IN THE SUPREME COURT OF FLORIDA

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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.

PETITIONERS', FLORIDA DEPARTMENT OF REVENUE'S, AND LAWRENCE FUCH'S INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 337609

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol, Special Projects
Tallahassee, Florida 32399-1050
904/488-5899
904/488-6589 (FAX)

ELIZABETH T. BRADSHAW
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 833274

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
904/487-2142
904/488-5865 (FAX)

Counsel for Petitioners

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THIS COURT NEEDS TO REVIEW AND REVERSE THE DECISION BELOW[1]

This case is of great public importance to the State of Florida and the Florida Department of Revenue. This case concerns the State's ability to require an out-of-state vendor of tangible personal property to collect and remit the Florida Sales and/or Use Tax. The direct issue is whether physical presence in Florida, with the conscious intent and activity to exploit the Florida market, creates "substantial nexus" with Florida. In Scripto, Inc. v. Carson, 105 So. 2d 775 (Fla. 1958), affirmed, 362 U.S. 207 (1960), this Court found nexus where there existed in Florida physical presence of the vendor coupled with business activity to exploit the local market.

The District Court below, while acknowledging Share International, Inc.'s, physical presence and business activities in Florida, found no nexus with Florida and issued a final opinion in direct conflict with Scripto and United States Supreme Court decisions. The Department has relied upon Scripto and other Supreme Court cases for years and now the Department's entire administration of sales tax vendors is in confusion. Share is not the only vendor who physically enters Florida and then continues post-presence sales with Florida customers.

The Legislature has authorized the taxation of tangible personal property ("TPP") at retail in Section 212.05, Florida Statutes, which states:

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[1] This court has jurisdiction to review this case pursuant to Rule 9.030(a)(1)(A)(ii) [as the District Court affirmed a lower court declaring a statute invalid]; Rule 9.030(a)(2)(A)(v) [the district Court certified an issue of great public importance]; and Rule 9.030(a)(2)(A)(iv) [the decision of the District Court directly and expressly conflicts with a decision of this Court on the same question of law], Florida Rules of Appellate Procedure.

> It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business [2] of selling tangible personal property at retail in this state . . . For the exercise of said privilege a tax is levied on **each taxable transaction or incidence**. (e.s.)

See also, Gaulden v. Kirk, 47 So. 2d 567, 573 (Fla. 1950). The tax applies to each "sale," a "sale" being defined in Section 212.02(16)(a), Florida Statutes, as "any transfer of title or possession, or both, exchange, barter, license, lease, rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration." The tax applies at the moment the sale occurs, whether the sale takes 3 seconds or 3 days. The tax of 6% is computed on the "sales price" of each item sold. Section 212.05(1)(a)1.a., Florida Statutes. The tax on the privilege to do business is also applied to each item as it is "used" in Florida where no sales tax was previously paid to the State. Section 212.05(1)(b), Florida Statutes. [3] The sales or use tax is imposed on the purchaser with the collection duty being placed upon the vendor. Section 212.07(1)(a), Florida Statutes.

There are various forms of direct marketing, or "mail order sales," engaged in by American businesses. The most common forms or classes are:

1. "Pure" mail order - these are vendors who do their entire commercial marketing via the U.S. Mails, common carrier, 1-800 telephone services, telemarketing, magazines or television. These vendors do not physically enter the taxing jurisdiction in any manner. Their sales solicitation is done

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[2] "Business" being defined as "any activity engaged in by any person, or caused to be engaged in by him, with the object of private or public gain, benefit, or advantage, either direct or indirect. Section 212.02(2), Florida Statutes.

[3] "Use" being defined as the "exercise of any right or power over tangible personal property incident to ownership thereof, or interest therein, . . ." Section 212.02(21), Florida Statutes.

strictly by the above-stated means from their home state. *To be crystal clear, this case is **not** about this class of foreign vendor. Florida is not attempting in any way to impose its sales tax collections requirements on this type of vendor*;

2. Foreign, or out-of-state, vendors who travel into a state on a schedule set by the company to meet their business needs. The company is physically present in the state to sell directly to customers, attend trade shows, fairs or conventions. These firms then engage in post-presence forms of direct marketing to further solicit sales from state residents, having acquired some of the residents names from their presence in the state;

3. Out-of-state vendor who employees local residents, as representatives or independent contractors, to offer and sell their samples and merchandise. They too later engage in post-presence solicitation of the state's residents; and

4. Out-of-state vendors which have established both local retail outlets in a state and separate, dedicated mail order departments. Classic examples from the United States Supreme Court have been Sears, J.C. Penneys and Montgomery Ward.

