272 and
upholding the assessment, the New York Court of
Appeals read the preemption language in P.L.

37 Id. at 12.
38 Id.
(1971)).
41 Roadway Express Inc. v. Director, Division of Taxation, 236 A.2d 577
(N.J. 1967).
43 N J. 471, 236 A 2d 577, n.3.
44 Id. (citing S. Rep. No. 658).
45 Matter of Disney Enterprises Inc. v. Tax Appeals Tribunal, 10 N Y 3d
86-272 narrowly, determining that the term “person” referred to the entire unitary group, not the subsidiary alone. The unitary group’s activities in New York, which benefited Buena Vista’s DVD sales, far exceeded solicitation. The court observed that formula apportionment and unitary reporting existed at the time of P.L. 86-272’s enactment, and that nothing in the legislative history suggested that Congress intended to alter the use or application of those methods. Declining to infer any implicit preemption concerning the use of those methods, the court stated: “We will not, ‘absent unambiguous evidence, infer a scope of pre-emption beyond that which clearly is mandated by Congress’ language.”

III. Protection of Cloud Computing Income

P.L. 86-272 was enacted in an era when the manufacturing and sale of goods dominated the economy — long before cloud computing was contemplated. The law has no obvious application to taxation of income from sales of cloud computing. For its protection to apply, there must be (a) in-state solicitation activity; (b) orders for the sale of tangible personal property; (c) orders sent out of state for approval; and (d) delivery of tangible personal property from a point outside the state.

A. In-State Solicitation Activity

Eisenstein and Bessey claim that under the implicit preemption in P.L. 86-272, “in-state business activities themselves are a necessary predicate for state taxing authority.” They focus on a cloud computing service provider outside the customer’s state and consider the provider to be conducting no business activities in that state, although the provider interacts with the customer through the internet.

As Wayfair observed, in today’s economy “a substantial amount of business is transacted [with no] need for physical presence within a State in which business is conducted.” The customer may visit the cloud computing service provider’s website, purchase the cloud computing service on that website, and then remotely access the provider’s software, hardware, or both, in receiving the service. No support exists for the argument that P.L. 86-272 contains any implicit preemption, and P.L. 86-272 assumes that the seller has at least some in-state business activity. Otherwise, it has no apparent application at all. Virtual interaction between the provider and customer in a cloud computing transaction logically establishes in-state business activity.

Under Wayfair, the out-of-state seller’s virtual and economic presence can establish substantial nexus. The cloud computing service provider’s virtual interaction with the customer may occur at least partly through the customer’s computer. If the customer receives software or cookies, the question arises whether those are used in solicitation activity or in providing the service itself, which goes beyond the scope of solicitation.

SaaS may involve a customer’s downloading software to provide a portal or interface with or transmit data to the provider’s servers, enabling the customer to use the remotely accessed software. For example, in a New York State Department of Taxation and Finance advisory opinion, the petitioner provided its customers remote access to proprietary software that could be used to turn photos and video clips into...
professional videos. Customers uploaded their photos and video clips to the petitioner’s servers using interface software either accessed on the petitioner’s website or downloaded from a third-party website.\(^\text{58}\)

Downloading portal or interface software from the provider could constitute activity beyond the scope of solicitation protected by P.L. 86-272.\(^\text{59}\) It may be tangible personal property of the provider located in the taxing state, not used in protected solicitation but as part of providing the service. When an out-of-state seller owns property in the taxing state that is not de minimis and not used in solicitation activities, P.L. 86-272 protection is lost.\(^\text{59}\)

Even when the customer purchasing cloud computing services does not download any software, if the provider otherwise interacts with the customer virtually in providing that service, under Wayfair, such virtual conduct should be considered in-state activity. If so, it may fall outside protected solicitation activity under P.L. 86-272.

B. Sale of Tangible Personal Property

P.L. 86-272 contains no definition of tangible personal property. Therefore, the common ordinary meaning may apply.\(^\text{60}\) A court interpreting the meaning may not necessarily rely on a state’s statutory definition. Eisenstein and Bessey note \(^\text{62}\) Accuzip,\(^\text{63}\) in which the seller of prewritten computer software challenged New Jersey’s corporation business tax assessment, asserting protection under P.L. 86-272. The seller delivered software to New Jersey businesses on CD-ROMs, including a software licensing agreement. The director of taxation argued that the transactions were sales of intangibles because licensing agreements were involved, and P.L. 86-272 did not apply. Treasury regulations defined software as a “copyrighted article” and not as a license. The New Jersey Tax Court, using those regulations as a guide, determined that the transactions were sales of tangible personal property, so P.L. 86-272 did apply. The tax court also noted that a New Jersey sales tax statute defined prewritten computer software as tangible personal property.\(^\text{64}\)

