

IN THE
Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-879

HEUBLEIN, INC.,

Appellant,

v.

SOUTH CAROLINA TAX COMMISSION,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF SOUTH CAROLINA

**MEMORANDUM FOR THE MULTISTATE TAX
COMMISSION AS AMICUS CURIAE**

WILLIAM D. DEXTER,
Assistant Attorney General
State of Washington
Temple of Justice
Olympia, Washington 98504

THEODORE W. DE LOOZE,
Chief Tax Counsel
Department of Justice
State of Oregon
State Office Building
Salem, Oregon 97310

EUGENE F. CORRIGAN,
Counsel and Executive Director
Multistate Tax Commission
1909 26th Street
Boulder, Colorado 80303

Attorneys for Amicus Curiae.

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I.

INTRODUCTION

This brief is submitted, with the written consent of both parties, by the Multistate Tax Commission to supplement the arguments of the appellee, South Carolina Tax Commission, and of Erwin N. Griswold, Solicitor General of the United States, in his memorandum for the United States as amicus curiae.

The Multistate Tax Commission is the official administrative agency of the Multistate Tax Compact entered into by 21 states as full members and by 15 states as associate members.¹ Article I of the Multistate

¹The legislatures of 21 states have enacted the Multistate Tax Compact, thereby making those states regular members of the Commission. Those states are: Kansas, Washington, Texas, New Mexico, Illinois, Florida, Nevada, Oregon, Missouri, Nebraska, Arkansas, Idaho, Hawaii, Colorado, Wyoming, Utah, Montana, North Dakota, Michigan, Alaska and Indiana.

One state, Alabama, has enacted the Compact subject to congressional

Tax Compact states its purposes to be to:

"1. Facilitate proper determination of State and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

"2. Promote uniformity of compatibility in significant components of tax systems.

"3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

"4. Avoid duplicative taxation."

Thus, it is significant to the Multistate Tax Commission that the applicability of Public Law 86-272 (15 U.S.C. § 351 *et seq.*) to the facts of this case be uniformly understood and applied by all of the states. The Multistate Tax Commission is particularly concerned with the appellant's argument that in-state activities of a multistate corporation are immune from state income taxes under Public Law 86-272 where (1) those activities are required to be carried on within a state by appropriate state regulatory measures, and (2) in any other circumstances the activities would clearly disqualify the corporation for exemption under Public Law 86-272. This argument affects the revenue of the various states and is, therefore, of vital import to them.

While a basic aim of the Multistate Tax Compact is to "avoid duplicative taxation," a complementary purpose is to "facilitate proper determination of State * * * tax liability of multistate taxpayers * * *". Where an out-of-state seller can exploit the

legislative consent. Pending enactment of such consent, Alabama is considered to be an associate member state.

Fourteen other states are associate member states at the request of their respective governors. Those states are: Arizona, California, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, South Dakota, Tennessee, Virginia and West Virginia.

market of any state free of tax liability to that state, it sells at a tax advantage over in-state competitors; and it deprives the state of taxes which the in-state taxpayers would incur and pay with respect to that business lost to such competition.

It is the position of the Multistate Tax Commission that problems involving multistate taxpayers are best subject to solution not by means of exemption but by promotion of uniformity in, and efficiency of, tax administration at the state and local level. Therefore, the exemption which Public Law 86-272 affords to out-of-state taxpayers should be strictly construed against those taxpayers.

The New Jersey Supreme Court has already so construed Public Law 86-272 in the case of *Clairol, Inc. v. Kingsley*, 109 N. J. Super. 22, 262 A.2d 213 (1970); and this Court has dismissed an appeal from that decision. Intrastate commerce of any type, entered into within a state for whatever reason, takes a corporation outside of the protection of Public Law 86-272 and subjects the seller to the tax jurisdiction of the state in which it takes place. Heublein has engaged in such intrastate commerce within South Carolina.

But there is a significant area of *interstate* activities which do not constitute a part of sales solicitation and which are not within the purview of Public Law 86-272. The statutory wording of Public Law 86-272 clearly contemplates that any activity other than the business activities narrowly specified therein will subject the seller to the jurisdiction of the state.