Class #1 is **not** subject to the Florida sales tax collection requirements. And class #1, pure mail order sales, is **not** the subject of this case. This case does **not** have as a taxpayer a vendor who did **not** have physical presence in Florida.

Classes #2, #3 and #4 are clearly subject to Florida's collection of sales and use tax requirements set out in Chapter 212, Florida Statutes. These classes collect sales taxes on their mail order sales to Florida because they know they have established a physical presence in Florida.

<u>This case is solely about Class #2 and a particular vendor falling into Class #2.</u> These are the vendors who come to Florida using salespersons that are residents of other states. These vendors physically enter Florida for varying amounts of time. But while these vendors are in Florida, they offer, solicit, display, sell, install or service the

foreign vendor's goods to the Florida market. These vendors attend various events where customers are drawn. These foreign vendors make a living out of the Florida sales. The Florida market, and its profitability, is what keeps bringing them back to Florida. However, when they return to their home state and continue their post - presence solicitation and sale of their products to Florida customers, these vendors **refuse** to collect the Florida sales tax on these sales. The United States Supreme Court's and this Court's decisions require this class of vendors to collect the Florida sales tax.

This case is of vital importance to the fiscal health of the State. First, this State relies heavily on sales and use taxes, both state and locally imposed, to operate the governmental functions of the State. These sales tax financed functions include the schools, social services, prisons, parks, judicial system and others. To have this flow of money unnecessarily disrupted by an interpretation of the law that does not comport with decisions of the United States Supreme Court jeopardizes the fiscal health of the State as a whole.

Florida is now the fourth largest state in America. We also have a great number of visitors each year. Out-of-state vendors want to tap into this large market by coming to the State at selected times to sell their goods. These foreign vendors physically come to trade shows, fairs and conventions. But they also continue to sell to the Florida market via various telecommunication and mailing methods after they have gone home. Some of the vendors physically enter Florida by employees or representatives with the company's samples and merchandise and some just physically

send samples and unsold merchandise for display or sale. Affirming 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 and then continue, *post-presence*, to exploit the Florida market from other places in the United States. To so immunize these vendors would cause the loss of tremendous tax revenues now being received.

Second, there is a fairness issue. Vendors domiciled in Florida must collect the Florida sales tax on goods they sell in the State, even when that merchandise is ordered out of Florida for Florida delivery. Why should there be a 6% advantage to vendors who physically enter the State for a period of time but then leave and sell to Florida residents the remainder of the time? There should not. This 6% price incentive does cause residents to avoid Florida vendors and buy out-of-state. This not only effects tax revenues, it affects the health of the Florida retail businesses, their owners and the employees working in the local stores. As part of the fairness issue, it places a greater tax burden on those buying in state to fund the necessary services. And one cannot argue that vendors like Share do not receive services while they are present in the State. These vendors, and their customers, have the protection of police and fire, drive on the roads and receive a host of other governmental services.

The United States Supreme Court has never wavered from its position that interstate commerce has the duty to collect taxes due or to pay its fair share of local

taxes.[4] That is all the Department is asserting here. Share physically came into Florida, brought its inventory in to the State and sold its goods here. Share has the duty to collect the sales taxes as part of its responsibility in choosing to engage in interstate commerce.

Of importance to this issue, and all the cases discussing nexus, is that the decision to physically enter Florida rests solely in the hands of the **vendor**. The State has no part in the decision whether or not a vendor physically enters Florida with its employees or goods. Florida only reacts when physical presence occurs. But once a vendor makes its decision to enter Florida and actually enters Florida, the vendor is bound by its decision and the effect of its decision as mandated by the United States Supreme Court.

The United States Supreme Court held that in order for a state to be able to impose this collection duty on a vendor, the company would have to be shown that it established "substantial nexus" with the taxing state. Quill Corporation v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992). The Court defined "substantial nexus" as physical presence in the taxing jurisdiction. Id. Share unquestionably had physical presence in Florida and yet the First District Court of Appeal decided that Share's physical presence was not enough. The decision of the District Court is contrary to the law, conflicts with this Court's decision in Scripto and must be reversed.

