BEFORE THE HEARING OFFICER
OF THE TAXATION AND REVENUE DEPARTMENT
OF THE STATE OF NEW MEXICO

IN THE MATTER OF THE PROTEST OF
DART INDUSTRIES, INC. **No. 04-03**
ID NO. 02-152241-00-3
ASSESSMENT NO. 1972584

DECISION AND ORDER

A formal hearing on the above-referenced protest was held November 7, 2002, before Margaret B. Alcock, Hearing Officer. Dart Industries, Inc. ("Dart") was represented at the hearing by Curtis W. Schwartz, with the law firm of Modrall Sperling Roehl Harris & Sisk P.A., and Paul H. Frankel, with the law firm of Morrison & Foerster LLP. The Taxation and Revenue Department ("Department") was represented by Bruce J. Fort, Special Assistant Attorney General. At the close of the hearing, a briefing schedule was established and the final brief of the parties was filed on January 30, 2004, at which time the matter was submitted for decision. Based on the evidence and arguments presented, IT IS DECIDED AND ORDERED AS FOLLOWS:

FINDINGS OF FACT

1. Dart is a corporation organized under the laws of Delaware. (Tr. 109). Unless otherwise noted, the findings set forth below pertain to Dart's business activities as they existed between January 1990 and December 1992, which is the period at issue in this protest.

2. Through a division known as "Tupperware Home Parties," Dart manufactured and marketed plastic food storage and serving containers, educational toys, and personal and home products under the "Tupperware" brand name. (5/14/90 franchise agreement between Tupperware Home Parties and Susan Carnell, referred to herein as "FA", p. 1).

3. Dart's commercial domicile was in Orlando, Florida; its manufacturing facilities were located in South Carolina. (Tr. 56-57, 129).

4. Dart had no employees in New Mexico. (Tr. 139).

5. Dart was a registered franchisor with the Federal Trade Commission and those states requiring registration of franchisors. (Tr. 157).

6. All domestic sales of Dart's products were made through a nationwide network of approximately 300 franchisees, referred to as "distributors." Each distributor recruited her own sales force by contracting with other individuals, known as "dealers", in accordance with the policies and procedures set out in the franchise agreement. (Tr. 173-174; FA, p. 2).

7. In January 1990, there was one franchised Tupperware distributorship in New Mexico, which was owned by Danny and Sabina Lawson, operating under the name Dana Sales, Inc. (Tr. 130).

8. Under the terms of Dart's franchise agreement with the Lawsons, the franchise could be sold or transferred to a third party on the following conditions: (a) Dart had a right of first refusal to purchase the franchise at the same price and terms offered by the proposed transferee; (b) the franchisee had to obtain Dart's prior written approval of the transfer, including approval of the price and terms of sale; (c) the proposed transferee had to be an individual of good character and have sufficient business experience, aptitude, and financial resources to operate the distributorship; (d) the transferee had to complete any orientation program Dart required; and (e) the transferee had to agree to be bound by the terms and conditions of the franchise agreement or to enter into a new franchise agreement with Dart.

(8/24/87 franchise agreement between Tupperware Home Parties and Sabina and Danny Lawson, pp. 14-16).

9. In May 1990, the Lawsons sold their Tupperware distributorship, together with their sales force of approximately 300 people, to Susan Carnell, a sole proprietor doing business under the name Del Sol Party Sales. (Tr. 45-46).

10. At the same time, Susan Carnell entered into a "Tupperware Home Parties Franchise Agreement" with Dart.

11. The franchise agreement between Dart and Ms. Carnell stated that she was an independent contractor and that "nothing in this Agreement is intended to make either party a general or special agent, joint venturer, partner, or employee of the other party for any purpose." (FA, p. 6).

12. The franchise agreement granted Ms. Carnell the right to use the registered trademark "Tupperware" and various other trademarks within a geographic area that included New Mexico and a section of southern Colorado. (FA, p. 5, Ex. A).

13. Ms. Carnell's use of the Tupperware trademark, and any goodwill established by her use of the trademark, inured to the exclusive benefit of Dart. (FA, p. 5).

14. The proper use of the Tupperware trademark by Dart's franchised distributors and their dealers was important to Dart's ongoing success. (Tr. 154).

15. The franchise agreement defined Dart's franchised distributorships as "businesses licensed by us to distribute TUPPERWARE products through Dealers using the Marketing Methods." (FA, p. 2).

16. The Marketing Methods were defined as "sales, distribution, marketing and administrative plans, systems, methods and techniques authorized by us from time to time for use by franchised TUPPERWARE distributorships, including but not limited to our direct selling techniques for the home party plan and personal demonstrations." (FA, p. 2).

17. The Marketing Methods were communicated to distributors through various means, including operating manuals, which Dart lent to its distributors for use during the term of the franchise. (FA, p. 4). Although the operating manuals remained the property of Dart, distributors were rarely required to account for or return the manuals to Dart. (Tr. 159-160).

18. Dart's Marketing Methods included "required and suggested techniques, systems, devices, plans, methods and programs for operating the Franchised Distributorship, including ... reporting systems, ordering and purchasing systems, bookkeeping systems, distribution methods and billing procedures; recruiting, retaining and motivating Dealers, and instilling in Dealers the TUPPERWARE philosophy of 'sharing opportunity' through means that may include Dealer rallies and Dealer incentive programs; promoting the reputation, distribution and use of TUPPERWARE Products; and general business operation and management." (FA, p. 4).

