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Comment

State Net Income Taxes

and Interstate Commerce:

Interstate Commerce Tax Exemption Act

As the first step toward a solution of the problem of state taxation of interstate commerce, Congress enacted Public Law 86-272, "An Act relating to the power of the States to impose net income taxes on income derived from interstate commerce." Title I of the act provides in part:

(a) No State, or political subdivision thereof, shall have power to impose 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. Section 103 of Title I of the act also provides:
   (a) No State, or political subdivision thereof, shall have power to assess, after the date of the enactment of this Act [September 14, 1959], any net income tax which was imposed by such State or political subdivision, as the case may be, for any taxable year ending on or before such date, on the income derived within such State by any person from interstate commerce, if the imposition of such tax for a taxable year ending after such date is prohibited by section 101.

(b) The provisions of subsection (a) shall not be construed —
   (1) to invalidate the collection, on or before the date of the enactment of this Act, of any net income tax imposed for a taxable year ending on or before such date, or
   (2) to prohibit the collection, after the date of the enactment of this Act, of any net income tax which was assessed on or before such date for a taxable year ending on or before such date.

Section 102, 73 Stat. 555 (1959) (U.S. CODE CONG. & AD. NEWS, 614 (1959)).

3. "For purposes of this title, the term 'net income tax' means any tax imposed on, or measured by, net income." Section 103, 73 Stat. 555 (1959) (U.S. CODE CONG. & AD. NEWS, 614 (1959)).

4. See notes 40-42 infra and accompanying text for a discussion of this term and the problems that may arise in its interpretation and application.

5. See notes 43-45 infra and accompanying text for a discussion of this term and the problems that may arise in its interpretation and application.
The act also provides an exemption from state net income taxation for a person or company otherwise within the act's exemption, if a sale is made or an order solicited for such a person or company by an independent contractor. However, the act does not in any event

6. Section 101(a), 73 Stat. 555 (1959) (U.S. CODE CONG. & AD. NEWS, 613 (1959)). The purpose of subsection (2) is to permit the salesmen of a manufacturer to solicit orders from retail customers for the benefit of a wholesale dealer. See note 18 infra for an example of this type of activity by the Brown-Forman Company.

As finally enacted, § 101(a) of the act generally incorporates the language of S. 2524, 86th Cong., 1st Sess. (1959), as submitted to the Senate by the Senate Finance Committee, but with one major exception. The original bill included a paragraph which provided:

(3) the maintenance and operation by such person, or his representative, in such State of an office the primary purpose of which is to serve representatives of such person who are engaged in the solicitation of orders described in paragraph (1) or (2), or both, and to receive, process, and forward such orders.

The purpose of this paragraph was specifically to overrule the decision of the Supreme Court in Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). Paragraph (3) would have allowed an interstate business to maintain office facilities to assist its salesmen in the solicitation of orders without being subject to state net income taxation. See S. REP. No. 658, 86th Cong., 1st Sess. (1959), quoted in U.S. CODE CONG. & AD. NEWS, 2549-51, 2553-54 (detailed description of bill) and 2556-57 (minority views) (1959).

Senator Byrd of Virginia, Chairman of the Senate Finance Committee, summed up the proposed purposes of the bill as follows:

Unless immediate action is taken at this time, it is feared that the States will amend their laws to further encroach upon interstate commerce as a result of the Supreme Court decisions in February of this year [Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959), decided with Williams v. Stockham Valves & Fittings, Inc.] . . . . The bill is designed to prevent this by definitely overruling the February 1959 decisions.

7. (c) For purposes of subsection (a), a person shall not be considered to have
exempt from state net income taxes a corporation which is incorporated under the laws of the taxing state or an individual who is domiciled in or a resident of that state. In addition, Title II of the act provides for a comprehensive study by congressional committees of state income taxation of interstate businesses. These committees are 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.

Section 101(c), 73 Stat. 555 (1959) (U.S. Code Cong. & Ad. News, 613 (1959)).

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.


