

IT 13-05

Tax Type: Income Tax

**Tax Issue: Nexus (Taxable Connection With Or Event Within The States)
Unitary – Inclusion of Company(ies) In A Unitary Group**

**STATE OF ILLINOIS
DEPARTMENT OF REVENUE
OFFICE OF ADMINISTRATIVE HEARINGS
CHICAGO, ILLINOIS**

THE DEPARTMENT OF REVENUE)	Docket No.	XXXX
OF THE STATE OF ILLINOIS)	NOD Nos.	XXXX
v.)		XXXX
ABC COMPANY,)	Tax Years	12/2005 – 12/2006
)	John E. White,	
Taxpayer)	Administrative Law Judge	

RECOMMENDATION FOR DISPOSITION

Appearances: Mark Rotatori, Jones Day, appeared for ABC Company; Ronald Forman, Special Assistant Attorney General, appeared for the Illinois Department of Revenue.

Synopsis: ABC Company (ABC COMPANY or Taxpayer) protested two Notices of Deficiency (NODs) the Illinois Department of Revenue (Department) issued to it regarding tax years ending on December 31, 2005 and December 31, 2006. ABC COMPANY files Illinois income tax returns as the reporting taxpayer for a group of four related corporations that conduct a single unitary business within the United States. The NODs proposed to assess tax, penalties and interest based on the Department's determination that ABC COMPANY should have included, in the numerator of its unitary group's Illinois sales factor, the gross receipts that ABC America (ABC America) derived from selling ABC products to distributors who lived and/or worked in Illinois. The issues are whether ABC America had nexus with Illinois in 2005 and 2006, and if so, whether Illinois was precluded, by federal law and/or by an applicable income tax regulation, from levying income and replacement income tax on ABC America for those years.

The hearing was held at the Department's offices in Chicago. The parties entered into a stipulation of facts and exhibits, and Taxpayer offered the testimony of two witnesses. After considering that evidence, I am including in this recommendation findings and stipulations of fact and conclusions of law. I recommend that the NODs be finalized as issued.

Findings and Stipulations of Fact:

Facts Re: ABC's Corporate Structure

1. ABC International Inc. (ABC) is an indirect, wholly-owned subsidiary of ABC Ltd. Stipulation (Stip.) Ex. 41 (portions of ABC's Form 10-K (Annual Report) for fiscal year ending December 31, 2005), p. 2 (statements under heading of, The Company, include, "ABC [Ltd] is a holding company, with substantially all of its assets consisting of the capital stock of its indirect, wholly-owned subsidiary, ABC International."); Stip. Ex. 42 (portions of ABC's Annual Report for fiscal year ending December 31, 2006), p. 4. ABC Ltd. is organized under the laws of the Someplace. Stip. Exs. 41-42 (cover page of each exhibit).
2. ABC COMPANY is a wholly-owned subsidiary of ABC, and is incorporated under the laws of Anystate, with headquarters in Anystate. Stip. ¶ 1; Hearing Transcript (Tr.), p. 24 (testimony of Jane Doe (Jane Doe)).
3. ABC COMPANY's principal business is to provide training services at live events to ABC Distributors. Stip. Ex. 40 (Department's Response to Taxpayer's First Set of Interrogatories and attached Auditor's Comments), p. 6 (p. 2 of Auditor's Comments); Tr. pp. 25-26 (Jane Doe).
4. ABC America (ABC America) is also a wholly-owned subsidiary of ABC, and is incorporated under the laws of Anotherstate, with headquarters in Anystate. Stip. ¶ 2; Stip. Ex. 37 (certified copies of: ABC America's Articles of Incorporation; Articles of Merger

(with ABC International of America, an Anystate corporation); and Certificate of Correction of Articles of Merger); Tr. p. 24 (Jane Doe).

5. ABC America's principal business is to sell and distribute ABC products to Distributors in all of the geographic areas ABC America serves, either for personal use or consumption, or for resale to others for use or consumption. Stip. Ex. 41, pp. 3-12; Stip. Ex. 42, pp. 5-13; Tr. p. 26 (Jane Doe).

Facts Re: ABC's Business and Business Model:

6. ABC is a global network marketing company that sells weight management, nutritional supplement and personal care products. Stip. Ex. 41, p. 3; Stip. Ex. 42, p. 5.
7. ABC distributes its products through a global network marketing organization comprised of over 1.5 million independent distributors in 63 countries, except in China where, due to regulations, sales are required to be conducted through company operated retail stores, sales representatives and employed sales management personnel. Stip. Ex. 42, p. 11.
8. ABC's Annual Reports provide a comprehensive description of its business and its global network marketing program. Stip. Ex. 41, pp. 3-12; Stip. Ex. 42, pp. 5-13.
9. ABC's 2005 Annual Report provides, in pertinent part, as follows:

Network Marketing Program

General

Our products are distributed through a global network marketing organization comprised of over one million independent distributors in 60 countries, except in China where, due to regulations, our sales are conducted through company operated retail stores, preferred customers, and employed sales management personnel. In addition to helping them achieve physical health and wellness through use of our products, we offer our distributors, who are independent contractors, attractive income opportunities. Distributors may earn income on their own sales and can also earn royalties and bonuses on sales made by the distributors in their sales organizations. We believe that our products are particularly well-suited to the network marketing distribution channel because sales of weight management and health and wellness products are strengthened by ongoing personal contact between retail consumers and distributors. We believe

our continued commitment to developing innovative, science-based products will enhance our ability to attract new distributors as well as increase the productivity and retention of existing distributors. Furthermore, our international sponsorship program, which permits distributors to sponsor distributors in other countries where we are licensed to do business and where we have obtained required product approvals, provides a significant advantage to our distributors as compared with distributors in some other network marketing organizations.

In connection with the Acquisition, we entered into an agreement with our distributors on July 18, 2002 that no material changes adverse to the distributors will be made to the existing marketing plan and that we will continue to distribute ABC products exclusively through our independent distributors. We believe that this agreement has strengthened our relationship with our existing distributors, improved our ability to recruit new distributors and generally increased the long-term stability of our business.

Structure of the network marketing program

To become a distributor, a person must be sponsored by an existing distributor, except in China where no sponsorship is allowed, and must purchase an International Business Pack from us, except in South Korea, where there is no charge for a distributor kit. The International Business Pack is a distributor kit available in local languages. The kit comes in two sizes. The larger kit costs the local currency equivalent of about \$75 and includes a can of *Tastegood*/Formula 1, several bottles of different nutritional supplements, booklets describing us, our compensation plan and rules of conduct, various training and promotional materials, distributor applications and a product catalog. The smaller version costs the local currency equivalent of about \$50 and includes sample products and essentially the same print and promotional materials as included in the larger kit version. To become a supervisor or qualify for a higher level, distributors must achieve specified volumes of product purchases or earn certain amounts of royalty overrides during specified time periods and must re-qualify for the levels once each year.

To attain supervisor status, a distributor generally must purchase products representing at least 4,000 volume points in one month or 2,500 volume points in two consecutive months. China has its own unique qualifying program.

Volume points are point values assigned to each of our products that are equal in all countries and are based on the suggested retail price of U.S. products (one volume point equates to one U.S. dollar). Supervisors may then attain higher levels, (consisting of the World Team, the Global Expansion Team, the Millionaire Team, the President's Team, the Chairman's Club and the Founders Circle) and earn increasing amounts of royalty overrides based on purchases by distributors within their organizations and, for members of our Global Expansion Team and above, earn production bonuses on sales in their downline sales organizations. Supervisors contribute significantly to our sales and some key supervisors who have attained the highest levels within our distributor network are responsible for their organization's generation of a substantial portion of our sales and for recruiting a substantial number of our distributors.

Distributor earnings

Distributor earnings are derived from several sources. First, distributors may earn profits by purchasing our products at wholesale prices, which are discounted 25% to 50% from suggested retail prices, depending on the distributors' level within our distributor network, and selling our products to retail customers or to other distributors. Second, distributors who sponsor other distributors and establish their own sales organizations may earn (a) royalty overrides, 15% of product retail sales in the aggregate, (b) production bonuses, 7% of product retail sales in the aggregate and (c) the Jack Black bonus, up to 1% of product retail sales in the aggregate. Royalty overrides together with the distributor allowances represent the potential earnings to distributors of up to approximately 73% of retail sales.

Distributors earn the right to receive royalty overrides upon attaining the level of supervisor and above, and production bonuses upon attaining the level of Global Expansion Team and above. Once a distributor becomes a supervisor, he or she has an incentive to qualify, by earning specified amounts of royalty overrides, as a member of the Global Expansion Team, the Millionaire Team or the President's Team, and thereby receive production bonuses of up to 7%. We believe that the right of distributors to earn royalty overrides and production bonuses contributes significantly to our ability to retain our most productive distributors.

As noted above, our compensation plan offers distributors opportunities to achieve higher levels of potential earnings up to ultimately 73% of retail sales, through a combination of royalty overrides and distributor allowances. Each distributor's success is dependent on two primary factors: the time, effort and commitment a distributor puts into his or her ABC business and the product sales made by a distributor and his or her sales organization.

Many of our non-supervisor distributors join ABC to obtain a 25% discount on our products and become a discount consumer or merely have a part-time income goal in mind. Consequently, non-supervisor earnings tend to be relatively low and are not tracked by the Company.

Distributor motivation and training

We believe that motivation and training are key elements in distributor success and that we and our distributor supervisors have established a consistent schedule of events to support these needs. We and our distributor leadership conduct thousands of training sessions annually on local, regional and global levels to educate and motivate our distributors. Every month, there are hundreds of one-day Success Training Seminars held throughout the world. Annually, in each major territory or region, there is a three-day World Team School typically attended by 2,000 to 10,000 distributors that focuses on product and business development. Additionally, once a year in each region, we host an Extravaganza at which our distributors from around the world can come to learn about new products, expand their skills and celebrate their success. In 2005, we conducted a worldwide extravaganza in celebration of the Company's 25th anniversary, in

Atlanta where more than 34,000 distributors attended. Additional regional events were held in 2005 in Mexico City, Sao Paulo and Japan.

In addition to these training sessions, we have our own “ABC Broadcast Network” that we use to provide distributors continual training and the most current product and marketing information. The ABC Broadcast Network can be seen on the internet.

Distributor reward and recognition is a significant factor in motivating our distributors. Each year, we invest over \$40 million in regional and worldwide promotions to motivate our distributors to achieve and exceed both sales and recruiting goals. Examples of our worldwide promotions are our 25th Anniversary Cruise that took place in April 2005, under which distributors qualified to receive a cruise vacation, and our Atlanta Challenge, under which distributors earned rewards for exceeding their prior year base-line performance. In Atlanta, the Company introduced a Worldwide Cup Promotion that was the primary promotion for 2005.

Stip. Ex. 41, pp. 10-12.

10. To become a Distributor in the United States, an individual must: be sponsored by an existing Distributor; submit an application to ABC America in Anystate; and purchase an International Business Product (IBP) kit. *Id.*, Stip. Exs. 9 (photo of nylon bag in which IBP is issued to purchaser/Distributor applicant), 10 (content list of IBP), 41 (p. 10); Tr. pp. 28-32 (Jane Doe). The IBP includes a series of handbooks that ABC publishes to inform/train Distributors. Stip. Exs. 30-33 (volumes 1 through 4 of ABC’s Distributor Handbooks).
11. An Agreement of Distributorship between ABC America and a person permitted to act as a Distributor includes, among others, the following provisions:

7. As an ABC Independent Distributor:
 - a. I will use my best efforts to promote the sale of ABC products to consumers in a manner that enhances the reputation of ABC. My success will come only from my sales of ABC product for consumption and those of persons I have sponsored, directly or indirectly.
 - b. I will not engage in any deceptive, unfair or illegal practice. I will indemnify, defend and hold harmless ABC from any cost or liability relating to any breach of this Agreement or violation of applicable law. ABC may offset against amounts which would otherwise be due to me reasonable amounts to cover such indemnity.

- c. I will conduct my ABC business as a self-employed independent contractor (determining my own schedule and objectives, responsible for my own expenses and any applicable taxes — including self-employment taxes), not as an employee, agent, franchisee, securities holder, joint venturer, fiduciary or beneficiary of ABC or any other Distributor. I will not be treated as an employee with respect to such services for Federal tax purposes or any other tax or other purpose, and will assert no position to the contrary.
 - d. If I sponsor others to become Distributors, I will do so in an ethical and lawful manner, and I will thereafter continue to sell and promote the sale of ABC products for consumption, will use my best efforts to train, assist and support those I sponsor to do the same and will communicate and lead by example. I will make no representations about ABC products or income opportunity except in compliance with ABC's Rules and applicable law. I may not order product primarily to qualify to earn compensation, as opposed to purchases for my own consumption and amounts I consider reasonable to service my customers.
 - e. ABC America collects certain personal identifiable information about its Distributors. It does so to fulfill its obligations under the Distributor relationship and to provide its Distributors with the products and services requested. I understand any information may be used to send me materials about ABC products and services, or other commercial information, including information on products of ABC's business partners.
8. During the term of my Distributorship:
- a. And, thereafter for so long as they have economic value, my spouse and I will hold in confidence and trust for the exclusive benefit of ABC any trade secrets, formulas, business plans, or confidential or proprietary business information (including, without limitation, genealogies and other compilations of identifying and other data relating to other Distributors or customers), and any other information of commercial value relating to other Distributors or customers, provided by ABC or which I develop or obtain while a Distributor, and I will not use them, directly or indirectly, for any purpose other than the conduct of my ABC Distributorship.
 - b. And, for one (1) year thereafter, neither my spouse nor I will, directly or indirectly (through or by any means of any person, entity or artifice), solicit, promote, sponsor or recruit any ABC Distributor or any customer of ABC of whom I become aware in the course of my ABC Distributorship, to join, promote, sell or purchase products of, or participate (as a salesperson or otherwise) in any multi-level marketing or direct sales company and I will not encourage anyone to do what I have agreed not to do.
 - c. And, in perpetuity thereafter, I will use ABC's trade name, logo, trademarks and intellectual property only if and to the extent expressly permitted by ABC in writing.

Stip. Ex. 20, p. 2; Stip. Ex. 33, p. 39.

12. ABC's Distributor Handbook 3, titled, Building Your Business, includes the following guidance to Distributors under the heading, Managing Inventory:

Managing Inventory

The amount of inventory you choose to have on hand for your business is a very individual decision. However, here are some typical issues to consider as you decide what to order:

- You can't sell what you don't have. Carry enough inventory on hand to cover all your local sales.
- Distributors often sell the products they use themselves. If you use the product yourself, consider carrying inventory for resale as well.
- Many people purchase product on the spot. Carry enough product on hand to accommodate spur-of-the-moment sales. You don't want to make a paying customer wait.
- If you're sponsoring another Distributor, consider carrying enough product to cover personally sponsored Distributors who run out of product.
- If you're planning an event, such as a grand opening or a shake party, make sure you have enough product to accommodate sales at the event.
- If you're doing one-on-one presentations, don't make the customer wait for product.

In addition to deciding how much to order, you need to decide when to reorder. This will vary depending on how much you order and how fast you sell individual products. Also keep in mind how long it takes to receive orders from the warehouse.

