Instructions for Form 4586, Michigan Business Tax (MBT) Schedule of Business Activity Protected Under Public Law 86-272

Purpose

Generally, Public Law (PL) 86-272, 15 USC 381-384, restricts a state from imposing a net income tax on income derived within its borders from interstate commerce if the only business activity of the company within the state consists of the solicitation of orders for sales of tangible personal property, which orders are to be sent outside the state for acceptance or rejection, and, if accepted, are filled by shipment or delivery from a point outside the state. The term *net income tax* includes the business income tax component of the MBT, but does not include the modified gross receipts portion of the MBT. In other words, even if a taxpayer has nexus with Michigan, that taxpayer may be protected from the imposition of the business income tax under PL 86-272, but still be subject to the Modified Gross Receipts Tax.

The purpose of this form is to provide data that helps the taxpayer and the Department of Treasury determine whether this restriction on state taxing power applies in this case.

General Information

PL 86-272 does not prohibit Michigan from asserting that an out-of-state business has nexus. Rather, implicit in the application of PL 86-272 is that an out-of-state business has nexus. PL 86-272 merely prohibits the imposition of tax based on net income generated from protected activities. As the Modified Gross Receipts Tax is not a tax on or measured by income, PL 86-272 offers no protection from this tax and all gross receipts are subject to the tax calculation. Nexus is a different concept than protection from taxation afforded by PL 86-272. As stated above, implicit in the application of PL 86-272 is that an out-of-state business has nexus but the activity is not subject to taxation because it is protected.

NOTE: MBT has the same nexus standard for both the Business Income Tax and Gross Receipts Tax. Substantial nexus is established by either a physical presence in Michigan for more than one day OR the taxpayer actively solicits and has gross receipts of $350,000 or more sourced to Michigan.

Only the solicitation to sell tangible personal property is afforded immunity under PL 86-272. Therefore, the leasing, renting, licensing, or other disposition of tangible personal property, or transactions involving intangibles, such as franchises, patents, copyrights, trade marks, service marks, etc., or any other type of property are not protected activities under PL 86-272.

If an entity has employees in Michigan, this fact alone does not preclude PL 86-272 protection. Employees, representatives, or independent contractors that are merely soliciting sales would not preclude PL 86-272 protection. In fact employees may have a home office, personal property such as fax machines, computers, and automobiles in Michigan. If this personal property is only used to solicit sales or transfer information out-of-state for approval, then the activities are protected.

Under PL 86-272, the activity must be limited solely to solicitation (except for de minimis activities, those that establish only a trivial connection with the taxing state, and those activities conducted by independent contractors) to be a protected activity. Solicitation is limited to speech or conduct that explicitly or implicitly invites an order; and activities that neither explicitly nor implicitly invite an order, but are entirely ancillary to requests for an order.

Ancillary activities are those activities that serve no independent business function for the seller apart from their connection to the solicitation of orders. Activities that seek to promote sales are not ancillary, because PL 86-272 does not protect activity that facilitates increased sales; it only protects ancillary activities that facilitate the request for an order.

Also, PL 86-272 provides protection to certain in-state activities if conducted by an independent contractor that would not be afforded if performed by the entity or its employees or other representatives. Independent contractors may engage in the following limited activities in Michigan without the entity's loss of immunity:

- Soliciting sales.
- Making sales.
- Maintaining an office.

However, maintenance of a stock of goods in Michigan by the independent contractor under consignment or any other type of arrangement with the entity, except for purposes of display and solicitation, removes the protection.

Sales representatives who represent a single principal are not considered to be independent contractors and are subject to the same limitations as those provided under PL 86-272.

Unprotected Activities

Entities are not protected under PL 86-272 if incorporated in the State of Michigan or, if individual, domiciled in, or a resident of, Michigan. Nor are entities protected if they solicit sales of services or property, other than tangible personal property, in Michigan. PL 86-272 protection must be evaluated on a tax year by tax year basis.

NOTE: PL 86-272 protection must be evaluated on a tax year by tax year basis. If at any time during a tax year an entity conducts activities that are not protected under PL 86-272, no income attributable to Michigan during any part of that tax year will be protected.

