IN THE SUPREME COURT OF FLORIDA

THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, a State Agency, and J. THOMAS HERNDON, Executive Director of the Department of Revenue, State of Florida,

Petitioners,

vs.

SHARE INTERNATIONAL, INC.,

Respondent.
_____/

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CASE NO. 86,481

Appeal from the 1st District Court of Appeals In and for the State of Florida

RESPONDENT'S ANSWER BRIEF

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PREFACE

The Petitioners in this case are The Department of Revenue of the State of Florida, and its Executive Director J. Thomas Herndon, referred to collectively herein as "the State," "the Department," "Plaintiffs" or "Petitioners." The Respondent is Share International, Inc., a Texas Corporation, which will be referred to herein as "Share," "Defendant" or "Respondent."

References or citations to the record will be R-#, with the number identifying the exact page of same. References to Petitioners' appendix will be noted as P-App-#-#, with the first number referencing the item number of the Appendix, and the second number referencing the page number of the item referenced.

QUESTIONS PRESENTED

1. WHETHER THE LOWER COURT PROPERLY CONCLUDED THAT SHARE'S PRESENCE IN THE STATE OF FLORIDA AT AN ANNUAL SEMINAR IS NOT ENOUGH TO CONSTITUTE A "SUBSTANTIAL NEXUS" SO AS TO ALLOW THE IMPOSITION OF TAXES AGAINST ALL FUTURE MAIL ORDER SALES MADE TO RESIDENTS WITHIN THE STATE?

   A. Must A Non-Resident Vendor Have a Substantial Nexus With the Taxing State Before the Non-Resident Will be Required to Collect and Remit Taxes on Sales Made to Residents Within the State?

   B. Does Share's Presence in the State of Florida For Approximately Three Days Each Year Create a Substantial Nexus to Support the Assessment of Taxes Against its Future Mail Order Sales Made to Residents Within the State?

2. IN THE EVENT THAT THIS COURT DISAGREES WITH THE LOWER COURTS THAT THERE WAS NO SUBSTANTIAL NEXUS, WHETHER EACH MONTH IS A SEPARATE TAX PERIOD FOR PURPOSES OF DETERMINING WHETHER THERE HAS BEEN A "SUBSTANTIAL NEXUS" SO AS TO ALLOW FOR THE ASSESSMENT OF TAXES?

STATEMENT OF THE CASE AND FACTS

This case is before this Court on a question certified by the First District Court of Appeal as a matter of great public importance:

> 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?

The appellate court certified the question in its decision dated August 21, 1995 affirming the trial court's final judgment which held that the Department's tax assessment against Share's mail order sales was unconstitutional as violative of the United States Commerce Clause (R-106-116). Florida Dept. of Revenue v. Share International, Inc., 20 Fla.L.Weekly D1911 (Fla. 1st DCA Aug. 21, 1995). The initial case arose when the Department conducted an audit of Share's books and records and wrongfully concluded that Share's annual presence in Florida for approximately three days during the years 1986 through 1989 constituted sufficient presence to tax all future mail order sales made by Share to residents within the State (R-47). The Department thereafter issued a tax assessment against Share in the amount of $77,933.98, which precipitated the filing of an action by Share seeking declaratory relief that the assessment was unconstitutional (R-47).

A. Factual Background

The Respondent Share is a Texas corporation which engages in the business of manufacturing and distributing chiropractic supplies consisting primarily of business forms and educational materials (R-159-160). Share is a small, privately owned company incorporated in 1961 whose sole shareholders are Dr. James William Parker and his son, Dr. William Karl Parker (R-153-199). Dr. James Parker is also the President of Share, and Dr. Karl Parker is the Executive Vice President of the corporation (R-153-154). The only other officer of the corporation is Doris Schrepel, who is the secretary (Id.). Share has one paid employee, Dr. James Parker (R-154).

Share sells its products primarily through direct mail solicitation from its offices in Ft. Worth, Texas (R-153). Share has no offices, agents, officers or employees in the State of Florida, or in any other state (Id.). In order to facilitate the sale of its products, Share mails product catalogs to doctors and other health care entities on a periodic basis (R-155). Share also mails occasional fliers to its customers (R-155). During the period from December 1985 through November, 1990, Share mailed only one catalog to its customers, and approximately 12 fliers (Id.) Share does not utilize telemarketing or direct advertising to sell its products (R-208-209). The names of the doctors and health care entities which receive the catalogs are obtained by Share from various medical associations and from mailing lists purchased from many different sources (R-155-156). The vast majority of Share's

sales of its products are made through utilization of its catalog, and made directly through the mail solicitation process (R-156). The doctors and health care entities which purchase Share's products through the mail are located throughout the United States, including the State of Florida, as well as Canada, Mexico, Europe and Australia (R-155).

A small amount, or approximately four (4%) percent, of Share's sales each year result from products sold directly to physicians and doctors at seminars held in the State of Florida[1/] (R-158). The seminars are held and conducted by the Parker Chiropractic Resource Foundation ("the Parker Foundation"), a corporation whose sole shareholder and President is Dr. James W. Parker (R-157). Dr. Karl W. Parker is Vice President of the Parker Foundation (Id.). The Parker Foundation was formed in 1951 for the purpose of providing chiropractic doctors with educational information to assist them in better managing their practice (R-157-158; R-199). The Foundation is also a Texas corporation which conducts its business out of its offices in Fort Worth, Texas (R-157). The Parker Foundation has no employees, offices or agents in any other state, including Florida (R-157, R-182). Although operated by the same individuals, the Parker Foundation and Share are legally separate corporations which perform separate functions (R-199).

[1/] Share's annual gross sales average close to $3,000,000 per year (R-156). During 1986 through 1989, Share's gross sales were approximately $13 million (R-173). During these same years, only 4.6% of Share's gross sales, or $600,000.00, was attributable to products sold at the seminars (R-174).

During the years 1986, 1987, 1988 and 1989, the Parker Foundation held seminars in the State of Florida (hereinafter referred to as "the seminars") during the month of November (R-81). The State of Florida was chosen as the site for the seminars because of its warm climate which assisted the Foundation in attracting doctors from its target market in the Northeast (R-165). In fact, most of the attendees at the seminar during the years 1986-1989, or approximately 80% to 90%, were from states other than Florida (R-165-169). The seminars were conducted by Dr. James W. Parker. Dr. Karl Parker was also present at most of the seminars. No other employees or officers of Share were present within the State of Florida during the seminars.

