NOT FOR PUBLICATION WITHOUT APPROVAL OF
THE TAX COURT COMMITTEE ON OPINIONS

STANISLAUS FOOD PRODUCTS COMPANY,	:	TAX COURT OF NEW JERSEY DOCKET NO: 011050-2017
Plaintiff,	:	
vs.	:	
DIRECTOR, DIVISION OF TAXATION,	:	
Defendant.	:	

Decided: June 28, 2019

Leah Robinson for Plaintiff (Mayer Brown LLP for Plaintiff, attorneys).

Michael J. Duffy for Defendant (Gurbir S. Grewal, Attorney General of New Jersey, attorney).

CIMINO, J.T.C.

I. INTRODUCTION

Congress enacted the Interstate Income Act of 1959, Pub. L. No. 86-272, 75 Stat. 555 (codified at 15 U.S.C. §§ 381-383) ("P.L. 86-272") to preclude the states from imposing a net income tax on certain out-of-state sellers of tangible goods. In New Jersey, this net income tax would be the Corporation Business Tax ("CBT").

The Director does not dispute that the taxpayer here is an entity covered by P.L. 86-272 for the years at issue.

While taxpayer is not subject to the CBT, the Director argues that the taxpayer is subject to the Alternative Minimum Assessment ("AMA"), which, for the time period at issue, imposes either a gross receipts or profits tax exclusively upon P.L. 86-272 entities. To be clear, no entities are subject to the AMA except those protected by P.L. 86-272. The Director argues that he is merely imposing the AMA and is not forcing any P.L. 86-272 entity to pay a net income tax, such as the CBT. The taxpayer argues that the AMA is merely an end-run around P.L. 86-272. Both parties have moved for summary judgment on this issue.

On the surface, this matter appears to be an esoteric tax issue involving two obscure taxation statutes: one federal and one state. However, wrapped inside is a weighty Constitutional issue. While this court is called upon to particularly decide the interplay between the two statutory provisions, the overriding issue is the competing roles of the state and federal governments.

A long time ago, New Jersey ratified the United States Constitution and agreed to a method of resolving disputes between the state and federal governments. Facing a trade war amongst the states, a constitutional convention was called in 1786. The convention culminated in the adoption of the United States Constitution which was ratified by New Jersey on December 18, 1787. The Constitution provided

what has come to be known as the Commerce Clause which gives Congress the ability to determine the parameters for interstate commerce. To prevent the states from undercutting the dictates of Congress through competing legislation or otherwise, the Constitution also contained the Supremacy Clause which provides that legislation that is within the realm of Congress supersedes the conflicting will of a state legislature. To give the Supremacy Clause some teeth, the framers of the Constitution explicitly provided that state court judges must adhere to the Supremacy Clause.

Here the issue boils down to whether the AMA stands as an obstacle to the accomplishment and execution of the purposes and objectives of P.L. 86-272. While some may argue it is time for Congress to revisit P.L. 86-272 on policy grounds, it is not the role of the court to make that policy determination. The court is duty-bound to faithfully obey the constitutional framework spelled out by the Supremacy Clause and the Commerce Clause. For the reasons set forth in much greater detail in this opinion, the court determines that the AMA is being imposed contrary to the mandate of P.L. 86-272.

II. STATEMENT OF FACTS

The taxpayer, Stanislaus Food Products Company, located in Stanislaus County, California, is a canner of tomato products. The taxpayer's tomato products

are shipped to food service independent distributors who in turn sell directly to restaurants.

The taxpayer employs a representative who lives in New Jersey. The representative does not have a set office in New Jersey and works from his home. The taxpayer provides a vehicle, phone, computer and samples to the representative. The representative visits restaurateurs and encourages them to compare their current sauce to taxpayer's products. The representative provides information to the restauranteurs as to the independent distributor options for obtaining the taxpayer's product. However, the representative has no responsibility for prices as these are set by the independent distributors. The taxpayer makes calls to restauranteurs to verify that they have "converted" to the taxpayer's products. The taxpayer asserts that the calls are necessary since the restaurant is purchasing the products from an independent distributor.

Initially, the taxpayer had maintained an inventory in South Plainfield, New Jersey, but that arrangement ended in June of 2011. For the tax years in question, 2012 through 2014, the taxpayer did not maintain an inventory of products in New Jersey. The Director does not dispute that the taxpayer was an entity covered by P.L. 86-272 for 2012 through 2014.

III. PROCEDURAL HISTORY

At the onset, the taxpayer filed its returns and paid the CBT based upon its net income. The Director then audited taxpayer's returns and issued a deficiency assessment. The taxpayer filed amended returns indicating it qualified as a P.L 86-272 taxpayer. Agreeing that the taxpayer qualified as a P.L 86-272 entity for 2012 through 2014, the Director allowed a refund of the CBT. However, the Director imposed the AMA gross profits tax and reduced the amount of the refund.

The taxpayer appealed to this court challenging the Director's ability to impose the AMA on it as a P.L. 86-272 entity. The taxpayer has now moved for summary judgment as to this issue. The Director cross-moved for summary judgment asserting that it is proper to impose the AMA. Our Supreme Court has indicated that summary judgment provides a prompt, business-like and appropriate method of disposing of litigation in which material facts are not in dispute. Brill v. Guardian Life Ins. Co. of Am., 142 N.J. 520, 530 (1995). The Director does not dispute the central material fact in this case, that is, the taxpayer was an entity covered by P.L. 86-272 from 2012 to 2014. Thus, the court is left with the legal issue of the applicability of the AMA to P.L. 86-272 taxpayers for the years in question.

