STATE OF MAINE
SAGADAHOC, ss.

BUSINESS AND CONSUMER DOCKET
Location: West Bath
Docket No. BCD-WB-AP-09-11

Avon Products, Inc.,

Petitioner

v.

DECISION AND ORDER

State Tax Assessor,

Respondent

This matter was heard on June 30, 2009, on the request of Petitioner Avon Products, Inc., (Avon), pursuant to M.R. Civ. P. 80C and 36 M.R.S. § 151, for judicial review of the determination of the Respondent State Tax Assessor (the Assessor) as to Avon's tax liability for the years 2000 through 2004. Attorneys Dan Snow and Sarah Beard represented Avon. Assistant Attorney General Scott Boak represented the Assessor.

In this action, Avon challenges the Assessor's corporate income tax assessment for the tax years 2000 through 2004. The parties submitted the matter for the Court's consideration based on a Joint Stipulation of Facts and Joint List of Exhibits. The Court incorporates herein the facts to which the parties stipulated.

Discussion

I. Applicable Law

The narrow legal question presented in this case is whether federal law protects Avon's activities in Maine from taxation. Avon contends that its activities are within the scope of the protection of federal law and, therefore, the income derived from those activities is exempt from taxation. Conversely, the Assessor maintains that Avon's activities exceed those protected by

federal law and Avon is thus subject to taxation. The federal statute at issue, 15 U.S.C. § 381, which is codified at Public Law 86-272 ("P.L. 86-272" or "Section 381"), provides in pertinent part:

> (a) Minimum standards. No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after September 14, 1959, a net income tax on the income derived within such State by any person from interstate commerce if the only business activities within such State by or on behalf of such person during such taxable year are either, or both, of the following: (1) the solicitation of orders by such person, or his representative, in such State for sales of tangible personal property, which orders are sent outside the State for approval or rejection, and, if approved, are filled by shipment or delivery from a point outside the State; and (2) the solicitation of orders by such person, or his representative, in such State in the name of or for the benefit of a prospective customer of such person, if orders by such customer to such person to enable such customer to fill orders resulting from such solicitation are orders described in paragraph (1).
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> (c) Sales or solicitation of orders for sales by independent contractors. For purposes of subsection (a) of this section, a person shall not be considered to have engaged in business activities within a State during any taxable year merely by reason of sales in such State, or the solicitation of orders for sales in such State, of tangible personal property on behalf of such person by one or more independent contractors, or by reason of the maintenance, of an office in such State by one or more independent contractors whose activities on behalf of such person in such State consist solely of making sales, or soliciting orders for sales, of tangible personal property.

Id. Here, the central issue is whether Avon's business activities in Maine "consist solely of making sales, or soliciting orders for sales."

In the leading United States Supreme Court case interpreting P.L. 86-272, *Wisconsin Dep't of Revenue v. William Wrigley, Jr., Co.*, the Court defined the scope of the state income tax immunity that Section 381(a)(1) provides for individuals or entities whose "'only business activities' in that State consist of 'solicitation of orders' for interstate sales." 505 U.S. 214, 223 (1992) (quoting 15 U.S.C. § 381). According to the Court in *Wrigley*, "solicitation of orders" includes "not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order."[1] *Id.* In addition, "solicitation of orders" includes conduct or speech that is "*entirely ancillary* to requests for

[1] As an example, the Court wrote, "a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in 'solicitation' even if he does not come right out and ask the retailer to buy some." 505 U.S. at 223.

purchases - . . . [that is, an activity] that serve[s] no independent business function apart from [its] connection to the solicitation of orders -" as opposed to an activity "that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id.* By way of illustration, the Court explained:

> Providing a car and stock of free samples to salesmen is part of the "solicitation of orders," because the only reason to do it is to facilitate requests for purchases. Contrariwise, employing salesmen to repair or service the company's products is not part of the "solicitation of orders," since there is good reason to get that done whether or not the company has a sales force. Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*, and cannot be converted into "solicitation" by merely being assigned to salesmen.

Id. at 229 (emphasis in original).

The Court in *Wrigley* also recognized that even when an activity is not entirely ancillary to solicitation, the potential taxpayer would nevertheless be exempt, provided that the activities are sufficiently *de minimus*. *Id.* at 231-32. "Whether in-state activity other than 'solicitation of orders' is sufficiently *de minimus* to avoid loss of the tax immunity conferred by § 381 depends on whether that activity establishes a nontrivial additional connection with the taxing state." *Id.* at 232.