In the instant case, Heublein engages in such activities, thereby subjecting itself to the corporate income tax jurisdiction of the state. Heublein's attempt to discount the significance of such activities by characterizing them as technical incidents of interstate sales,

cannot obviate the fact that those activities are not the type specified in the statute. The state of South Carolina has properly imposed tax liability on Heublein.

II.

ARGUMENT

A. Counterstatement.

We accept the statement of facts set forth in appellant's brief (App. Br. 3-5), but would add the following:

1. Title to the alcoholic beverages in question was transferred in South Carolina (Appendix 10).

2. There is nothing in the record to indicate what would constitute the nature and extent of the appellant's activities in South Carolina, if South Carolina had not in 1958 enacted its Alcoholic Beverage Control Act (hereinafter referred to as the ABC law), the text of which appears in the Jurisdictional Statement A32-40.

3. South Carolina had ample authority to enact its ABC law (§§ 4-131 to 4-150, 1962 Code of South Carolina) under the Twenty-First Amendment to the United States Constitution which it did prior to the enactment of Public Law 86-272 in 1959.

4. In practice, shipments of alcoholic liquors into South Carolina were in response to orders of appellant's wholesale distributor in South Carolina and were delivered to Heublein's producer representative (Mr. Belch) at the wholesaler's address (Appendix 10).

5. Heublein, in compliance with the regulations and upon the forms prescribed by the Alcoholic Beverage

Control Commission (hereinafter referred to as commission), sent copies of the invoice and the bill of lading to the Commission and to Mr. Belch (Appendix 10).

6. Upon arrival of the shipment by common carrier consigned at the wholesaler's address to Heublein in care of Mr. Belch, he turned the shipment over to the wholesaler pursuant to a certificate of transfer obtained from the commission (Appendix 10).

7. Mr. Belch, upon acceptance and delivery, furnished the commission with a copy of the invoice with an endorsement thereon showing the date and place the delivery was accepted (Appendix 10).

8. The bulk of Mr. Belch's activity however was traveling as a company representative throughout the state of South Carolina contacting liquor establishments in the state to promote the intrastate retail sale of appellant's product within the state of South Carolina (Appendix 11-12).

9. To carry out his responsibilities and duties Mr. Belch maintained a stock of advertising material at the wholesaler's place of business which he distributed to retailers in South Carolina (Appendix 16-17).

10. While Heublein had no office as such in South Carolina, the personal representative, Mr. Belch, had office space at the place of business of the distributor and also had an office at his home (Appendix 13, 16).

11. Mr. Belch called on the dealers in the State of South Carolina as often as he could (Appendix 17).

12. In addition to the distributor, Ben Arnold Company, there was another distributor in South Carolina for part of the period (Appendix 17).

13. Mr. Belch testified to the handling and importa-

tion of liquor into South Carolina in the following language:

“* * * Well, actually an order is placed by a wholesaler or a distributor to a distillery. The distillery either accepts or rejects the order depending after the order has been checked for credit and whether this particular distributor is set up to sell this particular brand in the State. The order is then shipped directly to the distributor by motor freight line. At the time the shipment is made the distillery sends a copy of the invoice along with the copy of the original bill of lading to the Tax Commission or the ABC Commission. They send necessary copies of the invoice to the distributor. When the shipment is made they usually send three copies of the invoice to me. They were supposed to send three copies of the invoice to me. One of these copies I used as a receiving report for the Tax Commission or the ABC Commission and one I signed as transmittal papers to turn the merchandise over to the distributor and I made out the necessary permit required by the Tax Commission or the ABC Commission during that time and submitted these along with the two copies of the invoice, the one I used for receiving report and one as transmittal papers. That was pretty much it.”