The seminars conducted by the Parker Foundation would last approximately three (3) days, beginning on Thursday evening and ending on Sunday afternoon (R-157). The doctors and physicians in attendance at the seminars were from various states throughout the country, and had pre-registered pursuant to seminar brochures previously mailed out (R-188-190). The seminars were geared toward educating the physicians by providing them with practical chiropractic information that they could utilize in their practices. The seminars featured many well-known chiropractors, and offered classes on a variety of different subjects or topics (R-158-159). As part of the seminar, the Parker Foundation also offered for sale the chiropractic supplies and products manufactured by Share (R-156, R-170) These products and supplies were displayed in a separate room close to the classrooms, and

would be frequented by the doctors on an unsolicited basis throughout their stay at the seminar (R-170). No sales agents or employees of Share were present at the seminars to sell the products or solicit sales (R-170-171). Instead, the products were merely displayed on shelves or tables, with Parker Foundation employees operating cash registers to facilitate the transactions (R-170-171). Share paid the Parker Foundation an annual administrative fee for providing the services of these employees at the seminar, as well as other miscellaneous services that were performed throughout the year (R-154). The employees of Parker were paid on an hourly basis, and the wages earned by them were in no way connected to the amount of sales made at the seminar (R-109).

Many of the chiropractors present at the seminars in Florida were long-standing customers of Share, and had been purchasing products from Share for years through the catalog (R-188-190). Additionally, many of the chiropractors bought their annual supply of Share products while at the seminars (R-156). In fact, the products were displayed at the seminars as a service to the doctors so that they would not have to deal with the mail order process (R-156).

In 1986, $195,860.80 in products were sold at the seminars (R-81). In 1987, $150,951.80 in products were sold each year (Id.). In 1988, $118,263.50 were sold, and in 1989, $116,491.50 in products were sold (Id.). Share registered with the Department, and collected and paid taxes to the State of Florida for all of its

products sold during these years at the seminars (Id.). The taxes were paid by filing a monthly tax return with the State of Florida for November of each year in which a seminar was held in Florida (R-196). No seminar was held by the Parker Foundation in the State of Florida during the year 1990 (R-178). Share also did not display its products in the State during the year 1990 (Id.).

In November of 1990, the Appellant conducted an internal audit of Share's operations (R-82). The audit covered the period from December 1, 1985 through November 30, 1990 (Id.). During the audit, the Department found that Share had been selling through the mail its products to Florida residents and that sales tax was not being collected and paid on these sales. After the audit was concluded, the Department issued a tax assessment to Share in the amount of $77,933.98 for sales and use tax, plus interest and penalties (R-82). The assessment amount was calculated by the Department based on the additional sales made to Florida physicians through mail solicitation during the five years at issue. A formal protest was filed by Share, but the assessment was affirmed (Id.). Share thereafter filed its action for declaratory relief seeking to have the assessment declared unconstitutional.

B. Proceedings Below

A trial was conducted before the lower court whereat testimony of Dr. Karl Parker was presented on behalf of Share (R-33). The court, after hearing the testimony and argument of the parties, agreed with Share and held the assessment to be unconstitutional (R-105-116). Specifically, the lower court held that the display

of Share's products during three days at a seminar in Florida 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 (R-112; P-App-2-8). This conclusion was based upon the lower court's finding that Share had no offices in the State of Florida, or any employees or agents permanently residing within the State to continuously assist in the mail order sales (R-112; P-App-2-8). The trial court further found that the Parkers had come to the seminars each year to educate chiropractors, and to promote Share's products to these doctors (R-112; P-App-2-27). Because the doctors came from many different states, the trial court also found that the Parkers were not present at the seminars to solicit sales from Florida residents or doctors (R-115; P-App-3-27). Moreover, the lower court concluded that the Parker Foundation employees who assisted Share at the seminars merely collected money from paying customers and did nothing to further Share's market presence within the State or solicit further customers while in the State (R-114; P-App-2-10). Thus, based on all of these findings, the Court held that the tax assessment in the amount of $77,933.98 constituted an undue burden on interstate commerce and was therefore unconstitutional (R-115; P-App-2-11). The Department appealed the lower court's judgment.

The First District Court of Appeal affirmed the lower court's decision (P-App-3). The appellate court's decision resulted from its correct interpretation of the various Supreme Court decisions, including Quill Corp. v. North Dakota, 504 U.S. 298, 112 S.Ct.

1904, 119 L.Ed.2d 91 (1992), which in combination hold that a state's authority to tax a non-resident vendor's sales within the state require some type of "continuing presence in the state" for the purpose of solicitation of sales

(P-App-3-4-9). The appellate court, relying on the factual findings of the trial court, found that Share's brief presence at the seminars was not for the purpose of creating a customer base in Florida or exploiting the consumer market in that state (P-App-3-9). Therefore, the appellate court concluded that Share did not have a "substantial nexus" with the State of Florida so as to require it to collect and remit taxes to the Department on the mail-order sales made to Florida residents, and affirmed the decision of the trial court (P-App-3-10). In doing so, however, the District Court of Appeal also felt that the issues raised in this action are of great public importance and certified the question to be answered by this Court (P-App-3-11-12). The instant appeal resulted.[2/]

[2/] The Department also invokes the jurisdiction of this Court based upon Fla.R.App.P. 9.030(a)(1)(A)(ii) and Fla.R.App.P. 9.030(a)(2)(A)(iv).

SUMMARY OF THE ARGUMENT

The appellate court properly affirmed the trial court's judgment declaring as unconstitutional the Department's tax assessment against Share for sales made by direct mail solicitation to residents within Florida. Both decisions below were based upon the courts' interpretation of the recent United States Supreme Court decision in Quill Corp. v. North Dakota By and Through Heitkamp, 504 U.S. 298. The Quill case holds that a state's power to tax a non-resident vendor requires that the non-resident have a "substantial nexus" with the taxing state, or a continuing presence within the state for the purpose of soliciting the residents therein. Share's presence within the State of Florida for approximately three (3) days each year at a seminar does not create a "substantial nexus" with the State so as to allow the imposition of such taxes by the Department on all future mail order sales made to residents within Florida. First and foremost, as the trial court properly found, Share was not present within the State of Florida for the purpose of exploiting its consumer market. Rather, the seminars at which Share's products were displayed and sold were attended by doctors primarily from the Northeast who had been long-standing customers of the company. Moreover, the brief presence of Share's officers and its products at the seminars is not the type of continuing presence which satisfies the substantial nexus doctrine established by the case law. Therefore, the appellate court properly affirmed the lower court's decision holding the Department's tax assessment against Share as unconstitutional.

ARGUMENT

The Court of Appeal properly affirmed the trial court's judgment finding the Department's tax assessment unconstitutional because the facts of this case reflect that Share does not have a "substantial nexus" with the State of Florida. Under the law, a "substantial nexus" exists if the non-resident vendor has a continuing presence within the taxing state and is actively soliciting its residents. The trial court factually determined that Share was not present in the State of Florida for the purpose of soliciting its residents or to exploit the Florida market. Moreover, the presence of Share's officers and products within the State for three days at a seminar is not the continuing presence required under the law. Thus, the appellate court's decision affirming the trial court's judgment should be upheld.