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[4] See, e.g., Goldberg v. Sweet, 488 U.S. 252 (1988); Western Live Stock v. Bureau, 303 U.S. 250, 254 (1938).

STATEMENT OF THE CASE

STATEMENT OF FACTS

This case involves the intimate interplay of two commercial entities, both owned by the same person. Parker Chiropractic Resource Foundation ("PCRF") is a Texas corporation owned by Dr. James W. Parker. (R:157). PCRF began conducting educational seminars in 1951. (R:107) PCRF's seminars usually last three (3) days beginning on Thursday and ending on Sunday. (R:157, 170) Speakers are brought in to address the attending chiropractors. (R:158)

Share is a Texas corporation (R: 80) incorporated in 1961 and owned by Dr. James Parker and his son, Dr. William Karl Parker. (R:153) Share engages in the business of the manufacture, distribution and sale of chiropractic supplies to chiropractic physicians. (R:80) The majority of these products are paper goods. (R: 152-153, 158-159) Share's principal place of business is Forth Worth, Texas. (R: 80, 152, 153) Share voluntarily registered with the Department to do business in the State of Florida and submitted reports of its sales in and to residents of Florida. (R: 81, 193).

The only employee of Share is Dr. James Parker. (R:153). Other than Dr. Parker, Share has no other employees. (R:153). Share contracted with PCRF to have PCRF's employees display, sell, receive cash and take orders for Share, paying PCRF an administrative fee. (R:154) PCRF would send approximately 10-12 of its employees to the annual seminar in Florida to assist Share, among other things, in offering, selling and filling of orders of Share's products. (R: 180-184) PCRF's employees did participate in the solicitation and sale of Share's products in Florida (R:170-171)

During PCRF's educational seminars[5], Share conducted its sales scheme in Florida in the following manner:

a. Share sent representatives, PCRF's employees, authorized to sell Share's products into Florida (R:81);

b. Share sent some of Share's samples and unsold merchandise into Florida to display for immediate sale and sales orders for future delivery (R:183-184);

c. Share offered and permitted Share's products to be sold in the state. (R:183-184) Share collected Florida sales taxes on Share's products sold and delivered to the purchaser in the State (R: 81, 163, 164);

d. Share's representatives took orders for some of Share's products, physically offered for sale in Florida, which Share then shipped from its Texas headquarters to the Florida customer. No sales taxes were collected on these sales. (R: 81); and

e. Share directly sold products from its offices in Texas. Orders were sent from the Florida customer to Share either through the mail, telephone or common carrier (R: 81).

During other times of the year Share contacted its Florida customers by mail. During the audit period, Share voluntarily continued its contact with Florida customers by mailing one catalog, one supplement and approximately 15 fliers to its Florida customers. (R:155)

Share would send the goods into Florida to be displayed at the same time and at the same place as the PCRF seminars. (R: 81, 183-185). Share would send a minimum of 500 different items for sale and up to 1000 items for display and sale. (R: 184-185). Share's inventory would be placed in a room on long tables for display. (R:

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[5]/ PCRF conducted seminars all over the United States. (R:157).

183-184). The doctors would then roam, as in K-Mart, through the aisles and select from Share's offerings. (R: 184). After selection, the doctor would take the items to the cash registers manned by the up to 12 PCRF employees and pay for the items. (R: 184). Any unsold items would be returned to Texas. (R:188). For out-of-stock items or display items, the PCRF employees would take orders for future delivery. (R: 185-186).

Share filed with the Department DR-15's recording Share's sales of its products in Florida. Each of the recorded sales were made over a three (3) day period each November during Parker's seminars (R:) The record of sales shows the following amounts of taxable sales and taxes collected during the audit period [6]/:

November, 1986:	$195,860.80	$9,793.04
November, 1987	$150,951.80	$7,547.59
November, 1988	$118,263.50	$7,095.81
November, 1989	$116,491.50	$6,989.49

(R: 81). Each of the above-stated amounts of <u>direct</u> Florida sales, made during a 3 day period each November. Of the approximately $3 million in annual sales (R:156), the Florida sales amounted to approximately 4.6% of Share's *total* annual sales. (R:106). These above stated amounts did not include separate mail order sales to Florida residents.