As Eisenstein and Bessey acknowledge, states vary on whether they treat the sale of SaaS as a sale of tangible personal property or a service.\(^\text{65}\) The authors characterize an IaaS transaction as either a data processing service or lease of computer equipment, and remote monitoring as a service.\(^\text{66}\) Thus, IaaS and remote monitoring service transactions should fall outside the scope of P.L. 86-272.\(^\text{67}\)

States that impose sales tax on the sale of prewritten computer software typically define it as tangible personal property.\(^\text{68}\) If the software is not delivered in tangible media or downloaded by the customer and is merely remotely accessed, some states consider sales of remote access to software not to be sales of tangible personal property for sales tax purposes, treating them as sales of a nontaxable service.\(^\text{69}\) Some states that impose sales tax on cloud computing consider it a sale of tangible personal property. For example,

\(^\text{58}\) The department determined that allowing remote access to petitioner’s proprietary software was subject to sales tax as selling access to prewritten computer software and defined as tangible personal property under New York law.

\(^\text{59}\) See Illinois Department of Revenue ST 17-0006-GIL (Mar. 2, 2017) (“If a provider of a service provides to the subscriber an API, applet, desktop agent, or remote access agent to enable the subscriber to access the provider’s network and services, the subscriber may be receiving computer software.”).


\(^\text{62}\) *Supra note 1, at 771, n.17.*

\(^\text{63}\) *Accuzip Inc. v. Director, Division of Taxation*, 25 N.J. Tax 158 (Tax Ct. 2009).

\(^\text{64}\) Id. at 174.

\(^\text{65}\) *Supra note 1, at 771, n.17.*

\(^\text{66}\) Id. at 771.

\(^\text{67}\) See MTC statement, supra note 24. *See also Virginia Department of Taxation ruling P.D. 06-38 (Apr. 5, 2006) (out-of-state lessor of heavy equipment located in Virginia not protected by P.L. 86-272); and Virginia Department of Taxation ruling P.D. 16-135 (June 24, 2016) (rental of servers in Virginia not protected under P.L. 86-272).*

\(^\text{68}\) *See Streamlined Sales and Use Tax Agreement definition of prewritten computer software as tangible personal property, which its member states were required to adopt. Many states have followed suit.* *See, e.g., 830 Code Mass. Regs. 64H.1.3(2).*

\(^\text{69}\) *See also Colorado Department of Revenue GIL 17-012 (July 28, 2017); Florida Department of Revenue TAA 17-A-010 (Apr. 25, 2017); and Vermont Department of Taxes Formal Ruling 17-07.*
Massachusetts considers the sale of SaaS to be a sale of tangible personal property, as a transfer of the right to use prewritten computer software installed on a remote server, regardless of where it is located. Pennsylvania includes in its statutory definition of tangible personal property “canned software . . . whether electronically or digitally, delivered, streamed, or accessed.” New York considers the sale of remote access to prewritten computer software as “constructive possession” of the software and therefore a sale of tangible personal property.

Other states that impose sales tax on cloud computing consider it to be the sale of a service, not tangible personal property. Texas treats SaaS as a taxable data processing service. Connecticut treats SaaS as a taxable computer or data processing service, including “retrieving or providing access to information.”

C. Order Sent Out of State for Approval

P.L. 86-272 requires that orders for sales of tangible personal property be sent out of state for approval. In many cases, online sales appear to occur when the purchaser takes the final step of accepting the offer, under terms provided by the seller. To take advantage of P.L. 86-272, the cloud computing provider would have to establish that an order was accepted out-of-state. How will the place of approval be determined? What if the provider does not know where the order is approved? When all interaction between the provider and customer is virtual, it is likely that there will be no out-of-state approval of orders.

D. Delivery of Tangible Personal Property

“Delivery” is not defined in P.L. 86-272. Eisenstein and Bessey state that cloud computing transactions typically do not involve the installation of software on an end user’s computer. Even assuming cloud computing is considered tangible personal property under P.L. 86-272, has there been delivery from a point outside the state if software is remotely accessed and not downloaded to the customer’s computer? Remote access to software, such as SaaS, may not be considered a delivery under P.L. 86-272. For example, Colorado and Georgia require that the software be delivered in tangible media before the sale becomes taxable as a sale of tangible personal property. Kansas and Vermont impose tax on the sale of prewritten computer software electronically delivered, but the software must be downloaded to be considered delivered. If Accuzip had involved remote access to software, as opposed to software delivered to the customer on a CD-ROM, the New Jersey Tax Court might have determined that no delivery had occurred under P.L. 86-272.