19. The franchise agreement placed a number of restrictions and responsibilities on Dart's franchised distributors. These included, but were not limited to, a distributor's obligation:

(a) to devote the distributor's full time and attention to the operation of the distributorship (FA p. 3) and to refrain from holding any interest in or performing services for any businesses marketing products that were similar to or competitive with Dart's products or

any businesses that used direct selling methods similar to Dart's Marketing Methods. (FA, p. 8).

(b) to prominently display Dart's trademarks on the distributor's invoices, stationery, business cards, promotional materials and other advertising and marketing materials, and to use any notices of trademark and service mark registrations specified by Dart. (FA, p. 5).

(c) to immediately notify Dart of any apparent infringement of Dart's trademarks and "to give any assistance, and perform any acts that our attorneys deem necessary or advisable in order to protect and maintain our interests in any litigation or proceeding related to any Trademark or otherwise to protect and maintain our interests in the Trademarks." (FA, pp. 5-6).

(d) to use only invoices, purchase orders and other forms approved by Dart. (FA, p. 10).

(e) to use the specific brands, models, and types of computer hardware and software prescribed by Dart. (FA, p. 11).

(f) to cooperate with any inspections Dart wished to make of the distributor's premises or vehicles and of Tupperware products and marketing materials in the distributor's possession. (FA, pp. 11-12).

(g) to maintain the premises and any vehicles used in connection with the distributorship according to the standards set by Dart and "to effect such interior and exterior cleaning, repair, maintenance, and refurbishing of the Office and any such vehicles, including

periodic painting and decorating and replacement of worn out or obsolete furniture, furnishings, equipment, and signs, as we may reasonably require from time to time." (FA, p. 10).

(h) to obtain insurance policies—in amounts acceptable to Dart and naming Dart as an additional insured—on the premises and vehicles used in connection with the distributorship against claims for bodily injury, death, and property damage caused by or occurring in connection with the operation of the distributorship. (FA, p. 11).

(i) to obtain the prior written approval of Dart before relocating the premises used to operate the distributorship. (FA, p. 9).

(j) to obtain Dart's prior written approval of all advertising and promotions undertaken by the distributor. (FA, p. 10).

(k) to furnish weekly reports to Dart of activities and sales by the distributor and her dealers during the preceding week, along with "any other data, information, and supporting records" that Dart might require. (FA, p. 11).

(l) to prepare and submit verified financial statements (including a balance sheet and a profit and loss statement) reflecting the operation and financial condition of the distributorship. (FA, p. 11).

(m) to "fully and faithfully follow the Marketing Methods in all aspects of recruiting, rewarding, motivating and otherwise dealing" with dealers appointed to promote and sell Tupperware products and "not to deviate in any way from the Marketing Methods (including policies and incentive programs pertaining to the recruitment of and relations with Dealers) without our prior written approval." (FA, p. 9).

(n) to provide prompt and conscientious service to all customers serviced through the distributorship; to promptly respond to all customer complaints and inquiries; and "to comply with policies and procedures prescribed by us relating to the warranties for TUPPERWARE Products." (FA, p. 10).

(o) to attend up to six conferences per year. (FA, p. 4).

20. Dart's franchise agreement with Susan Carnell was for a period of seven months (FA, p. 3) and provided for automatic one-year renewals. (FA, p. 15).

21. Ms. Carnell could terminate the franchise at any time, with or without cause, upon 60 days notice. (FA, p. 16).

22. Dart could immediately terminate the franchise in the event Ms. Carnell failed to comply with the terms of the franchise agreement or was convicted of any crime or offense "that is likely to adversely affect the reputation of your Franchised Distributorship or our reputation or that of TUPPERWARE products...." (FA, p. 16).

23. At the time Susan Carnell entered into the franchise agreement with Dart in May 1990, she paid Dart a "promotion fee" of $1,500 to be applied to Dart's costs of developing and providing Ms. Carnell with materials for her use "in recruiting Dealers and promoting TUPPERWARE Products." (FA, p.7).

24. In May 1990, Dart sent two of its employees to New Mexico to help Ms. Carnell set up her distributorship. (Tr. 72).

25. The two employees spent about ten days at Ms. Carnell's Albuquerque business location. (Tr. 83-84).

26. One of the employees took an inventory of the premises which listed the Tupperware products located at the facility, as well as all of the office furniture and computer equipment Ms. Carnell had purchased from the former distributor. (Tr. 72).

27. The second employee went with Ms. Carnell to the bank to assist her in opening bank accounts for her business (Tr. 73) and also went with her to obtain required business licenses. (Tr. 84).

28. Dart's employees set up Ms. Carnell's record-keeping system, making the transition from Dana Sales, the former distributor, to Del Sol Party Sales on the computer equipment that Ms. Carnell had purchased from Dana Sales. (Tr. 84).

29. With Dart's authorization, Ms. Carnell listed her business under the name "Tupperware" in the white pages of the telephone book using the address and telephone number of her Albuquerque office. (Tr. 66).

30. Ms. Carnell listed her business as "Tupperware" because potential customers would not recognize the name of Ms. Carnell's sole proprietorship but would recognize the name Tupperware. (Tr. 66-67).

31. Twice each year, Ms. Carnell prepared and sent a copy of the profit and loss statement for her business to Dart. (Tr. 82).

32. In order to forecast product demand for manufacturing purposes, Dart also required its distributors to provide Dart with information concerning their dealers' party schedules. (FA, p. 11; Tr. 138-139, 166).