IV. LEGAL CONCLUSIONS

A. New Jersey Adopts a Net Income Tax on Corporations

To fully understand the issue at hand in this case, some background as to taxation of corporations in New Jersey is necessary. In 1945, New Jersey enacted the CBT. N.J.S.A. 54:10A-1 to -27. Initially, the tax was only based on a corporation's net worth allocated to New Jersey. L. 1945, c. 162, § 5(a). In 1958, the Act was amended to also tax net income allocable to New Jersey. L. 1958, c. 63. N.J.S.A. 54:10A-5(c). The starting point for this tax is a determination of "net income" which includes net income from all sources whether within or outside the state. L. 1958 c. 63, § 1(k). N.J.S.A. 54:10A-4(k).

While the United States Constitution does not permit a state to tax an out-of-state corporation for all net income regardless of where it has been earned, a state can fairly apportion and tax income allocable to it. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). Generally speaking, "the factor or factors used in the apportionment formula must actually reflect a reasonable sense of how income is generated." Container Corp. of Am. v. Franchise Tax Bd., 463 U.S. 159, 169 (1983). New Jersey has such a formula which has been amended from time to time. See N.J.S.A. 54:10A-6.

B. The Supreme Court's Expansion of Interstate Taxation and Congress' Response

Shortly after the New Jersey Legislature approved a net income tax on corporate businesses in 1958, the United States Supreme Court had the opportunity to consider the reach of apportioned net income taxes levied by other states in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). As explained by the Court, "[t]hese cases concern the constitutionality of state net income tax laws levying taxes on that portion of a foreign corporation's net income earned from and fairly apportioned to business activities within the taxing State when those activities are exclusively in furtherance of interstate commerce." Id. at 452. There was no question as to the fairness of any apportionment or the final assessment made. Id. at 453-54. Rather, the issue was whether these state net income tax statutes violated the Commerce Clause of the United States Constitution.[1] Id. at 452.

The Commerce Clause provides "the Congress shall have the power . . . to regulate Commerce . . . among the several States . . . ." U.S. Const., art. 1, § 8, cl. 3. The United States Supreme Court has recognized that:

> [t]hese "few simple words reflected a central concern of the Framers that was an immediate reason for calling the Constitutional Convention: the conviction that in order to succeed, the new Union would have to avoid the tendencies toward economic Balkanization that had

[1] The Court also considered whether the taxes violated the Due Process Clause.

> plagued relations among the Colonies and later among the States under the Articles of Confederation."
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> [Comptroller of the Treasury of Maryland v. Wynne, 135 S. Ct. 1787, 1794 (2015) (quoting Hughes v. Oklahoma, 441 U.S. 322, 325-26 (1979)).]

Thus, the impetus for adopting our constitutional system was commerce and trade.

Shortly after the signing of the Declaration of Independence in 1776, the Articles of Confederation were adopted in 1777 and came into force in 1781 after ratification by the states. 1 The Documentary History of the Ratification of the Constitution 73, 86, 135 (Merrill Jensen ed. 1976). Facing disputes over trade and commerce between the states, a convention was called to be held in Annapolis, Maryland in 1786 for resolving the disputes. Id. at 181. Not all the states appointed commissioners to the convention, and even fewer states attended. Id. at 181, 183. Notably, the New Jersey commissioners attended with an expanded mandate to consider not only "an uniform system in [the states'] commercial regulations," but also "other important matters." Id. at 183. While the Annapolis convention was not a success in resolving the commerce disputes between the states, the report of the convention suggested that all states follow New Jersey's lead and extend the power of their commissioners "to other objects than those of Commerce." Ibid. That lead to the Constitutional Convention of 1787 which resulted in our current federal constitution containing what is commonly referred to as the Commerce Clause.

The Commerce Clause has been construed to contain both a power and prohibition. The power is reflected in the express or affirmative words of the Constitution which empowers Congress to regulate commerce among several states. On the other hand, the prohibition is contained in what is known as the negative or dormant Commerce Clause, "prohibiting certain state taxation even when Congress has failed to legislate on the subject." Comptroller of Treasury, 135 S. Ct. at 1794. "[T]he dormant Commerce Clause precludes states from 'discriminating between transactions on the basis of some interstate element.'" Ibid. (quoting Boston Stock Exchange v. State Tax Comm'n, 429 U.S. 318, 322, n. 12 (1977)). A review of the case-law reflects that most Commerce Clause disputes that find their way to the courts concern prohibiting discrimination pursuant to the dormant Commerce Clause, as compared to the affirmative congressional power conferred by the Commerce Clause to regulate interstate commerce. Compare S. Dakota v. Wayfair Inc., 138 S. Ct. 2080, 2089 (2018) (dormant Commerce Clause); Comptroller of Treasury, 135 S. Ct. at 1794 (2015) (dormant Commerce Clause); McBurney v. Young, 569 U.S. 221, 234 (2013) (dormant Commerce Clause); Dep't. of Rev. v. Davis, 553 U.S. 328, 337 (2008) (dormant Commerce Clause); Am. Trucking Ass'n. v. Mich. PSC, 545 U.S. 429, 433 (2005) (dormant Commerce Clause) with Morales v. TWA, 504 U.S. 374, 390 (1992) (affirmative Commerce Clause); Exxon Corp. v.

Hunt, 475 U.S. 355, 362 (1986) (affirmative Commerce Clause); Aloha Airlines v. Dir. of Tax'n., 464 U.S. 7, 9-10 (1983) (affirmative Commerce Clause).