Thus, Share, with full knowledge and intent, voluntarily exploited Florida's commercial market for Share economic benefit and gain. (R: 180-184) While Share's

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[6]/ Share also physically returned to Florida in 1991 at a similar seminar. (R: 163, 164).

employees and/or representatives, including employees of PCRF, were physically in the State of Florida, Share displayed its samples and goods, Share took orders for final sales of its products, and from Share's samples and catalogs that were physically in Florida, took sales orders from the attendees physically present (chiropractic doctors) in Florida at the time the orders were taken. (R: 180-184)

In summation, the course of Share's business dealings resulted in the following tax situations: a) Share assessed, collected and remitted sales taxes on sales Share made in Florida where Share then immediately delivered the products to the purchaser; b) Share did not always collect Florida sales taxes on sales or orders made while physically in Florida but delivered by mail or common carrier at a later date to Florida purchasers (R: 185-186); and c) Share did not collect Florida sales taxes on post-presence sales or orders made by telephone or mail from residents in Florida but delivered by mail or common carrier (R: 10-18). This case concern's Share's collection responsibilities for situations b) and c).

COURSE OF THE PROCEEDINGS BELOW

In November, 1990, the Department conducted an audit of Share's records in Texas. The audit covered the period December 1, 1985 though November 30, 1990. (R: 81) The Department discovered that Share had not collected and remitted to the Department the sales and use taxes that should have been applied to sales and orders taken in Florida for later delivery and to mail order/direct sales made to Florida residents. (R: 5) The Department decided that Share had "substantial nexus" with Florida because Share was physically present in Florida in 1986, 1987, 1988, 1989,

and 1991 through employees and/or representatives and unsold merchandise; made sales and deliveries of Share's merchandise in Florida; made sales and took orders in Florida for later delivery to Florida; and made direct mail-order sales to Florida residents by mail. (R: 14)

The Department issued a final assessment, in the amount of $77, 933.98, finding that Share had the duty to collect the Florida sales tax on sales to Florida residents pursuant to Section 212.0596(2)(b) and (c), Florida Statutes. (R: 10) Share timely filed a protest to the assessment. (R: 5) The Department issued a Notice of Decision with respect to Share's protest on January 24, 1992. (R: 10) Share timely filed a protest to the Notice of Decision, requesting reconsideration of the Department's decision. (R: 6, 22) The Department issued a Notice of Reconsideration with respect to Share's request for reconsideration on May 15, 1992. The Department upheld the assessment in toto. (R: 6, 22)

Share timely filed its Complaint in the Second Judicial Circuit, in and for Leon County, on July 13, 1992. (R: 1-19) Share's underlying complaint was that the Department's assessment was in violation of the Commerce Clause[7]/ to the United

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[7]/ The primary case that delineates a state's power to impose a tax upon a business' activities in a state is Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977). This case outlines the limits of state taxation of business activities taking place in interstate commerce. In Complete Auto, the Court specifically set out a four-prong test for the states to use in determining their present or future taxes on interstate commerce constitutional. The Court held that a state tax would be sustained against a Commerce Clause challenge if the tax is:

1. applied to an activity with a substantial nexus with the taxing state;
2. is fairly apportioned;

(continued...)

States Constitution in that Share did not have "substantial nexus" [8]/ with Florida allowing Florida to impose a sales tax collection duty on Share in accordance with the then recently decided United States Supreme Court decision of Quill Corporation v. North Dakota, ___ U.S. ___, 112 S.Ct. 1904 (1992).

Stipulation to the majority of the facts was reached on October 1, 1993, and entered into the record. (R: 45). Share stipulated that it had in fact physically entered Florida with its employees/representatives; brought samples and unsold goods to Florida; sold and delivered goods in Florida; took orders in Florida for later delivery; and later engaged in mail-order sales with Florida residents. Trial was held in the matter in Tallahassee on October 10, 1993. (R: 51) The testimony of Mr. Parker supplied the

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[7](...continued)

3. does not discriminate against interstate commerce; and

4. is fairly related to the services provided by the State.

Id., 430 U.S. at 279. (Continued on next page)

This Court expressly adopted the Complete Auto test in Delta Air Lines, Inc. v. Department of Revenue, 455 So. 2d 317 (Fla. 1984), citing the four prongs of the Complete Auto test as the test that was to apply. Id., at 319. The Court again cited to Complete Auto in Miller v. Publiker Industries, Inc., 457 So. 2d 1374 (Fla. 1984).

[8]/ Only the first prong is at issue in this appeal as Share has not contested any other part of the Complete Auto test. Thus, the other Complete Auto factors were not addressed below. However, the first prong is met by the Scripto holding.