B. Contrary To Appellant's Argument, Public Law 86-272 Is Required To Be Applied Strictly According To Its Terms.

As indicated in *General Motors Corp. v. Washington*, 377 U.S. 436, 12 L. Ed.2d 430, 84 S. Ct. 1564 (1964):

“We start with the proposition that ‘[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing business.’ Western

Live Stock v Bureau of Revenue, 303 US 250, 254, 82 L ed 823, 827, 58 S Ct 546, 115 ALR 944 (1938). 'Even interstate business must pay its way,' Postal Telegraph-Cable Co. v. Richmond, 249 US 252, 259, 63 L ed 590, 595, 39 S Ct 265 (1919), as is evidenced by numerous opinions of this Court. * * * (377 US 439)

“* * *

“A careful analysis of the cases in this field teaches that the validity of the tax rests upon whether the State is exacting a constitutionally fair demand for that aspect of interstate commerce to which it bears a special relation. * * *

“* * *

“ * * * The general rule, applicable here, is that a taxpayer claiming immunity from a tax has the burden of establishing his exemption.' Norton Co. v. Department of Revenue, 340 US 534, 537, 95 L ed 517, 521, 71 S Ct 377 (1951). And, as we also said in that case, this burden is not met 'by showing a fair difference of opinion which as an original matter might be decided differently. This corporation, by submitting itself to the taxing power * * * [of the State], likewise submitted itself to its judicial power to construe and apply its taxing statute insofar as it keeps within constitutional bounds. * * *'" (377 US 440-441)

By its terms Public Law 86-272 exempts on jurisdictional grounds from a nondiscriminatory and properly apportioned state net income tax “* * * the solicitation of orders * * * 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 * * *”. It does not provide exemption if any other activity is carried on by Heublein in South Carolina. A recent article by Ray Stringham of the New

York and Oregon Bars entitled "Crystal Gazing: Legislative History in Action," 47 ABAJ 466 (May 1961), warns us at page 472:

"Far better would it be for the courts to accord to legislature and executive the respect due to coordinate departments, to accept laws as passed according to their own words, the careful crystallization of study, preparation, drafting, debating, redrafting and final enactment.

"A law is what it says, not the raw clay of which it was sculptured."

The Conference Report (No. 1103) on P.L. 86-272 states:

"Both the House and Senate bills contain a minimum activities approach to the problem of State taxation of income from interstate commerce. It was the purpose of both Houses to specifically exempt, from State taxation, income derived from interstate commerce where the only business activity within the State by the out-of-State company was *solicitation*. * * *"

(Emphasis added.)

"Solicitation" is the act of soliciting, or, as the dictionary states: "To endeavor to obtain by asking or pleading * * *" (Webster's New International Dictionary, Second Edition (Unabridged)). What is plead for? The statute clearly requires that the *orders* be solicited *and it is the orders which are thus solicited* which are sent outside of the state and which are filled by shipment or delivery from a point outside the state.

The use of the word "which" in the phrase "which orders are sent outside the state," etc., in the statute clearly ties in the orders solicited with the orders to be sent outside the state and filled outside the state. Where the solicitation is for orders to be filled from within the state, there is no exemption.

In order to circumvent the literal application of the language employed by Congress to the facts and circumstances of this case, the appellant contends that there is a substance to Public Law 86-272 which permits an ignoring of its express terms, not only in what constitutes "solicitation" but also in reference to what constitutes an "interstate" sale. Public Law 86-272 is addressed solely to interstate sales. The operative effect of the ABC law and of the appellant's activities in compliance therewith placed the sales in question in the category of intrastate sales as contrasted from interstate sales. Heublein's activities do not constitute mere "solicitation of orders".

Thus, appellant is contending, in the instant case, for (1) an extremely loose interpretation of Public Law 86-272, an interpretation which is contrary to the express terms of that statute; and (2) an equally loose application and interpretation of the facts. This approach is contrary to numerous decisions of this Court which require exemption statutes to be strictly construed and place upon the party claiming an exemption a distinct burden of proof. This requirement is particularly important where there is involved the interpretation and application of local law and the possible overruling of the findings and conclusions of a state supreme court.