Thus, the exemption of the act allows a broader range of tax free activities by an independent contractor than by a sales representative. The independent contractor is permitted to make sales as well as solicit orders, and hence, can render services to customers. This exemption could be used by a company to accomplish the same ends that the act precludes—the maintenance of an office and the provision of services to customers—merely by using a different means. This was pointed out by Senator Gore who stated:

An independent contractor, who could represent a company having a vast spread of business, could represent some other small concern for a minuitia of business and thereby qualify as an independent contractor. The company could have as many of these men as it desired within a State, taking orders and selling and delivering goods, and yet avoid State income taxes. 105 Cong. Rec. 15123 (daily ed. Aug. 20, 1959).

Senator Gore also pointed out that, although an independent contractor could be taxed by the state, it might be possible for a large corporation to maintain a subsidiary within a state to act as an independent contractor. The parent company could so manage the business of the subsidiary that the subsidiary would show little profit and the parent company would accomplish considerable savings. 105 Cong. Rec. 15125 (daily ed. Aug. 20, 1959).

However, Senator Byrd of Virginia expressly stated that the exemption of an office of the independent contractor does not include the maintenance of an office by the out-of-state company or its representatives, and this is apparently intended to prevent the use of subsidiaries as independent contractors. See 105 Cong. Rec. 15125 (daily ed. Aug. 20, 1959). See also S. Rep. No. 658, 86th Cong., 1st Sess. (1959), quoted in U.S. Code Cong. & Ad. News, 2554 (1959).

(b) The provisions of subsection (a) shall not apply to the imposition of a net income tax by any State, or political subdivision thereof, with respect to—

(1) any corporation which is incorporated under the laws of such State; or

(2) any individual who, under the laws of such State, is domiciled in, or a resident of, such State.

Section 101(b), 73 Stat. 555 (1959) (U.S. Code Cong. & Ad. News, 613 (1959)).

Thus, a corporation may be taxed by the state in which it is incorporated, even though the corporation otherwise fulfills all of the acts requirements for exemption in that state.

The Committee on the Judiciary of the House of Representatives and the
to recommend to Congress proposed legislation to establish uniform standards for states imposing income taxes on interstate commerce. Thus, Title I of the act is intended as a stop-gap measure until the study-group provided for by Title II submits an adequate solution to the entire problem of heterogeneous state taxation of interstate commerce.

The new act is unique in that it is the first congressional action designed to resolve the growing conflict between the vital interests of the states in financing their activities and the national interest in promoting interstate business for a more prosperous industrial economy. The act attempts to resolve this conflict by defining limits to state taxing power and by assigning to congressional committees the task of drafting uniform standards for state taxation of interstate commerce. Previously, the task of delimiting the state power to tax interstate business had been assumed by the Supreme Court. Prior

Committee on Finance of the United States Senate, acting separately or jointly, or both, or any duly authorized subcommittees thereof, shall make full and complete studies of all matters pertaining to the taxation by the States of income derived within the States from the conduct of business activities which are exclusively in furtherance of interstate commerce or which are a part of interstate commerce, for the purpose of recommending to Congress proposed legislation providing uniform standards to be observed by the States in imposing income taxes on income so derived.

Section 201, 73 Stat. 555 (1959) (U.S. CODE CONG. & AD. NEWS, 614 (1959)).


However, the Frear amendment was rejected by the House of Representatives in favor of an amendment by Representative Walters. This amendment, as adopted, was substantially the same as Title II of the act as passed by Congress. See 105 Cong. Rec. 15541 (daily ed. Aug. 25, 1959). The conference committee which met to resolve the differences in the Senate and House proposals stated that they concluded that the study should be made by congressional committees. See Cong. Rep. No. 1103, 86th Cong., 1st Sess. (1959), quoted in U.S. CODE CONG. & AD. NEWS, 2560 (1959). See also 105 Cong. Rec. 16096–97 (daily ed. Sept. 1, 1959), and 105 Cong. Rec. 16348 (daily ed. Sept. 3, 1959).


11. See generally HARTMAN, STATE TAXATION OF INTERSTATE COMMERCE (1953); Anderson, State Taxation of Interstate Commerce, 1952 Wash. U.L.Q. 1 (1952); Lockhart, State Tax Barriers to Interstate Trade, 53 Harv. L. Rev. 1253 (1940); Strecker, "Local Incidents" of Interstate Business, 18 Ohio St. L.J. 69 (1957); 43 MINN. L. REV. 1010 (1959); 43 MINN. L. REV. 1015 (1959).