33. In June 1990, Dart held a regional sales meeting in Santa Fe, New Mexico, for the distributors in its southwest region. (Tr. 74).

34. In 1991 or 1992, Dart held a regional sales meeting in Albuquerque, New Mexico, that included the region's entire sales force, *i.e.*, dealers as well as franchised distributors. (Tr. 75-76).

35. In addition to the sales meetings, Dart's regional vice president visited Ms. Carnell twice each year during the audit period. (Tr. 71).

36. The job of Dart's regional vice presidents was to foster growth of the distributorships and the sale of products and to identify potential candidates for future ownership of Tupperware distributorships. (Tr. 133).

37. During the regional vice president's semiannual visits, he talked with Ms. Carnell concerning her business needs and went over her financial numbers to determine whether she was recruiting, promoting, and selling enough to give her a comfortable living. (Tr. 71).

38. If there was sufficient time, the regional vice president participated in sales meetings to generate enthusiasm among Ms. Carnell's dealers and motivate them to sell Dart's products. (Tr. 71-72).

39. Dart leased a certain number of automobiles and assigned them to Ms. Carnell based on her sales performance. (Tr. 89).

40. Ms. Carnell then awarded the automobiles to the members of her sales force who reached and maintained a specified sales volume. (Tr. 89-91).

41. When Ms. Carnell received calls from potential customers who wanted to purchase Tupperware products, she referred these customers to one of her dealers. (Tr. 92).

42. Pursuant to Dart's Marketing Methods, the dealers sold the Tupperware they purchased from Ms. Carnell by means of demonstrations the dealers arranged at the homes of potential customers. (FA, p. 2; Tr. 40-42).

43. All of Dart's sales of Tupperware were made to distributors such as Ms. Carnell at 44 percent of the retail price shown in the Tupperware catalog. Ms. Carnell then sold the products to her dealers, usually at 65 percent of the retail price. (Tr. 93-94).

44. The difference between the price Ms. Carnell paid Dart for Tupperware products and the price she charged her dealers for those products represented Ms. Carnell's income from the franchise. The amount remaining after she paid her office rent and other expenses represented her profit. (Tr. 50).

45. During each year of the audit period, Ms. Carnell purchased $700,000 to $800,000 of Tupperware products from Dart, which represented 44 percent of retail sales to New Mexico customers. (Tr. 49).

46. Ms. Carnell purchased Tupperware products by sending purchase orders to Dart at its headquarters in Orlando, Florida. Dart forwarded the purchase orders to its factory in South Carolina for direct shipment to Ms. Carnell via common carrier. (Tr. 56-58).

47. In September 1995, the Multistate Tax Commission completed an audit of Dart on behalf of the Department. The audit covered the three-year period 1990-1992. (Auditor's File).

48. The audit report concluded that Dart's activities in New Mexico were sufficient to establish nexus with New Mexico and also exceeded the scope of sales activities protected by Public Law 86-272 (15 U.S.C. § 381). (Auditor's File).

49. Based on these conclusions, the audit report determined that Dart should have been filing corporate income tax returns with New Mexico during the years at issue. (Auditor's File).

50. On October 28, 1995, the Department issued Assessment No. 1972584 to Dart in the total amount of $22,019.00, representing $13,336.00 of corporate income and franchise tax, $1,333.60 of penalty, and $7,349.50 of interest due for the period January 1990 through December 1992.

51. On November 15, 1995, Dart filed a written protest to the assessment. The stated basis for the protest was that Dart's only business activity in New Mexico was the solicitation of sales and that "[b]ecause Public Law 86-272 prohibits the imposition of tax, the assessment for the years 1990-1992 should be cancelled."

52. On September 12, 2003, the parties submitted a Joint Prehearing Statement in accordance with the Hearing Officer's Amended Scheduling Order dated April 2, 2003. The parties' Summary of Positions on Unresolved Issues stated that "the sole issue is whether Dart was engaged in business activities in New Mexico which are immune from the New Mexico corporate income tax under Public Law 86-272 (15 U.S.C. § 381)."

ISSUE TO BE DECIDED

As set out in the parties' Joint Prehearing Statement, the sole issue to be decided is whether Dart's business activities in New Mexico during the period January 1990 through December 1992

exceeded the scope of activities protected by Public Law 86-272, thereby subjecting Dart to New Mexico corporate income tax.

In its post-hearing briefs, Dart attempted to raise a new issue, arguing that it did not have constitutional nexus with New Mexico during the audit period. The Tax Administration Act, NMSA 1978, § 7-1-24(A), requires every protest filed with the Department to specify the individual grounds upon which the protest is based. A taxpayer is allowed to supplement the statement "at any time prior to ten days before any hearing conducted on the protest...or, if a scheduling order has been issued, in accordance with the scheduling order." In this case, the April 2, 2003 scheduling order advised the parties as follows:

> The prehearing statement shall serve as a supplemental statement of the grounds for Dart's protest for purposes of Section 7-1-24(A) NMSA 1978, and no additional supplement may be filed thereafter. Unless ordered by the Hearing Officer upon good cause shown, no issue shall be raised...unless listed in the prehearing statement.

