0?7

IN THE SUPREME COURT OF FLORIDA

THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State Agency, and **LAWRENCE FUCHS**, Executive Director of the Department of Revenue, State of Florida,

Petitioners

vs.

Case No. 86,481

SHARE INTERNATIONAL, INC.,

Respondent.

FILED
SID J. WHITE
DEC 8 1995
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

BRIEF OF AMICUS CURIAE
DIRECT MARKETING ASSOCIATION, INC.
IN SUPPORT OF RESPONDENT SHARE INTERNATIONAL, INC.

GEORGE S. ISAACSON
MARTIN I. EISENSTEIN
DAVID W. BERTONI

BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, Maine 04240
(207) 786-3566
(207) 783-9325 (Fax)

On Motion to Appear
Pro Hac Vice

Counsel for Petitioners

STEPHEN M. CARLISLE
Fla. Bar No. 708313

CARLISLE & LECATES
415 S.E. 12th Street
Fort Lauderdale, FL 33316
(305) 764-4000
(305) 525-9604 (Fax)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES, REGULATIONS AND RULES

LAW REVIEWS

The Direct Marketing Association, Inc. ("DMA") respectfully submits this brief as amicus curiae in support of Respondent Share International, Inc. ("Share").[1] DMA urges the Florida Supreme Court to affirm the decisions below.

I. STATEMENT OF INTEREST

A. Overview of DMA

Since its inception in the late 19th century, mail order marketing has attracted start-up companies and local entrepreneurs who recognized opportunities for expansion into a national marketplace. Direct marketers have been able to sell to this large market despite limited resources, few employees, and locations remote from urban centers.

DMA, a not-for-profit corporation, is the oldest and largest trade association representing individuals and companies engaged in mail order marketing and advertising. DMA has over 3,200 members located in all fifty states and forty foreign countries. The majority of DMA's members are small businesses. Approximately 85% of DMA's members have annual sales of $10 million or less; approximately 20% employ fewer than 4 people,

---

1 Pursuant to Florida Rule of Appellate Procedure 9.370, the parties sought and obtained leave from the Supreme Court of Florida for DMA to appear, by brief only, as amicus curiae. Throughout this brief, the Petitioners, the Florida Department of Revenue and its Executive Director, are collectively referred to as the "Department." References to the record appear as "R." followed by a page designation. The Department's brief is cited as "DOR Br.," followed by a page designation.

including "mom and pop" operations that prepare their catalogs on kitchen tabletops and in home offices.

B. **DMA's Interest In This Case**

DMA's members have relied on a long line of United States Supreme Court decisions, most recently Quill v. North Dakota, 112 S.Ct. 1904 (1992), in which the Court held that states may not impose use tax collection duties on out-of-state retailers unless those companies have a "substantial nexus" with the taxing state. The Supreme Court has consistently held that both the nature and extent of a company's in-state presence are critical to determining whether a substantial nexus exists. Scripto, Inc. v. Carson, 362 U.S. 207, 211-12 (1960)(emphasis added). Moreover, it has soundly rejected attempts by state tax authorities to replace the substantial nexus test with a slightest presence test. See, e.g., National Geographic Society v. Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977).

Despite this clear constitutional precedent, some state revenue departments continue to target DMA members as part of an aggressive campaign to erode the "substantial nexus" standard. Here, the Florida Supreme Court is asked to adopt a new Commerce Clause standard which would hold that any physical presence in the taxing state, "without any reference whatsoever to the length of time in the state," subjects a direct marketer to sales and use tax collection obligations on all of its mail order sales to its residents. (DOR Br. at 14 (emphasis in original)). "It matters not," according to the Department, whether the visit lasts for "6 hours," or for "3 seconds or 3 days." (DOR Br. at 38).

Court approval of the Department's "trip wire" nexus test would be a devastating blow to DMA's members and would undermine both the objectives and precedents of Commerce Clause jurisprudence. As the United States Supreme Court recognized in Quill, if one state succeeds in weakening the "substantial nexus" rule by imposing use tax collection obligations on an out-of-state retailer, "similar obligations might be imposed by the Nation's 6,000-plus [sales and use tax] jurisdictions," forcing direct marketers to cope with the "many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements [which] could entangle [a mail order company] in a virtual welter of complicated obligations." 112 S.Ct. at 1913 n.6 (citation omitted). The compliance burdens, which would not be shared by local merchants, would be staggering. Faced with tax collection obligations on behalf of states, counties and municipalities across the country, DMA's smaller members might not survive.