The entire history of the judicial process was described by Mr. Justice Frankfurter in Freeman v. Hewitt, 329 U.S. 249 (1946), as follows:

The power of the States to tax and the limitations upon that power imposed
to its decision in *Northwestern States Portland Cement Co. v. Minnesota*, the Supreme Court permitted "indirect, non-discriminatory" and "apportioned" taxes to be levied only on the local or intrastate activities of an interstate business. In *Northwestern Ce-

by the Commerce Clause have necessitated a long, continuous process of judicial adjustment.

... The history of this problem is spread over hundreds of volumes of our Reports. To attempt to harmonize all that has been said in the past would neither clarify what had gone before nor guide the future.

*Id.* at 251-52.

12. 358 U.S. 450 (1959), decided together with Williams v. Stockham Valves & Fittings, Inc. In the *Northwestern Cement* case the Supreme Court affirmed the state court's decision that an interstate business which maintained a leased sales office, five salesmen and a secretary in the taxing state was subject to an apportioned state net income tax. See State v. *Northwestern States Portland Cement Co.*, 250 Minn. 32, 38, 84 N.W.2d 378, 378 (1957). In *Stockham Valves* the Supreme Court reversed the state court's decision that an interstate business which maintained a sales-service office occupied by one salesman and a secretary was not subject to an apportioned state net income tax. See *Stockham Valves & Fittings, Inc. v. Williams*, 213 Ga. 713, 716-17, 101 S.E.2d 197, 199 (1957).


However, it is significant to note that the Court has held that a tax on net income is not a direct burden since it is levied only if there is a net profit; whereas taxes such as the gross receipts tax are levied whether there is a profit or not, and hence are considered to be direct. See United States Glue Co. v. *Oak Creek*, 247 U.S. 321, 328-329 (1918).

The Supreme Court has held that states are prohibited from discriminating against interstate commerce, directly or indirectly. See *Memphis Steam Laundry Cleaner Co. v. Stone*, 342 U.S. 399, 394 (1952); *Nippert v. City of Richmond*, 327 U.S. 416, 433-34 (1946); *Gwin, White & Prince, Inc. v. Henneford*, 305 U.S. 434, 438-39 (1939); *Northwestern States Portland Cement Co. v. Minnesota*, supra at 458 (dictum).


15. In *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P.2d 861, *aff'd per curiam*, 328 U.S. 823 (1946), the California Supreme Court permitted an apportioned, non-discriminatory net income tax which was attributable to the company's local activities. However, the tax statute made no attempt to segregate the intrastate business activities from the interstate activities of the company. By affirming this decision, the Supreme Court may have indicated that it was no longer fearful of the possible multiple burden on interstate commerce in the case of state net income taxes. Finally, in *Northwestern Cement* the Court made its position explicit when it stated, "Logically it is impossible, when the tax is fairly apportioned, to have the same income taxed twice." 358 U.S. at 462.
The Court rejected the "local activities" requirement and sustained a non-discriminatory, apportioned state net income tax levied on income derived from interstate commerce where the business had, for tax purposes, established "sufficient nexus" with the taxing state. The Court's reference to "sufficient nexus" caused considerable consternation among businessmen who feared that "sufficient nexus" might be interpreted to include the mere solicitation of orders in a state. This fear was heightened by the Supreme Court's subsequent denials of certiorari to two state court cases decided prior to the Court's decision in Northwestern Cement. In these two cases a state court had upheld net income taxes similar to those allowed by the Supreme Court in Northwestern Cement. However, the local activities of the interstate businesses in these two cases were limited to the solicitation of orders by salesmen; the activities which the Court found to be a "sufficient nexus" in Northwestern Cement were both the solicitation of orders by salesmen and the maintenance of a permanent office in the taxing state.

The sentiments of the businessmen were more completely expressed by the proponents of the act who contended that conformity to complex state tax structures and apportionment formulas unduly increased the cost of doing interstate business, especially for small interstate businesses, by greatly increasing the cost of account-

16. Mr. Justice Clark stated in the majority's opinion:
We conclude 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.

