

Administrative Release No. 2

**Subject: Interstate Commerce Tax Act. Domestic and Foreign Corporations.
Nexus Requirements. Apportionment of Corporate Net Income.**

I. General

Maryland imposes its corporate income tax to the full extent permitted by law. The U.S. Constitution has been generally construed to preclude the imposition of income tax on a corporation unless it has sufficient nexus with the taxing state. The Interstate Commerce Act (heretofore "Public Law 86-272") further limits a state's power to tax certain foreign corporations.

II. Public Law 86-272 Interstate Commerce Tax Act (15 USC 381-384)

Public Law 86-272 generally prohibits a state from imposing an income tax on a foreign corporation whose only business activity within the state consists of the solicitation of orders of tangible personal property by its employees or representatives. To qualify for the exemption, such orders must be sent outside the state for approval or rejection and, if approved, must be filled by shipment or delivery from a point outside the state.

III. Domestic and Foreign Corporations

A. Every corporation that is organized under the laws of Maryland, registered or qualified to do business within this State, or doing business within this State, regardless of net income, shall file a true and accurate return of its income or loss for the taxable period. The return shall be signed by a duly-authorized officer of the corporation. If the corporation was inactive or not doing business within Maryland during the taxable year, although registered or qualified to do so, the return must contain a statement to that effect.

B. The Comptroller will, in the administration of the Maryland income tax law and its application to foreign corporations, make the following interpretation of Public Law 86-272 and determine what constitutes transacting or doing business within the State in the following manner:

1. Business Location. A "business location" includes, but is not limited to, a repair shop, parts department, purchasing office, employment office,

warehouse, terminal, meeting place for directors or other personnel, sales office, permanent sample or display room, research facility or a recreational facility for use of employees or customers.

A residence of an employee or representative is not ordinarily considered a "business location" of the employer unless the facts indicate otherwise. It would be considered a business location under one or more of the following conditions: A portion of the residence is used exclusively for the business of the employer, the employee is reimbursed or paid a flat fee for the use of this space by the employer or the employee's phone number is listed in the telephone directory under the name of the employer; or if the employee uses his home to store supplies, equipment or samples furnished by the employer, or the space is used by the employee to interview prospective employees, hold sales meetings, or discuss business with customers. Occasional or isolated use of the residence in the above fashion will not normally cause the residence to be considered as a business location.

2. Representatives. If a person is subject to the direct control of a foreign corporation, he or she is a representative and may not qualify as an independent contractor. A person may be considered a representative even though he or she may not be considered an employee for other purposes, such as the withholding of income tax from commissions or other amounts paid to the person.

3. Activities. Under Public Law 86-272, the following activities in Maryland do not cause an entity to be taxable.

a. Employees or representatives soliciting orders for tangible personal property which orders are sent outside this state for approval or rejection.

b. Solicitation activity by non-employee independent contractors, conducted through their own office or business location in Maryland.

c. Delivery of goods to customers by the corporation in its own or leased vehicles from a point outside of Maryland.

IV. Nexus

Trivial or de minimis activity does not establish nexus. The following is a non-exclusive list of in-state activities which generally create nexus and are outside the protection of Public Law 86-272:

A. Maintaining a business location in Maryland, including any kind of office.

B. Ownership or use of property in Maryland, real or personal, whether the property is:

1. Rented office space; or

2. Equipment used in the manufacture and distribution of goods.

C. Employees soliciting and accepting orders in Maryland.

D. Installation or assembly of the corporation's product.

E. Maintaining a stock of inventory in a public warehouse or placement of the corporation's inventory in the hands of a distributor or other non-employee representative.

F. Sales persons making collections on regular or delinquent accounts.

G. Technical assistance and training with Maryland offered by corporate personnel to purchasers or users of corporate products after the sale.

H. Corporate personnel repairing or replacing faulty or damaged goods.

I. Mobile stores in Maryland (such as trucks with driver-salesmen) from which direct sales are made.

V. Apportionment of Income

If the trade or business of a corporation is carried on partly within and partly without this State, the corporation is required to use the apportionment formula as provided in § 10-402, Tax-General Article, Annotated Code of Maryland. However, if the trade or business of the corporation is carried on wholly within this State, the corporation may not use the apportionment formula.

In determining whether a corporation is doing business "wholly within" Maryland and thus not

entitled to use the apportionment formula, or is doing business "partly within and partly without" Maryland so as to be required to use the apportionment formula, the following guidelines apply:

1. The mere shipment of goods from a location in Maryland to another state is not to be considered doing business in a state other than Maryland. See *W.J. Dickey v. State Tax Commission*, 212 Md. 607, 131 A.2d 277 (1957). Thus, a corporation doing business in Maryland, whose activities in locations outside of Maryland for the relevant taxable year are limited to such shipment of goods, is not entitled to use the apportionment formula to compute its Maryland taxable income.

2. Other activities in locations other than Maryland may or may not be considered "doing business" in such locations so as to allow the corporation to use the apportionment formula. If such activities in all other states do not go beyond the scope of Public Law 86-272, the corporation would not normally be considered as doing business in any other state, and thus would not be able to use the apportionment formula.

3. If a corporation claims to be doing business in Maryland and other states and is thus entitled to use the apportionment formula, the tax reporting and corporate registration history of the corporation in such other states is relevant, but not conclusive, on the question of whether a corporation is doing business in more than one state. Thus, if a state imposes a registration requirement or a tax based upon a corporation's doing business in that state, and the subject corporation has either: (i) never registered; (ii) never filed relevant tax returns; or (iii) successfully defended against a tax assessment or claim in such other state, under Public Law 86-272 such corporation would normally not be allowed to make the inconsistent claim on its Maryland tax return that it is doing business in such other state, so as to be able to use the apportionment formula. Corporations that can explain the inconsistent claim are, notwithstanding the inconsistency, allowed to apportion their income between Maryland and other states as long as they are, in fact, doing business in at least one state other than Maryland during the relevant taxable year.

4. The same standards and rules used for determining whether a foreign corporation is doing business in Maryland, so as to be subject to the

Maryland income tax, shall be used for determining whether a corporation is doing business in at least one other state so as to require the use of an apportionment formula.

5. Specific rules applicable to all corporations subject to the Maryland income tax laws are published in COMAR 03.04.03, Corporations.

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