In addition, the Department's new rule could--and likely would--be enforced retroactively by state revenue departments (as the Florida Department of Revenue is attempting to do in this case), creating the specter of massive back tax assessments against DMA's members. The settled expectations protected by Quill would be shattered.[2]

II. STATEMENT OF THE CASE AND FACTS

A. Proceedings Below

This case involves a "use tax" assessment against Share in the amount of $77,933.98. Share, the Department contended, should have collected these taxes from its Florida mail order customers. Share filed an action in the Circuit Court seeking a declaration that the assessment was unconstitutional. (R. 47).

The Circuit Court, after holding an evidentiary hearing, ruled in favor of Share, concluding that the Department's attempt to impose use tax collection and remittance obligations on Share violated the Constitution's Commerce Clause. "The display of its products by Share during three days at a seminar," the Circuit Court concluded, "is not enough to create a 'substantial nexus' so as to allow the imposition of a sales tax against all future mail order sales made within the State of Florida." (R. 112).

---

[2] As the Quill Court explained, the "substantial nexus" test "encourages settled expectations and, in doing so, fosters investment by businesses and individuals." 112 S.Ct. at 1915. "Indeed," the majority wrote, "it is not unlikely that the mail order industry's dramatic growth over the last quarter-century is due in part to the bright-line exemption from state taxation" embodied in the substantial nexus rule. Id. If the Department's position were adopted, companies that organized their operations in reliance on National Bellas Hess and Quill would suddenly face large and unexpected tax liabilities far out of proportion to their limited presence in the taxing state. Quill Corporation v. North Dakota, 112 S.Ct. 1904 (1992); National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967).

The decision of the Circuit Court was upheld by the Court of Appeal, First District, which certified the following question to the Court:

> Whether, under the facts of this case, 'substantial nexus' within the meaning set forth by the United States Supreme Court in Quill Corporation v. North Dakota, 504 U.S. 298 (1992), and National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), exists which would permit Florida to require Share to collect sales and use taxes on all goods sold to Florida residents?

(R. 106, 116; 20 Fla.L.Weekly D1911 (Fla. 1st DCA Aug. 21, 1995).

B. The Facts

While the Statement of Facts is usually left to the parties, the Department presents in its brief "facts" which are contrary to those found by the trial court. For example, the Department states that employees of a Texas corporation known as Parker Chiropractic Resource Foundation (or "PCRF") "did participate in the solicitation and sale of Share's product in Florida." (DOR Br. at 7). The Circuit Court, to the contrary, expressly found that the PCRF employees "merely collected money from paying customers, and did not solicit further customers while in the state." In fact, the Circuit Court found that PCRF employees "did nothing to further Share's market presence within the State of Florida," and engaged in "no 'exploitation of the consumer market' in Florida." It is noteworthy that there are an absence of references to the Circuit Court's factual findings in the Department's brief.

After an evidentiary hearing, the Circuit Court made the following factual findings concerning Share:

1. **<u>Share's Operations</u>**

Share sells chiropractic supplies by mail order to doctors and health care providers across the United States, as well as in Canada, Mexico, Europe and Australia. (Judgment at R. 153, 155, 156). Share sends its catalogs and fliers to persons on mailing lists acquired from medical associations and other sources. (R. 155, 156). From December 1, 1985 through November 30, 1990, Share's total nationwide gross sales averaged only a little over $3 million per year. (R. 156). Aside from three days per year participation in a Florida seminar in 1986, 1987, 1988 and 1989, Share had no presence in the State of Florida. (R. 153). Share did not attend a Florida seminar in 1990, the final year covered by the use tax assessment. (R. 81).

2. **<u>The Seminars</u>**

During the assessment period, from 1985 through 1990, Share participated in four educational seminars for chiropractors which were held in Florida. (R. 81, 158). Each of the four seminars, which are neither scheduled nor organized by Share, lasted three days. (R. 157). The seminars were scheduled for and held in November in order to attract chiropractors practicing in the northeastern United States and Canada to Florida; consequently, only 16% of the chiropractors attending the seminars were from Florida. (R. 165, 169).