I. THE APPELLATE COURT PROPERLY AFFIRMED THE TRIAL COURT'S JUDGMENT DECLARING UNCONSTITUTIONAL THE DEPARTMENT'S ASSESSMENT OF TAXES AGAINST SHARE'S MAIL ORDER SALES TO FLORIDA RESIDENTS AS VIOLATIVE OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION

The Supreme Court of the United States has recently declared that a non-resident vendor must have a "substantial nexus" with a taxing state before a tax may be imposed upon its sales made to residents within the taxing state. A "substantial nexus" exists if the non-resident vendor has a continuing presence within the taxing state and is actively soliciting its residents. The lower court determined that Share was not in the State of Florida to exploit the commercial market or its residents. In addition, the presence of Share's officers and products for three days was "slight" and

not continuing as required. Based upon these findings, as well as the applicable law, the District Court of Appeal properly upheld the trial court's judgment declaring the Department's tax assessment unconstitutional.

A. A Non-Resident Vendor Must Have a Substantial Nexus With the Taxing State Before the Non-Resident Will be Required to Collect and Remit Taxes on Sales Made to Residents Within the State

The issue in this case is very simple: when is a non-resident vendor required to collect and remit taxes on sales made to residents within the taxing state? The issue was squarely addressed in a recent decision by the Supreme Court of the United States. Quill Corp. v. North Dakota By and Through Heitkamp, 112 S.Ct. 1904 (1992). In the Quill case, the Supreme Court established a two-part test to utilize in determining whether a state has authority to impose taxes upon a foreign corporation's sales to residents within its borders. Quill, 112 S.Ct. 1904 (1992). First, the foreign corporation must have sufficient minimum contacts with the taxing state to ensure that the imposition of the sales tax does not offend the protections afforded by the Due Process Clause of the United States Constitution. Id., at 1909-1912; see also National Bellas Hess, Inc. v. Dept. of Revenue of the State of Illinois, 386 U.S. 753, 87 S.Ct. 1389, 1391, 18 L.Ed.2d 505 (1967).[3/] Second, and more

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[3/] Systematic and continuous solicitation of sales through the mail is the type of activity that will satisfy the requirements of the Due Process Clause. Quill, 112 S.Ct. at 1911. There is a question as to whether Share's mailing of (continued...)

importantly, the Supreme Court stated that the tax assessment must not violate the Commerce Clause of the Constitution. Quill, 112 S.Ct. at 1912. In order to satisfy the Commerce Clause, the Supreme Court declared that the corporation sought to be taxed must have a "substantial nexus" with the taxing state. Id. "Substantial nexus" exists only if the foreign corporation is present within the state conducting the activity sought to be taxed. Quill, 112 S.Ct. at 1916 (affirming doctrine and principles first established in the Bellas Hess decision). Moreover, the Supreme Court noted that the presence in the taxing state cannot be slight or based on insubstantial activity. Quill, 112 S.Ct. at 1914, n. 8 (citing National Geographic Soc. v. California Bd. of Equalization, 430 U.S. 551, 97 S.Ct. 1386, 51 L.Ed.2d 631 (1977). Rather, it must be shown that active solicitation is ongoing through the presence of a "small sales force, plant or office" within the state. Id., at 1914 (citing Scripto, Inc. v. Carson, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960)). In other words, the physical presence must be substantial. Id. The trial court properly held that Share's display of its goods for three days at a seminar is not enough to create a "substantial nexus" so as to

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[3]/(...continued)
one catalogue and 12 fliers during the five year period would be sufficient activity to satisfy the Due Process Clause. It is Share's position that these sporadic contacts with the State are not sufficient to satisfy the Due Process Clause. Thus, the tax assessment is invalid on this basis as well.

allow the imposition of a sales tax against all future mail order sales made within the State of Florida.[4/]

(1) The Teachings of Quill Support the Decisions of the Courts Below

The facts in Quill are very similar to those of the instant case. There, a Delaware office supply company solicited business or sales from North Dakota residents through catalogs, flyers, advertisements and telephone calls. Quill, an office supply company, had no offices or agents in North Dakota, and delivered its products into the state by mail or common carrier. North Dakota assessed a sales tax against Quill pursuant to its statute which required that all persons who engage in regular or systematic solicitation, or advertise within the state regularly, must collect and submit sales tax on all products sold as a result of such activity. Quill, 112 S.Ct. at 1908. Quill refused to pay the taxes, and an action was commenced by North Dakota for the alleged

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[4/] The Department's assessment must also be held unconstitutional because the statute upon which the Department bases its authority to impose the tax is unconstitutional on its face. The Department's assessment was made pursuant to the authority of Fla. Stat. § 212.0596(e) which reads:

> Every dealer . . . who makes a mail order sale is subject to the power of this state to levy and collect the tax imposed by this part when . . . [t]he dealer, by purposefully or systematically exploiting the market provided by this state by . . . direct mail advertising . . . creates a nexus within this state.

On its face, this statute is unconstitutional. As prohibited by Quill, the statute allows for the assessment of taxes against mail order activities conducted from outside the state without evidence of further presence in the state. This type of taxation clearly violates the protections afforded by the Commerce Clause and is therefore unconstitutional.

taxes and penalties owed. The state court upheld the tax assessment upon the basis that the delivery of "24 tons" of catalogs and flyers into the state each year was enough presence to create a "substantial nexus". Quill, 112 S.Ct. at 1909. Quill appealed.

The Supreme Court reversed the decision of the lower court. In doing so, the Court noted that although Quill's activities in the state were sufficient to satisfy the due process concerns of the Constitution, there was not a sufficient nexus to satisfy the Commerce Clause. 112 S.Ct. at 1911. In making this distinction, the Court explained that the purposes and concerns of the constitutional clauses were very distinct. The Due Process Clause prevents a state from collecting taxes against an entity without adequate notice or fair warning. Quill. 112 S.Ct. at 1913. The Commerce Clause, on the other hand, prevents a state from creating unnecessary burdens on interstate commerce through taxation. Id. Thus, although a corporation's activities may satisfy the due process concerns of the constitution, the same activities do not automatically satisfy the concerns of the Commerce Clause. Id. In other words, Quill's mass-mailing activities in the state created sufficient minimum contacts to satisfy the Due Process Clause. However, these same activities did not automatically satisfy the concerns of the Commerce Clause. Id. at 1913-1914 n. 7. To satisfy the Commerce Clause, the corporation must be "physically present" within the State. Id. The Court in Quill noted that "physical presence" in the state would turn on the "presence in the

taxing State of a small sales force, plant or office." Id. at 1914. Quill had no offices, employees or agents within the state. Thus, taxation of its mail order activities was unconstitutional. Id. at 1916.

The assessment of a tax against Share's mail order activities within Florida is likewise unconstitutional. Share conducts business out of its offices in Ft. Worth, Texas (R-153). It has no offices in the State of Florida, or any other state. Id. Share also has no employees or agents permanently residing within Florida to continuously assist in the sale of its products. Id. Instead, Share simply mails its catalogs and fliers to residents throughout the world, including those in Florida, to advertise its products and solicit sales. Unlike Quill, however, Share mailed only one catalog and approximately 12 fliers during the 4 year period at issue. From these mailings, Share made sales of approximately $13 million dollars during the four year period. Many of these sales were to Florida residents. It is the Department's position that Share owes taxes on these sales. However, as mandated by Quill, without a continuing physical presence in the State, the assessment of a tax against the mail order sales made to residents within Florida is unjustified and violates the Commerce Clause.