Because Dart failed to raise the issue of "substantial" or constitutional nexus in the prehearing statement, it will not be addressed in this decision.[1]

During opening argument at the September 23, 2003 hearing, Dart's attorney also raised the issue of penalty, stating: "our position today is that, in any event, there shouldn't be penalties...." (Tr. 15). This issue was not included in the statement of grounds set out in Dart's protest letter or in the prehearing statement. In addition, there was no evidence presented by Dart to explain the basis for its decision not to report New Mexico corporate income tax during

[1] In the context of this case, the issue of substantial nexus is redundant in any event. A finding that Dart's activities in New Mexico exceeded the scope of Public Law 86-272 would also establish that Dart had substantial nexus with the state. If Dart's activities did not exceed the scope of Public Law 86-272, the issue of substantial

the audit period or explain why this decision did not constitute negligence as defined in NMSA 1978, § 7-1-69. Accordingly, the issue of penalty will not be addressed in this decision.

DISCUSSION

In 1959, Congress enacted Public Law 86-272, which confers immunity from state income taxes on foreign corporations whose only business activities in a state consist of the solicitation of orders for interstate sales. The pertinent portions of Public Law 86-272 are set out below.

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nexus is irrelevant since Dart would be immune from New Mexico corporate income tax even if such nexus existed.

P. L. 86-272—The Interstate Income Law
Title I—Imposition of Minimum Standard

Sec. 101. (a) No State, or political subdivision thereof, shall have power to impose, for any taxable year ending after the date of the enactment of this Act, 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) . . . .

(c) For purposes of subsection (a), 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) 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.

Public Law 86-272 does not define the term "solicitation of orders." In *Wisconsin Department of Revenue v. William Wrigley, Jr., Co*., 505 U.S. 214 (1992), the United States Supreme Court held that the solicitation of orders covers more than activities that are "strictly essential" to making requests for purchases. *Id*. at 228. For example, providing a salesman with a company car and product samples comes within the term "solicitation of orders" because these activities serve no purpose other than to facilitate requests for purchases. *Id*. at 229. *Wrigley* drew a line, however, "between those activities that are *entirely ancillary* to requests for purchases—those that serve no independent business function apart from their connection to the soliciting of orders—and those activities that the company would have reason to engage in anyway but chooses to allocate to its in-state sales force." *Id*. at 228-229. (emphasis in original). A *de minimis* exception applies to these additional activities. Whether a particular activity is sufficiently *de minimis* to avoid loss of the immunity afforded by Public Law 86-272 depends upon whether that activity establishes a "nontrivial additional connection" with the taxing State. *Id*. at 232.

In *Wrigley*, the Court found that the company was subject to Wisconsin corporate income tax because its in-state activities of replacing stale chewing gum, supplying gum through agency stock checks, renting storage space and storing gum served a separate business purpose and were not entirely ancillary to the solicitation of orders. On the other hand, Wrigley's recruitment and training of sales staff, as well as the in-state sales staff's periodic intervention in credit disputes between customers and the Wrigley home office, were entirely ancillary because they served no function other than to facilitate the solicitation of orders.

In this case, Dart argues that it is immune from New Mexico corporate income tax because: (1) Susan Carnell, Dart's franchised distributor, was an independent contractor who sold Tupperware products on her own behalf and not on behalf of Dart; (2) all of Dart's in-state activities during the audit period qualify as the "solicitation of sales" protected under Public Law 86-272; and (3) any activities outside the protection of Public Law 86-272 were *de minimis*. Each of these arguments are addressed below.

I. Dart's Franchised Distributors were Engaged in Activities on Behalf of Dart.

Dart argues that the business activities of Susan Carnell, its New Mexico franchised distributor, cannot be attributed to Dart because she was acting as an independent contractor and not as an agent or on behalf of Dart. It is well settled that under certain circumstances an independent contractor's in-state activities may be attributed to an out-of-state vendor for purposes of establishing nexus. In *Tyler Pipe Industries Inc. v. Washington Department of Revenue,* 483 U.S. 232 (1987), the United States Supreme Court held that Washington could impose its wholesale tax on an out-of-state vendor whose only contact with the state was through the activities of independent contractors. In reaching its decision, the Court found that "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." 483 U.S. at 251 (quoting from the Washington Supreme Court's decision). *See also*, *Scripto, Inc. v. Carson,* 362 U.S. 207 (1960) (taxing state had nexus with an out-of-state vendor based solely on the presence of independent contractors).

In this case, Ms. Carnell purchased and sold Tupperware products on her own behalf. However, as set out in some detail in the Findings of Fact, *supra*, the terms of Ms. Carnell's

franchise agreement with Dart contractually obligated her to perform a host of other duties designed to establish and maintain Dart's New Mexico market. In operating her "independent" business, Ms. Carnell was required to follow the Marketing Methods prescribed by Dart. These methods included "distribution methods and billing procedures; recruiting, retaining and motivating Dealers....; promoting the reputation, distribution and use of TUPPERWARE Products; and general business operation and management." (FA, p. 4). For example, Ms. Carnell was contractually obligated to respond to all customer complaints and inquiries and to comply with Dart's policies and procedures relating to warranties on Tupperware products. (FA, p. 10). At the administrative hearing, Maureen Morrissey, Dart's vice president, testified that the "vehicle for product replacement or other warranty services would have been Ms. Carnell." (Tr. 149). Ms. Carnell also confirmed that she handled all customer complaints and all warranty services on Dart's Tupperware products. (Tr. 76, 77).