During the three days each year when it participated in the seminars, Share sold some of its products to chiropractors attending the seminars. (R. 158). Share collected and remitted the Florida sales tax in connection with all sales made at the four seminars, an amount averaging $7,855.98 per year. (R. 81). As the Circuit Court found, Share did not attend these seminars to build or exploit a Florida market. (R. 114). Rather, it understood and expected that, like most professional and trade events held in Florida, the seminars would attract chiropractors from across the nation. (R. 114). "Share," the Circuit Court found, "did not create a customer base in Florida during its presence at such seminar[s]." (R. 114).

III. SUMMARY OF ARGUMENT

The question for this Court is whether it will adopt the Department's "trip wire" test for determining nexus, in lieu of the substantial nexus test articulated by the United States Supreme Court. No reported case has ever upheld a finding of substantial nexus on facts as thin as those presented in the instant litigation; the Department no doubt chose Share as a "test case" to dramatically expand the scope of its taxing power.

Under the Department's test, any small business which participates in a Florida trade show, seminar or conference, no matter how briefly, would be trapped in Florida's taxing web. Dipping "one toe" in Florida, the Department suggests, is enough. (DOR Br. at 24 n. 15). This, DMA submits, is another attempt to replace substantial nexus with a "slightest presence" test, something which the Supreme Court considered and rejected years ago. National Geographic Society v. Cal. Bd. of Equalization, 430 U.S. 551, 556 (1977).

DMA respectfully requests that this Court decline the Department's invitation to adopt a radically new and lower-threshold nexus standard. Instead, the decisions of the Circuit Court and Court of Appeal should be affirmed for the following reasons.

First, the "substantial nexus" rule was never intended to create tax jurisdiction on the basis of limited and infrequent sojourns into the taxing state--here, one three-day visit during certain years. No substantial nexus case has rested on such a brief presence. The case which the United States Supreme Court described as representing the "furthest reach" of a state's taxing power, Scripto, Inc. v. Carson, 362 U.S. 207 (1960), involved an out-of-state company with a team of ten commissioned sales brokers conducting continuous in-state solicitation on its behalf. Scripto's ongoing and successful efforts to establish and exploit a Florida market for its products, through the continuous presence of a commissioned sales force, is a far cry from Share's sporadic attendance at a Florida seminar.

Second, the substantial nexus standard was only intended to extend the state's taxing power to those companies who maintain an in-state presence "significantly associated with the taxpayer's ability to establish and maintain a market in [the] state." Tyler Pipe Industries v. Wash. State Dept. of Revenue, 107 S.Ct. 2810, 2821 (1987). Here, the Circuit Court, acting as factfinder, specifically found that Share did not exploit the Florida market or "create a customer base in Florida" as a result of its three-day participation in the Florida seminars. (R. 112).

Third, the Supreme Court has held that Congress is best suited to balance the states' interest in greater tax revenue with the needs of the national marketplace. Indeed, if the Department's "slightest presence" test were adopted by this Court, the national repercussions would be sudden and severe. If Florida tax administrators can lower the "substantial nexus" threshold, so too can tax administrators in any or all of the 6000-plus taxing jurisdictions in the United States. Direct marketers would not only face a wide array of state and local tax rates, but would be confronted with a morass of differing product exemptions and excluded transactions, as well as a variety of reporting and record-keeping requirements. In addition, they would be subject to time-consuming and expensive audits by all of these taxing authorities. Direct marketers across the country would be exposed to retroactive tax assessments for prior years' sales in the same manner as the Department has done in this case.

Finally, upholding the Department's position would send a chilling signal to trade associations like DMA which may be considering whether to hold seminars, trade shows and conventions in Florida, as well as to individual companies deciding whether to participate in such events. For some companies, the risk of new tax obligations and potential liabilities would far outweigh the benefits of attending such events in Florida. Indeed, as the Department itself notes, a large number of companies fall precisely into this new tax opportunity category--their only contacts with Florida occur at isolated trade shows, seminars and conventions. (DOR Br. at 4 ("[a]ffirming the decision below would immunize from Florida tax collection all those foreign vendors who physically come into Florida to exploit the Florida market at trade shows, fairs and conventions")).