358 U.S. at 452.

17. Nexus is defined as a "connection or interconnection; tie; link." Webster's New International Dictionary 1849 (2d ed. 1947).

18. International Shoe Co. v. Fontenot, 236 La. 279, 107 So. 2d 640 (1958), cert. denied, 359 U.S. 954 (1959); Brown-Forman Distillers Corp. v. Collector of Revenue, 234 La. 651, 101 So. 2d 70 (1958), cert. denied, 359 U.S. 28 (1958). In both of these cases interstate businesses maintained no offices, warehouses or property with the taxing state. In the International Shoe case the company's only activity in the state was the regular solicitation of orders by fifteen salesmen. In the Brown-Forman case the company's only activity in the state was the solicitation of orders by "missionary men" who occasionally accompanied salesmen of wholesale customers to retail stores. However, the "missionary men" solicited no orders at the retail level. The Louisiana Supreme Court upheld apportioned state net income taxes in both cases, relying on West Publishing Co. v. McColgan, 27 Cal. 2d 705, 166 P.2d 861, aff'd per curiam, 328 U.S. 823 (1946).

It is probable that the fact situation in the Brown-Forman case was responsible for the inclusion of § 101(a)(2) in the act. This section allows a salesman to solicit orders for the benefit of a customer, see note 6 supra and accompanying text. Thus, the salesman of the Brown-Forman Company will now be able to solicit orders from retail stores for the benefit of the company's wholesale customers, and indirectly for the benefit of the Brown-Forman Company. The significance of these two cases is further apparent from references to them in S. Rep. No. 658, 86th Cong., 1st Sess. (1959), quoted in U.S. Code Cong. & Ad. News, 2549 (1959).

19. See notes 13 & 18 supra.
Therefore, they contended, it was the duty of Congress to enact uniform apportionment formulas for state taxation. However, this solution would require prolonged study if it were to be equitable and effective. And the proponents added that until Congress acted, the fear of an extension of the *Northwestern Cement* decision was detrimental to the interests of small businesses by discouraging the primary method of expansion by such businesses—the efforts of solicitors in adjoining states. To alleviate these fears and thus stimulate, rather than stifle, economic development, they contended that it was necessary for Congress to define the precise limits of the state power to tax the income of interstate businesses.


Many small- and medium-sized firms engaged in interstate commerce are fearful of the cost of compliance necessary to properly make such determinations [the portion of the company's total taxable income that is properly apportioned to the taxing state] under the laws of each of the States in which such sales are made. This apprehension exists in large part because of the lack of uniformity in the laws of the various States in determining "taxable income," prior to apportionment, and in the factors to be taken into account in determining the amount of income to be apportioned to the State.

There are at least 35 States, the District of Columbia, and at least 8 cities taxing business income, including earnings derived from interstate commerce where there is local business activity. No two States have exactly the same formula for apportioning the amount of income attributable to local activities within the State. The committee understands that the formulas currently in use are complex, that even within the formulas the meaning of the basic words are inexact.

Many of the witnesses appearing before the committee advised the committee that they had no objection to paying their fair share of the State tax burden, but were concerned with the heavy cost of compliance that resulted from the lack of uniformity mentioned above and suggested that in fact in some cases the cost of compliance would exceed the amount of tax liability reflected on the return.

See also the dissent of Mr. Justice Frankfurter in *Northwestern Cement*, "The cost of such a far-flung scheme for complying with the taxing requirements of the different States may well exceed the burden of the taxes themselves, especially in the case of small companies doing a small volume of business in several States." 358 U.S. at 474. *But see* 43 Minn. L. Rev. 1010 (1959).