The franchise agreement required Ms. Carnell to provide sales information to Dart on an ongoing basis in order to enable Dart to better predict its manufacturing schedule. As Ms. Morrissey explained (Tr. 138-139):

> [W]e were always interested in being able to forecast for manufacturing purposes what the demands were going to be. And so one of the pieces of information that we would have solicited or requested from distributors would have been their forecast for parties, of what their datings were going to look like for upcoming weeks, and that's not something that an employee would typically report on, because they were not engaged in the business. So this was a voluntary reporting mechanism. Susan—Ms. Carnell would have asked her sales force to advise her about what their party lineup looked like, and then Susan would have consolidated that information and provided it to Tupperware. And this was principally for logistics and planning purposes.

Although Ms. Morrissey characterized the distributors' participation as voluntary, Paragraph 11 of the franchise agreement makes such reporting mandatory (FA, p. 11):

> 11. Reports and Financial Statements.
>
> You agree to furnish us each week on the day we designate, in the form we prescribe from time to time, a report of activities and sales by you and Dealers for the preceding week, and any other data, information, and supporting records that we require....

In other portions of her testimony, Ms. Morrissey acknowledged that the franchise agreement imposed specific reporting obligations on the distributors—only the form of reporting was optional—stating: "We required certain information to be reported to Tupperware, and we prescribed certain forms under which they could do that, or they could be substantially similar forms." (Tr. 137). At another point Ms. Morrissey testified: "there is a need for some upstream information, and we basically tell them what information we need and we suggest how we would like to see it reported." (Tr. 166).

Dart's franchise agreement also required Ms. Carnell to promote and protect the Tupperware trademark within New Mexico. Paragraph 5(B) states (FA, p. 5):

> You agree to display the Trademarks prominently in the manner we prescribe on invoices, stationery, business cards, promotional materials and other advertising and marketing materials, and other forms designated by us....

In order to protect the Tupperware image, Ms. Carnell was also required to adhere to certain guidelines concerning the conduct of her business, including the condition and appearance of her business premises, her advertising practices, and the character of the dealers she recruited. (FA, pp. 9-10). The agreement specified that Ms. Carnell's use of the trademark, and any goodwill established by that use, inured to the exclusive benefit of Dart. (FA, p. 5). She was

obligated to immediately notify Dart of any apparent infringement of the Tupperware trademarks and to give whatever assistance Dart deemed necessary to "protect and maintain" Dart's interests in its trademarks. (FA, pp. 5-6).

In her role as a franchised distributor, Susan Carnell personified the goodwill associated with the trade name "Tupperware." This goodwill was instrumental in generating her sales of Tupperware products to her dealers and, by extension, Dart's sales of Tupperware products to Ms. Carnell and its other franchised distributors. As Maureen Morrissey, Dart's vice president, explained: "The intellectual property embodied in our mark is what gives, we think, the premium value to our products that are sold. You know, the way we make money is not by having a valuable trademark, but by whether or not we sell products." (Tr. 154). Ms. Carnell testified that her decision to become a Tupperware distributor was largely based on the strength of the company's trademark, stating: "It was a good business decision for a female to have a product that had such a good reputation and a name. People knew what we had to sell when we used the word Tupperware, and it was—it was a great opportunity." (Tr. 47).

In effect, the franchise agreement created a symbiotic relationship between Dart and its franchisees. The fact that Susan Carnell and the other franchised distributors benefited from Dart's marketing system and trademark recognition does not negate the fact that Dart benefited from the activities of its distributors and was totally dependent on those activities to establish, maintain, and protect Dart's market for sales of Tupperware products. *See*, *Tyler Pipe, supra*. Dart's characterization of Ms. Carnell as an independent wholesaler acting solely on her own

behalf simply does not correspond to the facts. In the operation of her franchised distributorship, there is no question that Ms. Carnell was also acting on behalf of Dart.

II. Dart's In-State Activities Exceeded the Scope of Activities Protected by Public Law 86-272. **A. Activities of Susan Carnell**. In *Wrigley, supra*, the United States Supreme Court held that the activities protected by Public Law 86-272 must facilitate the actual solicitation of orders, rather than merely serve to increase general sales. In this case, several of the activities Susan Carnell performed under the terms of her franchise agreement with Dart exceeded this standard. As discussed in Part I, *supra*, one of Ms. Carnell's contractual obligations included the handling of customer complaints and warranties on Tupperware products. In *Wrigley*, similar activities were found to exceed the scope of Public Law 86-272. As the Court noted: "Repair and servicing may help to *increase* purchases; but it is not ancillary to *requesting purchases*...." 505 U.S. 214, 229. (emphasis in original). The Court also found that the replacement of stale gum was not a protected activity, noting:

> Although Wrigley argues that gum replacement was a "promotional necessity" designed to ensure continued sales,...it is not enough that the activity facilitate *sales*; it must facilitate the *requesting of sales*, which this did not.

Id. at 233. (emphasis in original). Here, Ms. Carnell's contractual obligation to promptly respond to all customer complaints and to comply with Dart's policies and procedures relating to warranties on damaged or defective Tupperware products clearly falls outside the solicitation of orders as defined in *Wrigley*. *See also, Alcoa Building Products, Inc. v. Commissioner of Revenue*, 440 Mass. 224, 797 N.E.2d 357 (2003) (sales managers' activities in connection with warranty claims exceeded activities protected by Public Law 86-272).