It can be helpful to keep a running list of how much inventory you have on a clipboard near the place where your inventory is stored. You can also write down your "when to reorder" amount next to each product, so you'll always have the reminder of when to reorder right next to the number of how much of each product you have on hand.

Try keeping your inventory in one place where it will stay cool and clean. It's a good idea to keep your inventory together, as this makes it easier to physically check how much you have on hand.

Stip. Ex. 32, p. 19.

13. ABC's Distributor Handbook 4, titled, Sales & Marketing Plan and Business Rules, includes the following rules, among others, for Distributors to document and report their retail sales to customers:

Section 17 Customer Retail Receipts and the Customer Refund Policy
Rule 17-A Providing Retail Receipts to Customer

A Distributor must provide an official completed ABC Retail Order Form to all retail customers when the sale is completed. This must list the products sold, the sales price, and the name, address and telephone number of the Distributor and the customer. Distributors are required to maintain their copy of all Retail Order Forms on file for a period of two (2) years. ABC maintains the right to request copies of these and to verify the transactions and the terms and conditions of the sale, and the service provided by the Distributor.

Rule 17-B Customer Refund Policy

The ABC products have a 30-day money-back guarantee for the retail customer. The 30 days commence on the date the customer receives the product. When a customer requests the guarantee be honored, the Distributor must respond quickly and courteously. They may offer the customer a choice of a full refund of the purchase price or full credit for exchange of other ABC products, in accordance with the return procedures set forth in this book. The Distributor must honor the customer’s choice. (Refer to the procedures on page 22 of the “Sales & Marketing Plan” section of this book.)

Stip. Ex. 33, p. 66.

14. The front of a ABC Retail Order Form appears substantially as follows:

[ABC logo]	RETAIL ORDER FORM		
Date: _____			
ABC INDEPENDENT DISTRIBUTOR			
Name: _____			
Address: _____			
City, State, Zip Code: _____			
Telephone: _____	Cell Phone: _____		
E-mail Address: _____			
CUSTOMER			
Name: _____			
Address: _____			
City, State, Zip Code: _____			
Telephone: _____	Cell Phone: _____		
E-mail Address: _____			
Quantity	Description of Goods	Unit	Price
Customer Signature: _____			
I understand that this order may be considered as an invitation to call upon me from time to time, with the understanding that I will be under no obligation to buy.			

Important Notice

You, the buyer, may cancel this transaction at any time prior to midnight of the third business day after the date of this transaction.

See the "Notice of Cancellation" on the reverse of this form for an explanation of this right. After the 3-day cancellation period provided above, you are still protected by the ABC REFUND POLICY as set forth.

[distribution instructions]

[form identifier]

Stip. Ex. 33, p. 42.

15. The reverse side of an ABC Retail Order Form appears below:

ABC Refund Policy

ABC offers an exchange or a full refund. Simply request a refund from your Distributor within thirty (30) days from your receipt of the product, and return the unused portion with the product containers to the Distributor named on the reverse side.

FEDERAL AND STATE LAW: Regulations require that we print the following Notice of Cancellation. The ABC Refund Policy offers and provides you greater protection than the law requires.

Notice of Cancellation

Date of Transaction: _____ / _____ / _____

You may cancel this transaction, without any penalty or obligation, within THREE BUSINESS DAYS from the above date.

If you cancel, any property traded in, any payments made by you under the contract or sale, and any negotiable instrument executed by you will be returned within TEN BUSINESS DAYS following receipt by the seller of your cancellation notice, and any security interest arising out of the transaction will be canceled.

If you cancel, you must make available to the seller at your residence, in substantially as good condition as when received, any goods delivered to you under this contract or sale; or you may, if you wish, comply with the instructions of the seller regarding the return shipment of the goods at the seller's expense and risk.

If you do make the goods available to the seller and the seller does not pick them up within 20 days of the date of your Notice of Cancellation, you may retain or dispose of the goods without any further obligation. If you fail to make the goods available to the seller, or if you agree to return the goods to the seller and fail to do so, then you remain liable for performance of all obligations under the contract.

To cancel this transaction, mail or deliver a signed copy of this Cancellation Notice or any other written notice, or send a telegram to:

ABC Distributor: _____

Address: _____

City: _____ State: _____ Zip Code: _____

NOT LATER THAN MIDNIGHT OF: _____ / _____ / _____
(Date: 3 days after date of order)

I HEREBY CANCEL THIS TRANSACTION:

_____ Day//Month/Year []	_____ Buyer's Signature
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Stip. Ex. 33, p. 42; *see also* 16 C.F.R. § 429 (federal cooling off rule applicable to sales made door-to-door).

16. ABC's Customer Guarantee is also described in volume 4 of ABC's Sales and Marketing Plan and Business Rules:

ABC guarantees the quality of any product which carries the ABC name and certifies that the products manufactured for it meet high standards of freshness and purity for customer use.

We are confident that our customers will find our products satisfactory in every way. However, if for any reason, a retail customer is not completely satisfied with any ABC product purchased from an ABC Distributor, the customer may request a refund from the Distributor within 30 days from the date the customer receives the product. The customer will be instructed to return the unused portion of the product, or the original product labels, or the empty product containers, along with a copy of the retail receipt/copy of the retail order form, to the Distributor from whom the customer purchased the product. The Distributor must offer the customer a full credit toward the purchase of other ABC products or a full refund of the purchase price.

This guarantee is limited only by the terms of certain specific warranties attached to or packaged with certain products and does not apply to any product intentionally damaged or misused. If the retail customer is not satisfied, the Distributor must honor the product guarantee quickly and courteously, according to the instructions that follow.

Distributor Must Honor Guarantee

A Distributor is required to fully complete and provide an official ABC Retail Order Form with each retail sale made. It is important for the customer to know how to reach the Distributor for more products, questions, etc. The Distributor must maintain a copy of the Retail Order Form for their records so they can properly follow up with their customer.

If, however, a customer requests a refund, then the Distributor must complete a "Customer Request for Refund Form," a copy of which is included in the "Business Administration" section of this book. The Distributor is to calculate the amount of the customer's refund or credit due, have the customer sign the Refund Form, and immediately pay the refund to the customer or apply their credit to other products.

The Distributor may then submit the "Customer Request for Refund Form," a copy of the customer's original Retail Order Form, along with the unused portion

of the product, or the original product labels, or the empty product labels, or the empty product containers to ABC within 30 days of making the refund to the customer.

ABC will exchange the returned product with the identical replacement product for the Distributor as soon as all the required documentation has been received.

The ABC money-back guarantee does not apply to products purchased by Distributors, whether or not consumed by them and this fact must be presented to individuals who become Distributors. However, for Distributors, the company maintains a Distributor repurchase policy, according to the guidelines of the Direct Selling Association, which under certain circumstances may provide for repurchase of Distributor kits and marketable merchandise. (Refer to Rule 10-D “Inventory Repurchase” in the “Rules of Conduct and Distributor Policies” section of this book, or contact ABC’s Distributor Relations Department toll-free at [866] 866-4744 for more information.)

Stip. Ex. 33, p. 22.

17. ABC’s Annual Report also discuss its product return policy:

Product Return and Buy-Back Policies

In most markets, our products include a customer satisfaction guarantee. Under this guarantee, within 30 days of purchase, any customer who is not satisfied with an ABC product for any reason may return it or any unused portion of it to the distributor from whom it was purchased for a full refund from the distributor or credit toward the purchase of another ABC product. If they return the products to us on a timely basis, distributors may obtain replacements from us for such returned products. In addition, in most jurisdictions, we maintain a buy-back program pursuant to which we will repurchase products sold to a distributor provided that the distributor resigns as an ABC distributor, returns the product in marketable condition generally within twelve months of original purchase and meets certain documentation and other requirements. We believe this buy-back policy addresses a number of the regulatory compliance issues pertaining to network marketing, in that it offers monetary protection to distributors who want to exit the business.

Historically, product returns and buy-backs have not been significant and have been steadily declining over these reporting periods. Product returns, refunds and buy-back expenses approximated 1.9%, 1.1%, and 1.0% of retail sales in 2003, 2004 and 2005, respectively.

Stip. Ex. 41, p. 15; *accord* Stip. Ex. 42, p. 16.

18. ABC's U.S. Rules of Conduct and Distributor Policies (ABC's Rules), which govern ABC's United States Distributors, are included within Volume 4 of ABC's Distributor Handbooks. Stip. Ex. 33, pp. 53-80.
19. ABC's Rules and its Sales and Marketing Plan are expressly incorporated as part of the Agreement of Distributorship. Stip. Ex. 20, p. 2; Stip. Ex. 33, p. 39. Requiring Distributors to adhere to ABC's Rules and Marketing Plan "is key to the future growth of the Company [i.e., ABC America]. Stip. Ex. 29, p. 1.
20. Section 8 of ABC's Rules provides, in part, as follows:

Section 8 Distributor Conduct

Rule 8-A Inducement to Sell Other Products or Services

During the course of a Distributorship and for one year thereafter, neither the Distributor nor their spouse, nor any other person assisting in a Distributorship will, directly or indirectly (through or by means of any person, entity or artifice), solicit, promote, sponsor or recruit any ABC Distributor, or any ABC customer they become aware of in the course of their ABC Distributorship, to join, promote, sell or purchase products of, or participate in as a salesperson or otherwise, any multi-level marketing or direct-sales company, nor will they encourage anyone to do what is prohibited under this rule.

Violation of this rule is likely to result in termination of the Distributorship.

Stip. Ex. 33, p. 60; *but see* Tr. pp. 53, 61-62 (Jane Doe).

Facts Re: ABC's Agency Agreement With the Department

21. In 1984, ABC America executed an Agency Agreement with the Department. Stip. ¶ 33(dd); Stip. Ex. 38 (copy of Agency Agreement); Tr. p. 87 (testimony of Gene Green (Green), ABC America's Senior Director of Tax Compliance).
22. The Agency Agreement admitted as Stipulation Exhibit 38 consists of a pre-printed Department form, with spaces provided for entries to be either typed or handwritten on the form, with such entries being made by the parties who executed it. Stip. Ex. 38, p. 2 (form name on lower left side of page, including revision date of February 1981).

23. The substantive provisions of ABC America's Agency Agreement are:

The purpose of this letter is to set forth the basis of an understanding between the Department of Revenue and the undersigned with reference to the collection and reporting of taxes under the Illinois Retailers' Occupation Tax Act.

1. Effective July 1, 19 84, we will assume full responsibility for the collection of tax from independent dealers buying merchandise from us and the obligation of accounting for the proper tax (State and local Retailers' Occupation Tax) on such dealers' retail sales of our products in Illinois.
2. The base of the tax will be published suggested retail price being charged by our dealers to their customers at the time of purchase, at the existing State and local Retailers' Occupation Tax rate which is in effect at that time.
3. On all sales made directly to dealers who give these items away, the tax shall be based on our selling price to our dealers.
4. We will remit such tax directly to the Department of Revenue in lieu of having each dealer who is buying goods from us, and doing business in the State of Illinois, remit such tax.
5. We will pay local Retailers' Occupation Tax on all sales on which we are agreeing to pay State Retailers' Occupation Tax for the benefit of N[ot]/A[pplicable] where our headquarters are located.
6. It is understood that we will not have to post a bond with the Department upon registering in view of our having voluntarily assumed this tax reporting and tax remitting responsibility for our dealers.

Stip. Ex. 38, p. 2.

24. As part of completing the Agency Agreement, ABC America submitted a registration application with the Department, and was assigned an Illinois business registration number.

Stip. Ex. 38, pp. 1 (cover letter from Department to ABC America), 3 (Supplement to Agency Agreement); *see also* 35 ILCS 120/2a.

25. ABC America used its own Illinois business registration number when reporting the amounts of Illinois ROT it agreed to collect from Illinois Distributors, and remit to the Department.

Stip. Ex. 38, pp. 1, 3; Stip. Ex. 40, p. 9 (Discussion of Issues section of Auditor's Comments); *see also* 35 ILCS 120/2a (Certificates and sub-certificates of registration).

26. At the time the Agency Agreement letter was executed, ABC America responded to the Department's pre-printed request for the "[n]ame and address of each dealer or agent covered by this agreement from whom [it] will collect and remit tax." Stip. Ex. 38, p. 3. The request continued that, "[i]f more than 25 agents, do not list but give us the total number." *Id.* In response to that request, ABC America reported having 9,027 Distributors in Illinois from whom it would collect and remit tax. *Id.*; Tr. p. 87 (Latini).

27. In 2008, after the tax years at issue, ABC America opened a Sales and Distribution office in Illinois. Stip. Ex. 33, pp. 25, 28-29, 35; Tr. p. 27 (Jane Doe).

Facts Re: Illinois Tax Returns Filed by ABC COMPANY & ABC America During 2005 & 2006

Illinois ROT Returns Filed by ABC America

28. The Agency Agreement between ABC America and the Department remained in effect since the parties executed it in 1984. Tr. p. 87 (Latini).

29. As it had been doing since the Agency Agreement was executed, during 2005 and 2006, ABC America filed Illinois sales tax returns to report the taxable gross receipts the Illinois Distributors realized from selling ABC products at retail in Illinois, and to pay the ROT due, based on the gross receipts from such sales. Stip. Ex. 40, p. 9; Tr. p. 87 (Latini).

Illinois Corporate Income Tax Returns Filed by ABC COMPANY

30. During 2005 and 2006, ABC COMPANY and three of its affiliates were engaged in a unitary business, as that term is used in the Illinois Income Tax Act (IITA). Stip. ¶ 5; 35 ILCS 5/1501(a)(27)(A) (IITA defines the term "unitary business group" to mean "a group of persons related through common ownership whose business activities are integrated with, dependent upon and contribute to each other. ***").

31. In addition to itself, the other corporations ABC COMPANY reported as being members of its Illinois unitary business group were ABC America, ABC International, and XYZ Business. Stip. ¶ 6.
32. ABC COMPANY was the reporting person for the ABC unitary business group (hereafter, ABC Group or Group). Stip. Exs. 1-2; Stip. ¶ 6.
33. The ABC Group filed an Illinois Corporation Income and Replacement Tax return with the Department for tax years ending on December 31, 2005 (2005 Return) and December 31, 2006 (2006 Return). Stip. ¶¶ 7, 13; Stip. Ex. 1 (copy of 2005 Return); Stip. Ex. 2 (copy of 2006 Return).
34. The ABC Group filed its 2005 Return with the Department on October 10, 2006. Stip. ¶ 7; Stip. Ex. 1.
35. In its 2005 Return, the ABC Group reported having Illinois taxable income before net loss deduction of \$12,082. Stip. ¶ 8.
36. The ABC Group determined that \$12,082 amount by multiplying the Group's \$131,344,733 base income by an apportionment factor of 0.000092. Stip. ¶ 9.
37. The ABC Group determined the 2005 apportionment factor of 0.000092 by dividing ABC COMPANY's Illinois sales for 2005, \$61,130, by all of the sales activity reported by all members of the Group, everywhere within the waters' edge of the United States (everywhere), for 2005, \$664,510,459. Stip. ¶ 10; Tr. p. 78 (Latini).
38. During 2005, ABC America had Illinois sales of \$10,464,329. Stip. ¶ 11; Tr. pp. 78-80 (Latini); 86 Ill. Admin. Code § 100.3370(c)(1)(a) ("Gross receipts from the sales of tangible personal property (except sales to the United States Government) ... are in this State ... if the

property is delivered or shipped to a purchaser within this State regardless of the f.o.b. point or other conditions of sale”).