As noted above, Section 381(a) also "protects the solicitation of orders 'for the benefit of a prospective customer of such person,' if the customer's orders to the soliciting company meet the requirements of § 381(a)(1)." James A. Amdur, *Protection of Out-of-State Sellers from State Income Tax by Public Law 86-272 (15 U.S.C.A. §§ 381 to 384)*, 182 A.L.R. Fed. 291 (quoting 15 U.S.C. § 381(a)(2)). "Courts have held or recognized that this provision protects the activities of 'missionary' sales representatives, that is, activities designed to promote sales of a company's products to 'indirect' customers who would purchase the products from wholesalers or other 'direct' customers of the company." *Id.* at § 2(a). *See also id.* at § 53.

In addition to the immunity conferred by Section 381(a) for the "solicitation of orders," Section 381(c) also confers immunity for actual in-state sales and "the maintenance . . . of an office . . . by one or more independent contractors whose activities . . . consist solely of making sales, or soliciting orders for sales." 15 U.S.C. § 381(c). "Independent contractor" is defined in 15 U.S.C.A. § 381(d)(1) as "a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities[.]" *Id.* Under the statute, "the term 'representative' does not include an independent contractor." *Id.* at § 381(d)(2).

II. Avon's Business Activities

The Assessor contends that Avon's activities exceeded the protections of P.L. 86-272 in three different respects. First, the Assessor contends that "Avon Representatives/LABC operators regularly engaged in unprotected activities in Maine, such as delivering products, collecting money from customers, picking up and replacing defective products, demonstrating the use of Avon products, and recruiting and training other individuals to recruit and train new Avon Representatives." Resp.'s Br. at 6-7. According to the Assessor, "[t]hese activities are properly imputed to Avon because Avon Representatives were acting as agents or representatives of Avon." *Id.* at 7.

In addition, the Assessor contends that "Avon DSMs [District Sales Mangers] also engaged in unprotected activities." *Id.* Specifically, the Assessor argues that Avon sales managers "regularly recruited and trained people who did more than just solicit orders. Avon DSMs also conducted training on the use of Avon products and did collection activities on Avon's behalf." *Id.* The Assessor maintains that "[t]hese activities did not facilitate requests for purchases and are not protected under P.L. 86-272." *Id.*

The Assessor also argues that Avon engaged in "unprotected activities at the corporate level by (1) entering into license agreements in Maine with LABC operators and (2) loaning office equipment to DSMs so they could conduct activities other than solicitation of orders (e.g. recruit individuals who did more than solicit orders)." *Id.* The Assessor contends that the activities are not exempt from taxation because "while these activities may have been designed to *increase* sales, they did not facilitate requests for specific purchases and are not protected." *Id.*

A. District Sales Mangers

The District Sales Managers are clearly Avon employees and, therefore, the conduct of the DSMs is appropriately imputed to Avon when determining state income tax liability under P.L. 86-272. The issue is whether the sales managers engaged in activities other than the implicit or explicit "solicitation of orders" and, if so, whether those activities were entirely ancillary to requests for purchases or *de minimus*.

The Assessor argues that Avon, through the District Sales Mangers, exceeded the scope of P.L. 86-272 when: (1) the DSMs trained and recruited Avon Representatives who, according to the Assessor, did more than solicit sales; (2) Avon provided the DSMs with a budget to hire administrative assistants, also employed by Avon, who engaged in collection activities; and (3) DSMs delivered products to sales meetings or directly to Avon Representatives. Based on a review of the record, the Court disagrees.

With respect to the "collection activities," the record reflects the following: Avon could and sometimes would request that a DSM contact an Avon Representative who was having difficulty paying Avon for the orders in a timely manner. JSF ¶ 189. If an Avon Representative's account

with Avon was past due, the DSM might contact the Avon Representative to encourage the person to establish a payment arrangement with Avon, such as a "pay and sell" arrangement, in order to allow the Avon Representative to make payments on the account with Avon, while continuing to sell product. JSF ¶ 190. The District Sales Managers were not involved in payment or deposit transactions, and did not collect money for product from Avon Representatives. JSF ¶ 191.