In deciding Northwestern on February 24, 1959, the Court held that "net income from the interstate operations of a foreign corporation may be subjected to state taxation provided the levy is not discriminatory and is properly apportioned to local activities within the taxing State forming sufficient nexus to support the same." Northwestern, 358 U.S. at 452. While not mentioning the dormant Commerce Clause by name, it is readily apparent that the Supreme Court was indeed proceeding under the dormant Commerce Clause.

Less than seven months later, on September 14, 1959, Congress responded with the enactment of P.L. 86-272 which narrowed the scope of interstate commerce that would be subject to a net income tax. The affirmative words of the Commerce Clause gives Congress plenary power to regulate commerce through enactments such as P.L. 86-272 so long as a rational basis exists for Congress to conclude that the activities being impacted substantially affect interstate commerce. Gonzales v. Raich, 545 U.S. 1, 22, 29 (2005) (rational basis and plenary power); U.S. v. Lopez, 514 U.S. 549, 553 (1995) (commerce power to be exercised to utmost extent). In particular, P.L. 86-272 provides for minimum standards which disallow a net income tax on interstate commerce if the only in-state activity is the solicitation of orders of tangible personal property which are approved or rejected out-of-state. 15 U.S.C. §

381(a).[2] Moreover, the statute defines net income tax as "any tax imposed on, or measured by, net income." 15 U.S.C. § 383.

The United States Supreme Court has explained that the rational basis expressed by Congress for the "minimum standards" of P.L. 86-272 was to provide

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[2] The full text follows:

> Minimum standards. No State, or political subdivision thereof, shall have the power to impose, for any taxable year ending after the date of the enactment of this Act [enacted Sept. 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).
>
> [15 U.S.C. § 381(a).]

clarity to the perceived uncertainty arising from the Supreme Court's decision in Northwestern. Heublein, Inc. v. South Carolina Tax Comm'n, 409 U.S. 275, 279-280 (1972). "By establishing such a limit, [i.e. minimum standards,] Congress did, of course, implicitly determine that the State's interest in taxing business activities below that limit was weaker than the national interest in promoting an open economy." Id. at 280. The legislative history reveals that the measure was considered a temporary solution to address the pressing concerns of Northwestern. Id. at 281. More comprehensive legislation would follow careful study by a congressional committee. Ibid. Needless to say, the law was never amended.

It is important to remember that the "minimum standards" set forth in P.L. 86-272 only apply to a net income tax, as opposed to a gross receipts or gross profits tax. Moreover, the "minimum standards" only apply to sales of tangible personal property, as opposed to intangible personal property or services.[3]

Both parties in this case have spent some time arguing over whether the AMA is discriminatory against interstate commerce. However, we are not dealing here with a situation in which Congress has not spoken, thus raising the

[3] The original Senate bill applied to tangible personal property. S. 2524, 86th Cong. (1959). The House bill applied to all transactions. H.R. 450, 86th Cong. (1959). After initial passage, the conference decided to keep the tangible personal property limitation. The House acceded to this change. 105 Cong. Rec. 1769-76 (1959). The rationale for or against this decision is unknown.

nondiscriminatory mandate of the dormant Commerce Clause. Rather, Congress has exercised its powers under the Commerce Clause and enacted P.L. 86-272 to set certain minimum standards below which a state cannot impose net income taxation. Once Congress acts, courts are not free to review state taxes under the dormant Commerce Clause since it is Congress, and not the courts, that has struck the balance that it deems appropriate. See, Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 154 (1982). Obviously, in certain scenarios, there may be tension with due process and equal protection as guaranteed by the Fifth Amendment, but that issue is not present in this case.[4, 5] See, e.g., Sec'y. of Ag. v. Central Roig Refining, Co., 338 U.S. 604, 616 (1950) (Fifth Amendment Due Clause Process trumps Commerce Clause). See also, U.S. v. Stoeco Homes, Inc., 498 F.2d 597, 611 (3d Cir. 1974). Neither party is claiming that P.L. 86-272 is unconstitutional in some way.

As dictated by P.L. 86-272, which was enacted by Congress through the power conferred by the Commerce Clause, businesses providing tangible personal

[4] Congress' power to act is circumscribed by the due process and equal protection protections of the Fifth Amendment. The Fifth Amendment which applies to the federal government does not have explicit equal protection language like the Fourteenth Amendment which applies to the states. Bolling v. Sharpe, 347 U.S. 497, 498-99 (1954). However, equal protection is implied by the Fifth Amendment. Ibid., U.S. v. Armstrong, 517 U.S. 456, 464-65 (1996).

[5] A due process challenge could also arise as to a Commerce Clause enactment if Congress extended nexus with a state to be short of the minimums prescribed by the Due Process Clause.

property are permitted to ship their goods into a state and not face that state's net income tax if certain conditions are met.

C. The Supremacy Clause

The Supremacy Clause of the Constitution provides "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. 6, cl. 2. The Supremacy Clause is not a source of rights. Instead, it simply provides a rule of decision for courts to follow when federal and state law are in conflict. Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378, 1383 (2015). As such, the issue is whether federal law preempts a state law enactment. English v. General Electric Co., 496 U.S. 72, 78 (1990). The first step is whether the federal law is a valid exercise of power, or is instead a power reserved to the states. Here, Congress implemented P.L. 86-272 pursuant to the Commerce Clause. There is not any challenge in this case as to whether Congress can enact such a law.