(2) The Department Improperly Interprets the Holding of Quill

In its Brief, the Department blatantly misinterprets the Quill decision and improperly cites the holding of the case. As acknowledged by the Department, the Quill decision reaffirms the doctrines and principles set forth in the Bellas Hess decision

rendered approximately 25 years earlier. The Bellas Hess decision, like the Quill decision, held that a vendor who does no more than communicate by mail or common carrier with residents of the taxing state cannot be required to collect and remit taxes on sales made to those residents. Bellas Hess, 87 S.Ct. at 1392; Quill, 112 S.Ct. at 1914. In other words, the Bellas Hess decision set forth a "bright-line" test requiring physical presence of the vendor before the obligation of collecting and remitting taxes could be imposed. Quill, 112 S.Ct. at 1914. By establishing the "bright-line" test, vendors who did no more than communicate by mail or common carrier fell within the "safe harbor" and would not have to concern themselves with whether their activities would be subject to taxation under some "flexible substantive approach." Id. The Court noted that the creation of this bright-line test for these taxpayers encourages "settled expectations and fosters investment...." Quill, 112 S.Ct. at 1915.

With some slight of hand, the Department seeks to convert or transform the "bright-line" test set forth in Bellas Hess and re-established in Quill as a "state-line" test. See Petitioners' Brief, at 23. In other words, the Department seeks to expand the holding in Quill to say that any conduct that does not fall within the safe harbor is automatically taxable. The Quill decision said no such thing. In fact, to reach this conclusion requires a huge leap of logic and a complete rejection of the plain language of the Quill decision. The Court in Quill, when discussing the bright-

line rule, specifically stated:

> Like other bright-line tests, the Bellas Hess rule appears artificial at its edges: whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office.

Quill, 112 S.Ct. at 1914 (emphasis added)(citations omitted). In addition, the Court also expressly rejected the notion that substantial nexus could be found based upon the "slightest presence." Id., at n. 8.[5/]

From the above cited language, it is clear that the United States Supreme Court never intended to impose the burdens of state taxation upon every foreign corporation who simply crosses the borders of the taxing state as suggested by the Department. Rather, the plain reading of the Court's decision reflects that the "bright-line" which was established creates settled expectations in those limited cases where the taxpayer only communicated by mail or common carrier. The decision, if settling anything further, indicated that presence of the taxpayer must be continuous or

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[5/] In Quill, the taxpayer licensed software to many of its customers in North Dakota. By virtue of the licensing arrangement, Quill remained the owner of the software. The Court in Quill ruled that the existence of this software in the State was "slight" and did not meet the substantial nexus requirement. 112 S.Ct. at 1914, n.8.

permanent.[6/] As discussed further in this Brief, Share did not have the presence required.

(3) The Rulings of the Courts Below Are Consistent With the Prior Decisions of the United States Supreme Court

The Quill decision is one that has evolved from a long line of cases discussing the power to tax the sales of a foreign corporation. In each of these previous cases, the Supreme Court has made it clear that the foreign corporation must have some type of continuing presence within the taxing state before the duty to collect taxes arises. The cases in this area have found presence where the foreign corporation has either a permanent office or salesperson within the state, or has employed independent contractors or agents who continuously solicit within the state on behalf of the foreign corporation. Each of these decisions are consistent with the holding in Quill and support the lowers courts' rulings in the present case.

In National Geographic, the Supreme Court ruled that the taxing state's imposition of a use tax against the foreign corporation's mail order operation did not violation the Commerce Clause because the foreign corporation had two offices in the state. 97 S.Ct. at 1390. Similarly, in Standard Steel Co. v. Washington Rev. Dept., 419 U.S. 560, 95 S.Ct. 706, 42 L.Ed.2d 719

[6/] The Department also argues that the Quill bright-line test was meant to avoid litigation of the type raised on the instant appeal. Unfortunately, such is not the case. As Justice White so aptly pointed out in his concurring and dissenting opinion, "[r]easonable minds surely can, and will differ over what is required to make out a 'physical presence' adequate to justify imposing responsibility for use tax collection." Quill, 112 S.Ct. at 1921.

(1975), a use tax imposed upon a foreign corporation was held constitutional by virtue of the fact that the company had one employee permanently working in the taxing state. See also D.H. Holmes Co., Ltd. v. McNamara, 486 U.S. 24, 108 S.Ct. 1619, 100 L.Ed.2d 21 (1988)(13 stores and 5000 employees of foreign corporation located in taxing state). The permanent presence of independent contractors or agents of the foreign corporation within the taxing state has also been imputed to the foreign vendor to support the constitutionality of a state tax. See Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 107 S.Ct. 2810, 97 L.Ed.2d 17 (1987)(independent contractor permanently residing in state engaged in activity to further market share within state of foreign corporation); Felt & Tarrant Co. v. Gallagher, 306 U.S. 62, 59 S.Ct. 376, 83 L.Ed. 488 (1937)(two agents of the foreign corporation permanently residing in the state). No decision to date has been rendered by the Supreme Court finding nexus without a similar finding of continuing presence.

The Department places much emphasis on the decision in Scripto v. Carson to support the constitutionality of its tax imposed against Share. In fact, the Department goes so far as to say that the appellate court's decision in this case is in direct conflict with the Scripto decision. Nothing could be further from the truth.

The Scripto case, like those cases referenced above, is inapposite and provides no support for this case because there the foreign corporation had local jobbers or wholesalers permanently

residing in the state soliciting and obtaining Florida customers for the company. 80 S.Ct. at 621. In fact, the Georgia corporation had detailed contracts with the jobbers which specifically defined the purpose of their arrangement -- "attracting, soliciting and obtaining Florida customers." Id. In addition, the presence of the jobbers was continuous and permanent. We know from the facts of this case that Share did not have any agents or employees permanently residing in Florida. Moreover, as discussed more thoroughly below, the brief presence of Share's officers within Florida was not for the purpose of sonication. See infra, at pp. 24-26.

The facts of this case are more similar to those which arose in Miller Bros. Co. v. State of Md., 347 U.S. 340, 74 S.Ct. 535, 98 L.Ed. 744 (1954).[7/] In that case, a Delaware corporation operated a store in Wilmington, Delaware which sold products directly to its customers, including residents of neighboring Maryland. 74 S.Ct. at 537. The Delaware corporation would often deliver the products sold to the Maryland residents by use of its own delivery trucks. Id. Also, the corporation often advertised in Delaware papers and radios which reached the residents of Maryland. Id. Additionally, the foreign corporation often mailed sales circulars to its

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[7/] Petitioners have previously attempted to argue that the Miller Bros. opinion is highly suspect and may have been overturned by Quill. The argument, however, is unfounded. The Miller Bros. decision was cited with approval in Quill, and has been repeatedly cited by courts throughout this country as persuasive authority on the state taxation issue. Further, although the Court in Miller Bros. found the tax unconstitutional based upon the Due Process Clause, it is more than likely that the tax would not have satisfied the concerns of the Commerce Clause as well.

customers, including residents of Maryland. Id. Based upon this activity with the state, Maryland officials assessed a use tax against the Delaware corporation, which was affirmed by the state's highest court. The matter was appealed.