As this Court made clear in Delta Air Lines, the State must show "substantial nexus" in order for it to legally impose a tax on interstate commerce. While the Delta Air Lines case was primarily involved with the third-prong question of discrimination, this Court stated:

> The first prong of Complete Auto clearly requires that the interstate business (here the airlines) have a substantial nexus with the state before any tax may be levied on it. (emphasis in the original).

Delta Air Lines, 455 So. 2d at 323.

remainder of the facts for the case. (R:151-209).

The trial court issued its Order on November 16, 1993, declaring the Department's assessment of sales/use taxes against Share as unconstitutional. (R: 105-116) Revenue filed its Notice of Appeal on December 13, 1993. (R: 118).

On August 21, 1995, the First District Court of Appeal issued its decision in the case. Florida Department of Revenue v. Share International, Inc., 20 Fla. L. Weekly D1911 (Fla. 1st DCA August 21, 1995). The District Court upheld the decision of the trial court finding that Share had insufficient "nexus" with Florida despite the physical presence of Share in Florida and the sales activity in this State. Unfortunately, the District Court did not provide any detailed analysis of the United States Supreme Court's cases directly addressing the issue nor did it provide an analysis of why, with all the physical presence and sales activity in Florida, Share did not have "substantial nexus" with Florida.

STATEMENT OF THE ISSUES

The District Court 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, 112 S.Ct. 1904 (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.

Florida Department of Revenue v. Share International, Inc., 20 Fla. L. Weekly at D1911.

Because of the Department's disagreement over the District Court's understanding of the law and this case, the Department would suggest that the question be rewritten and would state the issue as follows:

> Whether a vendor's *voluntary physical presence* in the State of Florida (i.e., through employees/representatives and/or property in Florida), without any reference whatsoever to the *length* of time in the State, *combined* with vendor's business activities in the State (i.e., display solicitation, sales and/or service in the State) revealing a purposeful commercial endeavor creates "substantial nexus," within the meaning set out by the United States Supreme Court in Quill Corporation v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992) and National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967), permitting Florida, and the Department, the authority to require the vendor to collect Florida's sales and use taxes on all goods the vendor later sells to Florida residents through telecommunications, mails or common carrier.

SUMMARY OF THE ARGUMENT

The United States Supreme Court recently, in Quill Corporation v. North Dakota ("Quill"), 504 U.S. 298, 112 S.Ct. 1904 (1992), reaffirmed its earlier test concerning the right of states to impose a duty to collect use taxes on mail order firms first set forth in National Bellas Hess, Inc. v. Department of Revenue of Illinois (Bellas Hess"), 386 U.S. 753 (1967). Bellas Hess stands for the proposition that before the states can impose their duty to collect use taxes on a foreign vendor, the foreign vendor ***must*** make a physical appearance in the taxing state in the form of either employees or representatives or have their products in the taxing state for sale or lease coupled with an intent to exploit the local market through sales or leases.

Share has met the "substantial contacts" test of Quill, permitting Florida to impose a duty on Share to collect Florida use taxes from all sales made to Florida

residents, whether in Florida or through mail order. Share met this test because it physically entered Florida during the audit years, Share brought samples and inventory into Florida, it solicited orders in Florida through representatives, it sold products in Florida, it took orders in Florida for later delivery and it solicited and sold merchandise through mail order. This entrance into Florida was **not** unintended; it was a deliberate business decision by the owner of Share. It is clear that Share's entry into Florida was for the intent of seeking financial gain through the display of its inventory and the sale of its merchandise both while in the State and post-presence. *Share's physical presence in Florida was regular, continuous and systematic.*

Because of these facts, the trial court erred in quashing Revenue's assessment against Share and finding Section 212.0596, Florida Statutes, unconstitutional. The District Court erred in sustaining the trial court's findings and not recognizing the facts to establish "substantial nexus" with Florida. The District Court further erred when it established a new test for nexus contrary to and not recognized by the United States Supreme Court in any of its decisions. This Court must reverse both the trial court's and the District Court's decisions and reinstate the assessment against Share.

ARGUMENT

The United States Supreme Court, over the last 50 years, has set the standard of when a state may, consistent with the Commerce Clause of the United States Constitution, require that a foreign (out-of-state) vendor impose and collect the state's sales or use tax on sales to that state's residents. The Supreme Court concluded its long line of cases recently with the case of Quill Corporation v. North Dakota, 504 U.S.