C. Heublein's Activities in South Carolina Exceeded Permitted Activity Under Public Law 86-272.

As heretofore indicated, Heublein's representative in South Carolina engaged in extensive promotional activities for the purpose of consummating intrastate sales of alcoholic beverages on behalf of Heublein. In doing so, he was conforming with the requirements of the ABC law. As indicated by the Solicitor General in

his Amicus Curiae Memorandum, the terms of Public Law 86-272 do not include such promotional activities.

Additionally, Heublein's representative maintained an office in his home (Appendix 16). This Court, in *General Motors Corp. v. Washington, supra*, 377 U.S. 436, 12 L. Ed. 430, 84 S. Ct. 1564 (1964), commented that the use of a home as an office served the corporation "just as effectively" as other offices. The legislative history of Public Law 86-272 convincingly demonstrates that Congress did not intend to exempt a corporation maintaining an office in a state. The original bill would have permitted the maintenance of an office; this was deleted, and the clear intention of Congress remains to deny exemption if there is an office. See Beaman, "Paying Taxes to Other States" (1963), Chapter 6-15; Appendix B-6. This "home" office, together with the office maintained at the distributor's office (Ben Arnold Company) (Appendix 13) clearly takes Heublein outside the protection of Public Law 86-272.

Thus, Heublein's representative did not restrict his activities to solicitation of orders to be accepted out of state and filled "by shipment or delivery from a point outside the State". Rather, he did whatever was necessary for Heublein to establish, to maintain, and to hold the market for the retail, intrastate sale of its products in South Carolina.

In substance, Heublein argues that the activities of its representative in South Carolina did not exceed the activities which are exempt under Public Law 86-272 because these activities were required by the liquor regulatory measures of South Carolina. This is a *non sequitur*. It does not change either (1) the nature or extent of the appellant's activities within South Carolina or (2) the scope of the exemption and preference

granted by Public Law 86-272. We agree with the Solicitor General that the fact that the state of South Carolina has jurisdiction under the Twenty-First Amendment to require certain things to be done in South Carolina to carry on a liquor business furnishes no reason "to expand the application of P.L. 86-272 beyond its terms and the factual situations considered in its legislative history, and to apply it on a contrary-to-fact or might-have-been basis" (Br. of Solicitor General 7).

We also agree with the position of the Solicitor General that South Carolina's liquor control laws and the decision below do not threaten to render ineffective the protection afforded by Public Law 86-272 to other interstate businesses. It is absurd for appellant to contend that this Court's decision in favor of the state of South Carolina in this case would permit the extension of the applicability of the Twenty-First Amendment to businesses other than alcoholic beverage businesses.

Firstly, the promotional activities of Heublein's representative in South Carolina are in excess of activities required to meet the ABC law. Secondly, even if those activities did not exceed those requirements, the Twenty-First Amendment pertains to alcoholic beverage control and to alcoholic beverage control only. Thirdly, had Congress intended for Public Law 86-272 to immunize activities such as Heublein's from the tax jurisdiction of the state, Congress could easily have so provided by means of specific wording to that effect. It did not do so, even though the Twenty-First Amendment and the ABC law already were in effect. Finally, the business decision to comply with the requirements of the ABC law, prior to the enactment of Public Law 86-272, is no different than any other decision as to

how a business is to be conducted in a state, which decision carries with it its own tax consequences.

We do not agree with the inference in the appellant's brief that the South Carolina ABC law was designed to circumvent the otherwise applicable exemption provisions of Public Law 86-272. The ABC law was enacted prior to Public Law 86-272. It is therefore reasonable to assume that the State of South Carolina was concerned about control and management of the liquor traffic in South Carolina and was not concerned about income tax jurisdictional problems.

Nor do we find any merit in the appellant's contention that, were it not for the Alcoholic Beverage Control Act requirements of South Carolina, Heublein would do business in South Carolina in a manner as to be exempt under Public Law 86-272. This is pure conjecture on the part of appellant. It is not relevant to proceed in this case on the assumption that certain of appellant's activities in South Carolina were dictated solely by South Carolina liquor laws.