39. The ABC Group did not include ABC America’s Illinois sales of \$10,464,329 in the numerator of the Group’s apportionment factor calculation for 2005, because it did not consider ABC America to be subject to Illinois’ income and replacement income tax. Stip. ¶ 11.

40. From Illinois taxable income before net loss deduction of \$12,082, the ABC Group deducted an Illinois net loss of \$12,084 to arrive at negative Illinois net income, and a reported \$0 Illinois income and replacement tax liability for 2005. Stip. ¶ 12.

41. The ABC Group filed its 2006 Return with the Department on September 12, 2007. Stip. ¶ 13; Stip. Ex. 2.

42. In the 2006 Return, the ABC Group reported Illinois taxable income before net loss deduction of \$3,549. Stip. ¶ 14.

43. The \$3,549 amount was determined by multiplying the ABC Group’s \$138,155,976 base income by an apportionment factor of 0.000026. Stip. ¶ 15.

44. The ABC Group determined the 2006 apportionment factor of 0.000026 by dividing ABC COMPANY’s Illinois sales for 2006, \$20,050, by all of the sales activity reported by all members of the Group, everywhere, for 2006, \$780,606,283. Stip. ¶ 16; Tr. p. 78 (Gene Green).

45. During 2006, ABC America had Illinois sales of \$13,011,361. Stip. ¶ 17; Tr. pp. 78-80 (Gene Green); 86 Ill. Admin. Code § 100.3370(c)(1)(a).

46. The ABC Group did not include ABC America’s Illinois sales of \$13,011,361 in the numerator of the Group’s apportionment factor calculation for 2006, because it did not

consider ABC America to be subject to Illinois' income and replacement income tax. Stip. ¶ 17; Tr. p. 79 (Gene Green).

47. The ABC Group claimed no Illinois net loss deduction in 2006 and reported Illinois income and replacement income tax liability of \$259 on its reported Illinois taxable income of \$3,549. Stip. ¶ 18.

48. After the 2005 and 2006 Returns were filed, the Department audited them. Stip. ¶ 19.

Facts Re: The Department's Audit of the ABC Group's 2005 & 2006 Returns

49. As a result of the Department's audit, a Department auditor wrote a letter to ABC COMPANY, with an attached Notice of Proposed Deficiency (NPD), to notify it that the Department was proposing adjustments to the ABC Group's 2005 and 2006 Returns, resulting in a proposed deficiency for those tax years. Stip. ¶ 20; Stip. Ex. 3 (copy of letter and NPD, both dated April 24, 2009).

50. As reflected in the NPD, the Department proposed to increase the ABC Group's 2005 Illinois taxable income before net loss deduction by \$2,068,285 to \$2,080,369. Stip. ¶ 21.

51. The \$2,080,369 amount was determined by multiplying the ABC Group's \$131,344,733 base income by an apportionment factor of 0.015839. Stip. ¶ 22.

52. The apportionment factor of 0.015839 was determined by dividing the sum of ABC COMPANY's and ABC America's Illinois sales for 2005, \$10,525,459, by all sales activity reported by all members of the ABC Group, everywhere, for 2005, \$664,510,459. Stip. ¶ 23.

53. As reflected in the NPD, the Department also proposed to increase the ABC Group's Illinois net loss deduction for 2005 by \$688 to \$12,772. Stip. ¶ 24.

54. As reflected in the NPD, after taking the foregoing adjustments into account the Department proposed to increase the ABC Group's Illinois net income to \$2,067,597 and its Illinois income and replacement income tax liability to \$150,935 for 2005. Stip. ¶ 25.
55. As reflected in the NPD, the Department proposed to increase the ABC Group's 2006 Illinois taxable income before net loss deduction by \$2,302,784 to \$2,306,376. Stip. ¶ 26.
56. The \$2,306,376 amount was determined by multiplying the ABC Group's \$138,155,976 base income by an apportionment factor of 0.016694. Stip. ¶ 27.
57. The apportionment factor of 0.016694 was determined by dividing the sum of ABC COMPANY's and ABC America's Illinois sales for 2006, \$13,031,411, by all sales activity reported by all members of the ABC Group, everywhere, for 2006, \$780,606,283. Stip. ¶ 28.
58. As reflected in the NPD, after taking the foregoing adjustments into account, the Department proposed to increase the ABC Group's Illinois income and replacement income tax liability to \$168,365 for 2006. Stip. ¶ 29.
59. On July 28, 2010, the Department issued two Notices of Deficiency (NODs) to ABC COMPANY, one for 2005 and one for 2006. Stip. ¶ 30; Stip. Ex. 7 (copy of NODs).
60. On September 23, 2010, ABC COMPANY filed a Protest with the Office of Administrative Hearings. Stip. Ex. 31; Stip. Ex. 8 (copy of Protest).
61. The parties agree that any future tax calculations required because of this litigation shall be based on the amounts reflected on the NODs. Stip. ¶ 32.

Conclusions of Law:

This matter involves two issues. The first is whether ABC America has nexus with Illinois. The second issue is, assuming ABC America has Illinois nexus, whether Illinois is precluded from imposing income and replacement income tax on it because of Public Law 86-

272, or because of Illinois Income Tax Regulation (IITR) § 100.9720.

Based on the evidence, and for the reasons expressed in this recommendation, I conclude that ABC America has nexus with Illinois, and that neither Public Law 86-272 nor IITR § 100.9720 preclude the Department from imposing Illinois income and replacement income tax on an apportioned share of ABC America's business income, as proposed in the NODs issued to ABC COMPANY.

The Department's Prima Facie Case

Section 904(a) of the IITA provides that “[t]he findings of the Department [in a NOD] shall be prima facie correct and shall be prima facie evidence of the correctness of the amount of tax and penalties due.” 35 ILCS 5/904(a). Thus, when the NODs were admitted at hearing as a stipulated exhibit (Stip. Ex. 7), they constituted prima facie evidence that Taxpayer owed the Illinois income and replacement income taxes proposed for the years at issue. 35 ILCS 5/904(a); Balla v. Department of Revenue, 96 Ill. App. 3d 293, 296, 421 N.E.2d 236, 238 (1st Dist. 1981).

The Department's prima facie case is a rebuttable presumption. See Branson v. Department of Revenue, 168 Ill. 2d 247, 260, 659 N.E.2d 961, 968 (1995). After the Department's prima facie case is established, the burden shifts to a taxpayer to establish that the Department's determinations were not correct. *Id.* Moreover, “[t]o overcome the Department's prima facie case, a taxpayer must present more than its testimony denying the accuracy of the assessments, but must present sufficient documentary support for its assertions.” Mel-Park Drugs, Inc. v. Department of Revenue, 218 Ill. App. 3d 203, 217, 577 N.E.2d 1278, 1287 (1st Dist. 1991); PPG Industries, Inc. v. Department of Revenue, 328 Ill. App. 3d 16, 33, 765 N.E.2d 34, 48 (1st Dist. 2002) (agreeing that, “[u]nder Illinois law, ... [a taxpayer] ... had the burden of overcoming [the Department's] *prima facie* case through documentary evidence, meaning books

and records, and not mere testimony.”). Here, Taxpayer had the burden to provide documentary support for its claim that it lacked Illinois nexus. Balla, 96 Ill. App. 3d at 295, 421 N.E.2d at 238. It had the same burden to produce documentary evidence to show that its activities in Illinois were protected by Public Law 86-272 and/or IITR § 100.9720. *Id.*

As an initial matter, Taxpayer has argued that, “[b]ecause the Department’s Notices of Deficiency are without any foundation whatsoever, it retains the burden of proving that ABC America had nexus with Illinois during the audit period and owes the tax assessed in the Notices” Initial Brief of [ABC COMPANY] (Taxpayer’s Brief), p. 9. In support of that argument, it cites Kohler v. United States, 468 F.2d 1032 (7th Cir. 2007). While the nexus issue will be discussed next, I first address Taxpayer’s argument that the Department had to do more than offer the NODs — which were admitted as a stipulated exhibit — to present its prima facie case.

The law regarding the effect of IITA § 904(a) has been thoughtfully explained by the Illinois appellate court in Balla:

Ordinarily, the taxing authority has the burden of proof regarding a taxpayer’s liability to the government. (*Cornett-Lewis Coal Co. v. C. I. R.* (6th Cir. 1944), 141 F.2d 1000.) For example, the taxing authority bears the burden of proving that the taxpayer actually received income (*Thomas v. C. I. R.* (6th Cir. 1955), 223 F.2d 83), and that such income is properly subject to taxation (*Miller v. United States* (7th Cir. 1961), 296 F.2d 457). The Illinois legislature, in order to aid the Department in meeting its burden of proof in this respect, has provided that the findings of the Department concerning the correct amount of tax due are prima facie correct. (Ill.Rev.Stat.1979, ch. 120, par. 9-904(a).) When the taxpayer introduces credible evidence to the contrary, the burden is again placed on the Department to prove its contentions by a preponderance of the evidence. *Goldfarb v. Department of Revenue* (1952), 411 Ill. 573, 104 N.E.2d 606.

Balla, 96 Ill. App. 3d at 295, 421 N.E.2d at 238.

The federal case Taxpayer cites to support its argument involved the court’s pragmatic allocation of the burden of proof on the issue of how to value the gain derived by a taxpayer from a series of transactions described as a “debt-equity swap.” Kohler, 468 F.2d at 1032, 1035

(“The parties quarrel only over the value to Kohler of the exchange when made. The quarrel has driven them to take opposite positions, both untenable.”). The Kohler court explained that it was deviating from the ordinary federal rule that the burden be allocated to the taxpayer, because the evidence regarding the transactions, and the evidence regarding the IRS’s audit of Kohler’s federal return reporting them, revealed that the IRS’ valuation of Kohler’s gain was arbitrary. Kohler, 468 F.2d at 1035 (“How to choose between adversaries’ valuations when both are manifestly erroneous?”), 1036 (“To permit the Internal Revenue Service to place an arbitrary value on difficult-to-value property obtained in a transaction and require the taxpayer to prove that it was worth less-and exactly how much less-would place an unreasonable burden on taxpayers.”).

This matter, in contrast, involves no dispute over the value of anything. The parties agree on the amount of ABC America’s Illinois sales to Illinois Distributors. Stip. ¶¶ 11, 17. Nor do rules of federal procedure — be they tax court rules, federal court rules, or a rule of decision determined in a particular case, like Kohler — ordinarily supersede the statutory procedures prescribed for state tax disputes. *See e.g., American Airlines, Inc. v. Department of Revenue*, 402 Ill. App. 3d 579, 605-06, 931 N.E.2d 666, 688-89 (1st Dist. 2009) (noting, in dicta, that a federal district court’s decision holding that a taxpayer could toll the federal statute of limitations for filing a federal income tax refund claim did not affect Illinois’ statutory limitations period for filing a state tax refund claim). Kohler involved a question of federal law as applied to unique set of facts, and provides no guidance for resolving this state tax dispute. *See Kohler*, 468 F.2d at 1035-36.

In sum, I do not agree with Taxpayer’s claim that Kohler supports its argument that the Department has not made a prima facie case here. As a matter of Illinois law, the NODs

constituted prima facie evidence that the tax proposed was due. 35 ILCS 5/904(a); PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48; Balla, 96 Ill. App. 3d at 295, 421 N.E.2d at 238.

Issue 1: Does ABC America Have Nexus With Illinois

Section 201 of the Illinois Income Tax Act (IITA) imposes a tax measured by net income on “every individual, corporation, trust and estate ... on the privilege of earning or receiving income in this State.” 35 ILCS 5/201(a). That said, state law is not the ultimate authority on whether a state may subject a foreign corporation to its own, state tax. That is because the Due Process and Commerce Clauses of the United States Constitution impose limits on a state’s authority to tax a foreign corporation’s activities. Dow Chemical Co. v. Department of Revenue, 359 Ill. App. 3d 1, 23, 832 N.E.2d 284, 301 (1st Dist. 2005) (“Under both the Due Process and the Commerce clauses of the [United States] Constitution, a State may not, when imposing an income-based tax, ‘tax value earned outside its borders.’”) (internal quotation marks omitted). The distinct aspects of both clauses were the subject of the United States Supreme Court’s decision in Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904, 119 L.Ed.2d 91 (1992).

In Quill Corp., the Court explained that:

The Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,” Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-345, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954), and that the “income attributed to the State for tax purposes must be rationally related to ‘values connected with the taxing State,’ “ Moorman Mfg. Co. v. Bair, 437 U.S. 267, 273, 98 S.Ct. 2340, 2344, 57 L.Ed.2d 197 (1978) (citation omitted). Here, we are concerned primarily with the first of these requirements. Prior to Bellas Hess, we had held that that requirement was satisfied in a variety of circumstances involving use taxes. For example, the presence of sales personnel in the State [footnotes omitted] or the maintenance of local retail stores in the State ... justified the exercise of that power because the seller’s local activities were “plainly accorded the protection and services of the taxing State.” Bellas Hess, 386 U.S., at 757, 87 S.Ct., at 1391. The furthest extension of that power was recognized in Scripto, Inc. v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4

L.Ed.2d 660 (1960), in which the Court upheld a use tax despite the fact that all of the seller's in-state solicitation was performed by independent contractors. These cases all involved some sort of physical presence within the State, and in *Bellas Hess* the Court suggested that such presence was not only sufficient for jurisdiction under the Due Process Clause, but also necessary. We expressly declined to obliterate the "sharp distinction ... between mail-order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as a part of a general interstate business." 386 U.S., at 758, 87 S.Ct., at 1392.

Our due process jurisprudence has evolved substantially in the 25 years since *Bellas Hess*, particularly in the area of judicial jurisdiction. Building on the seminal case of *International Shoe Co. v. Washington*, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.*, at 316, 66 S.Ct., at 158 (quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 343, 85 L.Ed. 278 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's "presence" within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State. In *Shaffer v. Heitner*, 433 U.S. 186, 212, 97 S.Ct. 2569, 2584, 53 L.Ed.2d 683 (1977), the Court extended the flexible approach that *International Shoe* had prescribed for purposes of in personam jurisdiction to in rem jurisdiction, concluding that "all assertions of state-court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny."

Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State.

Quill Corp., 504 U.S. at 306-07, 112 S.Ct. at 1909-10, 119 L.Ed.2d 91.

The Court then distinguished the nexus requirements of the two separate constitutional clauses:

*** [T]he nexus requirements of the Due Process and Commerce Clauses are not identical. The two standards are animated by different constitutional concerns and policies.

Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due

process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy. ***

*** Thus, the “substantial nexus” requirement is not, like due process’ “minimum contacts” requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce. ***

Id., at 312-13, 112 S.Ct. at 1913, 119 L.Ed.2d 91.