IV. ARGUMENT

Share had a limited presence in Florida once each year for four years. Each visit by Share lasted no more than three days. Share personnel came to Florida each time for the sole purpose of participating in a single educational seminar. The seminars Share attended were held in November to attract chiropractors from the colder climates in the northeastern United States and Canada. These seminars were not scheduled or marketed to attract Florida chiropractors. Approximately 84% of the seminar attendees lived outside of Florida.

At each seminar, Share sold some of its products. As the Department admits in its brief, "84% of the purchasers [at the seminars] lived permanently outside Florida at the time they purchased Share's products in Florida." (DOR Br. at 37.) These sales represented just a sliver of Share's overall national sales. As a result, a very small number of sales at the seminar were to Florida residents--no more than 0.7% of the company's gross sales.[3] The lack of Florida buyers was not fortuitous. These were national, professional seminars intended to bring chiropractors from around the country to one location. Share, in a good faith effort to comply with Florida law, collected and remitted the Florida sales tax on all of its seminar sales. Ironically, it was Share's payment of these taxes which triggered an audit and the subsequent use tax assessment.

According to the Department, a physical presence in the state "for 6 hours" or for "3 seconds or for 3 days" renders a direct marketer liable for use tax collection and remittance obligations on <u>all</u> of its mail order sales to Florida residents prior to and after the visits. (DOR Br. at 38). DMA respectfully submits that this dismissive view of the Commerce Clause's substantial nexus rule should be rejected for a number of reasons.

A. <u>The United States Supreme Court Has Stressed That Both The Nature And Extent Of In-State Contacts Are Critical To Determining Whether Substantial Nexus Exists</u>

The Department repeatedly urges that <u>any</u> in-state presence, regardless of how fleeting, creates a substantial nexus--which not only sticks with a mail order company for years, but also

---

3 While the total seminar sales over four years (approximately $600,000) accounted for 4.6% of Share's total gross sales, the sales to Florida residents for all four years combined were just 16% of $600,000--or 0.7% of the company's total gross sales.

reaches into the past to create retroactive liability.[4] The Department can point to no reported case supporting such a thesis. In reality, the United States Supreme Court has clearly and repeatedly held that both the nature and extent of a direct marketer's in-state presence are relevant to determining if the substantial nexus threshold has been crossed, and that both substantiality and continuity are also critical factors. Here, these factors are missing.

1. Substantial Nexus Has Never Been Found Based Upon In-State Presence As Minimal As That of Share

For the Department, the "extent" of a nonresident company's in-state presence is irrelevant. A single meeting in an airport will do. (DOR Br. at 38). A three second or six hour presence, the Department believes, is sufficient to set a tax hook. (Id.). This approach, however, flies in the face of Supreme Court precedent.

In its seminal decision in National Geographic Society v. Cal. Bd. of Equalization, the Supreme Court clearly rejected California's effort to replace substantial nexus with a "slightest presence" test:

> Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's 'slightest presence' standard of constitutional

---

4 For example, Share attended its first seminar in November of 1986; yet, the tax assessment covers the preceding twelve months. Likewise, the assessment covers 1990, a year in which Share did not attend a seminar at all. There is no legal precedent, in Florida or elsewhere, for concluding that a three-day presence in a single month creates nexus for the entire year (both before and after the visit).

> nexus. Appellant's maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually ... establish a much more substantial presence than the expression 'slightest presence' connotes. Our affirmance thus rests upon our conclusion that appellant's maintenance of the two offices in California and activities there establish a relationship or 'nexus' between the Society and the State that renders constitutional the obligations imposed upon appellant ...

430 U.S. at 556.

More recently, the Supreme Court observed that the furthest extension of the state's power to tax was recognized in Scripto, Inc. v. Carson, 362 U.S. 207 (1970). Quill Corp. v. North Dakota, 112 S.Ct. 1904, 1910 (1992). Accord National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753, 757 (1967)("the furthest constitutional reach to date ... is Scripto ..."). In Scripto, the taxpayer had ten sales brokers who resided in Florida while "conducting continuous in-state solicitation" on Scripto's behalf. 362 U.S. at 211 (emphasis added). Each of the ten were "actively engaged in Florida as a representative of Scripto for the purpose of attracting, soliciting and obtaining Florida customers," operated under detailed contracts and established a Florida market for Scripto's products. 362 U.S. at 209-11.