The enactment of the South Carolina ABC law in 1958 required Heublein to make a business decision. Heublein had to decide whether the South Carolina market was sufficiently profitable to justify Heublein's continuing to do business in that state. That decision was affirmative. It was affirmative despite the absence of Public Law 86-272. Heublein should not now be permitted, in the face of such facts, to speculate, to its own advantage, that Public Law 86-272, enacted in 1959, somehow has resulted in Heublein's continuing to abide by that 1958 business decision. The law and facts must be accepted as they are, and appellant should not be permitted to surmise as to the hypothetical effect of a change in either.

D. The Applicable Case Law Supports The Position Of South Carolina And The Solicitor General.

The scope of the exemption and of the immunity granted by Public Law 86-272 has been before the Supreme Court of Oregon on several occasions; and it has been considered by the Supreme Court of New Jersey in the recent case of *Clairol, Inc. v. Kingsley*, 109 N. J. Super. 22, 262 A.2d 213, aff. per curiam, 57 N. J. 199, 270 A.2d 702, appeal dismissed 402 U.S. 902 (1970). The most recent Oregon case is *Herff Jones Co. v. State Tax Commission*, 247 Or. 407, 430 P.2d 998 (1967), which limited the application of an earlier Oregon case, *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P.2d 375 (1965). The principal question in the Oregon and New Jersey cases was what is to be included within the term "solicitation" as used in Public Law 86-272. The Supreme Court of Oregon, in the earlier *Smith Kline & French* case, *supra*, had given a broad interpretation to the word "solicitation". In substance, it overruled that interpretation in *Herff Jones Co.*, *supra*. *Clairol*, in turn, followed the narrow interpretation of *Herff*.

Appellant here contends for a broad interpretation of the word "solicitation" and ignores the fact that that this case involves solicitation *and promotion* of *intrastate* sales, rather than of interstate sales.

Proper rules of statutory construction require a strict interpretation of the exemption granted by Public Law 86-272. The strict interpretation of the language by the Courts in *Clairol* and *Herff* is proper and supports the position of South Carolina in this cause. The Supreme Court of New Jersey noted in *Clairol* that

"the primary function of Clairol's detailmen and other representatives in New Jersey is to pro-

mote the public's purchase and use of its products. To accomplish that purpose, its salaried cosmetics detailmen assigned to visit retail druggists do so at regular intervals."

This is the primary function of the appellant's representative in South Carolina. The New Jersey Supreme Court rejected the argument that such activity could be characterized as solicitation of orders for sales in interstate commerce.

Likewise, the Supreme Court of Oregon, in *Herff Jones Co. v. State Tax Commission, supra*, 247 Or. 407, 430 P.2d 998 (1967) declined to include in solicitation the collection of deposits and balances due on ordered merchandise. In holding that such in-state activity was not part of solicitation, The Oregon Supreme Court stated:

"This court's decision in *Smith Kline & French v. Tax Com.*, *supra*, might be considered to have placed a broad interpretation on the word 'solicitation' as it is used in P.L. 86-272, and plaintiff's sales representatives' activities might well be considered no more than solicitation if such were the case. But, in *Cal-Roof Wholesale v. Tax Com.*, 242 Or. 435, 410 P.2d 233 (1966), this court expressly rejected such an interpretation. In that case we stated through Mr. Justice Schwab, p. 447:

" 'In any event, the tax commission's analysis of our decision in *Smith Kline & French v. Tax Com.*, 241 Or. 50, 403 P.2d 375, as a "broad" interpretation "of solicitation" as the word is used in Public Law 86-272, is not warranted. Without mentioning the terms "inter" or "intra," Public Law 86-272 prohibits the imposition of a state tax on income.

" " * * * if the *only business activities*
 * * * within such state * * * are
 * * * (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).” (Italics supplied.)

“Therefore, it seems clear that in order to come within the purview of P.L. 86-272 the *only* business activity which plaintiff’s sales representatives could engage in is the solicitation of orders. It is abundantly clear from the record that the representatives do more than this. Aside from the actual solicitation of orders, the salesmen also collect an initial deposit on merchandise ordered, and forward such deposits to plaintiff. The sales representatives on occasion also collect the balance due on the merchandise when it is delivered to a school. The sales representative may also do occasional collection work for plaintiff in order to prevent their own commissions from being reduced.” (247 Or. 411-412)

If, as contended by appellant, Public Law 86-272 is not concerned with technicalities, we wonder with what it is concerned. It is not concerned with any comprehensive legislation concerning state and local taxation of interstate commerce. This is indicated by the history of Public Law 86-272.