As a final word about the Court’s decision in Quill, the Court distinguished the issue in that case, which was whether North Dakota could require Quill to collect from North Dakota purchasers of Quill’s products the use tax that state imposed on purchasers for use in the state, with Congress’ action to regulate state income taxation. Specifically, in footnote 9, the Court wrote:

It is worth noting that Congress has, at least on one occasion, followed a similar approach in its regulation of state taxation. In response to this Court's indication in *Northwestern States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 452, 79 S.Ct. 357, 359, 3 L.Ed.2d 421 (1959), that, so long as the taxpayer has an adequate nexus with the taxing State, “net income from the interstate operations of a foreign corporation may be subjected to state taxation,” Congress enacted Pub.L. 86-272, codified at 15 U.S.C. § 381. That statute provides that a State may not impose a net income tax on any person if that person's “only business activities within such State [involve] the solicitation of orders [approved] outside the State [and] filled ... outside the State.” *Ibid.* As we noted in *Heublein, Inc. v. South Carolina Tax Comm'n*, 409 U.S. 275, 280, 93 S.Ct. 483, 487, 34 L.Ed.2d 472 (1972), in enacting § 381, “Congress attempted to allay the apprehension of businessmen that ‘mere solicitation’ would subject them to state taxation.... Section 381 was designed to define clearly a lower limit for the exercise of [the State's power to tax]. Clarity that would remove uncertainty was Congress’ primary goal.” (Emphasis supplied.)

Quill Corp., 504 U.S. at 316 n.9, 112 S.Ct. at 1915, 119 L.Ed.2d 91. Thus, the nexus required to allow a state to impose a tax on the net income from the interstate operations of a foreign corporation is satisfied if the person’s activities within a state exceed mere solicitation of orders for approval outside the state, and which are filled outside the state. *Id.*; 15 U.S.C. 381. Whether ABC America’s activities in Illinois exceeded mere solicitation of orders is the subject of the

second issue in this dispute. *See infra*, pp. 60-72.

Here, the parties have stipulated that ABC America, an Anotherstate corporation (Stip. ¶ 2; Stip. Ex. 37), and three other related corporations, conduct a single, unitary business, part of which is conducted in Illinois. Stip. ¶¶ 5-6. There is also no dispute that, as one part of the ABC's Group's single unitary business, ABC America made regular sales of tangible personal property to thousands of Distributors who either worked and/or resided in Illinois during each of the tax years at issue. Stip. ¶¶ 11, 17; Stip. Ex. 38. The parties agree that ABC America had Illinois sales in excess of 10 million dollars in 2005, and in excess of 13 million dollars in 2006. Stip. ¶¶ 11, 17. ABC America knew and intended that many of the Illinois Distributors would sell the ABC products they purchased to others, at retail, for use and consumption in Illinois. Stip. Ex. 33, p. 67; Stip. Ex. 38; Stip. Ex. 41, pp. 10-12. ABC America encouraged the Illinois Distributors to purchase enough ABC products so they would have enough inventory on hand to physically transfer to retail purchasers at the time a Retail Order Form was completed. Stip. Ex. 32, p. 19. Based on those stipulated facts and evidence, under the IITA's statutory formula, there is no dispute that ABC America exercised "the privilege of earning ... income in this State" during the years at issue. 35 ILCS 5/201(a).

ABC America, moreover, purposefully directed its sales of ABC products that were delivered to Illinois Distributors. Stip. Ex. 33, pp. 40 (Wholesale Product Order Form), 66 (ABC's Rules regarding Distributor's purchases of products from ABC America). That is, it knew that it was selling tangible personal property to purchasers for resale, at retail, and for use and consumption, in Illinois. *Id.* The fact that a foreign corporation purposefully directs the sale of its products or service to persons in a particular state is one of the considerations taken into account when determining whether the corporation has sufficient contacts with the state to

satisfy due process. Asahi Metal Industry, Co. Ltd. v. Superior Court of Anystate, Solano County, 480 U.S. 102, 109, 107 S.Ct. 1026, 1031, 94 L.Ed.2d 92 (1987) (“[t]he forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State.”) (quoting World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297-98, 100 S.Ct. 559, 567, 62 L.Ed.2d 490 (1980)). In its Annual Reports to the SEC, and to the public, ABC America’s parent made clear that its network marketing program is designed to distribute ABC products to consumers in all domestic market areas served by the ABC group via direct sales by independent Distributors. Stip. Exs. 41-42. Thus, when it sold over 10 and 13 million dollars worth of ABC property to Illinois Distributors (Stip. ¶¶ 11,17), ABC America knew that some of that property would be sold, at retail, to purchasers for use or consumption in Illinois. Stip. Ex. 33, pp. 42, 67; Stip. Ex. 38; Stip. Ex. 41, p. 10; *see also* Stip. Ex. 40, p. 9.

Are the Activities of Distributors Who Were Physically Present in Illinois Attributable to ABC America, And Sufficient To Satisfy Due Process

Notwithstanding the considerable amount of sales that ABC America purposefully directed to Illinois Distributors, and to subsequent retail purchasers, ABC America argues that it has no nexus in Illinois, because it has no physical presence in Illinois (Taxpayer’s Brief, pp. 1, 10-11), and because the Illinois Distributors cannot be treated as ABC’s agents who were necessary for maintaining a market for ABC America in Illinois. *Id.*, pp. 12-16. The Department disputes each of the contentions.

Regarding ABC America’s physical presence argument, it is helpful to take into account the United States Supreme Court’s explanation of what “physical presence” means, for purposes of a corporation:

Since the corporate personality is a fiction, although a fiction intended to be acted upon as though it were a fact, [all citations omitted], it is clear that unlike an individual its 'presence' without, as well as within, the state of its origin can be manifested only by activities carried on in its behalf by those who are authorized to act for it. To say that the corporation is so far 'present' there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms 'present' or 'presence' are used merely to symbolize those activities of the corporation's agent within the state which courts will deem to be sufficient to satisfy the demands of due process. ... Those demands may be met by such contacts of the corporation with the state of the forum as make it reasonable, in the context of our federal system of government, to require the corporation to defend the particular suit which is brought there. An 'estimate of the inconveniences' which would result to the corporation from a trial away from its 'home' or principal place of business is relevant in this connection. ...

'Presence' in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on, even though no consent to be sued or authorization to an agent to accept service of process has been given. ... Conversely it has been generally recognized that the casual presence of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities there. ... To require the corporation in such circumstances to defend the suit away from its home or other jurisdiction where it carries on more substantial activities has been thought to lay too great and unreasonable a burden on the corporation to comport with due process.

International Shoe Co. v. Washington, 326 U.S. 310, 316-17, 66 S.Ct. 154, 158-59, 90 L.Ed. 95 (1945). The Supreme Court's decisions in Quill and Scripto, Inc. v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960) make clear that a foreign corporation may be considered "physically present" in a state because of the physical presence of independent contractors who are soliciting orders for the seller's goods. Quill Corp., 504 U.S. at 306, 112 S.Ct. at 1909, 119 L.Ed.2d 91 (*quoted supra*, pp. 25-27); Scripto, Inc., 362 U.S. at 211, 80 S.Ct. at 621, 4 L.Ed.2d 660.

In its brief, ABC America stresses that the Illinois Distributors are independent contractors, and then contrasts that relationship with the relationships between the manufacturers

and sellers in the Scripto and Tyler Pipe Industries, Inc. decisions. Taxpayer's Brief, pp. 1-14 & n.2. In both of those cases, a manufacturer had hired one or more independent contractors (sellers) to solicit orders for its goods in a state in which the manufacturer was not registered to do business, and in each, the sellers' activities in the state were held to be sufficient to allow the state to tax the manufacturer. Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232, 249-51, 107 S.Ct. 2810, 2821-22, 97 L.Ed.2d 199 (1987); Scripto, Inc., 362 U.S. at 211, 80 S.Ct. at 621, 4 L.Ed.2d 660. It next compares its relationship with Illinois Distributors to the relationship between a manufacturer and an Illinois distributor in Grobark v. Addo Machine Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959). Taxpayer's Brief, pp. 11-12. In that case, the manufacturer was held to be not transacting business in Illinois, under the version of the Illinois long-arm statute in effect in 1959. Grobark, 16 Ill. 2d at 437, 158 N.E.2d at 79. This recommendation discusses each of Taxpayer's distinctions and comparisons, in turn.

With regard to Scripto, ABC America argues that:

... Unlike the Independent Distributors, who are not agents of ABC America, the representatives in Scripto acted as agents of the taxpayer because they were compensated by receiving a commission equal to a percentage of the taxpayer's sales. Sales made by Independent Distributors, conversely, are not sales of ABC America. ABC America uses a buy/sell method with its distributors, and thus, receives no compensation from a sale made by an Independent Distributor.

Taxpayer's Brief, p. 10 n.2. But the Court in Scripto did not hold or make any determination of agency based on the method by which Scripto paid the "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida" Scripto, Inc. v. Carson, 362 U.S. 207, 211, 80 S.Ct. 619, 621, 4 L.Ed.2d 660 (1960). What the Court *did* hold was:

*** True, the 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida.

This is evidenced by the amount assessed against appellant on the statute's 3% basis over a period of but four years. To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance. See Thomas Reed Powell, Sales and Use Taxes: Collection from Absentee Vendors, 57 Harv.L.Rev. 1086, 1090. Moreover, we cannot see, from a constitutional standpoint, 'that it was important that the agent worked for several principals.' Chief Judge Learned Hand, in *Bomze v. Nardis Sportswear*, 2 Cir., 165 F.2d 33, 36. The test is simply the nature and extent of the activities of the appellant in Florida.

Scripto, Inc., 362 U.S. at 211-12, 80 S.Ct. at 621-22, 4 L.Ed.2d 660.

The fact that 10 wholesalers, jobbers, or salesmen were conducting solicitations in Florida for the sale of Scripto's goods, and forwarding their orders from Florida to Atlanta, where Scripto accepted such orders, was enough for the Court to agree that Scripto had sufficient contacts with Florida to subject it to Florida tax. *Id.* That is, the Court agreed that the activities of the 10 sellers in Florida were attributable to Scripto, regardless that their contractual relationship with it was as independent contractors. *Id.* Here, ABC America has contracted with *thousands* of Illinois Distributors (Stip. Ex. 38), each and every one of whom agreed to "use my best efforts to promote the sale of ABC products to consumers in a manner that enhances the reputation of ABC." Stip. Ex. 20, p. 2; Stip. Ex. 33, p. 39.

ABC America also compares the manner in which Scripto paid the 10 individuals who solicited sales of Scripto's products in Florida, with the way *it* earned revenues from selling ABC products to Illinois Distributors. Taxpayer's Brief, p. 10 n.2. This is comparing apples to oranges. What is similar in the two relationships is the fact that the manufacturer agreed to pay the persons for soliciting sales of the manufacturer's goods in a particular state, and the persons soliciting such sales agreed to solicit and/or sell the manufacturer's goods. Scripto agreed to pay the 10 independent contractors who were soliciting orders in Florida on a commission basis (Scripto, Inc., 362 U.S. at 209, 80 S.Ct. at 620-21, 4 L.Ed.2d 660), whereas ABC America

agreed to pay Illinois Distributors royalty overrides, and different levels of production bonuses, for their increasing success at selling ABC products in Illinois. Stip. Exs. 33, p. 17 (“Over 25% of Distributors reach the rank of Supervisor and above (‘Leader’), qualifying them for additional compensation which is paid by ABC based upon sales production of those they have sponsored directly and indirectly.”); Stip. Ex. 41, p. 12 (“... our compensation plan offers distributors opportunities to achieve higher levels of potential earnings up to ultimately 73% of retail sales, through a combination of royalty overrides and distributor allowances. Each distributor’s success is dependent on two primary factors: the time, effort and commitment a distributor puts into his or her ABC business and the product sales made by a distributor and his or her sales organization.”).

The biggest difference between the relationship between the manufacturer and the in-state solicitors in Scripto and the relationship here is that Distributors must first purchase the ABC products they sell, at retail, in Illinois. Stip. Ex. 33, pp. 40, 66. ABC America stresses this point in its briefs, and characterizes the Distributors as its customers. Taxpayer’s Brief, p. 13 (“ABC America sells products to Independent Distributors, not to retail customers.”). ABC America argues that once it has placed ABC products a Distributor has ordered with a shipping company that the Distributor has chosen, outside of Illinois, ABC America’s activities are complete, and any sales the Distributor might thereafter make inure to the Distributor’s benefit only. Taxpayer’s Brief, pp. 7-8. Its argument continues that, once ABC America has sold ABC products to a Distributor, and title to the goods passes, the goods are transmuted from being ABC products and become a Distributor’s products, which the Distributor is in the business of selling. *Id.*

In essence, ABC America’s arguments present a narrative that focuses on just one part of

the whole activities of the ABC Group's single unitary business. Parts of its narrative are certainly true — *e.g.*, I accept that title to the ABC products transfers upon delivery to the Distributors, and Distributors work in their own self-interest when making sales of ABC products in Illinois — but they are being presented in a way that obscures the whole truth about the business activities of the ABC Group, and the Group's network marketing program. The whole truth is that the ABC Group's single, unitary business includes a chain of distribution that begins with the manufacture of ABC's products and ends with the retail sale of such products, by Distributors, to the intended, ultimate, retail customer. Stip. Ex. 29, p. 1; Stip. Ex. 33, pp. 3-21, 67; Stip. Ex. 41, pp. 10-12.

The ABC Group's single unitary business uses Distributors as the means by which it markets ABC products throughout the waters' edge of the United States, via direct sales. Stip. ¶ 5; Stip. Ex. 41, p. 10 (“Our products are distributed through a global network marketing organization comprised of over one million independent distributors in 60 countries”). There is no doubt that ABC America wants its Distributors to use ABC products (Stip. Ex. 30, p. 7 (“Your first step in the business is simple: USE the products.”)), and knows that many individuals become Distributors simply to purchase ABC products, at a discount, for their personal use. Stip. Ex. 41, p. 12. But a Distributor's personal use of ABC products is just the first step of ABC America's published business plan for Distributors, and Distributors are the persons who actually sell ABC products to retail customers, in Illinois and elsewhere throughout the waters' edge of the United States. Stip. Ex. 30, p. 7; Stip. Ex. 41, pp. 10-12.

For example, ABC Rule 18-A provides, in part: “ABC is a wholesale/retail distribution Company. Products purchased from the Company are intended to be sold and distributed to retail customers and downline Distributors, or used for Distributors' and their immediate families' own

personal consumption.” Stip. Ex. 33, p. 67. Rule 18-C provides, in part: “[i]n any given month, a Distributor must sell to retail customers, and/or sell at wholesale to downline Distributors, at least 70% of the total value of ABC products they retain for resale in order to receive Royalty Overrides or Production Bonuses” *Id.* The ABC Distributors’ Code of Honor provides that, “Adherence to the Company’s [ABC America’s] Rules and Marketing Plan is key to the future growth of the Company” and that “Honoring the Marketing Plan in every respect is the best way to create individual, organizational and corporate success.” Stip. Ex. 29, p. 1.