Ms. Carnell's maintenance of an Albuquerque office for her franchised distributorship also exceeded the scope of permitted activities. In *Wrigley*, the Court noted the exception in Subsection 101(c) of Public Law 86-272, which states that a person shall not be considered to have engaged in business activities within a state merely by reason of the maintenance of an office by one or more independent contractors. Based on this exception, the Court concluded that "[e]ven if engaged in exclusively to facilitate requests for purchases, the maintenance of an office within the State, by the company or on its behalf, would go beyond the 'solicitation of orders.'" 505 U.S. 214, 230. The Court further observed that this provision "seemingly represents a judgment that a company office within a State is such a significant manifestation of company 'presence' that, absent a specific exemption, income taxation should always be allowed." *Id*.

In this case, Dart argues that Ms. Carnell was an independent contractor who maintained a New Mexico office for her own separate business and not on behalf of Dart. If this were true, the exception provided in Subsection 101(c) would apply. The problem with Dart's argument is that—regardless of the characterization of the parties' relationship in the franchise agreement—Ms. Carnell was not an independent contractor for purposes of Public Law 86-272. Subsection 101(d)(1) defines an independent contractor as someone who is engaged in selling or soliciting orders "*for more than one principal and who holds himself out as such in the regular course of his business activities*." (emphasis added). Dart's franchised distributors do not come within this definition because their sales activities were limited to selling the products of a single principal. Although Dart disputes this fact, asserting that its distributors were not prohibited

from selling on behalf of other companies (Reply Brief at 4), Dart's franchise agreement holds otherwise. As stated in Paragraph 9 of the agreement (FA, p. 8):

> 9. Exclusive Relationship.
>
> You agree that you will promote, sell and distribute through the Franchised Distributorship all TUPPERWARE Products. You agree not to promote, offer, sell or otherwise distribute through the Franchised Distributorship any products or services other than TUPPERWARE Products, without our prior approval.
>
> ....We have entered into this Agreement with you on the express condition that during the term of this Agreement, neither you nor any member of your immediate family will perform services as or have any direct or indirect interest as a disclosed or beneficial owner, director, officer, employee, consultant, or agent in (a) any business or association which promotes or sells Competing Products using methods similar to the Marketing Methods...; or (b) any business or association that franchises, licenses or develops businesses in the United States or Canada that promote or sell Competing Products using methods similar to the Marketing Methods...; or (c) any business that sells goods for household use using methods similar to the Marketing Methods....

At the administrative hearing, the Department's attorney asked Maureen Morrissey, Dart's vice president and assistant general counsel, what would happen if one of Dart's franchisees started selling competing products. She answered as follows (Tr. 158-159):

> [W]e have had franchisees from time to time dabble in Avon, Pampered Chef, Princess House and other direct sales organizations. And we believe very much in retaining the relationship that we have had with distributors and so we have basically—someone in my role, legal, has basically taken it upon themselves to counsel the distributors about what their obligations are under the franchise agreement, and we have never had to terminate a relationship on that basis. We have always adopted the philosophy that the best defense is a good offense, and we basically go forward and expound on the benefit of being a Tupperware owner, and hopefully we can get their head around to the correct way of thinking.

This testimony establishes that Dart actively enforced its exclusivity provision and took steps to insure that its franchisees did not perform sales services for anyone other than Dart.

Although Susan Carnell initially testified that she was not aware of anything that would prevent her from selling other products, she also acknowledged that she did not recall all of the provisions of the franchise agreement. (Tr. 107). When the Department's attorney drew Ms. Carnell's attention to Paragraph 9 of the agreement and again asked whether she was prohibited from selling products that compete with Tupperware, she responded: "I cannot say yes or no on that. I—I—I signed that contract, and it's stating—as far as that, I have not ever attempted and no one has ever brought anything up to me." (Tr. 108). In fact, Dart's franchise agreement not only prohibited *current* franchisees from selling or soliciting orders for other companies, it also prohibited *former* franchisees from engaging "in any business or activity involving the promotion, distribution or sale of Competing Products" for a period of two years after the franchise was terminated. (FA, p. 18).

In enacting Public Law 86-272, Congress drew a clear distinction between the activities of independent contractors and the activities of company representatives. For purposes of Public Law 86-272, the definition of an "independent contractor" is limited to someone who sells products for more than one principal and who holds himself out as such in the regular course of his business. A "representative" is someone who sells for only one principal. Unlike an independent contractor, a representative is not free to offer his services to another company, nor is he free to offer his customers a choice of more than one product line. In effect, the representative has tied his fortune to a single master, and the interests of both parties are inextricably intertwined. That is the case here: Dart's success or failure depends entirely on the sales activity of its franchised distributors; the distributors' ability to make sales depends on the

quality of Dart's trademark and related goodwill; this, in turn, depends on the distributors' implementation of Dart's confidential "Marketing Methods" and the other aspects of Dart's franchise system.

Dart's argument that Ms. Carnell's office was an independent enterprise unrelated to Dart's own business activities is disingenuous at best. Although Ms. Carnell's sole proprietorship operated under the name "Del Sol Party Sales," her office location and telephone number were listed in the white pages of the Albuquerque telephone book under the name "Tupperware." (Tr. 66). The Tupperware listing also appeared in the telephone directories of other New Mexico municipalities. (Tr. 67). As Ms. Carnell explained, the name Del Sol Party Sales had no meaning for her customers, "so we use the—the trademark name Tupperware." (Tr. 66). The Tupperware name also appeared on Ms. Carnell's business cards and on the invoices, purchase orders, and other business forms which were included in the promotional kit that Ms. Carnell was required to purchase from Dart at the time she entered into the franchise agreement. (Tr. 63, 164-166, FA, pp. 5, 10).