Much of the sales managers' "collection activities" constitute the same type of "mediating" activity that the Supreme Court in *Wrigley* deemed protected. In *Wrigley*, the Court considered whether "instances in which Wrigley's regional sales manager contacted [Wrigley's central office] about 'rather nasty' credit disputes involving important accounts in order 'get the account and Wrigley's credit department communicating," constituted unprotected collection activities. The Court explained that the activity was within the scope of the statute's protection:

> It hardly appears likely that this mediating function between the customer and the central office would have been performed by some other employee – some company ombudsman, so to speak – if the on-location sales staff did not exist. The purpose of this activity, in other words, was to ingratiate the salesman with the customer, thereby facilitating requests for purchases.

Wrigley, 505 U.S. at 234-35.

Similarly, in this case, DMSs contacted the Avon Representatives to urge them to make payments, but did not actually collect any of the amounts due. That is, they facilitated communication between the Avon Representatives and Avon's own credit department in order to permit the Representatives to continue to solicit sales. Consistent with the reasoning of the Court in *Wrigley*, this activity is protected by P.L. 86-272.

The reasoning of the Court in *Wrigley* also supports the conclusion that providing samples of Avon products and product brochures to Avon Representatives is within the scope of P.L. 86-272. *See Wrigley*, 505 U.S. at 229 ("Providing . . . a stock of free samples to salesmen is part of the

'solicitation of orders,' because the only reason to do it is to facilitate requests for purchases.") *Id.* Indeed, the supply of samples and product information appear to be central to the effort to solicit sales of a product.

Lastly, DSMs' efforts to recruit and train Avon Representatives to sell Avon product also fall within the scope of P.L. 86-272. The Avon Representatives constitute Avon's primary customers insofar as the Representatives were, overwhelmingly, the individuals who purchased product directly from Avon. As such, recruitment of new Avon Representatives was, at its core, a solicitation of orders. In addition, the training was designed to facilitate the Representatives' efforts and ability to solicit orders from their customers. In many ways, the training is a necessary part of the solicitation process and is, therefore, very much ancillary to the solicitation of orders.

B. Avon Representatives

The Assessor contends that Avon Representatives also engaged in a number of activities that were not ancillary to requests for purchases and, thus, not protected. According to Avon, those unprotected activities consisted of: (1) the delivery of product to and from and Maine customers; (2) the collection of payments from Maine customers; (3) the replacement of products for Maine customers pursuant to Avon's 100% satisfaction guarantee; (4) the demonstration of and the training on the use of Avon products for consumers and, on at least one occasion, for other Avon Representatives under Phase II of the Beauty Advisor Program; and (5) the recruitment and training of other Avon Representatives who, according to the Assessor, engaged in activities other than the solicitation of orders for sales.

Preliminarily, the Assessor contends that the Avon Representatives are not "independent contractors" and thus not subject to the protection afforded by Section 381(c). As explained above,

"independent contractor" is defined in 15 U.S.C.A. § 381(d)(1) as "a commission agent, broker, or other independent contractor who is engaged in selling, or soliciting orders for the sale of, tangible personal property for more than one principal and who holds himself out as such in the regular course of his business activities[.]" *Id.* Contrary to the Assessor's arguments, the record establishes that Avon Representatives are independent contractors. The Representatives advertised their services independent of Avon, managed their offices as they deemed best, worked a geographic area independent of Avon, and were not limited to engaging in sales solely for Avon. In other words, Avon did not exercise control over the Representatives and their activities sufficient to render the Representatives employees of Avon.

Furthermore, the demonstrations that Avon Representatives performed for their customers as to the use of Avon products, and the delivery of product to and from customers were entirely ancillary to their requests for purchase orders. In the Court's view, the demonstration of the product is plainly part of the solicitation process, and the delivery of product to customers is just as clearly a part of the sales process.

C. LABC Operators

During the contested tax years, two LABCs were operated as retail stores located in Augusta and Bangor. The Assessor argues that the LABC operators were representatives of Avon who engaged in non-exempt activity. After a review of the stipulated record, the Court agrees.

As explained above, under P.L. 86-272, in order to be exempt from taxation, the putative taxpayer's in-state business activities must be limited to "solicitation of orders," or to other activities that are ancillary to solicitation. 15 U.S.C. § 381(a)(1). Under Maine regulation, a company loses its tax immunity if, among other things, an employee or other representative maintains a place of

business in the State other than an in-home office. *See* Bureau of Rev. Servs., 18-125 CMR 808.04(E)(20).