And rather than merely selling ABC products to Distributors and being done with them, ABC America has also agreed to pay Distributors for increasing the levels at which they purchase more ABC products to resell to others. Stip. Ex. 33, p. 17 (“Over 25% of Distributors reach the rank of Supervisor and above (‘Leader’), qualifying them for additional compensation which is paid by ABC based upon sales production of those they have sponsored directly and indirectly.”); Stip. Ex. 41, pp. 10-11. ABC America pays bonuses and royalties to Distributors for increasing their level of purchases because that is the way ABC America provides direct income to a Distributor for increasing his sales of ABC products. Stip. Ex. 33, p. 17; Stip. Ex. 41, pp. 10-11. The more ABC products a Distributor sells, the more ABC America sells. Stip. Ex. 41, p. 10 (“Supervisors contribute significantly to our sales and some key supervisors who have attained the highest levels within our distributor network are responsible for their organization’s generation of a substantial portion of our sales and for recruiting a substantial number of our distributors.”). In essence, ABC America’s bonus and other payments treat a supervising Distributor’s purchases as a proxy for the Distributor’s sales of ABC products. *See* Stip. Ex. 33, p. 17; Stip. Ex. 41, p. 10. Under such circumstances, it is not unreasonable for the fact-finder to do the same.

ABC America does not sell its products in retail stores. Stip. Ex. 33, p. 67. ABC Rule 9-A provides, in part: “No Distributor shall (directly or indirectly, through any person, means or device) display or sell ABC products, product-related literature, or promotional items in any retail establishments, including but not limited to stores, open or enclosed markets, pharmacies, grocery, health food or military stores, temporary kiosks, booths in malls, outlets, or any other location which ABC determines, in its sole and absolute discretion, is inconsistent with direct selling.” *Id.* Its particular marketplace is in the private home of a Distributor, or the homes of potential retail purchasers, or in other non-traditional retail settings. *Id.*; Stip. Ex. 41, pp. 10-12. That is why the federal cooling off period, provisions of which ABC America has incorporated into the Retail Order Form it requires Distributors to use when making retail sales (Stip. Ex. 33, p. 42), applies to a Distributor’s retail sales of ABC products. 16 C.F.R. § 429; *see also* <http://www.consumer.ftc.gov/articles/0176-protections-home-purchases-cooling-rule> (consumer information on the website of the Federal Trade Commission) (last viewed July 23, 2013). ABC America and the ABC Group chose that method for distributing ABC products, and made a business decision to have Distributors present ABC products for retail sale, face-to-face, in such private homes or other non-traditional retail settings. Stip. Ex. 33, pp. 42, 67; Stip. Ex. 41, p. 10. To act as though Distributors are or become strangers to ABC America, once they have purchased products from it, is to ignore the final link in ABC America’s carefully planned chain of distribution of its products. Stip. Ex. 29, p. 1; Stip. Ex. 33, *passim*; Stip. Ex. 41, pp. 10-12.

Next, ABC America argues that its relationship with Illinois Distributors is not like the relationship between the manufacturer and the persons selling the manufacturer’s goods in Tyler Pipe Industries, Inc. Taxpayer’s Brief, pp. 10, 12-13. Both parties cite that case as announcing the correct test for determining whether the activities of persons physically present and selling

goods in a state may be attributed to another. Taxpayer's Brief, pp. 10, 12-15; Department's Brief, p. 13. Like the in-state sellers in Scripto, the single person who was physically present and soliciting sales of Tyler Pipe's goods in Washington was also an independent contractor, pursuant to the agreement between them. Tyler Pipe Industries, Inc., 483 U.S. at 249, 107 S.Ct. at 2821, 97 L.Ed.2d 199 (“[Tyler Pipe’s] solicitation of business in Washington is directed by executives who maintain their offices out-of-state and by an independent contractor located in Seattle.”). When considering that relationship and its effect for purposes of the manufacturer’s nexus, the U.S. Supreme Court noted and held that:

The trial court found that the in-state sales representative engaged in substantial activities that helped Tyler to establish and maintain its market in Washington. The State Supreme Court concluded that those findings were supported by the evidence, and summarized them as follows:

“The sales representatives acted daily on behalf of Tyler Pipe in calling on its customers and soliciting orders. They have long-established and valuable relationships with Tyler Pipe’s customers. Through sales contacts, the representatives maintain and improve the name recognition, market share, goodwill, and individual customer relations of Tyler Pipe.

“Tyler Pipe sells in a very competitive market in Washington. The sales representatives provide Tyler Pipe with virtually all their information regarding the Washington market, including: product performance; competing products; pricing, market conditions and trends; existing and upcoming construction products; customer financial liability; and other critical information of a local nature concerning Tyler Pipe’s Washington market. The sales representatives in Washington have helped Tyler Pipe and have a special relationship to that corporation. The activities of Tyler Pipe’s agents in Washington have been substantial.” 105 Wash.2d, at 325, 715 P.2d, at 127.

As a matter of law, the Washington Supreme Court concluded that this showing of a sufficient nexus could not be defeated by the argument that the taxpayer’s representative was properly characterized as an independent contractor instead of as an agent. We agree with this analysis. In Scripto, Inc. v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960), Scripto, a Georgia corporation, had no office or regular employees in Florida, but it employed wholesalers or jobbers to solicit sales of its products in Florida. We held that Florida may require these solicitors to collect a use tax from Florida customers. Although the “salesmen” were not employees of Scripto, we determined that “such a fine distinction is without constitutional significance.” *Id.*, at 211, 80 S.Ct., at 621. This conclusion is consistent with our more recent cases. See National Geographic Society v. Anystate Equalization Board, 430 U.S. 551, 556-558, 97 S.Ct. 1386, 1390-1391,

51 L.Ed.2d 631 (1977).

As the Washington Supreme Court determined, “the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer’s ability to establish and maintain a market in this state for the sales.” 105 Wash.2d, at 323, 715 P.2d, at 126. The court found this standard was satisfied because Tyler’s “sales representatives perform any local activities necessary for maintenance of Tyler Pipe’s market and protection of its interests...” Id., at 321, 715 P.2d, at 125. We agree that the activities of Tyler’s sales representatives adequately support the State’s jurisdiction to impose its wholesale tax on Tyler.

Tyler Pipe Industries, Inc., 483 U.S. at 249-51, 107 S.Ct. at 2821-22, 97 L.Ed.2d 199.

ABC America argues that its relationship with Illinois Distributors is not like Tyler Pipe’s relationship with its independent contractor/seller, because Illinois Distributors “do not provide market information on customers or competitors, let alone virtually all information on the Illinois market, that would be necessary for ABC America to maintain a market and protect its interests.” Taxpayer’s Brief, p. 14. But this is mere argument, with no documentary support in the stipulated record.

Illinois Distributors, like all ABC Distributors, are required to document the name and address of each and every one of their retail purchasers whenever they prepare and issue a Retail Order Form to a retail customer, and they are obliged to make that information available to ABC America, upon its request. Stip. Ex. 33, pp. 42, 66. To qualify for Royalty Overrides and other bonus compensation, a Distributor has to provide confirmation that it made sales to at least 10 separate retail customers. Stip. Ex. 33, p. 67 (Rule 18-B). Because Distributors are required to make the name, address, and phone number of each retail purchaser available to ABC America, as well as the amount and kind of ABC products each such customer purchased, they are providing it with information regarding the market for ABC products in Illinois.

Illinois Distributors also have to act to protect ABC America’s interests each and every

time a customer wishes to take advantage of ABC America's 30 day money back guarantee for ABC products. Stip. Ex. 33, p. 66. ABC America is the person extending a guarantee of ABC's products, not a Distributor. Stip. Ex. 33, p. 22. ABC America extends this guarantee only to retail purchasers, not to Distributors. *Id.* Yet Distributors are the persons who have to act, in Illinois, and pursuant to ABC America's express directions, to fulfill ABC America's guarantee to retail purchasers. Stip. Ex. 33, pp. 22 ("The Distributor must offer the customer a full credit toward the purchase of other ABC products or a full refund of the purchase price."), 42 ("ABC offers an exchange or a full refund. Simply request a refund from your Distributor within thirty (30) days from your receipt of the product, and return the unused portion with the product containers to the Distributor named on the reverse side."), 47 (Customer Request for Refund Form provides, "Within 30 days following the refund to your Customer, this form must be completely and accurately filled out, signed and returned in duplicate to your nearest ABC Distribution Center, along with a copy of your Customer's Retail Order Form, and the unused portion of the product, or the original product labels, or the empty product containers."), 66 ("When a customer requests the guarantee be honored, the Distributor must respond quickly and courteously. They may offer the customer a choice of a full refund of the purchase price or full credit for exchange of other ABC products, in accordance with the return procedures set forth in this book. The Distributor must honor the customer's choice."). Each and every Distributor is required to honor ABC America's 30 day money back guarantee to retail purchasers. *Id.*

Here, the Department is alleging, and the NODs constitute its determination (*see* 35 ILCS 5/904(a)), that the Illinois Distributors act on ABC America's behalf in Illinois. In its Brief, the Department more specifically argues that the Illinois Distributors act as ABC America's agent to fulfill ABC America's guarantee to retail customers. Department's Brief, p. 14. The party

alleging an agency relationship must prove it by a preponderance of the evidence. Amcore Bank, N.A. v. Hahnaman-Albrecht, Inc., 326 Ill. App. 3d 126, 134, 759 N.E.2d 174, 181 (2d Dist. 2001). Whether an agency relationship exists, and the scope of the purported agent's authority are questions of fact. *Id.* at 134-35, 759 N.E.2d at 181. In this case, the Department's factual determination is, pursuant to statute, presumed to be correct. 35 ILCS 5/904(a). In addition, the stipulated, documentary evidence fully supports the Department's argument that the Illinois Distributors act as ABC America's agent for purposes of satisfying ABC America's 30 day money back guarantee to retail customers.

An agency is a fiduciary relationship in which the principal has the right to control the agent's conduct and the agent has the power to act on the principal's behalf. Amcore Bank, N.A., 326 Ill. App. 3d at 134, 759 N.E.2d at 181. If the evidence shows one acting for another under circumstances implying knowledge of those acts by the supposed principal, a prima facie case of agency is established. Hartshorn v. State Farm Ins. Co., 361 Ill. App. 3d 731, 737, 838 N.E.2d 211, 217 (2d Dist. 2005). Only the alleged principal's words and conduct are to be considered when determining whether the relationship exists, and the scope of it. Amcore Bank, N.A., 326 Ill. App. 3d at 134, 759 N.E.2d at 181.

There can be no dispute that when an individual applies to become an ABC Distributor, and is accepted by ABC America as one, he is notified that he will be acting as an independent contractor. Stip. Ex. 33, p. 40. But Illinois law also recognizes that a person "may be both an independent contractor and an agent with the authority both to control the details of the work and also 'the power to act for and to bind the principal in business negotiations within the scope of the agency.'" Horwitz v. Holabird & Root, 212 Ill. 2d 1, 13, 816 N.E.2d 272, 279 (2004); *accord* Restatement (Second) of Agency § 2 (Master, servant, independent contractor) (1958)

(independent contractor defined as “a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other’s right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent.”).

Here, each and every Retail Order Form that a Distributor prepares when making a retail sale of ABC products includes a written guarantee from ABC America to the retail customer. Stip. Ex. 33, p. 42 (“ABC offers an exchange or a full refund. Simply request a refund from your Distributor within thirty (30) days from your receipt of the product, and return the unused portion with the product containers to the Distributor named on the reverse side”). A guarantee is a type of contract. Milwaukee Cheese Co. v. Cornerstone Inn, Inc., 142 Ill. App. 3d 840, 843, 492 N.E.2d 231, 233 (2d Dist. 1986). In this respect, a Retail Order Form actually involves two agreements, one of which is between the Distributor and the retail customer (a sale of goods or a contract for the sale of goods), and the other (the guarantee) is between ABC America and the retail customer. Stip. Ex. 33, p. 42. The Distributor is not the person who is extending the guarantee to the retail customer (*id.*), but his agreement with ABC America requires him to provide and perform all services required by ABC America’s guarantee. Stip. Ex. 33, p. 22 (“The Distributor must offer the customer a full credit toward the purchase of other ABC products or a full refund of the purchase price. *** If the retail customer is not satisfied, the Distributor must honor the product guarantee quickly and courteously, according to the instructions that follow *** If ... a customer requests a refund, then the Distributor must complete a “Customer Request for Refund Form,” a copy of which is included in the “Business Administration” section of this book. The Distributor is to calculate the amount of the customer’s refund or credit due, have the customer sign the Refund Form, and immediately pay the refund to the customer or apply their credit to other products.”).

The pre-printed ABC Refund Policy, written on the reverse side of a Retail Order Form, notifies the retail customer that the Distributor is the person who would take physical custody of the ABC products or containers that might be returned by a customer, and who would actually tender a refund to the customer. Stip. Ex. 33, p. 42. These statements, which are written by ABC America (*id.*), expressly notify the retail customer that the Distributor from whom the product was purchased is authorized to act to fulfill ABC's guarantee. Amcore Bank, N.A., 326 Ill. App. 3d at 135, 759 N.E.2d at 181 ("An agent has express authority when the principal explicitly grants the agent the authority to perform a particular act."). In short, in each and every Retail Order Form, ABC America holds out to a retail customer that a Distributor is authorized to perform the services required by ABC America's guarantee. Stip. Ex. 33, p. 42. Read together, the Distributor Agreement, ABC's Rules, and the Retail Order Form, not only authorize a Distributor to perform all services regarding ABC's, they *require* the Distributor to perform those services. Stip. Ex. 33, pp. 22, 39, 42, 47, 66.

ABC's Rules, its Distributor Handbooks and the Retail Order Form, moreover, are prior, written statements of ABC America, which are inconsistent with its position at hearing, which was that Distributors do not act in Illinois as its agent, or on its behalf. Taxpayer's Brief, pp. 10 ("ABC America ... had no representatives working in Illinois on its behalf"), 11 ("Independent Distributors Were Not Agents of ABC America ..."); In re Cook County Treasurer, 166 Ill. App. 3d 373, 379, 519 N.E.2d 1010, 1014 (1st Dist. 1988) (contradictory statements of a party constitute substantive evidence against the party of facts stated). ABC America's prior, written statements are admissions that ABC America has expressly authorized all Illinois Distributors to act as ABC America's agent for purposes of carrying out ABC America's written guarantee to retail purchasers. Stip. Ex. 33, pp. 22, 39, 42, 47, 66; Hartshorn, 361 Ill. App. 3d at 737, 838

N.E.2d at 217; Amcore Bank, N.A., 326 Ill. App. 3d at 135, 759 N.E.2d at 181.

Moreover, all of the elements of ABC America's contract of guarantee are performed in Illinois. To begin, since ABC America's guarantee is extended only to retail customers, ABC America's offer of that guarantee is actually made to a retail customer once the Distributor makes either a sale, or a contract for the sale, of ABC products, and prepares and tenders the Retail Order Form to the customer, in Illinois. Stip. Ex. 33, pp. 22, 42, 66. In the event the retail customer is dissatisfied with the ABC product, he is expected, within 30 days from the date of the sale, to present the ABC product, remaining portions, or empty ABC containers or labels to the Distributor at the Illinois address listed on the Retail Order Form. *Id.* Finally, the Distributor is obliged to replace the products, or provide a full refund to the customer, in Illinois. *Id.* By performing all such acts in Illinois, Illinois Distributors are protecting the interest that ABC America has in performing its contractual obligations to such retail customers. Stip. Ex. 29, p. 1; Stip. Ex. 33, pp. 22, 42, 66.