The opponents of the act generally conceded that there was a
need for uniformity in state taxation of interstate commerce and
that congressional action was necessary for an adequate solution of
the problem.23 However, they protested that any definition of the
states' taxing power would be inadvisable until a thorough study
could be completed.24 They contended, first of all, that the act
would result in a considerable loss of tax revenue to the consumer
states 25 which were already sorely pressed for income to finance the
ever-expanding services demanded by their citizens.26 The oppo-


24. Ibid.

25. Most of the objections to the act came from representatives of the consumer states, those states which are dependent upon the manufactured products of other states and which have relatively few corporations incorporated or domiciled in the state on which to levy income taxes. The minority of the Senate Finance Committee stated:

This bill represents a part of the fight, which is even older than the Constitu-
tion, between the producing and the consuming sections of our country. Two-
thirds of the revenue collected by the various States from net income taxes on
interstate commerce is collected by 10 manufacturing States. Should this bill
be enacted into law, these States will be able to collect additional revenue at
the expense of the consuming States.


For the objections of the officials of eight states to the proposed legislation, see
105 Cong. Rec. 15013 (Pennsylvania) (daily ed. Aug. 19, 1959); id. at 15014–15
(Minnesota); id. at 15016 (Kansas); id. at 15018 (Michigan); 105 Cong. Rec.
15098 (Georgia) (daily ed. Aug. 20, 1959); id. at 15122 (North Dakota); id. at
15180 (Oregon); id. at 15181 (Wisconsin).

26. See Pierce, State Fiscal Needs and Interstate Commerce, 18 Ohio St. L.J. 43,
44–45 (1957).

27. See note 6 supra for a discussion of the effects of the Talmadge amendment.

28. For example, a company could maintain either a private long-distance tele-
phone line or teletype communication with salesmen and customers within a state. In
this way, the company could maintain close and constant contacts without a sales
office, and thereby conform to the act's requirements with little inconvenience or
loss of business.
sarily increase the tax burden on local intrastate business; further, the act would be an incentive to large businesses to extend their sales activities, thereby increasing competition at the local level to the detriment of small business. The opponents also pointed out that the act was not a temporary or stop-gap measure as the proponents contended, for if no permanent solution were found, the act might be in effect indefinitely since no termination date was provided.

Although the precise effects of the act cannot be measured at this time, it is possible to consider and analyze the more important questions presented by the act. The most immediate and important of these questions is the act’s effect on the prior law of state taxation of interstate commerce as formulated by the Supreme Court. The proponents of the final bill were careful to point out that the act would not overrule any previous decisions of the court as the original bill was intended to do, and the holding of the Court in Northwestern Cement would not be affected, since the decision was based on the presence of the company’s sales office in the taxing state. Neither will the act work any changes in the Court’s decisions with regard to other forms of state taxation of interstate or intrastate businesses, for example, sales, use and property taxes; nor will the act affect state taxes on businesses which are engaged in foreign commerce. Rather, the act “draws the line” at the Court’s holding in Northwestern Cement and prevents the states and the Court from further extending state power to impose net income taxes on businesses whose only nexus with a state is the presence of salesmen.


30. The Sparkman amendment, to provide a termination date for the statute, (see 105 Cong. Rec. 15121 (daily ed. Aug. 20, 1959)), was defeated by the Senate, id. at 15125.

31. See generally text and articles cited note 11 supra for a summary of the judicial history of state taxation of interstate commerce. See also notes 13 & 14 supra and accompanying text for a summary of some of the leading Supreme Court cases on state taxation of interstate commerce.


33. Senator Bennett, one of the proponents of the statute, stated during the early debates on the original bill: “This bill does not affect in any way the power of a State to impose sales taxes, property taxes, licenses, any form of tax, except a tax on the income of the foreign corporation.” 105 Cong. Rec. 14997 (daily ed. Aug. 19, 1959).

34. See the statements of Senator Sparkman at 105 Cong. Rec. 16352 (daily ed. Sept. 3, 1959).
soliciting orders for acceptance outside the state. Thus, the act merely defines the minimum activities required for exemption and clarifies, rather than rejects, the Court's previous decisions.

Two further questions are raised by the act: What persons and businesses may take advantage of the exemption defined by the act? What must such persons and businesses do to come within the act's exemption? Since the act does not make any distinctions as to the size or type of business, it is clear that any person or business engaged in interstate commerce may avail itself of the act's exemption by meeting its specific requirements. The act does, however, limit its exemption to businesses not incorporated in and persons neither residents of nor domiciled in the taxing state. Further, such businesses and persons must limit their activities within the state to the solicitation of orders by salesmen for the sale of tangible property or to the solicitation of orders or the sale of tangible personal property by independent contractors on behalf of several such persons or companies.

