IN THE SUPREME COURT OF MISSOURI

AMWAY CORPORATION, Respondent, v. DIRECTOR OF REVENUE, STATE OF MISSOURI, Appellant,	No. 72155

MOTION FOR LEAVE TO FILE SUGGESTIONS OF AMICUS CURIAE IN SUPPORT OF RESPONDENT'S MOTION FOR REHEARING

Pursuant to Mo. Sup. Ct. Rule 84.05(1), the Direct Selling Association moves for leave to file Suggestions of Amicus Curiae, in support of Respondent Amway Corporation's motion for rehearing of matters decided by the Court's opinion entered July 31, 1990. In support of its motion, the Direct Selling Association states:

(1) It is the national trade association for about one hundred corporate member companies that manufacture and distribute consumer products through self-employed salespersons.

(2) In 1989, the direct selling industry in the United States provided income earning opportunities to four million individuals.

(3) The Direct Selling Association, as the national trade association for most direct selling companies in the

industry, is uniquely qualified to clarify the potential impact of the Court's decision on the direct selling industry.

(4) The decision of the Court treating small, one time or annual, amounts paid by self-employed salespersons as fees for the sale of intangible property, i.e. a "franchise", virtually eliminates the protection that P.L. 86-272, 15 U.S.C. § 381, and the Fourteenth Amendment of the United States Constitution provide interstate businesses.

(5) The Court's opinion will (i) increase uncertainty as to the amount of local activities within the state which will be regarded as providing sufficient nexus for state taxation of income, (ii) increase the burdens of compliance on the part of out-of-state companies, and (iii) increase lack of coordination and uniformity of treatment from state to state, all contrary to the legislative purposes of P.L. 86-272, 15 U.S.C. § 381, to the detriment of the member companies of the Direct Selling Association.

(6) As required by Rule 84.05(l), the Direct Selling Association's Suggestions of Amicus Curiae is filed herewith.

WHEREFORE, the Direct Selling Association moves for leave to file Suggestions of Amicus Curiae.

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IN THE SUPREME COURT OF MISSOURI

AMWAY CORPORATION, Respondent, v. DIRECTOR OF REVENUE, STATE OF MISSOURI, Appellant.	No. 72155

SUGGESTIONS OF AMICUS CURIAE THE DIRECT SELLING ASSOCIATION, IN SUPPORT OF RESPONDENT'S MOTION FOR REHEARING

The Direct Selling Association is the national trade association for about one hundred member companies, including Amway Corporation, that manufacture and distribute consumer products through self-employed salespersons.

I. THE AGREEMENTS BETWEEN AMWAY AND ITS SELF-EMPLOYED SALESPERSONS ARE NOT "FRANCHISES" OR SOME OTHER FORM OF VALUABLE INTANGIBLE PROPERTY.

This Court in its opinion overlooked or misinterpreted crucial facts as to the nature of the relationship between Amway and its self-employed salespersons. In the direct selling industry, the relationship between the company and those that sell its products frequently is that of buyer and seller. Amway operates in this manner. The salesperson buys tangible personal property from the company or from another distributor who buys from the company. The salesperson then resells the property. The salespersons are self-employed.

Generally, no cash investment is required when the salesperson enters into a contract with a direct selling company. However, the salespersons are either expected to or required to purchase certain items such as sales kits, samples, pamphlets, order forms, books and magazines. The salespersons are generally not given an exclusive right to solicit sales in an area.

The Direct Selling Association believes that these arrangements have the principal purpose to promote sales of tangible personal property and do not constitute a "non-exclusive" franchise or other form of valuable intangible property.

Approximately twenty-five states require franchise registration or disclosure. An additional twenty-one states require sellers of business opportunities to register. It is well accepted that direct sellers such as Amway are not required to register either as a franchisor or business opportunity offeror in any of these states. Moreover, there is no other authority for the position that arrangements similar to those of Amway and the rest of the direct selling industry are valuable franchise rights. Indeed, one of the statutes cited by the Court in its opinion defines a franchise to exclude "a commercial relationship that does not contemplate the establishment or maintenance of a place of business within the State of Missouri." Mo. Rev. Stat. § 407.400(1). This statute also includes an "Amway exception." See, Webster v. Membership Marketing Inc., 766 S.W.2d 654 (Mo. App. 1989). In

short, the relevant authorities are completely inconsistent with the conclusion that sales arrangements with Amway, or in the rest of the direct selling industry, involve franchises as that term is normally used to mean a valuable contract right.