The second step is "[w]hether a state law stands as an obstacle to the accomplishment of a federal objective, [and] requires a court to consider 'the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.'" R.F. v. Abbott Labs., 162 N.J. 596, 618 (2000) (quoting Jones v. Rath Packing Co., 430 U.S. 519 (1977)). "Determining whether federal law

preempts state law is a fact-sensitive endeavor, based on a court's review of fragments of statutory language, random statements in the legislative history, and the degree of detail of the federal regulation. However, preemption 'is not to be lightly presumed.'" Id. at 619 (quoting Turner v. First Union Nat'l Bank, 162 N.J. 75, 87 (1999)) (citation omitted).

Preemption can occur in three circumstances referred to as express, conflict or field preemption. With express preemption, Congress explicitly indicates through statutory language what type of state law the enactment is attempting to preempt. English, 496 U.S. at 78-79. Conflict preemption applies when it is impossible for a party to comply with both state and federal requirements, or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Id. at 79. Finally, field preemption occurs when federal law occupies and regulates a field so comprehensively that it has left no room for supplementary state legislation. Ibid. See also, R.J. Reynolds Tobacco Co. v. Durham County, 479 U.S. 130, 140 (1986).

First, the court needs to examine whether the provisions of P.L. 86-272 constitute an explicit, and thus express, preemption of the AMA. Alternatively, the court needs to examine whether there is a conflict preemption in that the AMA stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Finally, field preemption is plainly inapplicable because

Congress has not comprehensively regulated the field of taxation of interstate business. The court, having already addressed the history of P.L. 86-272, now reviews the history of the AMA.

D. The Enactment of the AMA

In 2002, the Legislature adopted the Business Tax Reform Act, providing for sweeping changes "intended to reform New Jersey's system of taxation of corporations and other business entities, through revision of the corporation business tax and other changes of law." A. Budget Comm. Statement to A. 2501 1 (June 27, 2002). S. Budget and Appropriation Comm. Statement to S. 1556 1 (June 27, 2002) ("Committee Statements"). The bill sought to "increase equity among business taxpayers and close[] numerous loopholes that allow many profitable companies to reduce their taxable New Jersey income." Ibid. A major piece of the Business Tax Reform Act was the AMA.[6] The stated purpose of the AMA was to:

> "assure[] a fair measure of support of State services from firms that exploit the State's marketplace, but are exempt from a tax like the CBT pursuant to federal Pub. L. 86-272. . . . This reform will effectively capture the value of the activities in New Jersey of out-of-state companies that currently pay no corporate income taxes in New Jersey.
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> [Id. at 5.]

[6] The AMA was repealed on July 1, 2018 and applies to tax years beginning on or after January 1, 2018. L. 2018, c. 48, § 32, 33.

The law provided for two similar, yet significantly distinct, implementation phases for the AMA. The first phase was in effect from 2002 through part of 2006. L. 2002, c. 40, § 7(b), (c). N.J.S.A. 54:10A-5a(b), (c). It provided that all taxpayers, both in-state and out-of-state, would be required to pay the greater of either the CBT or the AMA. Ibid. [7]

The rate of corporation business tax was 9.0% of the net income allocated to the State.[8, 9] N.J.S.A. 54:10A-5. The AMA consisted of a tax not on net income, but on either gross profits in excess of $1,000,000, or gross receipts in excess of $2,000,000.[10] The rate increases progressively from 0.25% up to 0.8% for gross profits and from 0.125% up to 0.4% for gross receipts.

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[7] P.L. 86-272 minimum standards rose the constitutionally permissible floor upon which there could be net income taxation. However, it did not raise the floor as to other forms of taxation.

[8] Parenthetically, up until 2008, if a corporation only had in-state business locations, 100% of its income would be allocated to New Jersey. L. 2008, c. 120, § 2. N.J.S.A. 54:10A-6.

[9] A corporation can elect to be a Subchapter S corporation in which the income passes through the corporation and is instead taxed as gross income tax to the shareholders. Subchapter S corporations must be closely held corporations of 100 or fewer shareholders. 26 U.S.C. § 1361. Subchapter S Corporations are not subject to the AMA. N.J.A.C. 18:7-18.3(a)(1). This decision focuses upon Subchapter C corporations, the type of taxpayer in this decision.

[10] The taxpayer was to elect for the first tax period whether to apply the gross profit or gross receipt computation. The election would be effective for the next four tax periods. N.J.S.A. 54:10A-5a(c).

As applied to a P.L. 86-272 corporation, the CBT would be zero by virtue of P.L. 86-272. However, the AMA would require the taxpayer to either pay a tax on gross profits or gross receipts. The court need not pass upon whether this initial implementation of the AMA can be sustained since the tax years at issue occur during the second phase of the AMA implementation described below.

The second phase provided that for "taxpayers exempt from corporation net income tax pursuant to [P.L. 86-272,] assessment [of the AMA] shall continue to be computed . . . ." L. 2002, c. 40, § 7(e). However, a P.L. 86-272 corporation "that has filed a consent . . . to the jurisdiction of this State to impose and the duty of the taxpayer to pay the [CBT] . . . shall have an alternative minimum assessment . . . of $0.00." Ibid. In other words, if a P.L. 86-272 taxpayer not otherwise subject to the CBT consents to CBT taxation, it will no longer face the AMA.

E. The AMA is Subject to Preemption

In light of the foregoing, the court must still examine whether the AMA is preempted through the Supremacy Clause, in that it runs afoul of Congress' Commerce Clause powers to regulate interstate commerce through P.L 86-272. In other words, the issue boils down to whether the AMA stands as an obstacle to the accomplishment and execution of the purposes and objectives of P.L. 86-272.