Examine the following list of unprotected activities. Any of the following activities conducted in Michigan by an out-of-state taxpayer or on its behalf are not protected under PL 86-272:

- Making repairs or providing maintenance or service to the property sold or to be sold.
- Collecting current or delinquent accounts through assignment or otherwise.
- Investigating credit worthiness.
- Installing or supervising installation.
- Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation.

- Providing any kind of technical assistance or service including, but not limited to, engineering assistance or design service, when one of the purposes thereof is other than the facilitation of the solicitation of orders of tangible personal property.
- Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is for improving the relationship between the sales personnel and the customer and facilitating requests for orders.
- Approving or accepting orders.
- Repossessing property.
- Securing deposits on sales.
- Picking up or replacing damaged or returned property.
- Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
- Using agency stock checks or any other instrument or process by which sales are made within Michigan by sales personnel.
- Carrying samples for sale, exchange or distribution in any manner for consideration or other value.
- Owning, leasing, using or maintaining facilities or property in this State, including, but not limited to, the following:
    - Repair shop.
    - Parts department.
    - Any kind of office other than an in-home office as permitted.
    - Warehouse.
    - Meeting place for directors, officers, or employees.
    - Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
    - Telephone answering service that is publicly attributed to the entity or to employees or agents of the entity in their representative status.
    - Mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles.
    - Real property or fixtures to real property of any kind.
- Consigning stock of goods or other tangible personal property for sale to any person, including an independent contractor.
- Maintaining in Michigan, by any employee or other representative of the out-of-state business, an office or place of business of any kind, other than an in-home office located within the residence of the employee or representative. The maintenance of any office or other place of business in Michigan that does not strictly qualify as an in-home office as described below shall, by itself, cause the loss of protection under PL 86-272. It is not relevant whether the out-of-state business pays directly, indirectly, or not at all for the cost of maintaining such an in-home office. To qualify as a protected in-home office, the following criteria apply:
    - Office cannot be publicly attributed to the out-of-state business or to the employee or representative of the out-of-state business in an employee or representative capacity.
    - Use of such office must be limited to soliciting and receiving orders from customers, for transmitting such orders outside Michigan for acceptance or rejection by the out-of-state business, or for such other activities protected under PL 86-272.
    - Office cannot be identified in a telephone listing or other public listing within Michigan as a specific address for the out-of-state business or for an employee or representative of the company in such capacity.
    - As an exception to the above, the normal distribution and use of business cards and stationery identifying the employee's or representative's name, address, telephone and fax numbers, and affiliation with the out-of-state business shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the out-of-state business or its employee or representative.
- Entering into franchising or licensing agreements; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchisor or licensor to its franchisee or licensee in Michigan.
- Conducting any activity not protected under PL 86-272 that is not entirely ancillary to requests for orders, even if such activity helps to increase sales.

NOTE: Protected activities are listed on the form.

Special Instructions for Unitary Business Groups

If business activity is protected under PL 86-272 for any member of the unitary business group (UBG), then the member must claim protection by filing the *MBT Schedule of Business Activity for Non-Designated Members of a Unitary Business Group Protected Under Public Law 86-272* (Form 4581) or the *MBT Schedule of Business Activity Protected Under Public Law 86-272* (Form 4586), as applicable, and report its individual activity. If all members of the UBG are claiming PL 86-272 protection, then the UBG will not calculate a business income tax liability. So long as one member of a UBG has nexus with Michigan and exceeds the protections of PL 86-272, all members of the UBG – including members protected under PL 86-272 – must be included when calculating the UBG's Business Income Tax base and apportionment formula. (In other words, PL 86-272 will only remove business income from the apportionable Business Income Tax base when all members of the UBG are protected under PL 86-272.) The inclusion of the business income of members that fall under PL 86-272 in the tax base of the UBG and the subsequent apportionment of such income does not constitute taxation upon those PL 86-272 members. Rather, this method is required for properly determining the Michigan income of the UBG.

Include completed Form 4586 as part of the tax return filing.