In Scripto, the Supreme Court was clear: "The test [for substantial nexus] is simply the nature and extent of the activities of the appellant in Florida." 362 U.S. at 211-12 (emphasis added). The importance of the "extent" prong of this test is evidenced by a number of other decisions besides Scripto and National Geographic. For example, in Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954), occasional visits to the state by Miller's employees to deliver goods to customers did not create nexus. In Standard Pressed Steel Co. v. Washington Dep't of Revenue, 419 U.S. 560, 561 (1975), the taxpayer had a full-time employee residing in Washington and operating out of a home office in that state who called on in-state customers. That employee was assisted by a "group" of the taxpayer's engineers who visited Washington approximately three days out of every six weeks. The taxpayer in Standard also maintained and directly paid for an answering service in Washington.

Also, in Tyler Pipe Industries, Inc. v. Washington Dep't of Revenue, 483 U.S. 232, 250 (1987), the Supreme Court found nexus on the basis of in-state sales representatives who acted "daily on behalf of Tyler Pipe in calling on its customers and soliciting orders." Based upon such activities, the United States Supreme Court agreed with the lower court that "[t]he activities of Tyler Pipe's agents in Washington have been substantial." Id. (emphasis added). No such continuous activity is present in the current case.

Finally, in General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944), a case in which the Department places great stock, a company conducted all of its business by sending salesmen into Iowa to solicit orders. At issue was whether the state could compel General Trading to collect the state use tax on sales made by these salesmen. In other words, General Trading does not stand for the proposition that a "3 second," "6 hour" or "3 day" visit creates a substantial nexus. See Miller Bros. Co., 340 U.S. at 346 (General Trading "was the case of an out-of-state merchant entering the taxing state through travelling sales agents to conduct continuous local solicitation")(emphasis added).

State courts have agreed. In L.L. Bean, Inc. v. Pennsylvania. Dept. of Revenue, 516 A.2d 820, 101 Pa.Cmwlth. 435 (1986), for example, a direct marketer occasionally sent employees into the state for various purposes, including "to improve [the] sale and delivery of merchandise." 516 A.2d at 825. The court declined to find a substantial nexus.

In The Orvis Company, Inc. v. Tax Appeals Tribunal, a case recently decided by the New York Court of Appeals, the nonresident company had nexus because it repeatedly sent salespersons into the state to establish and maintain its wholesale business in New York. 630 N.Y.S.2d 680, 654 N.E.2d 945 (1995). The facts showed a "systematic visitation" by Orvis "to all of its as many as 19 wholesale customers on the average of four times a year." 630 N.Y.S.2d at 688. The court of appeals upheld a finding of substantial nexus because Orvis' wholesale business "was generally accomplished by means of its sales personnel's direct solicitation of retailers through visits to their stores in New York ..." 630 N.Y.S.2d at 687.

In a companion case to Orvis, Vermont Information Processing, Inc. v. Tax Appeals Tribunal, 630 N.Y.S.2d 680, 654

N.E.2d 945 (1995), the New York Court of Appeals upheld a use tax assessment against a company ("VIP") which sent employees into New York on at least forty-one occasions over three years to provide after-order services to its customers, and solicited new customers using promises of in-state training and services. The New York court concluded that VIP's visits "significantly contributed to VIP's ability to establish and maintain a market for computer hardware and software it sold in New York." 630 N.Y.S.2d at 688.

2. <u>The "Substantial Nexus" Test Reaches Nonresident Companies That Are Establishing And Maintaining An In-State Market Through Their In-State Presence</u>

The "nature" of Share's visits to Florida underscore that this is not a case of substantial nexus. In articulating the purpose underlying the "substantial nexus" standard, the United States Supreme Court explained that another "crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market <u>in this state</u> for the sales." <u>Tyler Pipe Industries v. Wash. State Dept. of Revenue</u>, 483 U.S. 251, 107 S.Ct. 2810, 2821 (1987)(citation omitted; emphasis added). <u>See</u> <u>The Orvis Company, Inc.</u>, <u>supra</u>; <u>Vermont Information Processing, Inc.</u>, <u>supra</u> (finding that the in-state presence of these companies established an in-state market for their goods).