P.L. 86-272 in plain terms indicates that "[n]o State . . . shall have the power to impose . . . a net income tax" on certain "sales of tangible personal property." 15

U.S.C. § 381(a). For the tax years 2012 through 2014, the Director recognized that since the taxpayer did not house or store inventory in New Jersey, P.L. 86-272 status was applicable. With the finding of P.L. 86-272 status, the Director determined that CBT was not assessable and refunded same. Nevertheless, the Director insisted upon taxpayer paying the AMA.

The second phase of the AMA implementation at issue here represents an effort to avoid the express prohibition of a net income tax on P.L. 86-272 taxpayers. First and foremost, the plain language of enacting the second phase plainly reveals that the law only applies to P.L. 86-272 entities. The second phase provided that for "taxpayers exempt from corporation net income tax pursuant to [P.L. 86-272,] assessment [of the AMA] shall continue to be computed . . . ." L. 2002, c. 40, § 7(e). N.J.S.A. 54:10A-5a(e). To be clear, the AMA is imposed upon no other group of taxpayers except those which enjoy a P.L. 86-272 exemption.

In addition, an extensive legislative statement by the Assembly Budget Committee, as well as the Senate Budget and Appropriations Committee, is illuminating as well:

> [t]he AMA also assures a fair measure of support for state services from firms that exploit the State's marketplace but are exempt from a tax like the CBT pursuant to [P.L. 86-272]. This reform will effectively capture the value of the activities in New Jersey of out-of-state companies that currently pay no corporate income taxes in New Jersey.
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> [Committee Statements at 5 (emphasis added).]

The Legislature's use of the phrase "effectively capture" is especially telling. Moreover, the Legislature goes on to explain that "[t]o avoid any claim of discriminatory treatment," P.L. 86-272 taxpayers can consent to the lower CBT. Id. at 6. Any claim the AMA does not target P.L. 86-272 taxpayers simply ignores both the plain reading of the statute as well as the legislative history.

Courts are guided in their preemption analysis by the rule that the purpose of Congress is the ultimate touchstone in every preemption case. Treasurer of N.J. v. U.S. Dept. of Treas., 684 F.3d 382, 406-07 (3d Cir. 2012). Congress expressed and determined that no net income tax would apply to P.L. 86-272 taxpayers. While New Jersey is free to disagree with federal policy, under preemption principles it may not create an insurmountable obstacle to the accomplishment and execution of the full purposes and objectives of Congress. Housing Authority v. Spratley, 327 N.J. Super. 246, 255 (App. Div. 1999).

As stated, the law provides that the P.L. 86-272 taxpayer can pay the lesser of the CBT or the AMA. For a taxpayer in which the AMA is greater than the CBT, the AMA clearly operates as an end-run around P.L. 86-272, in that it coerces a taxpayer to consent and pay the CBT which is measured by net income. Thus, when the AMA is greater than the CBT, the AMA becomes a tax measured by net income since the taxpayer would be paying the CBT. "[A] tax on sleeping measured by the number of pairs of shoes you have in your closet is a tax on shoes." Hunt-Wesson,

Inc. v. Franchise Tax Bd., 528 U.S. 458, 464 (2000). With the AMA greater than the CBT, this either constitutes grounds for express preemption since the AMA targets P.L. 86-272 entities, or conflict preemption since the AMA stands as an obstacle to Congress exempting P.L. 86-272 entities from net income taxation, albeit indirectly.

If the AMA is lower, the P.L. 86-272 taxpayer does not have to pay the CBT that is being assessed against a similarly situated taxpayer not protected by P.L. 86-272 exemption. Instead, the P.L. 86-272 entity would pay the AMA. It is upon this ground that it seems that the Director claims that the statute should not be subject to express preemption. Even if correct, there is still the issue of conflict preemption, which precludes the law of a state legislature when it "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." English, 496 U.S. at 79. In enacting P.L. 86-272, Congress indicated that there shall be no net income tax, not merely a reduction which is collected in the form of the AMA as a stand-in for New Jersey's net income tax, the CBT. Obviously, if Congress were to allow P.L. 86-272 businesses to be taxed for net income at a lower amount, that would have been explicitly specified in the enactment.

Regardless of whether the amount assessed is above or below the CBT, the AMA is inextricably linked to the CBT. For a P.L. 86-272 entity, a consideration of the CBT is always necessary to determine the amount of tax to be paid, regardless

of whether the tax ultimately paid is the AMA or CBT.[11] Stated slightly differently, "the AMA is a part of the CBT and 'the Legislature imposed it to be used in calculating liability for corporation business taxes.'" State ex rel. Campagna v. Post Integrations, Inc., 451 N.J. Super. 276, 281 (App. Div. 2017) (quoting Equip. Leasing & Finan. Ass'n v. Dir., Div. of Tax'n, 24 N.J. Tax 527, 529 (Tax 2009)). "The purpose [of the AMA is] the generation of additional revenue from corporations that, in the Legislature's view, [are] not paying their fair share of the tax burden." Equip. Leasing & Finan., 24 N.J. Tax at 536. See also Committee Statements at 5.