The use of the term franchise by the Court is meant to imply there is some sort of valuable intangible right involved. Amway distributorships are simply not franchises. A franchise is a valuable right frequently involving territorial exclusivity or, at least, a limited number of other franchisees. These characteristics are what give the franchise value. Under the Amway agreements, any purchaser is free to resell Amway products whether or not they have entered into a contract with Amway. The number of Amway salespersons in Missouri in these years, ranging from 19,000 to 35,000, is inconsistent with any conclusion that the initial contract with Amway is something of intrinsic value.

Traditional franchises require substantial capital investments. Direct selling companies, such as Amway, are noted for the lack of investment required to sell the company's products. The part-time nature of the industry's salesforce and the high industry turnover rate further illustrates the fact that the relationship is not a franchise or any other form of valuable intangible contract right.

The Direct Selling Association thinks the only reasonable conclusion that can be drawn with regard to direct selling companies, such as Amway, is that they do not "sell" franchises or any other form of valuable intangible right.

Insofar as any amounts are received by a direct selling company at the time a salesperson initially signs with a company, they are in payment for a sales kit, pamphlets, samples, order forms, books, magazines or similar tangible personal property.

II. AMWAY'S ACTIVITIES IN MISSOURI DURING THE YEARS IN QUESTION WERE THE SOLICITATION OF SALES OF TANGIBLE PERSONAL PROPERTY OR ACTS INCIDENTAL THERETO AND ARE SQUARELY WITHIN THE PROTECTION OF P.L. 86-272, 15 U.S.C. § 381.

The Court also overlooked or misinterpreted Amway's activities in Missouri. P.L. 86-272 bars a state from imposing a net income tax on a person if the activities of the person or his representative in the state are limited to the solicitation of orders for sale of tangible personal property which orders are approved outside the state and filled by delivery from a point outside the state. 15 U.S.C. § 381. In CIBA Pharmaceutical Products, Inc. v. State Tax Commission, 382 S.W.2d 645 (Mo. 1964) this Court took an expansive reading of P.L. 86-272 and treated CIBA's numerous activities in the state as incidental to the solicitation of sales. The permissible incidental activities of twelve employee professional service representatives of CIBA, who were supplied with automobiles by CIBA and reimbursed for expenses, included attending periodic sales meetings and visiting doctors in their territory.

Effective sales activity requires many acts which are incidental to solicitation. These are considered "mere solicitation" if they are related to, and further, the sales of tangible personal property. United States Tobacco Co. v.

Pennsylvania, 478 Pa. 125, 386 A.2d 471, cert. denied, 439 U.S. 880 (1978) (incidental sales to retailers of samples by salesmen in the state within "solicitation"). The activities of Amway in connection with signing and renewing distributors were directly related to sales of tangible personal property. The distributors were the company's customers in the state, and, without distributors, no property would have been sold. The fact that Amway, or any other out-of-state business, encourages product sales by creating a customer base as large as possible is reasonable, expected and entirely consistent with P.L. 86-272.

As previously noted, amounts paid in connection with signing up distributors were for tangible personal property purchased by the distributor. No franchise or other intangible personal property of any intrinsic value was sold. The direct selling industry is concerned with the implication that a non-exclusive relationship with self-employed salespersons could be characterized as involving the sale of intangible property and take a company outside the protection of P.L. 86-272. One of the legislative purposes of this statute was to bring certainty to companies engaged in interstate commerce by spelling out some fairly clear and well understood rules. Congress intended to minimize the burdens of compliance on the part of out-of-state companies. After 30 years, this Court is eliminating a great deal of the certainty and potentially exposing the industry to uncertain and inconsistent tax treatment by this novel interpretation that these

arrangements may involve the sale of intangible property of some intrinsic value.