Under the terms of the franchise agreement, Dart retained substantial control over its distributors' premises. *See, e.g.*, Findings of Fact 19(e) through 19(i). Distributors were required to obtain prior approval before relocating their premises, to maintain the premises according to standards set by Dart, and to cooperate in any inspections Dart wished to make. Ms. Carnell testified that no one from Dart ever gave her suggestions concerning her office or how to arrange her displays. (Tr. 80, 114). She acknowledged, however, that one of Dart's regional vice presidents visited her Albuquerque business location twice each year and that "I'm

sure he might have been looking around." (Tr. 71, 80). Ms. Carnell has a four-year degree in business and marketing and testified that "I kind of feel like I know what I need to do." (Tr. 114-115). Ms. Morrissey also noted that Dart had "been very blessed with a very fine distributor like Ms. Carnell." (Tr. 173). The fact that Dart did not find it necessary to intervene in Ms. Carnell's operation of her franchise does not alter Dart's right of control under the terms of the franchise agreement.

Ms. Carnell's Albuquerque office gave Dart a clear advantage over out-of-state vendors who had no physical presence in the state. Potential customers looking for the name "Tupperware" in the telephone directory would find it listed under a local address and telephone number. When they called that number, Ms. Carnell would put them in touch with the appropriate Tupperware dealer. Because Ms. Carnell was able to maintain an in-state inventory of Tupperware products, customer orders could be filled more quickly than they would have been through out-of-state delivery. Ms. Carnell testified to the importance of quick delivery at the administrative hearing. When asked whether it was her practice to wait until she had her dealers' orders in hand before placing her own order with Tupperware, she responded (Tr. 115):

> No, because that would be a—a turnaround issue. We want to—if you buy—if you give cash or a check to someone you want your product back as fast as you can. So if I use that type of practice I would have a delay on the consumer receiving it, so I want it as quickly and reward them for making money for what they did, for their checks, so if I can have it—if I can have it in hand that is my goal.

While Ms. Carnell's ability to fill Tupperware orders in a timely fashion helped her own sales, it also helped Dart maintain a high level of customer satisfaction among the final consumers of

Tupperware products. The presence of a local representative to handle customer complaints and product warranties did the same.

For purposes of Public Law 86-272, Susan Carnell was a representative of Dart and was not an independent contractor. Accordingly, her maintenance of an Albuquerque office for her Tupperware distributorship exceeded the scope of activities protected by the Act. As the United States Supreme Court stated in *Wrigley*: "a company office within a State is such a significant manifestation of company 'presence' that, absent a specific exemption, income taxation should always be allowed." 505 U.S. 214, 230.

B. Activities of Dart's Employees. In addition to Ms. Carnell's activities, Dart's own employees made regular visits to New Mexico during the audit period. In May 1990, Dart sent two of its employees to New Mexico for ten days to help Ms. Carnell set up her distributorship. One of the employees took an inventory of the Tupperware products located at Ms. Carnell's facility, as well as all of the office furniture and computer equipment she had purchased from the former distributor. The second employee helped Ms. Carnell open bank accounts for her business and obtain required business licenses. Dart's employees also set up Ms. Carnell's record-keeping system, making the transition from Dana Sales, the former distributor, to Del Sol Party Sales on the computer equipment that Ms. Carnell had purchased from Dana Sales.

In June 1990, Dart held a regional sales meeting in Santa Fe, New Mexico, for the distributors in its southwest region. In 1991 or 1992, Dart held a regional sales meeting in Albuquerque, New Mexico. In addition to the sales meetings, Dart's regional vice president visited Ms. Carnell twice each year to discuss her business needs and go over her finances. If

there was sufficient time, the regional vice president participated in sales meetings to generate enthusiasm among Ms. Carnell's dealers and motivate them to sell Dart's products.

Many of the activities performed by Dart's employees were ancillary to the solicitation of orders for Tupperware products and were protected by Public Law 86-272. *See, Wrigley*, 505 U.S. 214, 234 (company's in-state recruitment, training, and evaluation of sales representatives and its use of hotels and homes for sales-related meetings served no purpose apart from their role in facilitating solicitation). Some activities, however, went beyond the "requesting of sales" sanctioned by *Wrigley*. *Id*. at 233. For example, the services performed by the two Dart employees who helped with the start-up of Ms. Carnell's distributorship were designed to insure that her business was in compliance with New Mexico law and that her internal bookkeeping and accounting systems were in good order. Insuring that its new distributor was operating legally and in accordance with good business practices served to protect the reputation and value of Dart's trademarks and franchise system. While this may have resulted in the generation of more sales of Tupperware products in the long term, it cannot be characterized as "entirely ancillary" to the solicitation of orders for those products.

With regard to the regional vice presidents, Maureen Morrissey testified that their job was "to foster growth of the distributorships and of the sales of our products" and to identify potential candidates for future ownership of Tupperware distributorships. (Tr. 133). Ms. Morrissey explained the importance of this aspect of the job as follows (Tr. 161):

> Because distributors under the terms of the franchise agreement, you know, have the ability to resign upon delivery of notice, it would be an imprudent franchisor or business practice not to have a pool of potentially available candidates, and the regionals being the ones who would interface with the

> market and with distributors would utilize the assistance of distributors to identify prospective future candidates for ownership of those businesses.