Thus, the general requirements of the act are clear, but, in many cases, further interpretation of the act may be necessary to assure precise compliance. Two terms in the act, "the solicitation of orders" and "tangible personal property," may present difficulty in interpretation and application. Although the act does not precisely define "the solicitation of orders," the committee reports and congressional debates indicate that the proponents of the final bill definitely considered that a warehouse, stock of goods or sales office in...

35. Senator Long proposed an amendment which, as modified, provided:

(e) The provisions of subsection (a) shall not apply with respect to any person for any taxable year, if the sales of such person in such State during such taxable year are less than $250,000.

105 CONG. REC. 15129 (daily ed. Aug. 20, 1959). However, this amendment was rejected by the Senate, 105 CONG. REC. 15131 (daily ed. Aug. 20, 1959).

36. See text accompanying notes 3-6 supra.

37. See note 8 supra and accompanying text.

38. See note 41 infra and accompanying text.


the state would be more than "the solicitation of orders." 40 But, the legislative history does indicate that the act was intended to permit a company to have either itinerant salesmen or permanent sales representatives in a state without being subject to state net income taxation. 41 It is probable that these agents would be permitted to rent temporary quarters to display their merchandise; however, they could maintain no permanent office or display facilities or service orders after acceptance, if their employers wished to remain within the act's exemption. 42

The second term in the act which may raise some interpretative problems is "tangible personal property." The act does not attempt to define "tangible personal property," and the history of the act indicates only that Congress definitely intended to exclude from the definition, and hence from the exemption, insurance contracts and the premiums thereon, 43 and the sale of personal services. 44 Since the history of the act contains nothing which indicates that Congress intended either an unusually broad or a restrictive application of the term, it is probable that Congress intended the ordinary meaning of the term "tangible personal property," that is, property "capable of being touched." 45


Incidental property which is allowed would probably include, for example, merchandise samples carried by a salesman and an automobile for the use of a company's salesmen.


42. It is the permanent nature of a warehouse or sales office that is objectionable. See note 41 supra and accompanying text. The reason for this is that these facilities require an expenditure by the state for public services such as police and fire protection. Ordinarily a temporary activity would not unduly increase the need for such services.

Another problem which may be raised by the term "solicitation of orders . . . which are sent outside the State for approval or rejection" is a problem of contract law, to determine when an order or offer is made and when and where it is accepted. This problem was explained by Senator Byrd of Virginia as requiring the contract to be concluded in the state of acceptance, although the act does not require title to the goods to pass within the state of acceptance, See 105 Cong. Rec. 16349 (daily ed. Sep. 3, 1959). Thus, it is probable that general principles of contract law will be determinative in resolving the question of when and where the order is accepted. See generally Comment, Contracts §§ 24 & 88 (1950) for the applicable rules of contract law.

While the act clarifies the previous law and eliminates the doubts of business, it also blueprints the means for a business to accomplish considerable savings in accounting costs and to avoid state net income taxes. It cannot be overlooked that the resultant financial losses to the consumer states must be regained, if possible, by other means. This leads to yet another important question raised by the act—the ability of the consumer states to recoup any financial losses occasioned by the act.

Several alternatives are available to the consumer states to recoup their lost revenue. It is, of course, possible for a state to increase the rates of the present tax structure or to impose new forms of taxes on the state's present taxpayers. A more desirable alternative for a state would be to levy new forms of taxes on those businesses now exempt from the state's net income taxes. However, if the only contact of an interstate business is the presence of salesmen soliciting orders in a state, the Supreme Court has held that few other forms of state taxation of such a business are permitted by the commerce clause. And none of the permitted forms of taxation would be sufficiently remunerative to be an adequate substitute for the net