Public Law 86-272 was hurriedly enacted by Congress after limited hearings before the Select Committee on Small Business of the United States Senate² and

²State Taxation on Interstate Commerce—1959, *Hearings before the Select Committee on Small Business, United States Senate, Eighty-*

the Committee on Finance of the United States Senate³

Public Law 86-272 not only defined the above referred to jurisdictional prerequisites, but also made provision for congressional study of the problem of state taxation of interstate commerce. This constitutional authorization has led to the creation of a Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, which has conducted hearings on various aspects of the problems. The first series of hearings took place December 4 through 8, and December 11 through 13, inclusive, 1961.⁴

On June 15, 1964, this Special Subcommittee issued the first two volumes of its report.⁵ Much of the material in these volumes indicate the continued existence of the problems involved in the state taxation of interstate commerce and note the artificial and limited scope of the provisions of P.L. 86-272.

Appellant, in its effort to bring itself within the immunity of Public Law 86-272, attributes entirely too much to this temporary legislation. To go beyond its language and to characterize the South Carolina decision as leading to "complete frustration of Congressional income tax policy" (App. Br. 26) is of little help when the arbitrary and temporary nature of the

Sixth Congress, First Session, April 8, 1959, Part 1; May 1, 1959, Boston, Mass., Part 2; and June 19, 1959, Part 3.

³State Taxation of Interstate Commerce, *Hearings before the Committee on Finance, United States Senate, Eighty-Sixth Congress, First Session, July 21 and 22, 1959.*

⁴"State Income Taxation of Mercantile and Manufacturing Corporations", *Hearings before the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, Eighty-Seventh Congress, First Session, December 4, 5, 6, 7, 8, 11, 12, and 13, 1961, Serial No. 20* (hereinafter referred to as the "Special Subcommittee").

⁵"State Taxation of Interstate Commerce", *Report of the Special Subcommittee on State Taxation of Interstate Commerce of the Committee on the Judiciary, House of Representatives, Pursuant to Public Law 86-272, as amended, Volumes 1 and 2.*

legislation is considered. The temporary preference and immunity which it accords to certain interstate business under its specific terms in no way implies that it should be broadened to encompass "a business location" test (App. Br. 14) or to include activities which might be considered to be on a par with or even less significant than solicitation of interstate orders. We agree with the Solicitor General that Congress addressed this legislation to "drummer" sales activity (Solicitor General's Br. 7). In the instant case it is the wisdom of Congress and its role that must control. For the appellant to argue that Public Law 86-272 is not concerned with the technicalities of determining place of sale or passage of title and yet is concerned with the technicalities of where and how an order is accepted is totally inconsistent.

We note that for most of the period in question all sales were to one distributor, but that technical compliance with acceptance of the orders outside the state purportedly governed each and every sale, and a technical credit check was made on this one distributor as to each order (Appendix 26). It is no surprise that in no instance was any order rejected (Appendix 19, 27). In substance, appellant is claiming protection from the technicality of Public Law 86-272 and at the same time refuting such technicality in order to extend and re-interpret the law's requirements. It is technical legislation and should be so treated. There is no reason why the appellant's activities in South Carolina should be immune from the properly apportioned nondiscriminatory income tax law of South Carolina.⁶

⁶As indicated in their brief amicus curiae filed on behalf of a number of states in *International Shoe Co. v. Cocreham*, 246 La. 244, 164 So. 2d 314 (1964) certiorari denied 379 U.S. 902 (1965), the states are well aware of the defects and limitations of Public Law 86-272. That brief asserted the unconstitutionality of Public Law 86-272 on the basis of several arguments including the contention that the criteria

E. Specific Additional Response To The Brief Of The Appellant.

The appellant's argument in this cause is circuitous and confusing. For this reason it is believed important to specifically analyze its nature and content.