IV. Post-Wayfair Changes to Nexus Analysis for Cloud Computing Income

Eisenstein and Bessey argue that the due process clause might provide some defense for the cloud computing service provider against state taxation of its interstate income when the provider has no contact with the state other than its customers being located there. They contend that the provider may not know where customers remotely accessing its software are located, and argue that in due process nexus analysis the inquiry should focus on the taxpayer’s contacts with the taxing state, not the taxpayer’s contacts with its customers. According to Eisenstein and Bessey:

77 See Kranz and Nebergall, supra note 51. (“What does it mean to send an order outside the state when the order is being sent over the internet to a server whose location may not even be known to the seller?”).
Bessey, the provider's market activity should be ignored. However, the typical cloud computing transaction would likely involve a contractual relationship between the provider and the customer, possibly requiring training, troubleshooting, and other support activities involving extensive interaction. In such a relationship, the provider should know, or be able to find out, where the customer is located or is using the service.

Wayfair makes clear that due process analysis includes consideration of the benefits that the state provides to the seller's market, such as police and fire department protection for customers' goods and public roads and municipal services for access to customers. The size of the seller's market in the state, as well as the seller's virtual presence there, are both relevant to the due process analysis in establishing that the seller "availed itself of the substantial privilege of carrying on business in the state." The seller's "substantial virtual connections to the state" cannot be ignored in making the substantial nexus determination.

Noting the "significant parallels" between the due process and commerce clause standards for determining when a state may levy a tax, Wayfair observed that the same "reasons given in Quill for rejecting the physical presence rule for due process purposes" apply as well to the commerce clause substantial nexus determination. Wayfair concluded that "physical presence is not necessary to create a substantial nexus." Wayfair determined that the respondents' quantity of business showed such availment and met the South Dakota statutory annual sales threshold of more than $100,000 or at least 200 separate transactions. Wayfair found nexus "clearly sufficient," based on the respondents' economic and virtual contacts with the state.

A cloud computing service provider might have no physical presence in the market state, but in view of Wayfair, the quantity of the provider's economic and virtual contacts in that state (either through its marketing efforts or in remotely providing cloud computing services) should be considered in determining due process minimum contacts and commerce clause substantial nexus. Lack of the provider's physical presence in the taxing state, by itself, should be no obstacle to satisfying either constitutional provision.

V. Conclusion

Eisenstein and Bessey claim that P.L. 86-272 offers cloud computing service providers protection from a market state's income tax when they conduct no business activities in that state. The narrow preemption in P.L. 86-272 applies only to state taxation of net income derived in interstate commerce from sales of tangible personal property when the out-of-state seller's in-state activities are limited to solicitation of orders for the sale of tangible personal property, the order taken in-state is approved out-of-state, and the purchased item is shipped from a point outside the state. The statutory language does not preempt state taxation of income from services, which likely includes cloud computing. Moreover, no support exists in the legislative history of P.L. 86-272 or court decisions for implicit preemption of state taxing authority concerning income from services.

A cloud computing service provider lacking physical presence in the market state should not assume P.L. 86-272 provides any protection against the market state's income tax. The provider's virtual interaction with the customer establishes in-state business activity. A sale of cloud computing services may not be considered a sale of tangible personal property under P.L. 86-272, and in that case, the law would not apply. Further, even assuming the provider is engaged in the sale of tangible personal property, the

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62 See Kranz and Nebergall, supra note 51, Detailed Analysis.
63 138 S. Ct. at 2096.
64 Id. at 2099.
65 Id. at 2095. The Court noted the "continuous and pervasive virtual presence of retailers today."
66 See Complete Auto, 430 U.S. at 274.
67 138 S. Ct. at 2093.
68 Id.
69 Id.
70 See id.
71 Of course, the provider's economic and virtual presence must be more than de minimis, and the tax must pass the three other prongs of the Complete Auto test. Sourcing and apportionment issues can certainly arise in the context of cloud computing income, but those subjects are beyond the scope of this article.
provider’s virtual interaction with the customer could exceed the scope of protected activity. If the transaction involves downloading software to the customer’s computer, and that software is used in providing the service, such activity would exceed solicitation and fall outside P.L. 86-272. An order received virtually may not have been approved out of state, causing the loss of P.L. 86-272 protection. Assuming the cloud computing product is considered tangible personal property, there may not be any delivery of the product from outside the state, as required by P.L. 86-272, when the cloud computing customer has only remote access to software or hardware.

P.L. 86-272 may provide little protection for cloud computing income. Absent such protection, a cloud computing service provider’s virtual and economic presence in the market state can establish income tax nexus, regardless of any physical presence, particularly post-Wayfair.

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