The Supreme Court reversed. In doing so, the Court noted there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Bros., 745 S.Ct. at 539. The Court found that the infrequent delivery of products into the state, and the occasional advertising or fliers being sent into the state without solicitation, was not the type of activity that would subject a foreign corporation to taxation. Miller Bros., 74 S.Ct. at 539-40. There was "no invasion or exploitation of the consumer market in Maryland," and thus no power to tax. Id.[8/] See also In Re Laptops

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[8/] In its decision, the Miller Bros. Court also distinguishes and rejects the findings of a prior case entitled General Trading Co. v. State Tax Commission of Iowa, 322 U.S. 335, 64 S.Ct. 1028, 88 L.Ed. 1309 (1944). The Petitioner relies upon the General Trading decision to support the constitutionality of its tax assessment against Share's mail order sales. The decision is of no assistance to this Court. First, the General Trading case was written approximately 20 years prior to the Bellas Hess decision - the case which first identified the test to be followed by this Court. Moreover, the facts of the General Trading case are clearly distinguishable from those before this Court. In that case, the foreign corporation had sent traveling salesmen into the taxing state to solicit the local residents. General Trading, 64 S.Ct. at 1029. As the Miller Bros. Court pointed out, this is the type of "continuous local solicitation" which is subject to taxation. Here, Share has no salesmen or salesforce to solicit sales in Florida, or anywhere else. Rather, Share solicits sales solely by use of its catalogs and fliers mailed out periodically. This type of mail order sales is not taxable. Quill, 112 S.Ct. at 1916. Moreover, when Share was in the State, it was not to solicit sales from Florida consumers. See infra, at pp. 24-28.

Etc. Corp., 164 B.R. 506 (D. Md. 1993)(isolated trips into taxing state to ensure proper delivery and to enhance customer relations not enough to create a substantial nexus).

The above decisions, when reviewed in conjunction with the Quill and Bellas Hess decisions, make it clear that a substantial nexus will not be found unless the foreign corporation has a continuous or permanent presence within the taxing state for the purpose of soliciting the market therein. Like the term suggests, a substantial nexus exists where there is a substantial presence within the taxing state. The cases evolving from the United States Supreme Court, including Quill, all support this conclusion. The trial court below found no such presence on behalf of Share, and the appellate court properly upheld the ruling. The authority discussed above requires that this Court also affirm the trial court's judgment and hold the Department's tax to be unconstitutional as applied to Share.

B. Share's Presence in the State of Florida for Approximately Three Days Each Year Does Not Create a Substantial Nexus to Support the Assessment of Taxes Against its Future Mail Order Sales Made to Residents Within the State

The Department has argued that notwithstanding the lack of a permanent or continuing presence within the state, the presence of Share's products and two of its officers at the annual seminars held in Florida each year, for approximately three days, is sufficient presence within the State to create a "substantial nexus" for taxing purposes. The argument is unfounded and contrary to the law. First, the trial court specifically found that Share

was not in the State of Florida for the purpose of exploiting its market. Additionally, the presence of Share's products and its officers in the State for three days does not support a finding of substantial nexus. Lastly, the cases cited by the Department do not support its position and are also distinguishable upon their facts.

(1) Share Did Not Intentionally Exploit the Florida Market During the Years At Issue

As mentioned earlier, in order to establish that a substantial nexus exists with the taxing state, it must be shown that the foreign vendor or corporation is actively soliciting its products or services within the state. Quill Corp. v. North Dakota By and Through Heitkamp, 112 S.Ct. 1904 (1992). This solicitation is shown by the presence of a "small sales force, plant or office in the state." Id., at 1914. The record facts in this case reflect that Share does not have a sales force, plant or office in Florida. The Department acknowledges that active solicitation is an essential requirement of the substantial nexus requirement. See Petitioners' Brief, at pp. 33, 37. The Department wrongfully argues, however, that the foreign vendor's "intent" is relevant to the inquiry. Even assuming, arguendo, that the intent of Share is relevant, the facts here show that no such intent to exploit Florida's market existed.

At the trial of this action below, testimony was submitted which reflected that the Parker Foundation conducted its seminars in Miami Beach, Florida, during the months of November in the years 1986, 1987, 1988 and 1989 (R-81). Miami Beach was the situs chosen

for the seminars due to its favorable weather during the winter months (R-165). The weather was an important factor in choosing Florida as the situs for the seminars due to the fact that Parker Foundation's target market is the Northeast area, where the winter months are miserably cold (Id.). It would logically follow that the majority of the attendees at the seminar would be doctors residing in the Northeast, or states other than Florida. This, in fact, is what the evidence showed. Dr. Karl Parker testified that approximately eighty (80%) to ninety (90%) percent of the doctors at the seminars during the years 1986 through 1989 were from states other than Florida (R-165-169). Given this statistical information, it is difficult to accept the Department's argument that Share displayed its products at the seminars for the purpose of exploiting the Florida market. The seminar attendees did not reflect the "Florida market," but instead comprised a mixture of doctors from the Northeast and Canada.

Moreover, evidence was submitted at the trial which reflected that most of the attendees at the seminar, including those Florida doctors in attendance, were long-standing customers of Share (R-175; R-207-208). Most of the doctors in attendance purchased their Share products at the seminars on a convenience-basis only. There was no hard-selling or heavy solicitation going on at the seminar. Instead, the products were displayed on shelves or tables in a separate room, and the doctors would voluntarily frequent the rooms throughout the seminar, on an unsolicited basis (R-170-171). Many doctors would take advantage of the opportunity presented at the

seminar by the Share center and replenished their diminished supplies of those products which they had been consistently using in their practices (R-175).[9/] Thus, there was no reason to "exploit" the doctors in attendance at the seminars in Florida.

It should also be noted that the seminars were not open to the public at large within Florida. Rather, the attendees were doctors who had pre-registered with the Parker Foundation. (R-188-190). Thus, holding the seminars in Florida did not give Share the opportunity to solicit non-registered customers, nor was it Share's intention to do so.

The trial court's factual findings also support the conclusion that Share was not actively soliciting the Florida market. Its findings were based upon the testimony and evidence presented at the trial. After hearing this evidence, which included the testimony of Dr. Karl Parker himself, the court expressly found that the purpose of Share's presence was not to exploit the Florida market. Specifically, the lower court concluded:

> [T]he Parker employees did nothing to further Share's market presence within the State of Florida. The Parker employees merely

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[9/] It should be noted at this point that Share is not disputing the fact that it is liable for sales tax on those sales made to doctors at the seminars. Share collected and paid taxes on all sales made at the seminars in each given year (R-172). However, contrary to Petitioners' contention, registration and payment of these taxes does not subject Share to further taxes upon its mail order sales. See State of Nevada v. Obexer & Son, Inc., 660 P.2d 981 (Nev. 1983)(Registration and payment of taxes on certain sales or transactions is not dispositive of whether a "substantial nexus" exists.) Thus, the fact that Share had registered with the State of Florida and paid taxes on those sales made at the seminars is not a factor to support the substantial nexus requirement.