1945) (interpretation of the Revenue Act of 1918); State v. Jones, 60 Ariz. 380, 387 P.2d 970 (1943) (state sales tax). For the judicial application of this term, based on legislative intent, see, e.g., State v. Advertiser Co., 257 Ala. 423, 59 So. 2d 576 (1952) (court assumed that the ordinary meaning of the term was intended by the legislature); Green v. Reed Constr. Corp., 91 So. 2d 834 ( Fla. 1958) (court assumed that the ordinary meaning of the term was intended by the legislature); Farrand Coal Co. v. Halpin, 10 Ill. 2d 507, 140 N.E.2d 698 (1957) (court assumed that the ordinary meaning of the term was intended by the legislature); People ex rel. Terminals & Transp. Corp. of America v. State Tax Comm'n, 229 App. Div. 289, 241 N.Y.S. 38 (Sup. Ct.), rev'd, 254 N.Y. 501, 173 N.E. 562 (Ct. App. 1930) (the court of appeals assumed that the ordinary meaning of the term was intended by the legislature); Magnolia Petroleum Co. v. Oklahoma Tax Comm'n., 326 P.2d 821, 823 (Okla. 1958) (court held that the legislature intended a broad application of a sales tax statute).

46. It would not be contrary to the intent of Congress to substitute new forms of taxes on these businesses. Furthermore, it is quite evident from the legislative history of the act that businesses did not object to paying a fair share of taxes. Rather, they objected to taxes which required costly compliance in the conformity to such taxes. See note 20 supra.

47. A gross receipts tax on an interstate company whose activities are thus limited is invalid. See Norton v. Department of Revenue, 640 U.S. 594, 537 (1951) (citing McLeod v. J. E. Dilworth Co., 322 U.S. 327, 329 (1944)). In Norton the Court stated, "This corporation could have approached the Illinois market through solicitors only and it would have been entitled to the immunity of interstate commerce as set out in the Dilworth case." Id. at 588 (dictum). See also id. at 593 (dictum); Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422, 429 (1947); Freeman v. Hewit, 329 U.S. 249 (1946). In the Carter case a gross receipts tax on the essential incidents of interstate commerce was held invalid. In the Hewit case a gross receipts tax on an interstate sale was held invalid.

A license tax on solicitors of an interstate business has also been held invalid. Nippert v. City of Richmond, 327 U.S. 416 (1946); Robbins v. Shelby County Taxing Dist., 120 U.S. 489 (1887).
income tax. It might be possible to tax the incidents of the businesses' activity within the state—the retail sale of goods and the solicitation of orders. However, except in a limited number of cases, an exempt business will not make sales within the state and it has been held that a retail sales tax may not be imposed on a solicited order which is accepted in another state.

The use tax, levied on goods brought into the taxing state, would be a practical means by which a state might obtain tax revenue from transactions conducted in accordance with the act's defined requirements for exemption. By levying a use tax, a consumer state may regain much of its lost revenue. However, the use tax has a significant disadvantage for some states. Although the question has not been

48. A property tax on the property of an interstate business has been held valid, however. See, e.g., Braniff Airways, Inc. v. Nebraska Bd., 347 U.S. 590 (1954); Northwest Airlines, Inc. v. Minnesota, 322 U.S. 292 (1944). See also 43 MINN. L. Rev. 1015 (1959). However, a property tax would be an impractical alternative since an interstate company, to conform to the act's exemption, will have no more than incidental property within a state. See note 40 supra and accompanying text.

49. The act does permit an interstate business to employ an unlimited number of independent contractors in a state and yet qualify for the act's exemption. These independent contractors are permitted to make sales as well as solicit orders. See note 7 supra. Therefore, a state could levy a retail sales tax on those sales made in the state by such independent contractors. However, it is possible that, because of this fact, the number of sales so made would be small.

50. See McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944). In Dilworth the Court held that a state sales tax was invalid where title to the goods was found to have passed outside the taxing state. The act does not require that title to the goods pass outside the taxing state, but requires only that the order be accepted outside the taxing state. See note 41 supra. However, it is probable that, if the only activity of a company within a state is the solicitation of orders, a state determination that title to the goods passed within the taxing state would not be sufficient to allow a state sales tax. In McGoldrick v. Berwin-White Coal Co., 309 U.S. 33 (1940), the Court upheld a sales tax on a sales made within the state by an interstate company. However, in the Berwin-White case the determination of the place of sale was based on the fact that the company maintained an office and accepted orders in the taxing state. Id. at 44. Thus, it is probable that such a state determination of the place of sale, without a similar factual basis, would be invalid. It is also probable that a comparable factual basis would not exist in the case of an interstate company seeking the act's exemption. See note 28 supra.