By fragmenting and discussing separately its activities in the state of South Carolina, and by fragmenting and discussing separately the requirements of Public Law 86-272 in such a manner as to conclude that Heublein is entitled to an exemption, appellant would lead this Court to believe that its activities are protected by Public Law 86-272. As a further fragmentation of its factual picture, appellant would have subtracted, from its total activity in South Carolina activity it attributes to the ABC law. This fragmented approach to the facts and the requirements of Public Law 86-272 is not justified. The *total* of the appellant's activities in South Carolina must be applied against the *total* requirements of Public Law 86-272.

Appellant further argues that the purpose of Public Law 86-272 was to "protect a businessman who shipped from a stock of goods maintained outside of the state, leaving unprotected those who maintain their stocks in the state." (App. Br. 14.) As a matter of fact, the statute employs no such test. In order to be protected by the statute, the activity must be subject to characterization as "the solicitation of orders" by any person from interstate commerce.

employed to separate immune from taxable activity were highly artificial and had previously been rejected by this Court in deciding interstate commerce state tax questions.

No constitutional question has been raised in the instant Heublein case. Inasmuch as Public Law 86-272 has no application here, we believe the constitutional question cannot properly be reached. Furthermore, there is some indication by this Court's denial of certiorari in the *International Shoe* case, *supra*, and its dismissal of appeal in *Clairol*, *supra*, that this Court might be inclined to uphold the constitutionality of Public Law 86-272 if the question of constitutionality were properly raised.

In arguing, on pages 9-23 of its brief under the heading "Heublein's Activities in South Carolina Do Not Remove It From The Protection Of Public Law 86-272", appellant classifies its activities as the solicitation of orders in South Carolina (App. Br. 10). Yet, on page 6 of its brief, appellant claims that the producer-representative did not take any orders. Obviously, if he did not take any orders his activities could not be that of the solicitation of orders.

The quotation on pages 11 and 12 of the appellant's brief from the dissent in *Northwestern Cement Co. v. Minn.*, 358 U.S. 450, is irrelevant. The history of congressional involvement in the field of state and local taxation since the enactment of Public Law 86-272, referred to by appellant on pages 12-14 of its brief is likewise of no import here. These references are smoke screens used by appellant to cloud the effect of the language employed by Congress in the enactment of Public Law 86-272 and to confuse this Court as to the manner in which that language should be applied to the uncontroverted facts in this cause. Such references are made apparently with the object of establishing that Congress has employed a "business location" rather than a "business activity" test in Public Law 86-272. This contention is not supportable by the history of Public Law 86-272 which shows that Congress specifically rejected this latter test.

In making the "business location" argument, Heublein relies on the phrase "shipment * * * from a point outside the State" and assumes that any shipment across state lines, even though the title and risk are retained by the seller until after the property is located within the state, is an interstate sale which is protected by Public Law 86-272. As a matter of fact, the sales were intrastate and all the legal consequences

that flow from this fact exist as to these sales. The shipments from out-of-state were made to Heublein's representative in South Carolina. Subsequently, after the goods reached South Carolina and while they were still owned and possessed by Heublein through its representative, that representative transferred them within South Carolina to Heublein's customers. These are intrastate sales and not interstate sales. The shipment with which Public Law 86-272 is concerned is the transfer from an out-of-state seller to an in-state buyer in "interstate commerce" and not a shipment which is "intrastate" in nature. Thus, it is irrelevant for the purpose of characterizing Heublein's in-state activities that its alcoholic beverages were delivered to the wholesaler's place of business in South Carolina rather than to Heublein's own warehouse prior to the transfer of title and sale in South Carolina. The absence of a South Carolina warehouse does not change the intrastate nature of the sales transactions.

The statement on page 17 of the appellant's brief that "* * * The plain language of the statute demonstrates that Public Law 86-272 is concerned with the physical location of goods when ordered and shipped in interstate commerce, and not with the technicalities of determining place of sale or passage of "title." is without foundation. The delivery was made to Heublein's customers from a stock of goods located in the state. This is the operative effect of the ABC law, and the technical requirements of delivery and passage of title with which the appellant complied.

