

STATE INCOME TAXES—INTERSTATE COMMERCE

PUBLIC LAW 86-272; 73 STAT. 555

[S. 2524]

An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

**[As proposed to be amended by H.R. 1083 (111<sup>th</sup> Congress)]**

TITLE I—IMPOSITION OF MINIMUM STANDARD

[Sec. 381. Imposition of net income tax]

Sec. 101. (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 any one or more, of the following:

(1) the solicitation of orders (which are sent outside the State for approval or rejection) or customers by such person, or his representative, in such State for sales or transactions, which are--

(A) in the case of tangible personal property, filled by shipment or delivery from a point outside the State; and

(B) in the case of all other forms of property, services, and other transactions, fulfilled or distributed from a point outside the State;

(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);

(3) the furnishing of information to customers or affiliates in such State, or the coverage of events or other gathering of information in such State by such person, or his representative, which information is used or disseminated from a point outside the State; and

(4) those business activities directly related to such person's potential or actual purchase of goods or services within the State if the final decision to purchase is made outside the State.

(b) Domestic corporations; persons domiciled in or residents of a State

The provisions of subsection (a) of this section shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to -

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such

State.

(c) 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--

(1) by reason of sales or transactions in such State, the solicitation of orders for sales or transactions in such State, the furnishing of information to customers or affiliates in such State, or the coverage of events or other gathering of information in such State, on behalf of such person by one or more independent contractors;

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Deleted: 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 ¶

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(2) 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 fulfilling transactions, soliciting order for sales or transactions, the furnishing of information to customers or affiliates, or the coverage of events or other gathering of information; or

(3) by reason of the furnishing of information to an independent contractor by such person ancillary to the solicitation of orders or transactions by the independent contractor on behalf of such person.

▼ 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, or tangible personal property.

**Deleted:** (c) Sales or solicitation of orders for sales by independent contractors¶

(d) Definitions

For purposes of this section -

(1) the term "independent contractor" means a commission agent, broker, or other independent contractor who is engaged in selling or fulfilling transactions, or soliciting orders for a sale or transaction, furnishing information, or covering events, or otherwise gathering information for more than one principal and who holds himself out as such in the regular course of his business activities; and

**Deleted:** the sale of, tangible personal property

(2) the term "representative" does not include an independent contractor.

[Sec. 382. Assessment of net income taxes]

Sec. 102. (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act, any net income tax which as imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed—

(1) to invalidate the collection, on or before the date of the enactment of this Act, or any net income tax imposed for a taxable year ending on or before such date, or

(2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

[Sec. 383. "Net income tax" defined]

Sec. 103. For purposes of this title, the term "net income tax" means any tax imposed on, or measured by, net income.

[Sec. 384. Separability]

Sec. 104. If any provision of this title or the application of such provision to any person or circumstance is held invalid, the remainder of this title or the application of such provision to personal or circumstances other than those to which it is held invalid, shall not be affected thereby.

Sec. 105. For taxable periods beginning on or after January 1, 2010, the prohibitions of section 101 that apply with respect to net income taxes shall also apply with respect to each other business activity tax, as defined in section 3(g) of the Business Activity Tax Simplification Act of

2009. A State or political subdivision thereof may not assess or collect any tax which by reason of this section the State or political subdivision may not impose.

[The amendments made by this section shall apply with respect to the imposition, assessment, and collection of taxes for taxable periods beginning on or after January 1, 2010.]

[Sec. 3 of H.R. 1083 \*it is not clear how it is intended to fit with the above amendments to PL 86-272, although new Sec. 105 makes reference to section 3(g)]

MINIMUM JURISDICTIONAL STANDARD FOR STATE AND LOCAL NET INCOME TAXES AND OTHER BUSINESS ACTIVITY TAXES.

(a) In General- No taxing authority of a State shall have power to impose, assess, or collect a net income tax or other business activity tax on any person relating to such person's activities in interstate commerce unless such person has a physical presence in the State during the taxable period with respect to which the tax is imposed.

(b) Requirements for Physical Presence-

(1) IN GENERAL- For purposes of subsection (a), a person has a physical presence in a State only if such person's business activities in the State include any of the following during such person's taxable year:

(A) Being an individual physically in the State, or assigning one or more employees to be in the State.