Here, the Circuit Court found, after hearing the evidence, that Share's three-day seminar attendance bore little or no relationship to the company's establishment or maintenance of a market in Florida. The evidence showed, according to the Circuit Court, that Share did not create a customer base in Florida during its presence at such seminars and did not exploit the Florida market by virtue of its limited in-state activities. Indeed, this case presents the antitheses of an intent to exploit the Florida market. These seminars were intended to reach non-residents, not Floridians, and Share participated in the seminars to reach a national, not local, audience. These findings--which have not been challenged on appeal--have ample support in the record.[5]

This case, therefore, is a far cry from Standard Pressed Steel, Scripto, Tyler Pipe, Orvis and Vermont Information, where it was undisputed that repeated in-state sojourns played a highly significant, if not essential, role in establishing the company's in-state business.

B. If Upheld, The Department's Nexus Standard Would Have Dramatic And Negative Impact Both Within And Without The State

While the Department's test fails to comport with the "substantial nexus" test and should be rejected for that reason

---

[5] Using the evidence contained in the record--that only 16% of seminar attendees were from Florida, that seminar sales amounted to merely 4.6% of the company's gross sales, and that seminar sales by Share averaged $147,500 per year--the Circuit Court had grounds to conclude that seminar sales to Florida residents averaged $23,600 for each of the four seminars (16% of sales at each seminar). This figure represents 0.7% of the company's annual gross sales of $3,000,000.

alone, its imposition would also do violence to the underlying economic and commercial rights and interests which the Commerce Clause was intended to protect. Not only would the Department's "slightest presence" test have a dramatic and substantial effect on interstate commerce and the rights of small mail order houses, it would place at risk Florida's role as a major site for national meetings, conventions, trade shows and seminars.

1. **If The Department Can Employ A "Trip Wire" Nexus Test, So Too Can Other States**

The rationale behind the Department's desire to impose use tax collection obligations on nonresident direct marketers like Share is clear. However, the Department, in its eagerness to push its taxing jurisdiction to the absolute limit, gives short shrift to the national impact of "3 second" (or "6 hour" or "3 day") nexus rule. If Florida can adopt this rule, so too can every other state.

If a fleeting and insubstantial presence is sufficient to create "substantial nexus," the costs and administrative burdens of use tax collection on DMA's members will be extreme. Such compliance responsibilities will be especially burdensome on direct marketers when compared to in-state, point-of-sale retailers. In-state retailers, for example, need only collect a single tax rate based upon the location of their business. Direct marketers, in contrast, would need to familiarize themselves with the tax rates and regulations of 6,000-plus state and local sales and use tax jurisdictions. They would have to know and apply the vast number of inconsistent product exemptions for each state, as well as state-by-state provisions regarding which customers must pay the tax.[6]

As commentators have explained, "disparities in state and local taxation may have the same effects on business and personal decision-making as an outright tariff at the jurisdictional boundary." Shaviro, "An Economic and Political Look at Federalism In Taxation," 90 Mich. L. Rev. 895, 896 (1992).[7] "The compliance costs alone of having multiple taxing jurisdictions are great enough, according to one recent commentator, to constitute 'a drag on interstate trade almost as debilitating as the border restrictions our federal system was designed to prevent.'" Shaviro, supra, at 910 (quoting

---

[6] There is a great disparity among the states regarding tax exempt items. For example, Connecticut exempts "children's clothing" and clothing or footwear costing less than $75.00, but taxes clothing worn exclusively during sporting events. Conn. Gen. Stat. §§ 7204 176-130(26). New Jersey exempts clothing or footwear articles except those made with fur when fur is the component material of chief value. N.J. Admin. Code 18:25-6 Reg. 18:24-6.1. Minnesota exempts clothing, but not footwear or products made of fur if the value of the fur is more than three times the value of the next most valuable component. Minn. Stat. § 297A.25(8). Massachusetts exempts clothing and footwear that costs up to $175.00, as well as special clothing or footwear designed primarily for athletic activity or protective use. Mass. Gen.L.Ch. 64H(k) § 6. Rhode Island exempts clothing and footwear, except special clothing and footwear. R.I. Laws § 44-18-30(cc). Each state also has its own set of rules exempting certain persons from the tax, including schools, charitable associations, railroad companies and many others.