ABC America's extension of a guarantee to retail customers reflects its business decision that extending such a guarantee is significant for maintaining a market for ABC products wherever they are being sold at retail. Stip. Ex. 33, pp. 22, 39, 42, 47, 66; Stip. Ex. 41, p. 15; Stip. Ex. 42, p. 16. Because each and every ABC Distributor is expressly authorized and required to act, as ABC America's agent, to fulfill ABC America's guarantee to retail customers, their actions are necessary for ABC America to maintain a market for its products, and to protect its interests, in those places where they are required to act. Tyler Pipe Industries, Inc., 483 U.S. at 251, 107 S.Ct. at 2822, 97 L.Ed.2d 199. Thus, Illinois Distributors' physical presence and activities in Illinois are necessary for maintaining ABC America's market in Illinois, and for protecting ABC America's interests. *Id.*

Further, all Distributors agree to “use my best efforts to promote the sale of ABC products to consumers in a manner that enhances the reputation of ABC.” Stip. Ex. 33, p. 40; *see also* Stip. Ex. 29, p. 1. ABC America obviously has an interest in its reputation, and when Illinois Distributors pledge to conduct their activities in Illinois in a way that enhances ABC’s reputation, they protect ABC America’s interest. Distributors also agree to protect the interests ABC America has in its business and trade secrets. Specifically, Distributors agree to “hold in confidence and trust for the exclusive benefit of ABC any trade secrets, formulas, business plans, or confidential or proprietary business information (including, without limitation, genealogies and other compilations of identifying and other data relating to other Distributors or customers), and any other information of commercial value relating to other Distributors or customers, provided by ABC or which I develop or obtain while a Distributor, and I will not use them, directly or indirectly, for any purpose other than the conduct of my ABC Distributorship.” Stip. Ex. 20, p. 2; Stip. Ex. 33, p. 39. Taxpayer’s narrative suggestion that it loses all interest in ABC products, or in Distributors’ sales activities, once it ships ABC products to them, is undercut by its own books and records. Stip. Ex. 29, p. 1; Stip. Ex. 33, *passim*.

Whether Distributors are employees or independent contractors is a critical determination for purposes of deciding, for example, whether ABC America owes federal payroll taxes (26 U.S.C. § 3508 (direct sellers are not statutory employees); Tr. pp. 80-82 (Latini)), but it is irrelevant for deciding whether the activities of a Distributor who is physically present in Illinois — let alone the activities of thousands of such Distributors — constitute sufficient minimum contacts between ABC America and Illinois to satisfy due process. Tyler Pipe Industries, Inc., 483 U.S. at 249-51, 107 S.Ct. at 2821-22, 97 L.Ed.2d 199. Again, for due process purposes, whether an in-state seller is an employee or independent contractor has no constitutional

significance. Scripto, Inc., 362 U.S. at 211-12, 80 S.Ct. at 621-22, 4 L.Ed.2d 660.

Next, ABC America argues that the relationship between it and Illinois Distributors was like the relationship between the parties in Grobark v. Addo Machine Co., 16 Ill. 2d 426, 158 N.E.2d 73 (1959). Taxpayer's Brief, pp. 11-12. Grobark involved a special appearance by Addo Machine Co., Inc. (Addo), a New York corporation who was named a defendant in a contract dispute by plaintiffs who previously acted as the distributor of Addo's products (adding machines), for a large area of Illinois. Addo challenged the plaintiff's service of process on it, under § 17 of Illinois' long-arm statute, arguing that it was not amenable to suit in Illinois because it was not transacting business in Illinois. Grobark, 16 Ill. 2d at 427-29, 158 N.E.2d at 74-75. The circuit court agreed with Addo, and entered an order quashing the service of summons. *Id.* at 427, 158 N.E.2d at 74. The appellate and Illinois supreme courts affirmed, agreeing that Addo was not transacting business in Illinois and, therefore, had not submitted to the jurisdiction of an Illinois court. *Id.*

The Department accurately describes the issue in Grobark, but misapprehends why ABC America relies on it. Department's Response, p. 18 ("Taxpayer relies on *Groba[r]k v. Addo Machine Co.*, 158 N.E.2d 73 (1959) to show ABC America was not doing business in Illinois."). Taxpayer cites Grobark because it wants to persuade the fact-finder that the relationship between it and the Illinois Distributors is sufficiently like the relationship between Addo and the plaintiff to justify a conclusion that is similar to the court's conclusion in Grobark. Again, Taxpayer is arguing that its relationship with Illinois Distributors is completely different from the relationships described in the Scripto and Tyler Pipe cases, where the Supreme Court concluded that it did not violate due process for a state to subject a foreign corporation/manufacturer to state tax, and is just like the relationship described in Grobark, where the Illinois supreme court

concluded that compelling the defendant, a foreign corporation/manufacturer, to defend a suit in Illinois, would violate due process.

But the only real similarity in the contractual relationship here and the one in Grobark is that, in each case, the foreign corporation/manufacturer sold its products to distributors who were physically present in Illinois, and who were then expected to resell such products at retail for use or consumption. Stip. Ex. 33, pp. 40, 42, 63; Grobark, 16 Ill. 2d at 437, 158 N.E.2d at 79. The relationship here, however, is quite different, in several critical respects, than the parties' relationship in Grobark. First, there is nothing in the Grobark decision suggesting that Addo required the plaintiffs to act, in Illinois, in a manner that would enhance Addo's reputation. *Compare* Grobark, 16 Ill. 2d at 437, 158 N.E.2d at 79 *with* Stip. Ex. 33, p. 40. Second, Addo did not agree to pay the distributor for increasing its sales of the products Addo manufactured; but here, ABC America did. Stip. Ex. 33, p. 17; Stip. Ex. 41, p. 10; Tr. pp. 80-82 (Latini). Next, ABC Rule 10-D, which grants a resigning Distributor the right to timely tender sealed and usable ABC products previously purchased back to ABC America, for repurchase by it (Stip. Ex. 33, pp. 49, 63), at least arguably renders ABC America's wholesale sales to Distributors more properly characterized as sales or returns, under either Anystate's or Illinois' commercial codes. *Compare* Cal. Com. Code §§ 2326-2327 *with* 810 ILCS 5/2-326, 2-327; Stip. Ex. 33, p. 61 (Distributor Agreement to be construed under Anystate law). Although this argument was never made, ABC's Inventory Repurchase Rule provides compelling evidence that the relationship between ABC America and its Distributors is not like the parties' relationship in Grobark. Stip. Ex. 33, pp. 49, 63.

Further, the Illinois appellate court's more specific description about the parties' relationship in Grobark, noted that "[d]efendant [Addo] ... did not at any time and does not have

the right to exercise any control over the distributors ... Nothing was required of plaintiffs in the way of performance in Illinois. ... There was no ‘performance’ in Illinois which defendant could have required of the plaintiffs.” Grobark v. Addo Machine Co., Inc., 18 Ill. App. 2d 10, 14-15, 152 N.E.2d 425, 427 (1st Dist. 1958). This record, in contrast, includes over twenty-seven pages of ABC’s Rules that ABC America requires Illinois Distributors to follow. Stip. Ex. 33, pp. 53-80. ABC’s Rules prove that it has and exercises the power to control the manner in which each Distributor operates in Illinois (*id.*), whereas Addo did not. Grobark, 18 Ill. App. 2d at 14-15, 152 N.E.2d at 427. Requiring Distributors to adhere to ABC’s Rules, moreover, “is key to the future growth and success of [ABC America].” Stip. Ex. 29, p. 1.

And there are other reasons why Grobark does not support ABC America’s position and arguments in this tax case. Perhaps most importantly, the Grobark decision is widely considered to have been overruled by the Illinois supreme court’s subsequent decision in Gray v. American Radiator & Standard Sanitary Corp., 22 Ill. 2d 432, 176 N.E.2d 761 (1961). Mergenthaler Linotype Co. v. Leonard Storch Enterprises, Inc., 66 Ill. App. 3d 789, 798, 383 N.E.2d 1379, 1386 (1st Dist. 1978) (the Illinois appellate court has “consistently assumed that, to the extent that Grobark stands for the proposition that jurisdiction cannot be found under section 17(1)(a) unless the defendant had been physically present in Illinois, it was impliedly overruled by Gray v. American Radiator & Standard Sanitary Corp. (1961), 22 Ill. 2d 432, 176 N.E.2d 761”) (and the many cases cited there).

Further, the statute that the Grobark court interpreted in 1959 was subsequently amended, in 1989, to add several additional acts that would allow a court to assert jurisdiction over a named defendant, as well as new subparagraph (c), which provides that, “A court may also exercise jurisdiction on any other basis now or hereafter permitted by the Illinois Constitution

and the Constitution of the United States.” 735 ILCS 5/2-209(c) (*formerly* Ill.Rev.Stat. ch. 110, ¶ 2-209 (1989)); P.A. 86-840 (eff. Sept. 7, 1989). Since it was added, “Illinois courts have treated section 2-209(c) as an independent basis for asserting *in personam* jurisdiction over a defendant. ... Thus, an Illinois court may exercise personal jurisdiction over a nonresident defendant as long as the exercise of such jurisdiction offends neither federal nor state guarantees of due process.” Alderson v. Southern Co., 321 Ill. App. 3d 832, 856, 747 N.E.2d 926, 946 (1st Dist. 2001).

The legislature’s 1989 amendment to Illinois’ long-arm statute also provided courts with jurisdiction over defendants regarding “[t]he making or performance of any contract or promise substantially connected with this state” P.A. 86-840, § 1 (eff. Sept. 7, 1989) (adding subsection (a)(7) and others to Ill.Rev.Stat. ch. 110, ¶ 2-209(a)). “The performance of activity in Illinois by a defendant in substantial furtherance of the terms of a contract, even one executed outside of Illinois, is sufficient to satisfy the due process requirements for the exercise of jurisdiction by the courts of Illinois in matters relating to that contract.” E.A. Cox Co. v. Road Savers Int’l Corp., 271 Ill. App. 3d 144, 150, 648 N.E.2d 271, 276 (1st Dist. 1995).

As already described (*supra*, pp. 42-45), each Illinois Distributor is required to perform, in Illinois, all activities required by ABC America’s contractual guarantee to retail customers. Stip. Ex. 33, pp. 22, 42, 66. ABC America held the Distributors out as being required to perform such activities to each and every retail customer to whom an Illinois Distributor sold ABC products. Stip. Ex. 33, p. 42. Their performance was required even under circumstances where neither federal law setting a cooling off period for door-to-door sales, nor Illinois law governing the sale of goods, would require the Distributor to do so. 16 C.F.R. § 429; <http://www.consumer.ftc.gov/articles/0176-protections-home-purchases-cooling-rule> (last viewed July 23, 2013) (federal cooling off rule does not apply for sales of less than \$25); 810

ILCS 5/2-301 (“General obligations of parties. The obligation of the seller is to transfer and deliver and that of the buyer is to accept and pay in accordance with the contract.”). But since ABC America wrote the Retail Order Form that it requires Distributors to use when making retail sales, Distributors have no independence at all regarding those particular contract terms. Stip. Ex. 33, p. 42. Nothing in Grobark suggests that Addo wrote Grobark’s sales contracts, when the latter sold one of Addo’s machines in Illinois.

In sum, I do not agree that ABC America’s relationship with thousands of Illinois Distributors was like the parties’ relationship in Grobark. As between themselves and ABC America, Illinois Distributors were independent contractors (Stip. 20, p. 2), but as between ABC America and the retail purchasers of ABC products, the Distributors were expressly authorized and required to act as ABC America’s agent to provide all services required by ABC America’s guarantee to retail purchasers. Stip. Ex. 33, pp. 22, 42, 66. Again, Illinois Distributors’ physical presence and activities in Illinois were necessary to fulfill ABC America’s guarantee, to maintain ABC America’s market in Illinois, and to protect ABC America’s interests. Stip. Ex. 29, p. 1; Stip. Ex. 33, pp. 22, 42, 66; Tyler Pipe Industries, Inc., 483 U.S. at 251, 107 S.Ct. at 2822, 97 L.Ed.2d 199.

ABC America purposefully directed significant sales of ABC products to thousands of Illinois Distributors, who agreed to promote and sell ABC products, at retail, in Illinois, and who were required to act as ABC America’s agent for purposes of fulfilling ABC’s guarantee to retail customers. Stip. ¶¶ 11, 17; Stip. Ex. 33, 22, 42, 66. Those activities created sufficient minimum contacts between ABC America and Illinois, for Illinois to impose a tax on ABC America for the privilege of earning income there. Asahi Metal Industry, Co. Ltd., 480 U.S. at 112, 107 S.Ct. at 1032, 94 L.Ed.2d 92 (“The ‘substantial connection,’ ... between the defendant and the forum

State necessary for a finding of minimum contacts must come about by *an action of the defendant purposefully directed toward the forum State.*”) (emphasis original).

Does ABC America, Itself, Have Sufficient Contacts With Illinois To Satisfy Due Process

ABC America, itself, has also been engaged in continuous and systematic activities with Illinois regarding its purposefully directed sales of ABC products to Illinois Distributors, and the subsequent resale of such products, at retail, in Illinois. Stip. Ex. 38; Stip. Ex. 40, p. 9. More than twenty years prior to the years at issue, ABC America registered with the Department and obtained its own certificate of registration as a retailer. Stip. Ex. 38; Tr. pp. 84, 87 (Latini). It did so because it had agreed to act as the Department’s agent to collect the ROT that would be due from the Illinois Distributors’ retail sales of ABC products in Illinois. Stip. Ex. 38. Thereafter, and during the years at issue, ABC America maintained its registration as a retailer, and regularly filed Illinois tax returns to report to the Department the amount of taxable gross receipts and ROT due regarding such sales, and to pay such ROT over to the Department. Stip. Ex. 38; Stip. Ex. 40, p. 9; Tr. pp. 84, 87 (Latini).

When ABC America registered with the Department, and agreed to act as the state’s agent to collect ROT from Illinois Distributors, and to file Illinois tax returns and to pay over such ROT to the Department, it submitted itself to the taxing and regulatory authority of Illinois. *See e.g., People v. Floom*, 52 Ill. App. 3d 971, 974, 368 N.E.2d 410, 413 (1st Dist. 1977) (“the legislature intended the Department to be able to verify the amount of the tax and to be able to collect the tax.”); *id.* at 975, 368 N.E.2d at 414 (“It is also consistent with the object and purpose of the Act and the provision in question, that the legislature, when it specifically granted the power to inspect to the Department of Revenue, intended to impliedly grant the power to audit to the Department so that the Department could execute its power to inspect and to achieve the

object and purpose of the Act.”). By those same actions, ABC America established significant, continuing, and direct contacts with Illinois. When I say “direct,” I mean that these contacts exist between ABC America and Illinois, without regard to the nature of the relationship between ABC America and the Distributors.

Generally, a person who exercises the privilege of engaging in the occupation of making retail sales in Illinois, is also exercising the privilege of earning or receiving income in Illinois. Persons who exercise the privilege of earning or receiving income in Illinois are subject to the tax imposed by § 201(a) of the IITA. 35 ILCS 5/201(a) (the tax imposed by § 201(a) “shall be in addition to all other occupation or privilege taxes imposed by this State ...”). ABC America assumed the obligation to perform acts in Illinois — that is, to file Illinois tax returns and pay Illinois tax — that are required by persons who exercise the privilege of engaging in the occupation of making retail sales in Illinois. Stip. Ex. 38; Stip. Ex. 40, p. 9; 35 ILCS 120/2, 2a, 3.