(B) Using the services of an agent (excluding an employee) to establish or maintain the market in the State, if such agent does not perform business services in the State for any other person during such taxable year.

(C) The leasing or owning of tangible personal property or of real property in the State.

(2) DE MINIMIS PHYSICAL PRESENCE- For purposes of this section, the term 'physical presence' shall not include--

(A) presence in a State for less than 15 days in a taxable year (or a greater number of days if provided by State law); or

(B) presence in a State to conduct limited or transient business activity.

(c) Taxable Periods Not Consisting of a Year- If the taxable period for which the tax is imposed is not a year, then any requirements expressed in days for establishing physical presence under this Act shall be adjusted pro rata accordingly.

(d) Minimum Jurisdictional Standard- This section provides for minimum jurisdictional standards and shall not be construed to modify, affect, or supersede the authority of a State or any other provision of Federal law allowing persons to conduct greater activities without the imposition of tax jurisdiction.

(e) Exceptions-

(1) DOMESTIC BUSINESS ENTITIES AND INDIVIDUALS DOMICILED IN, OR RESIDENTS OF, THE STATE- Subsection (a) does not apply with respect to--

(A) a person (other than an individual) that is incorporated or formed under the laws of the State (or domiciled in the State) in which the tax is imposed; or

(B) an individual who is domiciled in, or a resident of, the State in which the tax is imposed.

(2) TAXATION OF PARTNERS AND SIMILAR PERSONS- This section shall not be construed to modify or affect any State business activity tax liability of an owner or beneficiary of an entity that is a partnership, an S corporation (as defined in section 1361 of the Internal Revenue Code of 1986), a limited liability company (classified as a partnership for Federal income tax purposes), a trust, an estate, or any other similar entity, if the entity has a physical presence in the State in which the tax is imposed.

(3) PRESERVATION OF AUTHORITY- This section shall not be construed to modify, affect, or supersede the authority of a State to bring an enforcement action against a person or entity that may be engaged in an illegal activity, a sham transaction, or any perceived or actual abuse in its business activities if such enforcement action does not modify, affect, or supersede the operation of any provision of this section or of any other Federal law.

(f) Rule of Construction- This section shall not be construed to modify, affect, or supersede the operation of title I of the Act entitled 'An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto', approved September 14, 1959 (15 U.S.C. 381 et seq.).

(g) Definitions, etc- For purposes of this section:

(1) NET INCOME TAX- The term 'net income tax' has the meaning given that term for the purposes of the Act entitled 'An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce, and authorizing studies by congressional committees of matters pertaining thereto', approved September 14, 1959 (15 U.S.C. 381 et seq.).

(2) OTHER BUSINESS ACTIVITY TAX-

(A) IN GENERAL- The term 'other business activity tax' means any tax in the nature of a net income tax or tax measured by the amount of, or economic results of, business or related activity conducted in the State.

(B) EXCLUSION- The term 'other business activity tax' does not include a sales tax, a use tax, or a similar transaction tax, imposed on the sale or acquisition of goods or services, whether or not denominated a tax imposed on the privilege of doing business.

(3) PERSON- The term 'person' has the meaning given such term by section 1 of title 1 of the United States Code.

(4) STATE- The term 'State' means any of the several States, the District of Columbia, or any territory or possession of the United States, or any political subdivision of any of the foregoing.

(5) TANGIBLE PERSONAL PROPERTY- For purposes of subsection (b)(1)(C), the leasing or owning of tangible personal property does not include the leasing or licensing of computer software.

(h) Effective Date- This section shall apply with respect to taxable periods beginning on or after January 1, 2009.

## TITLE II—STUDY AND REPORT BY CONGRESSIONAL COMMITTEES

Sec. 201. The Committee on the Judiciary of the House of Representatives and the Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to the Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Sec. 302. The Committees shall report to their respective Houses the results of such studies together with their proposals for legislation on or before July 1, 1962.

[amended by Pub. L. 87-17, Apr. 7, 1961, 75 Stat. 41; Pub. L. 87-435, Apr. 21, 1962, 76 Stat. 55; Pub.L. 88-42, June 21, 1963, 77 Stat. 67; Pub. L. 88-286, Mar. 18, 1964, 78 Stat. 166, and repealed by Pub. L. 94-455, title XXI, Sec. 2121(a), Oct. 4, 1976, 90 Stat. 1914]