> collected money from paying customers, and did not solicit further customers while in the state... [M]ost of the chiropractors present at the seminar were from out of state, and had been long-standing customers of Share.... Thus, there was no 'exploitation of the consumer market' in Florida by these employees....

(P-App-2-114) (citations omitted). The findings of fact of the lower court are "entitled to as much weight and respect as the verdict of a jury and may not be overturned unless review of the entire record reveals a lack of substantial evidence to support them." Cohen-Ager, Inc. v. Dept. of Revenue, 504 So.2d 1332 (Fla. 1st DCA 1987); H.S. Hamilton v. Title Insur. Agency of Tampa, 338 So.2d 569 (Fla. 2d DCA 1976). As reflected above, the record testimony and evidence supports the trial court's findings.[10/]

Based on the foregoing, Share did not intentionally avail itself of Florida's marketplace or its benefits therefrom. In fact, the only one who benefitted from the activities of Share at the seminars was the State of Florida. As mentioned earlier, Share collected and paid taxes on all sales made at the seminars. The

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[10/] The Department wrongfully argues that it is entirely irrelevant that the majority of the doctors at the seminars were non-Florida residents. Specifically, the Department argues that the residence of the person to whom Share was "soliciting" is irrelevant. Petitioners' Brief, at pp. 42-43. The argument wholly misses the point. The consumer market within a state is comprised of its residents. To solicit the consumer market of a state is to solicit its residents. Share's activities were directed at its own market, or that which the Parker Foundation created by organizing and conducting the seminar. The mass majority of the attendees at the seminar were from the Northeast -- not Florida. Moreover, the seminars were not open to the public or advertised to the doctors in Florida during the three day event. Thus, the act of having the seminars in Florida also did not expand or boost Share's market presence in the State.

majority of these taxes were collected from doctors residing outside the State of Florida (R-165-169). The State of Florida received the benefit of these sales taxes. Moreover, the State also received the benefit of the monies spent by the non-resident doctors at the local hotels, stores and restaurants. Thus, Share received no benefits from the State of Florida for which it should be obligated to pay continued taxes. See Allied Signal, Inc. v. Dir. Div. of Taxation, 504 U.S. 768, 112 S.Ct. 2251, 119 L.Ed.2d 533 (1992) (taxation is justified when some form of benefit is conferred).[11/]

Pursuant to the foregoing, Share did not intentionally exploit the consumer market within the State of Florida, or create any substantial nexus with the State so as to allow the Department to impose taxes upon all future mail order sales made within the State. For this reason, the lower court's judgment holding that the State's tax assessment is unconstitutional and violative of the United States Commerce Clause should be affirmed.

(2) The Presence of Two Officers of Share at the Seminar for Three Days Each Year is Insufficient to Establish Nexus

As noted above, both Dr. James Parker and Dr. Karl Parker were present at the seminars held in Miami Beach during the years 1986

11/ The Department also argues that its tax should be upheld because failure to do so would be unfair to Florida vendors. See Petitioners' Brief, at p. 5. The Department's argument fails to recognize that the Florida vendors who are required to pay taxes receive substantial benefits from the State continuously throughout the year (i.e. fire, police, roads, bridges, etc.). As noted above, Share receives no benefits from the State during its three day stay -- other than the warm climate. The warm climate is one benefit which is free and cannot be taxed.

through 1989. Dr. James Parker and Dr. Karl Parker are both officers and shareholders of Share. Notwithstanding these facts, the presence of these Share officers in Florida for three days is insufficient to establish nexus.

First, as noted above, the Parkers were not present at the seminar to sell products, but were there to educate other chiropractors (R-171). See infra, at p. 24-26. Their presence in the State of Florida was therefore unrelated and had nothing to do with the sale of Share's products. At most, the Parkers' presence within Florida each year for three days can be construed as assisting in delivery of the products. Even assuming, arguendo, that this were true, this type of presence or activity would also be insufficient to create nexus. Miller Bros., 74 S.Ct. at 540; In Re Laptops, 164 B.R. at 511; see also L.L. Bean, Inc. v. Commonwealth of Penn., 516 A.2d 820, 825 (Pa. 1986)(agents and employees of foreign corporation traveling into taxing state to assist retailer in displaying goods not enough to create substantial nexus). Thus, this presence for the limited period of three days does not grant Florida the authority to tax Share's future mail order sales to residents within the State.

Moreover, the use of Parker Foundation employees to work the registers within the rooms where the products are displayed is likewise not enough to create a nexus within the State. First, the Parker Foundation employees were not retained by Share to solicit customers in the State. Moreover, the employees' presence in Florida at the seminars was also not for the purpose of

solicitation. Instead, the employees were present merely to process the transactions and operate the cash registers. Thus, their presence in the State cannot be utilized to support a finding of substantial nexus. The fact that Share had an agreement with the Parker Foundation to utilize its employees does not change this fact. See, e.g. Bloomingdale's By Mail, Ltd. v. Pennsylvania Dept. of Rev., 567 A.2d 773 (Pa. 1989) (service agreement between foreign corp. and resident corp. for performance of services in State not enough to find nexus).

Notwithstanding the above, the presence of these Parker Foundation employees for three (3) days within the State is not the type of permanent presence needed to create a nexus with the state. Cf. Scripto, Inc. v. Carson, 80 S.Ct. 619 (1960) (permanent presence in state of independent contractors/salesmen continuously soliciting orders sufficient to create nexus to support sales tax); National Geographic, 97 S.Ct. 1390 (two local offices in the state); Standard Pressed Steel Co. v. Wash. Dept. of Revenue, 95 S.Ct. 706 (1975) (one employee permanently working in taxing state). Also, the Parker Foundation employees did nothing to further Share's market presence within the State of Florida. The Parker employees merely collected money from paying customers, and did not solicit further customers while in the State. As noted above, most of the chiropractors present at the seminar were from out of state, and had been long-standing customers of Share. Cf., Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 107 S.Ct. 2810 (1987) (independent contractor in state engaged in activity to

further market share within state of foreign corporation). Thus, there was no "exploitation of the consumer market" in Florida by the Parker employees. Miller Bros., 74 S.Ct. at 540.

(3) The Presence of Share's Products Within the State Also Does Not Create a Substantial Nexus With the State

There is also no dispute that Share displayed its products at the seminars in Miami Beach for three days during the years 1986 through 1989. Title to these goods was in the name of Share until sold to the doctors. The presence of these products or property of Share within the State of Florida for three (3) days each year likewise does not support a substantial nexus finding.