We respectfully contend that the Court's characterization of the Amway distributor arrangement as an intangible property right of value is unsupported. In any event, under any characterization of the sales arrangement between the company and its distributors, signing up a distributor is incidental to "mere solicitation" and within the protection of P.L. 86-272.

III. IMPOSITION OF THE MISSOURI CORPORATE INCOME TAX ON AMWAY WOULD CONSTITUTE A VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE U.S. CONSTITUTION.

Finally, this Court has misinterpreted the Due Process requirements of the Constitution of the United States. The United States Supreme Court has stated that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Brothers v. Maryland, 347 U.S. 340, 344-345, reh'g denied, 347 U.S. 964 (1954). Generally this requires the taxpayer's physical presence within the taxing state.

In Scripto, Inc. v. Carson, 362 U.S. 207 (1960), the Supreme Court found sufficient nexus to impose use tax collection despite the lack of an office or place of business within the taxing state. Based on the presence of ten salesmen in Florida, the court found that Scripto had sufficient nexus with Florida. These salesmen secured a "substantial flow of goods into Florida." 362 U.S. at 211. The fact that the

salesmen were independent contractors and not regular employees was a distinction "without constitutional significance." 362 U.S. at 212.

Scripto represents the furthest extension of the Supreme Court in finding nexus to tax without taxpayer property or employees in the states. This Court's opinion would go beyond the Scripto decision in that an out-of-state corporation would have nexus not only for sales tax collection purposes but also for corporate income tax liability. Amway has no property or employees in Missouri. Its distributors are self-employed persons who buy from Amway and resell. All of the activities of the Amway distributors noted by the Court were in furtherance of their own business purposes. In order to maximize their sales, each distributor sought more distributors who would buy from him or her. This Court's opinion could amount to finding nexus to tax based on the "slightest presence" in a state, a theory rejected by the Supreme Court in National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977).

For the nexus requirement to be constitutional, a tax levy must be fairly related to services provided by the state. Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). This Court characterized the question as "whether the state has given anything for which it can ask a return." Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940). Benefits a state may provide a taxpayer include promotion of commercial activity, a trained work force, (Commonwealth Edison

Co. v. Montana, 453 U.S. 609, 626-627 (1981)), municipal services, fire and police protection and the like. National Geographic, 430 U.S. at 561.

Amway does not appear to have had the benefit of any of the foregoing. It has no property or employees in the state. Consequently it does not benefit from police and fire protection or a trained workforce. In addition to lacking minimal contacts with the state, it appears to obtain no benefit from services provided by the state.

Indeed the direct selling industry brings many benefits to the states in which direct sellers live and work. Amway and other direct sales companies enrich the state through the income and other taxes paid by its independent contractors. This is not a circumstance where the $10 million in annual sales of Amway products in Missouri is going untaxed. These goods are resold in the state generating substantial sales and income tax revenues for state and local government. This is not a situation where the local market is being exploited and no taxes are being paid. It is simply that Amway, and other similarly situated direct selling companies, do not have sufficient nexus in Missouri to be subject to the Missouri corporate income tax.

CONCLUSION

On the basis of the foregoing, amicus curiae, The Direct Selling Association, respectfully requests that the Court reconsider and withdraw its opinion filed July 31, 1990. Amicus Curiae respectfully requests the Court to grant

Respondent's Motion For Rehearing to allow this Court to reconsider the crucial issues of fact and law previously overlooked or misinterpreted by this Court.

Respectfully submitted,

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AFFIDAVIT OF SERVICE

Lewis E. Striebeck, Jr., of lawful age, upon his oath, states that he did, on the 13th day of August, 1990, send by Federal Express, three envelopes each containing two copies of Amicus Curiae's Motion for Leave to File Suggestions In Support of Respondent's Motion For Rehearing and the Suggestions of Amicus Curiae and that they were addressed to:

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Subscribed and sworn to before me this 13th day of August, 1990.

Thomas E. Venker, Jr.
Notary Public

My commission expires:

THOMAS E. VENKER, JR.
NOTARY PUBLIC, STATE OF MISSOURI
MY COMMISSION EXPIRES AUG. 14, 1991
COUNTY OF ST. LOUIS