

Scenarios

(updated 7/8/19 to add four additional scenarios)
(further updated 7/11/19; 8/19/19 to revise scenario regarding cookies)

In each scenario, does P.L. 86-272 provide immunity to the seller against the imposition of a net income tax in the purchaser's state?

Assume for each scenario the following:

- (a) Seller has no state contacts other than those referenced below and is subject to tax under state law and the U.S. Constitution. (States in fact may have a factor presence statute or other rule that provides immunity to the seller, but this should not be considered for the purpose of analyzing the impact of P.L. 86-272.)
- (b) When a customer visits seller's website, the website transmits software to the customer's computer. This software is stored on the computer's hard drive and enables the customer to interact with seller's website with respect to the website's various activities. [This description is subject to discussion and receipt of additional information.]
- (c) For scenarios 1-10, the order is approved or rejected, and the products are shipped from a point, outside of the purchaser's state. Where orders are approved or rejected is the subject of scenario 11.

* * * *

- 1. Seller maintains a website offering various goods and services for sale. The provision of services does not require the seller, or a representative of the seller, to travel to the customer's state.
- 2. Seller maintains a website offering for sale only items of tangible personal property. The products are complicated to use and purchasers often need post-sale assistance. Seller provides assistance in only one of the following ways:
 - 2A. Seller identifies a toll-free number on its website, and purchasers may call the number to speak to a customer assistance representative (who is located out of state).
 - 2B. Purchasers may either email or engage in electronic chat sessions with a customer assistance representative through the seller's website.
 - 2C. Seller posts on its website a list of frequently asked questions together with answers.
 - 2D. Seller's website includes an interactive tool which allows customers to type in a question. In response, the system (without human intervention) either asks follow-up questions or provides an answer.

- 2E. Seller's website includes seller-sponsored "how to" videos and in some cases similar videos posted by its customers.
3. Seller maintains a website offering for sale only items of tangible personal property. The products are covered by a warranty. If a product ceases to function properly during the warranty period:
- 3A. [Added] Seller is able to fix the product remotely via the internet and WIFI (e.g., fixing a remote-control device that controls a bed's position).
- 3B. Purchaser may mail the product to the seller for repair after downloading a return slip from the website.
- 3C. Seller will repair the product at the purchaser's location, which is performed by an independent contractor pursuant to a contract with the seller.
4. Seller maintains a website offering for sale only items of tangible personal property. The website invites viewers to apply for employment at the seller.
- 4A. The website allows applicants to upload a copy of their cover letter and resume, which is then reviewed by seller's HR team (which is not located in state). The HR team then sends an email to applicants either informing them that they will not be hired or inviting them to participate in a telephone interview.
- 4B. The website directs applicants to complete an online form which is evaluated and scored by an automated system based on the appearance of certain words or phrases. Applicants who receive a high score are invited to participate in a telephone interview.
5. Seller maintains a website offering for sale only items of tangible personal property. Seller invites customers to apply for its branded credit card via an online application. Whether the application is accepted or rejected typically is noticed to the customer within minutes electronically.
6. Seller maintains a website which customers access to immediately watch a movie through streaming.
7. Purchasers download to their smartphone an app offered by seller. The app enables purchasers to order and pay for items of tangible personal property sold by the seller. Seller does not sell services or license any intangible property.
- 7A. Seller uses the information about the purchaser received via the app only to facilitate the sale.
- 7B. Seller sells the information about the purchaser received via the app to third parties.

7C. Seller uses the information to engage in market research to facilitate future sales, develop new products, and engage in targeted marketing.

8. Seller maintains a website offering for sale only items of tangible personal property. When a purchaser interacts with the seller's website, the seller utilizes one or both of the following technologies:

8A. Cookies. These are small text files installed on the hard drive of a customer's computer or customer's smartphone when he or she visits the seller's website. These cookies allow the seller's webserver to store information about the customer, including search histories and location information. Cookies also enable a seller to track its customers' behavior over time and to later deliver ads that are specific to each customer.

8A.1. Seller utilizes cookies for the following purposes: to remember items that a customer has placed in his or her shopping cart during a current web session; to store personal information the customer has provided to avoid the need for the customer to re-input the information when he or she returns to the seller's website; and to remind sellers what products they have considered during previous sessions.

8A.2. Seller uses customer search information collected by cookies to adjust its production schedules or inventory, to develop new products, and to identify new items to offer for sale.

8A.3. Seller sells the information gathered by cookies to third parties.

8B. Third party cookies. These are cookies that a seller allows other entities, such as advertisers or data brokers, to place on customers' computers and devices through the seller's website. Third party cookies may be persistent cookies that track the customer across multiple sites. Utilizing these cookies, advertisers and data brokers collect information and compile it for sellers so that sellers may promote their products to customers more effectively.

9. Seller maintains a website offering for sale only items of tangible personal property. Seller contracts with a provider of a content distribution network ("CDN") to use in-state servers to accelerate the delivery of the seller's web pages to customers. Because the CDN allows the seller to deliver web pages to customers more quickly and efficiently, the CDN helps ensure that the seller's customers are less likely to exit the seller's website.
10. Seller, which sells only tangible personal property, contracts with a marketplace facilitator. The marketplace offers for sale the seller's products via the marketplace's website, receives orders, processes payments from purchasers, transmits payments to the seller, and handles returns.

The marketplace maintains inventory, including seller's products, at fulfillment centers in the purchaser's state.

11. Seller maintains a website offering for sale only items of tangible personal property. The seller does not sell on a marketplace. Additional facts to be considered: After purchasers select items for purchase, input their credit card information and press the submit button on the website, purchase information is automatically transmitted to seller's merchant service provider. The merchant service provider in turn sends a notification to the purchaser's credit card company (bank) to see if sufficient credit is available to purchase the product. If sufficient credit is available, seller still may decline to make the sale anytime before shipping the item to the purchaser. Seller, however, rarely declines orders.
12. Seller maintains a website offering for sale only items of tangible personal property. It periodically hosts and moderates user group webinars for the users of its products. During these webinars, the seller teaches users how to use its products and answers questions about its products.
13. Seller is a provider of the following cloud computing "services." It maintains no equipment in the states where its customers are located. Assume that the customers' states do not treat the transactions as a sale of tangible personal property.
 - (a) Software as a Service (SaaS). Customers obtain access to software or applications hosted on remote servers maintained by the provider.
 - (b) Infrastructure as a Service (IaaS). Customers obtain access to the provider's remote IT infrastructure, such as servers and network equipment, in order to utilize the equipment's computing power and storage.
 - (c) Remote monitoring. Seller remotely monitors the performance of the customer's network and computer systems and addresses software issues when necessary.
14. Seller maintains a website offering for sale only items of tangible personal property and gift cards that can be used to purchase its products.
15. Seller, which sells only tangible personal property in its ordinary course of business, sells one of the divisions of its business. Some of the proceeds from the sale are attributed to brand and good will, which are assigned to certain states according to a market sourcing regime based on the destination of the division's sales of tangible personal property. Does P.L. 86-272 provide immunity to the seller against the imposition of income tax in those states (assuming that its other activities in those states are protected)?