[7] Professor Shaviro's article was cited by the majority in Quill in its analysis of the potentially severe impact on direct marketers if the "substantial nexus" rule was weakened or eliminated. 112 S.Ct. at 1913.

Henderson, Gordon D., "What We Can Do About What's Wrong With the Tax Law," 49 Tax Notes 1349, 1352 (1990))(emphasis added).

2. Congress Has Recognized The Danger of Adopting the Department's Nexus Test Without Carefully Limiting Its Impact On Smaller Direct Marketers Like Share

In upholding the substantial nexus test, the United States Supreme Court in Quill deferred to the United States Congress to balance local interests with the interests of the national marketplace. "Congress has the power to protect interstate commerce from intolerable or even undesirable burdens," as well as to the state's desire for increased tax revenues. Quill, 112 S.Ct. at 1916.

Over the years, Congress has considered a number of bills to address these competing interests. Each bill has included a number of provisions to protect smaller companies, like Share, from the enormous costs associated with use tax collection and remittance. Indeed, the Advisory Commission on Intergovernmental Relations ("ACIR"), a Congressionally established agency whose mandate is to represent the interests of state and local governments and the public, has recommended that any federal legislation include (1) a de minimis exemption excluding companies with nationwide sales of less than $12.5 million per year; (2) a single tax rate within each state; and (3) amnesty provisions to protect companies from indeterminate liabilities for back taxes.[8] ACIR, State and Local Taxation of Out-of-State Mail Order Sales (April 1986).

Bills thus far considered by Congress have contained some or all of the protective features recommended by the ACIR. Such legislation (Senate Bill S. 545) is now pending in Congress. To this date, federal legislation has not been enacted primarily because Congress has concluded that the proposed safeguards for mail order companies have been insufficient. For example, in 1988, after use tax collection bills were introduced, various states and municipalities voiced opposition to a uniform tax rate within each state, and instead lobbied Congress that mail order companies be held responsible for collection at the rate for each separate state and local jurisdiction that has a sales and use tax. Congress concluded that multifarious state and local tax rates placed too great a drag on interstate commerce.[9]

---

8 As the Supreme Court observed in Quill:

> An overruling of Bellas Hess might [also] raise thorny questions concerning the retroactive application of those use taxes and might trigger substantial unanticipated liability for mail-order houses. The precise allocation of such burdens is better resolved by Congress than by this Court.

112 S.Ct. at 1916 n. 10.

9 Indeed, Congressman Jack Brooks, a sponsor of one such bill, and the then-Chairman of the subcommittee considering the legislation, noted that the position of the state and local governments was unacceptable since it required direct marketers to collect taxes "in every county and city and each State ... and it is impractical to expect even the computerized mail order houses to figure out the tax and the volume in every county and every city in the State of Texas, much less every city in (continued...)

A finding by the Florida Supreme Court that Share has "substantial nexus" would contain none of the measures necessary to ameliorate the substantial burdens identified and addressed by the ACIR in its legislative recommendations. As one commentator has observed:

> In the absence of congressional action, compliance burdens associated with sales tax collections in multiple jurisdictions would be particularly burdensome for the smaller out-of-state seller, which presumably would find it necessary to be familiar with the tax laws in all the states and local taxing jurisdictions where it makes sales. In view of the multiplicity of use tax rules in different state and local governments, the mail order seller would be saddled with high compliance cost burdens if it is required to comply with the differing tax code provisions for forty-five states, the District of Columbia, and between 6,400 and 7,000 local governments that now impose such taxes. In addition to rate differentials, exempt items and taxed buyers vary a great deal from state to state.

P. Hartman, "Collection of Use Tax on Out-of-State Mail-Order Sales," 39 Vand. L. Rev. 993, 1028 (1986).[10]

---

[9](...continued) the nation." Hearings on H.R. 1242, H.R. 1891, and H.R. 3521 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary, 100th Cong., 2d Sess. at 389 (1988).