By only subjecting P.L. 86-272 entities to the AMA, while other entities are not, the Legislature relegates the AMA to nothing more than a de facto CBT, albeit at a potentially lower rate in cases where the AMA is lower. While the Director vigorously argues that the AMA is not a net income tax, but is technically a gross receipts or gross profits tax, the tax exclusively applies only to P.L. 86-272 taxpayers, and even more exclusively applies only to those P.L. 86-272 taxpayers that did not consent to net income taxation in the form of the CBT. The Legislature cannot create a special tax, whether it be a gross receipts, gross profits or some other

[11] Linking the AMA to the CBT is not necessarily an issue in all instances. The court here is only addressing the second phase of the AMA in which only P.L. 86-272 entities were subject to the AMA. The court is not considering the propriety of any linkage with the CBT when a tax such as the AMA does not specifically target P.L. 86-272 entities.

tax, that only applies to entities protected by P.L. 86-272 in a transparent attempt to garner lost net income tax. "[T]axation is a practical matter . . . ." In re Estate of Lichtenstein, 52 N.J. 553, 569 (1968). From a practical perspective, the AMA stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

To summarize, whether a state levy that exclusively targets P.L. 86-272 entities is denominated as a tax, user fee, penalty or otherwise, and whether it is the same, more, or less than the net income tax imposed pursuant to the CBT is irrelevant. Constitutional analysis of state taxation of interstate commerce depends not on the label given the tax, but on the economic effects of the tax. Avco Fin. Servs. Consumer Disc. Co. One v. Dir., Div. of Tax'n., 100 N.J. 27, 31 (1985). "The manner in which the state legislature has described and categorized [a tax] cannot mask the fact that the purpose and effect of the provision are to impose a levy" contrary to the dictates of Congress. Aloha Airlines, 464 U.S. 7, 13-14 (1983). See also Avis Budget Group, Inc. v. City of Newark, 427 N.J. Super. 326, 339 (App. Div. 2012) (quoting Aloha Airlines).

The fact remains that the AMA in this case solely and exclusively targets and "effectively capture[s]" P.L. 86-272 entities which Congress has determined are exempt from net income taxation. Committee Statements at 5. Moreover, in adopting regulations applicable to the AMA, the Director commented that the second

phase of the AMA at issue here applied to "taxpayers that otherwise would have claimed protection of [P.L. 86-272]." 35 N.J.R. 1573(a) (Apr. 7, 2003). There is a presumption against preemption that must be overcome. See, Treasurer of N.J., 684 F.3d at 407. Moreover, since taxation is a traditional state power, the scope of federal supremacy cannot be beyond what Congress clearly mandated. Delaware County, Pa. v. Fed. Hous. Fin. Ag., 747 F.3d 215, 225-26 (3d Cir. 2014) (citing Dep't of Rev. of Or. v. ACF Indus., Inc., 510 U.S. 332, 345 (1994)). The presumption against preemption is overcome since the clear purpose of Congress in enacting P.L. 86-272 is effectively thwarted by the Legislature in enacting the AMA. As such, the AMA is subject to preemption.

This might be a different case if the AMA was truly a minimum assessment that applied to all entities regardless of P.L. 86-272 status. In such case, the Director could argue that he is not trying to collect a tax only from taxpayers which are otherwise exempt from net income tax, but is collecting a minimum amount from all taxpayers. For example, a flat minimum tax, separate and apart from the AMA, was in effect prior to 2006 and applied to all corporations regardless of income.[12] N.J.S.A. 54:10A-5(e). This court has previously determined that such a tax did not

[12] For 2006 forward, the minimum tax was no longer flat per se, but stepped. For a corporation that is not a S Corporation the tax was either $500, $750, $1,000, $1,500 or $2,000 depending on the amount of gross receipts. N.J.S.A. 54:10A-5(e). The validity of this tax is not at issue here.

run afoul of P.L. 86-272 since it was not based upon income. Home Impressions, Inc. v. Dir., Div. of Tax'n, 21 N.J. Tax 448, 461-62 (Tax 2004); AccuZIP, Inc. v. Dir., Div. of Tax'n, 25 N.J. Tax 158, 181, 185 (Tax 2009). However, the minimum tax applied to all entities regardless of P.L. 86-272 status. At that time, the court was not called upon to determine whether a tax that specifically and exclusively targeted P.L. 86-272 entities was permissible.

The first phase of implementation of the AMA in effect from 2002 to June 30, 2006 applied to entities regardless of P.L. 86-272 status. As to this first phase, the Business Tax Study Commission[13] noted in its June 29, 2004 final report that "[t]he AMA has become the lightning rod of criticism regarding New Jersey's tax policy and the changes made by the BTRA. . . . The AMA is perceived as an unfair and burdensome tax by both in-state and out-of-state corporations." N.J. Corp. Bus. Tax Study Comm'n, Final Report 20 (June 29, 2004). In the environment of such outcry, the Legislature did not take any steps to reinstate a broad-based AMA when it sunset on June 30, 2006.

As to the second phase of the AMA which only targets P.L. 86-272 entities, the Commission found "that subjecting only those out-of-state corporations to the AMA is unfair" and noted that "commentators have argued that the sunsetting of the

[13] As part of the Business Tax Reform Act, the Legislature established a Business Tax Study Commission. L. 2002, c. 40, § 31.

AMA only for regular CBT taxpayers and not for taxpayers that are protected from a net income based tax by P.L. 86-272 violates the Commerce Clause . . . ." Id. at 22. The Commission declined to wade into the issue now before the Court. Ibid. However, the Commission, by a majority vote, "recommend[ed] that the AMA rates, as applied to companies that are protected from a tax based on or measured by income under P.L. 86-272, be set at zero for tax years beginning on or after July 1, 2006." Ibid. In other words, with the sunset as to regular taxpayers on June 30, 2006, the Commission recommended that the AMA would not apply to any taxpayers.

This may also be a different case if the taxation of P.L. 86-272 entities under the AMA is merely incidental and had some basis separate and apart from capturing tax revenues from P.L. 86-272 entities. For example, if the Legislature did not base the imposition of a gross profits or gross receipts tax upon P.L. 86-272 status, but rather imposed the tax based upon some other classification (e.g., all makers of tomato sauce) with the result of sweeping in P.L. 86-272 entities. The court need not resolve this issue at this time. Instead, the plain language of the legislation, indicated the target criteria was P.L. 86-272 status, and to drive the point home the legislative history indicates that the AMA "effectively capture[s]" P.L. 86-272 entities that do not pay net income tax under the CBT.