For many years, the Supreme Court has consistently rejected the notion that the "slightest presence" within the taxing state will justify a finding of substantial nexus to support taxation against the foreign corporation. National Geographic Soc. v. California Bd. of Equalization, 97 S.Ct. 1386, 1390 (1977); see also Quill, 112 S.Ct. at 1914 n.8 (title to a few floppy diskettes held by Quill constitutes minimal nexus; too slight for substantial nexus). This position has also been followed by the state courts confronted with the issue of state taxation against foreign corporations. SFA Folio Collections, Inc. v. Tracy, 652 N.E.2d 693 (Ohio 1995); In Re Laptops Etc. Corp., 164 B.R. 506 (D.Md. 1993); Cally Curtis Co. v. Groppo, 572 A.2d 302 (Conn. 1990). The presence of Share's products in Florida for three (3) days is at best a slight presence.

The factual scenario in Cally Curtis is similar to that before this Court. In Cally Curtis, the foreign corporation involved was a California company engaged in the business of producing, selling, leasing and distributing industrial films and videotapes for personnel training purposes. 572 A.2d at 302. The sale and lease of the films were marketed by the corporation in Connecticut, the taxing state, only by way of trade shows or direct mail of its catalogs. The corporation had no salesmen or personnel in Connecticut, owned no offices there, and conducted no advertising in the state. Cally Curtis, 572 A.2d at 304. Instead, catalogs were mailed to customers in Connecticut, who in turn would submit orders to the California company. If a customer wished to preview a film before purchasing or leasing it, the company would send the film to the customer in Connecticut, who would then be permitted to view the film for three days before returning it to the corporation, or leasing or purchasing the film. Id. at 303-04. During the preview period, the corporation remained the owner of the film. Id. Based upon the presence of this property within Connecticut, the State concluded that a substantial nexus existed and imposed the appropriate tax. The corporation filed an action challenging the decision. Relying on the Bellas Hess decision, the Court in Cally Curtis concluded that the presence of the tapes within the state for three days was de minimis, and could not support a finding of substantial nexus. 572 A.2d at 306. The presence of Share's products within the State is also de minimis.

The seminars at which Share's products were displayed in Miami Beach, Florida, lasted for approximately three (3) days (R-157). During these three (3) days, Share remained the owner of the products that were not sold at the seminars. The presence of these products within the State for three days is de minimis or slight, and cannot form the basis of creating a substantial nexus between Share and the State of Florida. Quill, 112 S.Ct. at 1914; Cally Curtis, 572 A.2d at 306.

(4) The Cases Relied Upon By the Department are Not Persuasive or Binding on this Court

The Department cites to one case in particular which they feel is conclusive of the issues raised in this action. Specifically, Petitioners cite to In Re Orvis Co., Inc., 86 N.Y.2d 165 (N.Y. 1995), cert. denied _____ S.Ct. _____, 1995 WL 588208 (Nov. 27, 1995) to support the constitutionality of its tax assessment against Share. The Orvis decision, however, cannot assist this Court for many reasons.

First and foremost, the facts of the Orvis decision are distinguishable from those before this Court. Specifically, the Orvis Company who was contesting the New York tax assessment had established a substantial wholesale business within the taxing state by use of its sales personnel who directly solicited retailers in New York. Orvis, 86 N.Y. 2d at 179. Moreover, the Orvis Company failed to present any witnesses at the trial to refute the substantial sales activity or solicitation within the taxing state. Id., at 179-180. In addition, with respect to the

VIP vendor, the court in Orvis found that the foreign vendor made more than 41 trips into the taxing state to ostensibly deal with initial problems which its customers were having with its products. Id., at 180-181. The evidence showed that these visits "enhanced sales and significantly contributed to VIP's ability to establish and maintain a market for [its products] in New York." Id. The court in Orvis concluded that VIP's activity within the state constituted more than a "slight presence." Id.

As discussed thoroughly above, Share did not have any of its employees or officers actively soliciting consumers within Florida. See infra, at pg. 24-26. Share's only presence within the State was by two of its officers who were there for the purpose of educating chiropractors. This fact alone distinguishes the present case from the Orvis decision.

In addition, the court in Orvis, like the Department herein, misconstrued the holding in Quill and expanded the bright-line test enunciated by the Supreme Court. As noted previously, the Supreme Court in Quill established a safe harbor for those taxpayers who do no more than communicate by mail or common carrier with the taxing state. By creating this safe harbor, the Court did not rule that every other taxpayer who had any contact with the taxing state would be subject to the duty of collecting and remitting sales tax. Instead, the Supreme Court in Quill noted that "whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office." Quill, 112 S.Ct. at 1914 (emphasis added) (citations

omitted). The Orvis court ignored this language within the Quill decision when it upheld the tax assessment against the foreign vendors.[12/]

For these reasons, the Orvis decision relied upon by the Department does not assist this Court and has little, if any, persuasive value.

The Department also cites to many pre-Bellas Hess decisions to support its position that the tax is constitutional. Specifically, the Department relies heavily on the Supreme Court decision of General Trading Co. v. State Tax Commn. of Iowa, 322 U.S. 335 (1944). As noted earlier, this case is factually inapposite by virtue of the fact that the foreign corporation therein continuously sent its salesmen into the taxing state to solicit sales from its residents. Id. at 337; see infra n.8. The Scripto, Inc. v. Carson decision is likewise distinguishable based upon the fact that the foreign corporation in that case had independent salesmen permanently residing within the State to solicit the

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[12/] The fact that the Orvis court clearly misunderstood the ruling of Quill is further reflected by its holding in the case. The Orvis court improperly stated that physical presence may be manifested by "the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf. Orvis, 86 N.Y.2d at 178. This holding is completely incorrect. Physical presence or substantial nexus cannot be found where only the property of the foreign corporation is located in the state. Quill clearly negates this result, as all property of mail order vendors ultimately winds up in the taxing state. The court in Orvis also misconstrued the recent decision of Oklahoma Tax Commn. v. Jefferson Lines, _____ U.S. _____, 115 S.Ct. 1331, 131 L.Ed.2d 261 (1995). In the Jefferson Lines case, the Court found nexus because the transactions occurred in the taxing state. The power to impose taxes on these types of transactions has never been questioned.

residents of the taxing state. See infra, at pp. 22-23. What these cases reflect, if anything, is that a "continuous, systematic" presence within the state is required before the authority to tax a foreign corporation will be justified. There is no continuous or systematic presence by Share in the State of Florida.

Moreover, the cases relied upon by the Department which were decided after the Bellas Hess decision are likewise not applicable to the facts of this case. The Standard Pressed decision, as noted earlier, is easily distinguishable upon its facts. In the Standard Pressed case, the foreign corporation had an employee permanently residing within the state who provided continual sales services to the foreign corporation. See infra at pp. 19-20. Again, Share has no employees or agents within Florida. The National Geographic case is also distinguishable. In that case, the court found nexus to exist based upon the fact that the foreign corporation maintained permanent offices within the state out of which employees solicited close to $1 million in sales unrelated to the mail order business. Despite the fact that the presence was unrelated to the mail order activity, the Court found that the continuous presence was sufficient to create a nexus. National

Geographic, 97 S.Ct. at 1392.[13] Thus, the cases relied upon by the State are not helpful.[14]

Pursuant to the foregoing, the decisions of the lower court correctly concluded that Share's limited activities in the state do not create a substantial nexus as required. For these reasons, the decisions should be affirmed and the tax held unconstitutional.