Recruiting and training sales representatives is a protected activity under Public Law 86-272. However, as discussed in Parts I and II, *supra*, Dart's franchised distributors were not simply salesmen. Under the terms of the franchise agreement, the distributors were required to perform a number of activities that went beyond the solicitation of orders for sales of Tupperware products. For this reason, the recruitment of new franchised distributors cannot be treated as entirely ancillary to the solicitation of orders. For the same reason, Susan Carnell's meetings with Dart's regional vice president to go over her financial information and determine whether the distributorship was providing her with "a comfortable living" (Tr. 71), exceeded the scope of permitted activity.

C. Dart's Franchise Activities. The protection of Public Law 86-272 is limited to taxpayers whose "only business activities" within a state involve the solicitation of orders for sales of tangible personal property. In addition to activities relating to the sale of tangible Tupperware products, Dart was engaged in licensing its franchisees to use the Tupperware trademark in the operation of their franchised distributorships. The New Mexico Court of Appeals has long held that the licensing of intangible trademarks to be used within the state creates sufficient nexus with New Mexico to subject the licensor to tax. *See*, *Sonic Industries, Inc. v. State*, 2000-NMCA-087, 129 N.M. 657, 11 P.3d 1219, *cert. quashed*, 132 N.M. 397, 49 P.3d 76 (2002), *motion for reconsideration pending*; *American Dairy Queen Corp. v. Taxation and Revenue Department*, 93 N.M. 743, 605 P.2d 251 (Ct. App.1979); *AAMCO Transmissions, Inc. v. Taxation and Revenue Department*, 93 N.M. 389, 600 P.2d 841 (Ct. App. 1979); *Baskin-*

Robbins Ice Cream Co. v. Revenue Division, 93 N.M. 301, 599 P.2d 1098 (Ct. App.1979). In *New York ex rel. Whitney v. Graves*, 299 U.S. 366, 372 (1937), the United States Supreme Court held that the business situs of an intangible is determined by "the attributes of the intangible right in relation to the conduct of affairs at a particular place." Here, Dart's licensing of Susan Carnell to use Dart's trademark in New Mexico, together with her use of Dart's confidential Marketing Methods and other aspects of the Tupperware franchise, constitute a business activity separate and apart from the solicitation of orders for Tupperware products.

Dart argues that its franchise activities cannot be treated as business activities exceeding the scope of Public Law 86-272 because Dart did not "sell" its franchised distributorships. Dart's Memorandum of Law, pp. 10-11. Nothing in Public Law 86-272 or the Supreme Court's decision in *Wrigley, supra*, limits the term "business activities" to sales activities. In *Wrigley*, the taxpayer's non-immune activities included replacing stale chewing gum and renting storage space and storing gum. Although these were not sales activities generating direct income for the taxpayer, they were business activities designed to further the taxpayer's business interests in the state. The fact that Dart did not charge its distributors a franchise fee or royalty for their use of the trademark is irrelevant.[2] With or without a franchise fee, Dart's licensing of intangible property for use in New Mexico goes well beyond the solicitation of orders for sales of tangible personal property and exceeds the protection offered by Public Law 86-272. *See also*, Jerome R. Hellerstein & Walter Hellerstein, **State Taxation**, Vol. I, ¶ 6.20 (3d ed. 2000).

[2] It should be noted, however, that Dart did charge its franchisees a one-time "Promotion Fee" of $1,500, to be applied to the cost "of developing and providing you with materials for your use in recruiting Dealers and promoting TUPPERWARE Products." (FA, p. 7).

III. Dart's Non-Immune Activities Were Not *De Minimis*. Dart argues that even if some of its in-state activities were not immune from taxation under Public Law 86-272, those activities were *de minimis*. In *Wrigley*, the Supreme Court recognized an exception for *de minimis* activities in order to avoid rendering "a company liable for hundreds of thousands of dollars in taxes if one of its salesmen sells a 10-cent item in state." 505 U.S. 214, 231. To qualify for the exception, the non-immune activities must be analyzed as a whole to determine whether they constitute a "nontrivial additional connection with the State." *Id*. at 235. Although the non-immune activities in *Wrigley* made up only 0.00007 percent of Wrigley's annual sales in Wisconsin, the Court found that they were conducted "as a matter of regular company policy, on a continuing basis" and were not *de minimis*. *Id*.

In this case, Dart engaged in extensive in-state activities that exceeded the solicitation of orders protected by Public Law 86-272. These activities included Dart's licensing of its trademark and confidential franchise system, Dart's set-up services for Ms. Carnell's franchised distributorship, and Ms. Carnell's maintenance of an in-state office, her promotion and protection of Dart's trademarks and related goodwill, and her handling of customer complaints and warranty services. Taken as a whole, there is no question that these activities constituted a nontrivial additional connection to New Mexico and were not *de minimis*.

CONCLUSIONS OF LAW

1. Dart filed a timely, written protest to Assessment No. 1972584, and jurisdiction lies over the parties and the subject matter of this protest.

2. Dart's New Mexico business activities during the audit period were not limited to the solicitation of orders for sales of tangible personal property and are not protected by the prohibition on income taxation set out in Public Law 86-272.

3. Taken together, Dart's non-immune activities constituted a nontrivial additional connection with New Mexico and were not *de minimis*.

For the foregoing reasons, Dart's protest IS DENIED.

DATED February 26, 2004.