[10] What makes the Department's position all the more unreasonable is that there are other means by which it could collect the use taxes it has now assessed against Share. These taxes are owed, in the first instance, by Florida residents, not Share. A number of states, including Maine and New Jersey, collect use taxes from consumers by including separate use tax returns or "line items" on personal income tax returns. Maine's income tax return has a specific line for use taxes. If a taxpayer leaves it blank, the taxpayer is automatically assessed a use tax based upon a percentage of his or her adjusted gross income. The Maine program has resulted in the collection of millions of dollars in previously uncollected use taxes. 36 Maine Revised Statutes Annotated ("M.R.S.A") § 1861-A.

3. <u>Lowering The Nexus Threshold Could Jeopardize Florida's Lucrative Convention, Trade Show And Seminar Industry</u>

Seminars, conventions and trade shows, by their very nature, are national, or even international, events. They are not organized, promoted or attended with local markets in mind. It is inappropriate, from both a constitutional and practical sense, to treat trade show participation as the hook to establish liability for state and local taxes.

Florida's economy thrives, in part, on a vigorous convention, seminar and trade show industry. State and regional agencies promote Florida as a commercial cross-roads and a preferred site for national meetings and conventions. In 1994 alone, Orlando hosted 14,952 meetings and trade shows, "bringing an estimated 2,085,519 delegates to the area and resulting in an economic impact of $1,949,792,290." (Orlando/Orange County Convention and Visitors Bureau, Inc. "1994 Convention Delegate Business Survey Report," April 1995 ("Over the past six years, the economic impact of the convention business to this community has increased by 118%, underscoring the importance of this visitor segment.")).

Orlando was not alone. Palm Beach reported $101,631,251.64 in convention hotel expenditures for the year 1994-95; for the same period, Miami's convention hotel expenditures were over $600,000,000. (Sunbelt Research Associates, Inc., Palm Beach Hotel Managers Survey, September 1995; Miami Visitors Services Convention Information, May 3, 1995). Remarkably, these figures do <u>not</u> take into account general economic impact of these events on local restaurants, sporting facilities, boating rentals, tours and other area attractions.

If the Department's nexus standard is adopted, a chilling signal would be sent to trade associations and other organizations that hold annual conventions, seminars and trade shows. Suddenly, what might have been an easy decision--to hold an annual meeting or convention in sunny Florida--becomes mired in concern over the tax consequences for member businesses and vendors. Out-of-state businesses, vendors and trade associations might avoid these events altogether. This result is inconsistent with the Commerce Clause and the protection it affords to interstate commerce:

> Functionally and commercially, telling out-of-state businesses that they dare not dip their toes within New York's borders without incurring New York taxes is not the teaching of the United States Supreme Court cases. Rather, deterring interstate traffic in such respects by taxation is precisely what is forbidden under the mantle of the Commerce Clause.

Orvis, 630 N.Y.S.2d at 689 (Bellacosa, J., dissenting).

V. CONCLUSION

This case presents a paradigmatic example of one state's effort to replace Quill's "substantial nexus" standard with a "slightest presence" test--an approach which was rejected by the United States Supreme Court in National Geographic Society v. California Bd.of Equalization, 430 U.S. 551 (1977). Indeed, both the "nature" and "extent" of Share's visits to Florida are less "substantial" than in *any* previous case upholding a finding of constitutional nexus. For all the reasons set forth above, DMA respectfully requests that the Florida Supreme Court affirm the decisions of the Circuit Court and Court of Appeal.

George S. Isaacson
Martin I. Eisenstein
David W. Bertoni
BRANN & ISAACSON
184 Main Street
P.O. Box 3070
Lewiston, ME 04243-3070
(207) 786-3566
On Motion To Appear Pro Hac Vice

Stephen M. Carlisle
CARLISLE & LECATES
415 S.E. 12th Street
Fort Lauderdale, FL 33316
(305) 764-4000
FBN: 708313

Attorneys for Direct Marketing Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this seventh day of December, 1995 to: ERIC TAYLOR and Elizabeth T. Bradshaw, Assistant Attorneys General, Offices of Robert A. Butterworth, Attorney General, Department of Legal Affairs, The Capitol-Tax Section, Tallahassee, FL, 32399-1050, and Lisa R. Daugherty, Davis, Scott, Weber & Edwards, 66 West Flagler Street, 11th Floor, Miami, FL, 33130.

BY: ______________________

DAVID W. BERTONI