In its Reply, Taxpayer argues that it volunteered to register as a retailer, and to pay the ROT due on the Illinois Distributor’s retail sales, solely as an accommodation to the Department (Reply Brief of [ABC COMPANY] (Taxpayer’s Reply), pp. 11-12), while either denying or ignoring the bargain that is apparent, at least to this reader, by the text of the Agency Agreement. This argument, moreover, does not obviate the effect of ABC America’s own acts that created significant, direct, and longstanding connections with Illinois.

First, I reject Taxpayer’s argument that the Agency Agreement benefitted *only* the Department. The Agency Agreement was executed in 1984, years after the Scripto and National Geographic Society v. Anystate Board of Equalization, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977) cases were decided. ABC America apparently approached the Department, and notified it that there were many Distributors who were working in Illinois and making retail sales

of ABC products there, and asked that it be allowed to pay ROT on their behalf. Stip. Ex. 38; Stip. Ex. 40, p. 9; 86 Ill. Admin. Code § 130.550.¹ In National Geographic Society, the Supreme Court noted that “[a]ll States that impose sales taxes also impose a corollary use tax on tangible property bought out of State to protect sales tax revenues and put local retailers subject to the sales tax on a competitive parity with out-of-state retailers exempt from the sales tax. [citation omitted] The constitutionality of such state schemes is settled.” National Geographic Society, 430 U.S. at 555, 97 S.Ct. at 1389, 51 L.Ed.2d 631.

The Agency Agreement was a contract, written by the Department, detailing the scope of the agency that ABC America agreed to undertake on behalf of the Department. Stip. Ex. 38. The Agency Agreement binds ABC America to pay ROT. *Id.* While the Agreement referred to local ROT in some paragraphs, the paragraph detailing the place where the local ROT would be based provided that it was not applicable. *Id.* The Agency Agreement does not mention the statutory obligation, imposed on retailers who maintain a place of business in Illinois, to collect Illinois use tax. *Id.*; 35 ILCS 105/3-45. During the years at issue, ABC America knew that “[m]any of [its] non-supervisor distributors join ABC to obtain a 25% discount on our products and become a discount consumer” Stip. Ex. 41, p. 12. I presume it knew this, too, when the Agency Agreement was executed.

What I glean from the text of the Agency Agreement, and from the other evidence of

¹ The applicable ROT regulation provides:
Section 130.550 Filing of Returns for Retailers by Suppliers Under Certain Circumstances
For greater simplicity of administration, it shall be permissible for manufacturers, importers and wholesalers whose products are sold at retail in Illinois by numerous retailers, and who wish to do so, to assume the responsibility for accounting and paying to the Department all tax accruing under the Act with respect to such sales, if the retailers who are affected do not make written objection to the Department to this arrangement, and provided that such arrangement in any given case is acceptable to the Department.
86 Ill. Admin. Code § 130.550.

record, is that, in exchange for ABC America's agreement to pay the correct amount of ROT due on the gross receipts that thousands of Illinois Distributors realized from selling ABC products, at retail, in Illinois, the Department was willing to forgo investigating whether ABC America could be required to collect use tax from those who purchased ABC products for personal use and/or consumption. *See* Stip. Ex. 38. Indeed, it could well be that the Department never even thought about use tax at all, and was happy simply to have one taxpayer, instead of over nine thousand, to monitor.

But ABC America also had something to gain from executing the Agency Agreement, and that benefit may be inferred from the evidence. ABC America knew, when it executed the Agency Agreement, that it sold ABC products to many persons who became Distributors solely to purchase ABC products at a 25% discount from MSRP. Stip. Ex. 41, p. 12. Under the express terms of the Agency Agreement, there was no requirement that ABC America had to account to the Department for the Illinois use tax that would be owed by such purchasers, or any retail purchasers, either. Stip. Ex. 38. At all times (that is, when it executed the Agency Agreement, during the years at issue, and at the time of hearing), ABC America had the ability to discern the relative numbers of Illinois Distributors who purchased for personal use versus for resale at retail. After all, it had access to the Retail Order Forms that it required Distributors to prepare when making retail sales in Illinois (Stip. Ex. 33, p. 42), and it certainly knew the actual numbers of ABC products that it sold to Illinois Distributors. *Id.*, p. 40 (Wholesale Product Order Form).

I presume that ABC America was able to calculate the value of the benefit that inured to it from not having to collect, account for, and pay Illinois use tax regarding its sales to Illinois Distributors who purchased ABC products for personal use. And no presumption is really necessary, since ABC America's own documents reflect its knowledge of the benefit. *See* Stip.

Ex. 33, p. 17 (the ABC Advantage Program, or HAP “provides ABC Distributors who activate their HAP orders with exclusive added benefits, including free activation no Annual Processing Fee for non-supervisors with active HAP orders, ... multiple HAP orders — one for personal use and one consisting of products for resale; additional tax savings (on personal use orders only)”).

The Department litigator repeatedly asked Gene Green to identify the benefit ABC America realized from agreeing to pay the ROT due on the Illinois Distributors’ retail sales in Illinois, but he played coy at first, and finally said that it obtained no benefit. Tr. pp. 92-95 (Latini). That last bit of testimony is wholly incredible, as it is so contrary to ordinary, prudent, business practice. Prudent businessmen structure their affairs to pay only those taxes due; they don’t volunteer to pay taxes ostensibly owed by others *unless* there is a benefit to doing so. *See* Stip. Ex. 33, p. 17. No matter; ABC America made its bargain, and I am confident, based on ordinary human experience, prudent business judgment, and the text of the Agency Agreement, that it did not so without obtaining some benefit.

But even if ABC America acted with utter imprudence, and without realizing any benefit at all when it registered as a retailer with the Department, and, for decades thereafter, filed Illinois tax returns, and paid Illinois ROT that was due regarding the Illinois Distributors’ retail sales in Illinois, the voluntary nature of those acts does not change the fact that they occurred. *Every* person that registers as a retailer in Illinois does so voluntarily, even though the law requires him to do so to legally make retail sales in Illinois. 35 ILCS 120/2a. A person does not have to act as a retailer, or earn income by engaging in that occupation, in Illinois.

Registration with the Department is the statutorily required method by which one obtains a license to engage in the occupation of retailing in Illinois. 35 ILCS 120/2a; Department of

Finance v. Gandolfi, 375 Ill. 2d 237, 239, 30 N.E.2d 737, 738 (1940) (“It is a well-recognized attribute of sovereign power to tax any occupation for the purpose of raising revenue, and to impose and collect the tax in the form of a license.”). A license is permission to do an act or to exercise a privilege that is unlawful without the license (Weinstein v. Daley, 85 Ill. App. 2d 470, 481, 229 N.E.2d 357, 364 (1st Dist. 1967)), and it is unlawful to make retail sales in Illinois without first obtaining a license to do so. 35 ILCS 120/2a. Filing returns and making tax payments are the costs set by statute for persons granted the privilege of engaging in the occupation of making retail sales in Illinois. 35 ILCS 120/2, 2a, 3; Gandolfi, 375 Ill. 2d at 239, 30 N.E.2d at 738. ABC America assumed such costs related to the Illinois Distributors’ retail sales. Stip. Ex. 38. Notwithstanding its arguments to the contrary, it is not unreasonable to infer that ABC America agreed to pay the Illinois Distributors’ ROT liabilities, at least in part, because the Illinois Distributors were acting, in Illinois, on ABC America’s behalf. Stip. Ex. 29, p. 1; Stip. Ex. 33, pp. 22, 42, 66; Stip. Ex. 41, pp. 10-12, 15-16; Tyler Pipe Industries, Inc., 483 U.S. at 249-51, 107 S.Ct. at 2821-22, 97 L.Ed.2d 199; Scripto, Inc., 362 U.S. at 211-12, 80 S.Ct. at 621-22, 4 L.Ed.2d 660.

But regardless why it did so, ABC America registered with the Department, and for more than 20 years, it filed Illinois tax returns and paid Illinois ROT to the Department. Stip. Ex. 38; Stip. Ex. 40, p. 9; Tr. p. 87 (Latini). Given those undisputed facts, it is much too late for it to complain that it lacks minimum contacts with Illinois sufficient for Illinois to tax it. International Shoe Co., 326 U.S. at 317, 66 S.Ct. at 159, 90 L.Ed. 95 (‘Presence’ in the state in this sense has never been doubted when the activities of the corporation there have not only been continuous and systematic, but also give rise to the liabilities sued on,”).

As a final note on the connection between ABC America’s assumption of the obligation

to file Illinois tax returns and pay Illinois ROT due on Illinois Distributors' retail sales, and its own contractual guarantee to retail customers, the ROTA provides a deduction for a retailer who has paid tax in error regarding a sale that has been cancelled because of a return. 86 Ill. Admin. Code § 130.401(b) ("Returned Merchandise and Cancellations[.] Any seller may deduct from his gross receipts any refunds made by him during the preceding return period to purchasers, on account of tangible personal property returned to the seller, in case the seller had theretofore included the receipts from the sale of such tangible personal property in a return made by him, and had paid the tax imposed by the Retailers' Occupation Tax Act with respect to such receipts."). Every time a retail customer made a return of ABC products pursuant to ABC America's guarantee, the Distributor who made the sale was obliged to complete a Customer Request for Refund Form, to obtain replacement of the returned products that he previously sold to the customer. Stip. Ex. 33, pp. 22, 47. After filing Illinois tax returns for more than 20 years, I presume ABC America took advantage of this deduction on its Illinois returns, as authorized by Illinois law. Stip. Ex. 38; Stip. Ex. 40, p. 9; 86 Ill. Admin. Code § 130.401(b).

The stipulated facts and evidence in this record show that ABC America purposefully directed a substantial amount of sales to Illinois Distributors, either for use or for resale at retail to others in Illinois (Stip. ¶¶ 10, 17; Asahi Metal Industry, Co. Ltd., 480 U.S. at 112, 107 S.Ct. at 1032, 94 L.Ed.2d 92), and that it had significant, continuing, and direct contacts with Illinois that were related to its purposefully directed sales. Stip. Ex. 38; Stip. Ex. 40, p. 9; Tr. p. 87 (Latini). ABC America's direct, substantial contacts with Illinois were sufficient to give it fair notice that the Department might claim that it was exercising the privilege of earning income in Illinois. Quill Corp., 504 U.S. at 307, 112 S.Ct. at 1910, 119 L.Ed.2d 91; International Shoe Co., 326 U.S. at 317, 66 S.Ct. at 159, 90 L.Ed. 95. Given the evidence, it does not offend traditional

notions of fair play and substantial justice for the Department to seek to impose income and replacement income tax on ABC America for that privilege.

Issue 2: Does Public Law 86-272 Or IITR § 100.9720 Preclude The Department From Imposing Illinois Income And Replacement Income Tax On ABC America

The second issue is, assuming ABC America has nexus with Illinois, whether Public Law 86-272 or IITR § 100.9720 preclude Illinois from imposing Illinois income and replacement income tax on it. Public Law 86-272 “prohibits a State from imposing a net income tax on a foreign taxpayer if its only in-State business activity is the solicitation of sales.” Dover Corp. v. Department of Revenue, 271 Ill. App. 3d 700, 705, 648 N.E.2d 1089, 1092 (1st Dist. 1995); 15 U.S.C. § 381. Under § 381, “[s]tates have jurisdiction to tax interstate companies when their in-State business activities exceed mere solicitation.” Dover Corp., 271 Ill. App. 3d at 705, 648 N.E.2d at 1092.

Section 381 of the Interstate Commerce Act provides:

§ 381. Imposition of net income tax

(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).

(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) 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.

(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 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; and
- (2) the term “representative” does not include an independent contractor. ***

15 U.S.C. § 381. The most recent United States Supreme Court decision interpreting the text and applicability of § 381 is Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 505 U.S. 214, 112 S.Ct. 2447, 120 L.Ed.2d 174 (1992). There, the Court interpreted the statutory phrase “solicitation of orders” to determine whether the activities of Wrigley’s sales representative in Wisconsin fell outside the protection of that federal statute. *Id.* at 223, 112 S.Ct. 2453, 120 L.Ed.2d 174 (“The key question in this case is whether, and to what extent, ‘solicitation of orders’ covers activities that neither explicitly nor implicitly propose a sale.”).

Pursuant to the authority granted it in the IITA (35 ILCS 5/1401), the Department promulgated a regulation titled, Nexus. 86 Ill. Admin. Code § 100.9720. That regulation addresses Public Law 86-272, and describes how the Department will interpret and administer the IITA in light of that federal law. *Id.* For purposes of this issue, the most pertinent part of the regulation is the Department’s listing of activities that it will treat as exceeding the mere solicitation that is protected by § 381. It provides, in pertinent part:

Section 100.9720 Nexus

- c) The scope of federal statutes limiting nexus for imposition of Illinois income and replacement taxes are described in this subsection (c):

4) Unprotected Activities. The following activities (assuming they are not de minimus) do not constitute “mere solicitation” of orders, nor are they ancillary, nor otherwise protected under PL 86-272. If one or more of the following activities are conducted within this State, an otherwise protected nonresident taxpayer shall become subject to taxation by Illinois.

- A) Making repairs or providing maintenance or service to the property sold or to be sold.
- B) Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise.
- C) Investigating credit worthiness.
- D) Installation or supervision of installation at or after shipment or delivery.
- E) Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitation of sales of tangible personal property.
- F) Providing any kind of technical assistance or services, including, but not limited to, engineering assistance or design service, when one of the purposes of the assistance or service is other than the facilitation of the solicitation of orders.
- G) Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints when the sole purpose of such mediation is to ingratiate the sales personnel with the customer.
- H) Approving or accepting orders.
- I) Repossessing property.
- J) Securing deposits on sales.
- K) Picking up or replacing damaged or returned property.
- L) Hiring, training, or supervising personnel, other than personnel involved only in solicitation.
- M) Maintaining a sample or display room in excess of two weeks (14 days) at any one location within the State during the tax year.
- N) Carrying samples for sale, exchange or distribution in any manner for consideration.
- O) Owning, leasing, or maintaining any of the following facilities or property in-state:
 - i) Repair shop.
 - ii) Parts department.
 - iii) Any kind of office other than an in-home office as described as permitted under subsections (c)(4)(Q) and (c)(5)(B).
 - iv) Warehouse.
 - v) Meeting place for directors, officers, or employees.

- vi) Stock of goods other than samples for sales personnel or that are used entirely ancillary to solicitation.
- vii) Telephone answering service that is publicly attributed to the nonresident or to an employee or agent of the nonresident in his or her representative status.
- viii) Mobile stores, i.e., vehicles with drivers who are sales personnel making sales from the vehicles.
- ix) Real property or fixtures to real property of any kind.
- P) Consigning stock of goods or other tangible personal property to any person, including an independent contractor, for sale.
- Q) The maintenance of any office or other place of business in this State that does not strictly qualify as an “in-home” office as described in subsection (c)(5)(M) shall, by itself, cause the loss of protection under PL 86-272. A telephone listing or other public listing within the State for the nonresident or for an employee or other representative of the nonresident in such capacity or other indication through advertising or business literature that the nonresident or its employee or representative can be contacted at a specific address within the State shall normally be determined as the nonresident maintaining within this State an office or place of business attributable to the nonresident or to its employee or representative in a representative capacity. However, the normal distribution and use of business cards and stationary identifying the employee’s or representative’s name, address, telephone and fax numbers and affiliation with the nonresident shall not, by itself, be considered as advertising or otherwise publicly attributing an office to the nonresident or to its employee or other representative.
- R) 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 franchiser or licensor to its franchisee or licensee within the State.
- S) Conducting any activity that is not on the list of “protected activities” in subsection (c)(5), and that is not entirely ancillary to requests for orders, even if the activity helps to increase purchases.