51. The use tax is levied on the privilege of the use or consumption of personal property within a state. It is generally levied in conjunction with a state retail sales tax and, in such cases, is intended to prevent avoidance of the state sales tax by out-of-state purchases. The Supreme Court has held the use tax to be constitutional. Henneford v. Silas Mason Co., 300 U.S. 577 (1937). The Court has also held that a state may require out-of-state sellers to collect the use tax on goods which are sent into the state by the company in accordance with orders solicited by the company's salesmen in the taxing state. See, e.g., General Trading Co. v. Commissioner, 322 U.S. 335 (1944).

See also Scripto, Inc. v. Carson, 105 So. 2d 775 (Fla. 1958), aff'd 28 U.S.L. Week 4191 (U.S. March 21, 1960), where the Supreme Court of the United States affirmed a state court determination that Florida could validly require a Georgia dealer, selling its products in Florida through wholesale jobbers, to collect and remit a Florida use tax.
resolved by the Court, it is probable that the use tax may be levied only in conjunction with an equal tax on sales made within the state. Thus, those states which do not presently levy a sales tax would be forced to enact one, if they choose to adopt the use tax alternative. However, only the legislature of a state may select and impose new taxes such as the sales and use tax, and since the legislatures of a majority of the states will not be in general session until 1961, most consumer states will have no alternative but to suffer the consequent loss of tax revenue, at least until 1961. But, it would seem advisable for the state legislatures to postpone the enactment of any of these alternatives until the designated committees have submitted to Congress proposed uniform standards for state taxation of interstate commerce.

It is probable that the act will produce both the results desired by the proponents and those feared by the opponents. Generally, by defining the taxing power of the states, the act will stimulate the economic development of small interstate businesses as the proponents desired. However, as the opponents feared, the act will also be of benefit to large corporations, thereby increasing competition at the local level. In addition, some consumer states will suffer a loss of tax revenue as large and small businesses adapt their operations to conform to the act's exemption.

It is undeniably the duty of Congress to balance the interests of the states and the interests of the nation, and it is unquestionably the right of Congress to define the taxing power of the states with regard to interstate commerce. However, the Interstate Commerce Tax Exemption Act neither properly balances these interests nor adequately defines the states' power. The act's definition of the states' power adds little to the previous law as developed by the Supreme Court and may result in additional litigation as businesses attempt to put themselves within the act's exemption. Further, the

52. A tax levied on goods purchased outside the state, without an equal tax on goods sold within the state would probably be considered discriminatory by the Court and hence invalid. See cases cited note 13 supra.
53. This was pointed out by Senator McCarthy at 105 CONG. REC. 15016 (daily ed. Aug. 19, 1959).
54. However, the act does not require the designated committees to submit proposed legislation to Congress until July 1, 1962. Section 302, 73 Stat. 555 (1959) (U.S. CODE CONG. & AD. NEWS, 614 (1959)). Thus, the states would be forced to wait until 1963 to enact legislation.
Senator Harry Byrd of Virginia, Chairman of the Senate Finance Committee, reports that no action has as yet been taken by that committee. Letter from Senator Harry Byrd to Minnesota Law Review, March 22, 1960.
55. It is difficult to determine how many of the consumer states applied their income tax laws to interstate businesses prior to Northwestern Cement. However, it is certain that, but for the act, all such states would have taxed interstate businesses after Northwestern Cement.
balancing of the conflicting interests was apparently done with inadequate concern for the vital interests of the states. Obviously the act was the result of haste and compromise; insufficient consideration was given to the entire problem of state taxation of interstate commerce in an attempt to provide an immediate solution to the problems of small business. However, the act is at least the first step toward a uniform system of state taxation of interstate commerce, and a uniform system, if found, will be beneficial to all interests affected.