The Director further argues that the AMA should survive in some way because there are instances in which it could be read to not stand as an obstacle to P.L. 86-272. The Director sets forth what it claims are four examples where the tax does not impair P.L. 86-272. The first two examples are when the tax is zero because the taxpayer's gross profits are below one million dollars or its gross receipts are below two million dollars. In other words, the Director argues that the tax can stay in place, so long as there is not a tax. The third argument is that the tax is zero if the P.L. 86-272 taxpayer consents to pay the CBT on net income. However, as explained in greater length above, this coercion stands as a clear obstacle to the will of Congress. The Director's fourth argument is that even if the taxpayer pays AMA in year one, it can seek credit in outlying years if subject to the CBT in the outlying years if P.L. 86-272 protection is lost. What this example ignores is the fact that in year one the taxpayer is out-of-pocket for the money paid and the time-value thereof without some definite guarantee of obtaining a credit in outlying years. All four arguments are disingenuous.

F. The Preemption of the AMA

In large part, the Constitution governs the relationship between state and federal governments. In ratifiying the Constitution a long time ago in 1787, New Jersey agreed that when there is a conflict between state and federal provisions

affecting commerce, the federal provisions prevail. The framers of the Constitution, having the insight that issues such as the one facing the court would find their way into state courts, included a provision in the Supremacy Clause that specifically commanded the judges of state courts to obey the will of Congress, regardless of any contrary state law. U.S. Const., art. 6, cl. 2.[14] The courts play a significant role in assuring the supremacy of federal law. Armstrong, 135 S.Ct. at 1384. For once a case or controversy comes before the court, judges are bound by federal law despite state law provisions to the contrary. Ibid.

The court is not merely a legislative agent blindly implementing the will of the Legislature. See, e.g., In re 1984 General Election for Office of Council, 203 N.J. Super. 563, 577 (App. Div. 1985) (rejecting concept of a court sitting as legislative agent). The court has a sworn obligation to uphold both the state and federal constitutions. This court is acutely aware of this role in determining legislative intent and does not take this responsibility lightly.

The legislative history does express the frustration of the Legislature in getting everyone to pay their fair share. Equip. Leasing & Finan., 24 N.J. Tax at 536. See also Committee Statements at 5. The declared purpose of the Business Tax Reform Act was to close numerous loopholes for corporations that were making money in

[14] In addition,, "all judicial Officers . . . of the several states, shall be bound by Oath or affirmation to support this Constitution." U.S. Const., art. 6, cl. 3.

this State and paying little or no taxes. Committee Statements at 1. The Legislature asserted that P.L. 86-272 entities "exploit the State's marketplace, but are exempt from a tax like the CBT. . . ." Ibid. (emphasis added). In addition, the sponsors of the bill indicated that "companies are able to take advantage of the state's lucrative market, extensive infrastructure, and geographic prominence, while paying no corporate taxes to New Jersey." Sponsor's Statement to S. 1156 52 (2002), Sponsors' Statement to A. 2501 51 (2002) (emphasis added). Moreover, the legislative sponsors were concerned that "some companies exploit loopholes and avoid paying their fair share [and] the corporate citizens who pay their fair share are put at a competitive economic disadvantage with companies that evade or exploit the system." Ibid. (emphasis added). The goal of the sponsors was to "provide[] a level playing field for all businesses, large and small, that invest in New Jersey, employ our citizens and do business here." Ibid. While attempts to tax everyone fairly is certainly a laudable purpose, the second phase of the AMA obliterates the protections of P.L. 86-272 and is thereby contrary to supremacy of Congressional action as required by the Constitution. Despite the inequities, either real or perceived, of P.L. 86-272, the Legislature is not free to ignore the will of Congress.

P.L. 86-272 was adopted as a temporary measure many generations ago. After some sixty years of inaction, it may or may not be time for Congress to take another look at this provision, especially with the shift in the economy from a

manufacturing (i.e. tangible goods) economy to a service economy. Nevertheless, neither this court nor the Legislature can short-cut and eviscerate the will of Congress.

As to the decision of this court, while it is certainly arguable whether P.L. 86-272 is unfair, that cannot be the point of any ruling. That is a quarrel for the Legislature to have with Congress. The fairness of P.L. 86-272 is a policy debate which cannot be resolved by the courts. Comm. To Recall Robert Menendez from the Office of U.S. Senator v. Wells, 204 N.J. 79, 128 (2009). On one hand, the Legislature is seeking a "fair measure of support for State services [from P.L. 86-272 entities]." Committee Statements at 5. On the other hand, Congress wanted to provide clarity in how entities involved in interstate commerce would be taxed. Heublein, 409 U.S. at 280. In light of the Supremacy Clause, this court is not free to impose its own vision of fairness, or that of the Legislature, upon the will of Congress exercising its powers pursuant to the Commerce Clause. Courts are the final arbiter under the Commerce Clause when Congress has not acted. See Merrion, 455 U.S. at 154-55. Here, Congress has acted.

In any event, when a state law is subject to preemption, it is displaced by federal law. Turner, 162 N.J. at 88. The state law still exists, but becomes unenforceable and suspended. Constantino v. Borough of Berlin, 348 N.J. Super 327, 332 (App. Div. 2002). It is nullified to the extent of the conflict with federal

law.[15] Turner, 162 N.J. at 88. The New Jersey courts have displaced a number of state provisions that have been found to be preempted by federal law. See, e.g., Comm. To Recall (federal election law preempts state recall procedures); Chamber of Commerce v. State, 89 N.J. 131 (1982) (National Labor Relations Act preempts New Jersey Strikebreakers Act).