6) Independent Contractors. PL 86-272 provides immunity to certain in-state activities, if conducted by an independent contractor, that would not be afforded if performed by the nonresident or its employees or other representatives.

- A) Notwithstanding the provisions of subsection (c)(4), independent contractors may engage in the following limited activities in the State without the nonresident’s loss of immunity:
 - i) soliciting sales;
 - ii) making sales;
 - iii) maintaining an office.

- B) 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 and this Section.
- C) Maintenance of a stock of goods in the State, by the independent contractor under consignment or any other type of arrangement with the nonresident, except for purposes of display and solicitation, shall remove the protection.

86 Ill. Admin. Code § 100.9720.

The first thing to note about the effect of Public Law 86-272 on this particular dispute is the federal statute's definition of the term "independent contractor." Under § 381(d)(1), independent contractor "means 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" 15 U.S.C. § 381(d)(1). This statutory definition joins two clauses with the conjunction "and." 15 U.S.C. § 381(d)(1). Thus, for purposes of Public Law 86-272, to prove that a particular person is an independent contractor, the proponent must offer evidence showing that the person is selling or soliciting for more than one principal, *and* that the person is holding himself out as doing so. *Id.* That was Taxpayer's burden here. PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48 ("[u]nder Illinois law, ... [a taxpayer] ... had the burden of overcoming [the Department's] *prima facie* case through documentary evidence, meaning books and records, and not mere testimony.").

During its opening statement, Taxpayer asserted that Distributors were "also free to sell products of other competitors so long as they do so in an ethical way." Tr. p. 15. The documentary evidence proves otherwise. ABC's Rules expressly prohibit a Distributor from soliciting any ABC customer to purchase the products of any other multi-level marketer or direct sales company. Stip. Ex. 33, p. 60 ("During the course of a Distributorship and for one year

thereafter, neither the Distributor nor their spouse, ... will, directly or indirectly ... solicit, ... any ABC customer they become aware of in the course of their ABC Distributorship, to ... purchase products of, ... any multi-level marketing or direct-sales company, nor will they encourage anyone to do what is prohibited under this rule.”). For even more emphasis, ABC ends this particular rule with the warning that “Violation of this rule is likely to result in termination of the Distributorship.” *Id.*

Of course, the most direct evidence on this particular fact question would have consisted of the books and records of Illinois Distributors who *did* solicit or sell for more than one principal, and who *did* hold themselves out as doing so. *See* 15 U.S.C. § 381(d)(1). Not surprisingly, given ABC’s Rules (Stip. Ex. 33, p. 60), no such direct evidence was offered at hearing. Instead, it offered the testimony of Jane Doe. Specifically, Jane Doe was asked the following questions, on direct:

Q: Can a distributor sell products of competitors, including other multi marketing manufacturers?

A: Yes.

Q: If a distributor has customers who are buying ABC product and tries to sell them product of a competitor, does ABC encourage or discourage that type of selling?

A: We encourage our distributors to keep those two businesses separately.

Q: And why is that?

A: We just want to make sure that we are being fair to the customer and our distributors are behaving ethically.

Q: And you’ve been with the company for 19 years.

Has ABC ever terminated a distributor for selling product of another competitor to a customer who has also bought ABC product?

A: Not to my knowledge.

Tr. p. 53-54 (Jane Doe). On cross-examination, Jane Doe was asked the following questions and gave the following answers:

Q: Now, with respect to competitors' products, I think you testified that a ABC distributor can sell a competitor's products, correct?

A: Yes.

Q: Let's say that I'm a ABC distributor. Can I sell to a ABC customer, an established ABC customer, a competitor's products?

A: We discourage that.

Q: If I do that, and I continue to do that, and refuse to stop, can I lose my distributorship?

A: It will depend on the circumstances, but not to the best of my knowledge.

Q: You don't know? I mean, do you know whether or not that is the case?

A: No. Like I said, it would really depend on the circumstances. You know, we do discourage distributors, you know, from doing that.

Q: Why do you do that, ma'am?

A: Just to be fair to the customer. We don't want the customer to be confused, you know, as to whose products is being marketed to them.

Q: If ownership of the product goes to the distributor, and as you're alleging they're independent, what is to stop them from doing that?

A: Nothing.

Q: Well, you said you discourage that. Do you have a rule in place? What would it matter to ABC if they sell competitor's products?

A: Like I said, just to be fair to the customer. You know, it's just behaving ethically.

If you are a customer and you[re] already using ABC products, and your distributor comes to you and tries to sell you another product, I think that's just confusing to the customer.

And, like I said, we do encourage for them to keep their business separately.

Tr. pp. 61-62 (Jane Doe).

In their briefs, the parties argue about the effect of Jane Doe's testimony on this point. The Department likes Jane Doe's testimony that ABC America discouraged Distributors from selling competitors' products, and argues that such testimony showed that Illinois Distributors sell only ABC products in their businesses. Department's Brief, p. 20. Taxpayer, on the other hand, prefers Jane Doe's testimony that Distributors could sell competitors' products. Taxpayer's Reply, p. 9. Taxpayer also argues that Jane Doe's testimony was backed up by a statement in

ABC's 2005 Annual Report, that it "did not prohibit a new distributor from working with another company." Taxpayer's Reply, p. 9 (*quoting from* Stip. Ex. 41, p. 28).²

The sentence quoted in Taxpayer's Reply (Stip. Ex. 41, pp. 27-28), however, was not written in the part of ABC's Annual Report where it presented its statement of the company's actual business operations. *Compare* Stip. Ex. 41, pp. 3-25 *with id.*, pp. 25-38; *see also id.*, p. 1 (distinguishing statements of historical fact from "forward looking statements"). Rather, it was made when identifying and explaining one of the risk factors ABC's business might face. Stip. Ex. 41, pp. 25-38. To identify and describe one such risk, ABC explained how the direct sales industry is not particularly capital intensive or otherwise subject to high barriers to entry, and why ABC Distributors could easily enter and exit ABC's network marketing program. *Id.*, pp.

² The section heading of the 2005 Annual Report, and the full text of the paragraph in which the quoted sentence appears, provide as follows:

Due to the high level of competition in our industry, we might fail to retain our customers and distributors, which would harm our financial condition and operating results.

We are also subject to significant competition for the recruitment of distributors from other network marketing organizations, including those that market weight management products, dietary and nutritional supplements and personal care products as well as other types of products. We compete for global customers and distributors with regard to weight management, nutritional supplement and personal care products. Our competitors include both direct selling companies such as NuSkin Enterprises, Nature's Sunshine, Alticor/Amway, Melaleuca, Avon Products, Oriflame, and Mary Kay, as well as retail establishments such as Weight Watchers, Jenny Craig, General Nutrition Centers, Wal-Mart and retail pharmacies. In addition, because the industry in which we operate is not particularly capital intensive or otherwise subject to high barriers to entry, it is relatively easy for new competitors to emerge who will compete with us for our distributors and customers. In addition, the fact that our distributors may easily enter and exit our network marketing program contributes to the level of competition that we face. For example, a distributor can enter or exit our network marketing system with relative ease at any time without facing a significant investment or loss of capital because (1) we have a low upfront financial cost (generally \$50 to \$75) to become a ABC distributor, (2) we do not require any specific amount of time to work as a distributor, (3) we do not insist on any special training to be a distributor and (4) we do not prohibit a new distributor from working with another company. Our ability to remain competitive therefore depends, in significant part, on our success in recruiting and retaining distributors through an attractive compensation plan, the maintenance of an attractive product portfolio and other incentives. We cannot ensure that our programs for recruitment and retention of distributors will be successful, and if they are not, our financial condition and operating results would be harmed.

Stip. Ex. 41, p. 28.

27-28. Given the context, the sentence quoted in Taxpayer’s Reply is better understood as conveying, for example, that a person who wants to become an ABC Distributor would not be required to quit or resign from full-time employment in order to do so. *See id.* at 28.

“Evidence is probative when to the normal mind it tends to prove or disprove a matter at issue.” Camco, Inc. v. Lowery, 362 Ill. App. 3d 421, 433, 839 N.E.2d 655, 665 (1st Dist. 2005). The factual matters particularly at issue here are whether Illinois Distributors were selling or soliciting for more than one principal in Illinois, and whether they did held themselves out as doing so. *See* 15 U.S.C. § 381(d)(1). As between Jane Doe’s testimony and ABC’s Rules, I find only the latter to be both probative and reliable on this particular fact question. ABC’s Rules expressly prohibit a Distributor from soliciting ABC customers to purchase the products of a direct sales competitor. Stip. Ex. 33, p. 60.

But even if one were to disagree with my conclusion regarding the probative value of the sentence quoted in Taxpayer’s Reply, the record is absolutely devoid of any credible, documentary evidence showing that the Illinois Distributors actually held themselves out as selling or soliciting for more than one principal. On this point, ABC’s Rules regulate the type of advertising a Distributor may use. Stip. Ex. 33, pp. 55-56, 73-78. Two of them are pertinent here. The first, Rule 24-D, provides, in part:

Telephone Directory Listings

Distributors may list themselves in the telephone directory under the heading “ABC Distributor.” The only information that may follow this is the Distributor’s name, address, telephone number, fax number, email address or website.

Stip. Ex. 33, p. 73. The next, Rule 26-D, provides:

Associating with other organizations

Distributors may feature third party advertisements on their websites so long as, in ABC’s sole and absolute judgment, the advertisements:

Do not directly or indirectly promote any other direct-selling or network marketing companies (regardless of products offered) or any products which are competitive with those sold by ABC (including, but not limited to, meal replacements, nutritional supplements and cosmetics).

Stip. Ex. 33, p. 75.

The stipulated evidence includes telephone listings for persons holding themselves out as ABC Distributors or Independent ABC Distributors. Stip. Ex. 39. None the entries in the telephone directories identify a person as being, for example, an ABC and Melaleuca Distributor, or an ABC and NuSkin Distributor, or a distributor of ABC products and products marketed by persons who compete with ABC America. *Compare id. with* Stip. Ex. 41, p. 28 (identifying some of ABC America's direct seller competitors). Again, given ABC's Rules (Stip. Ex. 33, pp. 73, 75), that is not a surprise. ABC's Rules make it virtually impossible for a Distributor to both conform to those Rules and hold himself out as selling products for someone other than ABC, in the regular course of his business. *See id.*

ABC America had the burden to offer documentary evidence to support its suggestion that Illinois Distributors were independent contractors as that term is defined by Public Law 86-272. 15 U.S.C. § 381(d)(1); PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48. It did not do so. Jane Doe's mere testimony that Distributors could sell a competitors' products was not credibly corroborated by any regularly kept books and records, and the records that specifically address the proposition are inconsistent with her testimony. *Compare* Tr. pp. 53, 61-62 (Jane Doe) *with* Stip. Ex. 33, pp. 60, 73, 75; PPG Industries, Inc., 328 Ill. App. 3d at 33, 765 N.E.2d at 48. Taxpayer presented no evidence, whatever, which showed that even one Illinois Distributor actually held himself out as selling for more than one principal.

In sum, there is no credible, documentary evidence in this record that would support the conclusions that Illinois Distributors were engaged in selling tangible personal property for more

than one principal, *and* that they held themselves out as such in the regular course of their business activities. 15 U.S.C. § 381(d)(1); Stip. Ex. 33, pp. 60, 73, 75; Stip. Ex. 39. Therefore, I conclude that the Illinois Distributors were not independent contractors as defined by § 381(d)(1). *Id.* Instead, under that federal statute, the Illinois Distributors were representatives of ABC America. 15 U.S.C. § 381(a)(1)-(2), (d)(2); *accord* 86 Ill. Admin. Code § 100.9720(c)(6)(A)-(B). Because Taxpayer has failed to produce credible documentary evidence to show that the Illinois Distributors were independent contractors under § 381(d)(1), the provisions of § 381(c), pertaining to sales or solicitation of orders for sales by independent contractors (15 U.S.C. § 381(c)), do not apply to this dispute. Rather, only those set forth in § 381(a) apply. 15 U.S.C. § 381(a).

The remaining part of this issue is to determine whether the activities of the Illinois Distributors exceeded mere solicitation of sales. 15 U.S.C. § 381(a). The answer to this question is clear. The Illinois Distributors' activities in Illinois were not limited to soliciting sales (*see id.*); they were actually making sales of ABC products in Illinois. When an Illinois Distributor prepared a Retail Order Form, that form did not have to be sent outside of Illinois for approval or rejection. *See* Stip. Ex. 32, p. 19; Stip. Ex. 33, p. 42. Rather, the Distributor would accept the retail customer's order, in Illinois. *Id.*; 86 Ill. Admin. Code § 100.9720(c)(4)(H). He would then physically transfer possession of the ABC products to retail purchasers, from inventory the Distributor was encouraged to keep, in Illinois. Stip. Ex. 32, p. 19; Stip. Ex. 33, p. 42; 86 Ill. Admin. Code § 100.9720(c)(4)(H), (N). He would collect payment for such sales from the customer, in Illinois. Stip. Ex. 33, p. 42; 86 Ill. Admin. Code § 100.9720(c)(4)(B). These activities are not protected by Public Law 86-272. 86 Ill. Admin. Code § 100.9720(c)(4).

Further, every time a retail customer wanted to return ABC products, pursuant to ABC

America's guarantee, an Illinois Distributor was required to act, in Illinois, by taking physical possession of the ABC products, the empty ABC containers or the labels being returned. Stip. Ex. 33, pp. 22, 42, 66; 86 Ill. Admin. Code § 100.9720(c)(4)(A), (K). The Distributor also had to provide the customer with replacement ABC products, if they agreed to that remedy, or to physically give the customer a refund, if the customer so desired. Stip. Ex. 33, pp. 22, 42, 66; 86 Ill. Admin. Code § 100.9720(c)(4)(K). ABC America was guaranteeing its products, not the Distributors, but the Distributors were required to act, in Illinois, to fulfill all aspects of ABC America's guarantee to retail purchasers. Each and every time a Distributor did so, he was acting as an agent, pursuant to ABC America's express authorization, and as ABC America's representative. Stip. Ex. 33, pp. 22, 42, 66; 15 U.S.C. § 381(a), (d)(2); Amcore Bank, N.A., 326 Ill. App. 3d at 135, 759 N.E.2d at 181. I conclude that the Illinois Distributors' activities in Illinois exceeded mere solicitation for sales, and were not protected by either Public Law 86-272 or IITR § 100.9720. 15 U.S.C. § 381(a); 86 Ill. Admin. Code § 100.9720(c)(4)(A)-(B), (H), (N), (K).

Conclusion:

Based on the evidence, I recommend that the Director finalize the NODs as issued, and that the tax proposed be assessed, with interest to accrue pursuant to statute.

August 2, 2013

John E. White
Administrative Law Judge