298, 112 S.Ct. 1904 (1992). In sum, the Supreme Court reaffirmed its earlier holdings that in order for a state to impose a collection duty on a foreign vendor, the vendor must have "substantial nexus" with the taxing jurisdiction. The Court confirmed that "substantial nexus" meant some form of **physical presence** in the taxing state. But the Supreme Court also reaffirmed in Quill that this was **not** a "subjective" determination but a strict objective test. The Court restated its ruling from National Bellas Hess, Inc. v. Department of Revenue of Illinois, 386 U.S. 753 (1967) that "substantial nexus" was a "*bright line test.*" The test was a "bright line" so that, as the Court put it, the vendors and states would know that there would be "settled expectations" and vendors would have a "safe harbor" from state imposed collection requirements if they chose not to physically enter any particular state, or "do no more than communicate with customers by mail or common carrier" in that state without physical presence.

When the United States Supreme Court uses specific words and phrases to define its ruling, those words are to be taken seriously by those who wish to conform to the approved conduct. When that Court, in a challenge to those very words and phrases more than twenty years later, specifically repeats and reemphasizes the same words and phrases in rejecting the challenge, those words and phrases take on an even more important significance to the conduct under consideration. The significance of those words and phrases is the situation that confronts this Court in this appeal; the interpretation and meaning of those words and phrases as applied to a Florida factual situation. Both the circuit court and the District Court overlooked the significance of the words themselves, the fact that the words and phrases were repeated and the

underlying meaning those words imported to both vendors and the states.

Rather, the District Court created a *new*, yet unstated, test. This new test requires that the State now prove that the activities of the vendor, once it physically enters the State, are sufficient to establish "substantial nexus."[9] Id. Thus, the District Court throws out the objective "bright line" test and requires a "subjective" test of activity beyond physical presence to establish nexus. Where are the "settled expectations" in this test for the State or a vendor? What activity in Florida will be enough to establish nexus? The District Court did not say. From a reading of the Share decision, the Department and, for that matter, *vendors* have no clue as to what "activity" was not sufficient in Share's case. Did Share not sell enough?; did they not sell enough to Florida residents even though the sales took place in Florida?; were they not here enough days, even though the United States Supreme Court and this Court have never counted days to find nexus? What amount of activity in the future subject foreign vendors to Florida's collections requirements? The Department and vendors no longer know.

Just what was the test in Share? Just what will the test be in the next case? That is the very fallacy and failure of the District Court's new test. No one knows what the "rules" are now. The "bright line" and the settled expectations have been lost. To establish the "rules" will require case-by-case litigation with each vendor. This is the

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[9] This "continuing physical presence" test was raised, and roundly rejected, in Matter of Orvis, 86 N.Y.2d 165, 654 N.E.2d 954 (1995). The New York Court clearly showed how it was not supported by and directly inconsistent with the Supreme Court's "bright line" test. This point will be discussed later in more detail.

very "litigation" the Supreme Court sought to avoid in creating a "bright-line" test. It is for these reasons that the decisions below must be overturned and a return to the Supreme Court's "bright line" test accomplished.

The voluntary registration of Share as a Florida dealer, Share's voluntary physical entrance into Florida through its representatives who then sold Share's products and the remittance of the sales taxes collected by Share from its Florida sales **should** have been enough to resolve this case. There was no doubt that Share was physically present in Florida and, thus, under Quill, required to collect sales tax on all post-presence sales to Florida residents. But both the Circuit Court and the District Court did not understand the United States Supreme Court's clear cut, unwavering ruling about "bright-lines," "settled expectations," or "safe harbors." The two courts did not recognize the meaning of the phrase of "do no more than communicate." Rather, the First District Court of Appeal, without any proper analysis of the facts and holdings of Quill or National Bellas Hess, without mention or discussion of other Supreme Court cases directly on point to this case, without mention or discussion of other state supreme courts' decisions on this issue, though cited by the Department, including a case from the Court of Appeals of New York[10/] which just this July discussed this very issue finding "substantial nexus" based on facts similar to the facts here, and without any detailed comparison of the facts of this case to the facts in any of the long line of Supreme Court cases, came to a conclusion that runs directly contrary to the holdings

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[10/] In the Matter of Orvis, supra.

of Quill and National Bellas Hess. The District Court destroyed the very concepts of "bright line test", "settled expectations" and "safe harbor" and "do no more than communicate" when that court admitted that Share had done "more than communicate," had crossed the "bright line" and left the "safe harbor" and yet ruled that this was **not** enough to establish "substantial nexus." Share, 20 Fla. L. Weekly, at 1913.