Displacement does not necessarily mean the state law is invalid in toto, only that it does not apply where the federal law has effect. For example, in Chamber, the Court determined that the National Labor Relations Act preempted the New Jersey Strikebreakers Act in certain instances. Id. at 163. The Court did not invalidate the act, but rather limited its application to employees not covered by the National Labor Relations Act such as agricultural, supervisory and governmental employees. Id. at 153, 163. Here, the court is unaware of any situation where the second phase of the AMA taking effect in 2006 would not be displaced since it only applies to P.L. 86-272 entities. Resultantly, P.L. 86-272 displaces the second phase of the AMA which exclusively targets P.L. 86-272 entities.[16]

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[15] If the federal law is repealed or sunsets, the preempted state law is reinstated or revived without further action of the Legislature. Ibid.

[16] Arguably, there may also be an Equal Protection argument. For economic statutes such as those regarding taxation, only a rational basis has to be shown to sustain a statute on Equal Protection grounds. See Chamber, 89 N.J. at 158. The question would then turn on whether there could truly be a rational basis when Congress has preempted the contrary action of the Legislature. Having determined the statute is preempted, the court need not reach any Equal Protection issue. See, e.g., Townsend

G. Compensatory Tax

In a last ditch effort to save the AMA from preemption, the Director argues that the AMA is a compensatory tax. A compensatory tax has been applied in dormant Commerce Clause cases in which Congress has not spoken. The dormant Commerce Clause "denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." Or. Waste Sys., Inc. v. Dep't of Envtl. Qualtiy of Or., 511 U.S. 93, 98 (1994). However, "[i]nterstate commerce may be made to 'pay its way'" even if the law discriminates against interstate commerce. Id. at 100-02 (quoting Complete Auto Transit, 430 U.S. at 281). "It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burdens." Id. at 102. A compensatory tax "is merely a specific way of justifying a facially discriminatory tax as achieving a legitimate local purpose that cannot be achieved through nondiscriminatory means." Ibid. "Under that doctrine, a facially discriminatory tax that imposes on interstate commerce the rough equivalent of an identifiable and 'substantially similar' tax on intrastate commerce does not offend the negative Commerce

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v. Swank, 404 U.S. 282, 285, 291 (1971) (finding of preemption avoided reaching Equal Protection issue).

Clause."[17] Id. at 102-103 (quoting Maryland v. Louisiana, 451 U.S. 725, 758-59 (1981)).

Simply stated, the compensatory tax doctrine has been applied by the courts to situations in which Congress has not spoken and the dormant Commerce Clause is in effect. Without an act of Congress, it is "the Court, and not Congress, that is limiting the lawful prerogatives of the States." South Dakota v. Wayfair, 138 S. Ct. at 2097. In this case, Congress has spoken and has indicated that a net income tax cannot be applied to the out-of-state sellers of tangible products that meet certain criteria.

The Legislature cannot enact a "compensatory" measure which undercuts Congress' mandate regardless of the merits. A compensatory measure here would be tantamount to invalidating the efficacy of the Congressional provision. Courts are not the final arbiter as to the Commerce Clause when Congress has spoken. See Merrion, 455 U.S. at 154-55. There are exceptions, of course, such as where the

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[17] For example, in Henneford v. Silas Mason Co., 300 U.S. 577 (1937), the State of Washington had a sales tax on in-state sales. Id. at 579. Likewise, Washington also had a use or compensatory tax on items purchased out-of-state, but used in-state. Id. at 579-80. However, if sales tax was paid to another jurisdiction, the compensatory or use tax would be reduced by the sales tax paid. Id. at 580.

The taxpayers in Henneford argued that the compensatory or use tax only applied to products brought in from out-of-state and therefore discriminated against interstate commerce. Id. at 581. In rejecting this argument, the Court indicated that "the stranger from afar is subject to no greater burden as a consequence of ownership than the dweller within the gates." Id. at 584.

federal law at issue is at odds with due process, equal protection or Tenth Amendment rights.[18] However, the State here is not challenging the validity of P.L. 86-272. Since Congress has spoken, the AMA cannot be construed as an attempt to "compensate" under the dormant Commerce Clause. Rather, the AMA is an attempt to eviscerate the properly expressed will of Congress enacted pursuant to the affirmative words of the Commerce Clause.

As pointed out by the taxpayer in this case, to argue that the AMA compensates for the CBT is to recognize that the AMA stands as an obstacle to the congressional mandate of P.L. 86-272. The Legislature's attempt to "compensate" in this case is nothing more than an effort to ignore P.L. 86-272.

Congress has spoken and indicated what it wants done as to net income taxation of certain interstate businesses. This is not a case where the State imposed a gross receipts or gross profits tax upon all businesses. Rather, New Jersey decided to impose the AMA only upon entities protected by P.L. 86-272. Even if the AMA is somehow arguably "compensatory" in the literal sense of the word, it stands as a clear obstacle to the will of Congress exercised pursuant to the Commerce Clause and imposed upon the State by the Supremacy Clause. Thus, the AMA does not fit within the compensatory tax framework as enunciated by the U.S. Supreme Court.

[18] See infra at n. 4.

V. CONCLUSION

For the foregoing reasons, the AMA does not apply to P.L. 86-272 entities for tax periods commencing after June 30, 2006. Thus, plaintiff's motion for summary judgment as to this issue is granted and defendant's motion is denied. An order will follow.