II. A SUBSTANTIAL NEXUS EXISTS, IF AT ALL, ONLY DURING THE MONTH WHICH SHARE WAS PRESENT WITHIN THE STATE, THEREBY LIMITING THE ASSESSMENT OF TAXES AGAINST SALES MADE DURING THAT GIVEN MONTH

In the event this Court should conclude that Share had a substantial nexus with the State of Florida, the amount of the tax assessment is improper because such nexus did not exist in each year at issue, or in every monthly tax period.

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[13] The Court in National Geographic also flatly rejected the "slightest presence" standard of constitutional nexus that had been adopted by the lower court. 97 S.Ct. at 1390. Thus, without the presence of the unrelated stores within the taxing state, the tax would have been held unconstitutional. 97 S.Ct. 1392 at n.6.

[14] The Petitioners also rely on various state court cases which are wholly inapplicable to this case. Thompson v. Rhodes-Jennings Furn. Co., 268 S.W. 2d 376 (Ark. 1954)(substantial nexus found where active solicitation ongoing in taxing state); Pearle Health Services, Inc. v. Taylor, 799 S.W.2d 655 (Tenn. 1990)(employees of foreign corporation continuously traveling into taxing state to assist related franchise stores to which it sold its products); Topps Garment Mfg. Corp. v. State of Md., 128 A.2d 595 (Md. 1957)(foreign corporation had permanent solicitors residing in the taxing state); Scholastic Book Clubs, Inc. v. State Bd. of Equalization, 207 Cal.App.3d 734 (Cal. Ct. App. 1989)(teachers acting on behalf of foreign corporation in supplying books to local student residents); Good's Furniture House, Inc. v. Iowa Bd. of Tax Review, 382 N.W.2d 145 (Iowa 1985)(regular and systematic deliveries to Iowa); Rowe-Genereux, Inc. v. Vermont Dept. of Taxation, 411 A.2d 1345 (Vt. 1980)(continuous presence in state through use of subcontractors and retaining security interests in property sold; foreclosing on property in taxing state).

First and foremost, under Florida law, taxes are incurred and collected on a monthly basis. Fla. Stat. § 212.11(a)(b); see also Rule 124-1.056, F.A.C.; Rule 12.A-1.054, F.A.C. In other words, each month is a separate tax period for purposes of determining tax liability. Id. It would logically and necessarily follow that each month must be considered a separate tax period for the purpose of determining whether there has been a "substantial nexus" so as to allow the assessment of taxes during that given month. Here, Share had a nexus with the State, if at all, in a three day period in a total of four months during the five year period of the audit.

As reflected above, the seminars were conducted during November of each year, from 1986 through 1989. The extent of Share's activity in the State during November of each year was the display of its products for three days at the seminar. This "slight presence" is not enough to constitute substantial nexus. However, if nexus existed at all, it was for one month during each of these years. Therefore, taxation against sales made in any other month during these years would be unconstitutional. Accordingly, the assessment must be adjusted to reflect taxation only against those sales made in the months of November for the years 1986, 1987, 1988 and 1989. Moreover, it must be noted that Share has already paid taxes on many, if not all, of the sales made during November of years 1986 through 1989 (R-81). Thus, even if this Court were to determine that a substantial nexus exists during

these given months, there is a question whether Share would owe taxes at all.[15/]

Further, the Department's audit covered the period from December 1, 1985 through November 30, 1990 or six separate tax years. Share displayed its products at seminars in the State of Florida only during four of these years - 1986 through 1989. Share did not display its products at a seminar in 1990 because no seminar was conducted in the State during that year (R-178).[16/] The Department obviously believes that Share's slight presence in the State during the prior years is sufficient to tax sales made by Share in all future years, even where there has been no contact at all. Of course, the law does not support this position. Without the seminar, or any presence whatsoever, the argument cannot be made that Share had a substantial nexus with the State of Florida during 1990. Quill, 112 S.Ct. at 1916. Therefore, the assessment of sales tax against sales made by Share via direct mail solicitation during the year 1990 is unconstitutional and should

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15/ The Department has argued that tax is owed by Share on certain orders taken at the seminar but filled back in Texas. Petitioners' Brief, at pg. 36. At the trial, Dr. Parker testified that the orders taken at the seminar would have to be processed or verified before accepted. Specifically, the customer's account and/or credit had to be approved before the order was accepted and processed (R-174-175). This was done in Texas (Id.). Thus, it is clear that the transaction on these orders actually occurred in Texas -- not Florida. Therefore, Share would not be responsible for payment of taxes on these sales. If any tax is owed at all it would only be upon those mail order sales made during the month of November in 1986, 1987, 1988 and 1989.

16/ The seminar in 1990 was held in the Bahamas (R-115; App-3-14).

not be upheld. Instead, the assessment must be adjusted to eliminate payment of any taxes calculated for the year 1990.

Moreover, there is no evidence in the record to reflect that a seminar was conducted during the year 1985. Notwithstanding this fact, the Department's tax assessment includes taxes on sales made by Share during the month of December, 1985 (R-117; See Department's Tax Assessment filed as Exhibit 6 at the trial). Thus, not only does the Department believe that presence in any one given year can give rise to the duty to tax in another year, but it also apparently believes that the duty to collect taxes arises even before the activities upon which the duty is based have not even yet occurred. The argument is untenable and is completely contrary to the law. Quill. Accordingly, the taxes assessed against Share for sales made in 1985 are likewise unconstitutional.

Based on the above, the amount of the tax assessment issued by the Department is incorrect and this case should be remanded to the lower court with instructions to reduce the assessment to reflect payment of tax for only those mail order sales made during the month of November of years 1986 through 1989.

CONCLUSION

Based on the above, the lower court properly held that the assessment of tax against Share's mail order sales made to residents in the State of Florida is unconstitutional and should be prohibited. Accordingly, the judgment rendered by the lower court, and the decision of the appellate court upholding same, should be affirmed.

Alternatively, if this Court believes a substantial nexus exists by virtue of the seminar activity, the assessment amount imposed by the Department is incorrect because no seminar was conducted within Florida in 1985 or 1990. Moreover, under Florida law, each month is a separate tax period. Therefore, Share may only be taxed for those goods sold during the tax periods it had a substantial nexus with the State -- or the months in which seminars were held in the State. Thus, if necessary, the action should be remanded to the lower court with instructions to reduce the tax accordingly.

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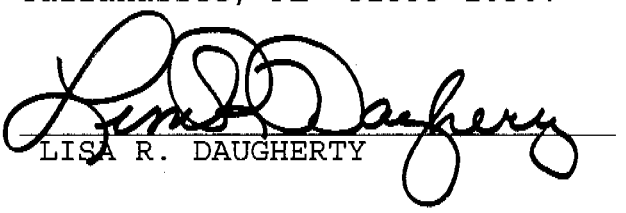
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 7th 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.

By: 
LISA R. DAUGHERTY

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