In this case, given the parties' stipulation that the LABCs represent "retail environments" in which the operators were authorized to sell Avon's products, the LABCs constitute "places of business." JSF ¶ 227. Under Maine's tax regulations, therefore, if the LABC operators are considered employees or representatives of Avon, this conduct is not exempt from taxation under P.L. 86-272. In other words, if the LABC operators are "independent contractors" as P.L. 86-272 and Maine State tax regulations define that term, Avon would not be subject to taxation for the activities of the LABC operators.

To qualify as an "independent contractor" under P.L. 86-272, one must be "engaged in selling, or soliciting orders for the sale of, tangible personal property *for more than one principal*, and "hold[] himself out as such in the regular course of his business activities." 15 U.S.C. § 381(d)(1) (emphasis added). LABC operators were prohibited from offering non-Avon products. JSF ¶ 254. In fact, "[t]he LABCs were prohibited from selling other non-beauty items that were advertised in the Avon brochure, such as Mattel, Disney, Barbie, Hot Wheels, and NASCAR items." JSF ¶ 253. In short, the record lacks any evidence upon which the Court could conclude that the LABC operators held themselves out as independent contractors engaged in the sale or solicitation of orders for a principal other than Avon.

Not only did the LABC operators sell Avon products exclusively, the LABC operators did not have the discretion to sell other products or to make independent business decisions. Avon reserved to itself the right to: (1) dictate what LABC operators could sell, as well as details such as "sales and marketing procedures, customer service and returns, . . .[and] employee appearance"; (2)

both approve or disapprove the location of a proposed LABC; (3) assume the LABC lease; (4) have sole control over advertising for the LABC; and (5) close the LABC for "continued failure of an LABC to comply with Avon policies." JSF ¶¶ 253, 254, 266, 268. These facts militate in favor of and in fact compel the conclusion that LABC operators were not independent contractors as that term is defined under P.L. 86-272 and Maine common law.[2]

Given the control that Avon retained under the terms of the license agreement, it is not surprising that Avon's entering into the agreement constitutes an unprotected activity under the applicable regulations. Rule 808.04(E)(21) specifically provides that "[e]ntering into a franchising or licensing agreement; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchiser or licensor to its franchisee or licensee with the state." Insofar as under a licensing agreement the licensor typically retains significant control over the licensee's operation, the merit of the rule is apparent.

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[2] Under well-established Maine law, "control is the most important factor in determining whether an individual is an employee or an independent contractor." *Legassie v. Bangor Publ. Co.*, 1999 ME 180, ¶ 6, 741 A.2d 442, 444 (citing *Timberlake v. Frigon & Frigon*, 438 A.2d 1294, 1296 (Me. 1982) ("The vital issue in proving an employee-employer relationship is whether or not the employer has the power of control or superintendence over" the other person.)) *See also Murray's Case*, 130 Me. 181, 186, 154 A. 352, 354 (1931), in which the Law Court "synthesized the 'commonly recognized' means of examining the existence of an independent contractor relationship and set out eight factors to be considered and weighed," including:

> (1) the existence of a contract for the performance by a person of a certain piece or kind of work at a fixed price;
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> (2) independent nature of the business or his distinct calling;
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> (3) his employment of assistants with the right to supervise their activities;
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> (4) his obligation to furnish necessary tools, supplies, and materials;
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> (5) his right to control the progress of the work except as to final results;
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> (6) the time for which the workman is employed;
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> (7) the method of payment, whether by time or by job;
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> (8) whether the work is part of the regular business of the employer.

Id. ¶ 6, 741 A.2d at 444 n.1 (quoting *Murray's Case*, 154 A. at 354).

In sum, because the LABC operators maintained specific places of business in Maine approved by Avon, sold only Avon products, and operated at the direction of Avon and in accordance with Avon policies, the LABC operators were not independent contractors as contemplated by the applicable law.[3] Section 381 did not, therefore, protect the activities of the LABC operators, nor did Avon's entering into the license agreement pursuant to which agreement Avon retained significant control over the business activities of the LABC operators.

Conclusion

Based on the foregoing analysis, the Court denies Petitioner's request for relief from the Assessor's determination.

Pursuant to M.R. Civ. P. 79(a), the Clerk shall incorporate this Decision and Order into the docket by reference.

Date: 9/10/09

Justice, Maine Business & Consumer Docket

[3] The Assessor asserts when a LABC operator performed "stand-in" duties for a District Sales Manager for parts of 2004 and 2005, the LABC operator engaged in activity that was not protected by Section 381. Because the Court has determined that the LABC operators are not independent contractors as contemplated by the applicable law, the Court does not need to determine whether the performance of the "stand-in" duties was protected activity.