

REPORT #727

TAX SECTION

New York State Bar Association

Supplemental Letter on Proposed Amendments

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TAX SECTION**New York State Bar Association****JOHN A. CORRY**

Chair
1 Chase Manhattan Plaza
New York City 10005
212/530-4608

PETER C. CANELLOS

First Vice-Chair
299 Park Avenue
New York City 10171
212/371-9200

MICHAEL L. SCHLER

Second Vice-Chair
Worldwide Plaza
825 Eighth Avenue
New York City 10019
212/474-1588

CAROLYN JOY LEE ICHEL

Secretary
30 Rockefeller Plaza
New York City 10112
212/903-8761

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July 9, 1992

Simon G. Salas, Esq.
Deputy Commissioner for Legal Affairs
345 Adams Street
Brooklyn, New York 11201

Dear Mr. Salas:

This will supplement our letter of June 4, 1992, regarding the proposed amendments to Sections 11-03, 11-04 and 11-06 of Title 19 of the New York City General Corporation Tax Rules ("Amended Rules"). We have made a further review of the proposed amendments to Sections 11-03 and 11-04 in light of the recent United States Supreme Court decision in Wisconsin Department of Revenue v. William Wrigley, Jr., Co., decided June 19, 1992.

In general we find the substance of the Amended Rules to be in conformity with the Supreme Court's analysis in the Wrigley case. There are, however, certain aspects of the Amended Rules which fail to conform with the decision of the court to:

(a) protect activities that are ancillary to solicitation (e.g., supplying customers or potential customers with display racks and promotional materials; the rental of space for storage of free samples; the recruitment, training and evaluation of employees; and intervention in credit disputes), and

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(b) allow taxpayers the protection of tax immunity conferred by Public Law 86-272 where there is only a de minimis amount of taxable activities.

Accordingly, certain portions of the Amended Rules should be modified to conform with Wrigley as follows:

1. Rule 11-03(e) - A salesperson's home should be deleted from the sentence listing locations that may constitute maintaining an office, and the following sentence should be added: "For the extent to which a salesperson's home may constitute an office, see §11-04(b)(11)(vi)."
2. Rules 11-03(f)(12) and (13) should be eliminated.
3. Rule 11-04(b)(11)(iv) - After the first sentence in the paragraph a second sentence should be added as follows: "De minimis or trivial deviations from this standard will not cause the Public Law 86-272 general corporation tax exemption to be lost."

The next sentence beginning with "The term 'solicitation' is narrowly construed ..." should be eliminated and replaced with the following: "The term 'solicitation' includes those activities which are entirely ancillary to making requests for the purchase of tangible personal property".

The next sentence beginning with "Some activities incidental to offering..." should be changed by replacing "Some" with "Ancillary".

Add the following subparagraphs:

"(E) supplying customers or potential customers with display racks and promotional materials;

"(F) the rental of space for storage of free samples;

"(G) the recruitment, training and evaluation of employees;

"(H) intervention in credit disputes."

4. Rule 11-04(b)(11)(v) - The following sentence should be eliminated "In general, activities of employees in New York City which are intended or designed to promote or encourage the marketing of the corporation's products in New York City, or intended or designed to maintain a market already established in

New York City are beyond mere solicitation and will make a corporation taxable."

5. Rule 11-04 (b)(11)(v)(D) and (E) should be eliminated.

6. All references to "mere solicitation" contained in the Amended Rules should be replaced by "solicitation".

We recognize that portions of the above Amended Rules are substantially identical to the corresponding State regulations, see § 1-3.4(b)(9), but we believe the Wrigley decision will require amendments to these regulations similar to those we have recommended above.

Because of the recent date of the Wrigley decision and the facts that the next meeting of the Tax Section's Executive Committee will not be until July 16 and that you require comments prior to that date, this letter expresses the views only of the Committee on New York City Tax Matters and not of the Tax Section itself.

Very truly yours,

RJL:bld

Robert J. Levinsohn
Co-Chair, Committee on
New York City Tax Matters

bcc: John A. Corry, Esq.
Peter C. Canellos, Esq.
Michael L. Schler, Esq.
Carolyn Ichel, Esq.
Robert Plautz, Esq.
Ron Rabkin, Esq.