Recognizing that as a matter of technical law we are here concerned with in-state sales and deliveries, the appellant next argues that the in-state transfer of title and delivery is only a "documentary formality" and should give way to "substantive requirements."

Appellant argues that the requirements of the ABC law is a mere formality and did not change its pattern of activity within the state of South Carolina. This argument leaves as a useless appendage to its brief its argument on pages 23-32 that South Carolina's regulatory laws and the requirements of the Twenty-First Amendment can and should be completely ignored in determining either the operative effect of Public Law 86-272 or the controlling facts in this cause.

Appellant contends that, although the ABC law requires physical delivery to Heublein's representative in South Carolina and then redelivery from him to the wholesaler, actual practice allows Heublein to treat such delivery as only a paper transaction. Appellant then derides the paper transaction as a mere technicality which does not destroy Heublein's immunity under Public Law 86-272. In so doing, appellant ignores the fact that the ABC law, however lightly obeyed in practice accomplishes its purposes of controlling the importation of liquor into the state of South Carolina. A taxpayer's success in using shortcuts to comply with the law should not be accepted as a basis for ignoring the purpose and effect of that law or the legal significance of the steps required to be taken. Heublein may use the shortcut method as a shield against any charge that it failed to comply with the ABC law of South Carolina; but it cannot use that practice as a sword to attack the true legal consequences of compliance with the ABC law.

Heublein is present in South Carolina in the form of its representative there. Through him Heublein owned and possessed, even if only momentarily, every ounce of alcoholic beverages which was purchased from Heublein by anyone in the state of South Carolina

during the years in question. That ownership and possession plus subsequent transfer to the wholesaler subjected Heublein to the corporate income tax jurisdiction of South Carolina. Here, compliance with the legal requirements constitutes more than mere form; it constitutes the substance of what appellant in fact does in South Carolina.

We concur with the appellant's assertion on page 27 of its brief "* * * that the Twenty-First Amendment simply does not deal with state taxing power. * * *" This is not a Twenty-First Amendment problem, and the effect of the Twenty-First Amendment should be given no consideration by this Court. This does not mean, however, that the activities that are required of the appellant in the state of South Carolina as a result of state legislation concerning the Twenty-First Amendment are irrelevant or immaterial.

III.

SUMMARY AND CONCLUSION

As indicated herein, it is the position of the Multi-state Tax Commission that Public Law 86-272 is a technical statute dealing with an income tax exemption for multistate businesses conducting a limited activity within a state. A statute of this nature should be strictly construed against the person claiming exemption and immunity from state and local income tax laws and should be strictly construed in favor of the jurisdiction of the states to impose a nondiscriminatory properly apportioned net income tax on a multistate business, such as Heublein. Furthermore, there should not be carved out of otherwise taxable activity, activity which Heublein would attribute to

the compliance with the Alcoholic Beverage Control Act of South Carolina.

Application of these basic principles clearly establish that Heublein's activities in South Carolina subject it to the income tax jurisdiction of South Carolina and are without the protective umbrella of Public Law 86-272. Heublein did in fact carry on activity in the state of South Carolina that could not be characterized as the solicitation of orders for sales from interstate commerce. No interstate sales were solicited by Heublein's representative in South Carolina. Heublein's activities in South Carolina were of an institutional nature designed to establish and maintain its position in the alcoholic beverage market in South Carolina. The reasons why Heublein has chosen to carry on activities which create tax liability are wholly irrelevant. The fact is Heublein does do business in South Carolina; and that tax liability results.

It is therefore requested that the decision of the Supreme Court of South Carolina be affirmed.

Respectfully submitted,

WILLIAM D. DEXTER,
Assistant Attorney General
State of Washington

THEODORE W. DE LOOZE,
Chief Tax Counsel
Department of Justice
State of Oregon

EUGENE F. CORRIGAN,
Counsel and Executive Director
Multistate Tax Commission

Attorneys for Amicus Curiae.