I. QUILL SETS THE STANDARD BY WHICH THE STATES AND VENDORS ARE TO ACT IN INTERSTATE SALES

A. Quill Corporation v. North Dakota, 504 U.S. 298, 112 S.Ct. 1904 (1992)

In 1992, the United States Supreme Court revisited issues raised by the states' collections efforts against mail order business. The case that now controls the "nexus" question is Quill Corporation v. North Dakota, supra. The issues in Quill required the Court to address the modern validity of National Bellas Hess, Inc. v. Department of Revenue of Illinois, supra. The issue in Quill was whether states could, in 1992, require mail order/direct marketers to collect sales taxes on sales made to customers in the states and not violate either the Due Process Clause or the Commerce Clause. In Quill, the North Dakota Supreme Court believed that Bellas Hess was antiquated and declared the rigid physical presence test of Bellas Hess dead and adopted a flexible, subjective economic presence test to determine if a mail order company was required to collect North Dakota's sales/use tax.[11/] Quill, 504 U.S., at ___, 112 S.Ct at 1908-

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[11/] In order to create this subjective flexibility, the state passes statutes that defined "retailer," "dealer," or "sales" or directly identified mail order sales, subject to the collection of the state's sales tax, in such a fashion to include foreign sellers who systemically solicited the local consumer market with catalogs, flyers, and periodicals (continued...)

1909. Like Bellas Hess, Quill had no employees or property physically present in North Dakota. Quill, 504 U.S., at ___, 112 S.Ct at 1907. Yet, North Dakota imposed a burden of tax collection on Quill. In Bellas Hess, the Supreme Court had decided that such a requirement on foreign business was a violation of both the Due Process and Commerce Clauses; were both holdings still valid in 1992?

Thus, the Supreme Court needed to reexamine its Commerce Clause ruling from Bellas Hess.[12/] While it did uphold the rule of law announced in Bellas Hess, it did so only reluctantly, stating "[w]hile contemporaneously Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, Bellas Hess is not inconsistent with Complete Auto." Quill, 504 U.S. at, 112 S.Ct., at 1912. Therefore, in reading Quill, the element of stare decisis is one of the strong reasons for the Court retaining the Bellas Hess rule of law. Under those circumstances, the Bellas Hess holding must be read narrowly and strictly limited.

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[11](...continued)
and by TV and radio ads, telegraph and telephone solicitation and computer hookups. See, e.g., Section 57-40.2-01 through 07, North Dakota C C; North Carolina General Statute Section 105-164.8(b)(5) (1989); Tennessee Code Annotated, Section 67-6-102(6)(J).

[12/] By 1989, it was estimated that the sales of items via mail, telephone (1-800), television/cable (infomercials & shopping channels), magazine and computer had grown from $2.4 billion in 1967 to $183.3 billion. State by Heitkamp v. Quill Corporation, 470 N.W.2d 203, 209 (N.D. 1991).

The Court first noted that Bellas Hess was not directly overruled by the Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1974). [13] Quill, 504 U.S., at ___, 112 S.Ct at 1912. Rather, Bellas Hess was consistent with the first prong of Complete Auto's four-prong test of state taxation stating "Bellas Hess . . . stands for the proposition that a vendor whose *only contacts* with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." (e.s.) . Quill, 504 U.S., at ___, 112 S.Ct at 1912. Citing National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977), the Court stated that it had again upheld the concept by finding a distinct difference between a seller with a physical presence in the taxing state and those "who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." Quill, 504 U.S., at ___, 112 S.Ct. at 1912. The Court noted its continual reaffirmation of this minimum of physical presence in a state to satisfy the Commerce Clause. Quill, 504 U.S., at ___, 112 S.Ct. at 1912-1913.

The U.S. Supreme Court rejected the North Dakota Supreme Court's ruling that the Commerce Clause and Due Process Clause nexus requirements had merged over the years. Id., 504 U.S., at ___, 112 S.Ct. at 1913. Citing the history of the two clauses, the Court concluded that the nexus requirement of the Due Process Clause was intended for notification and fairness while the nexus requirement for the Commerce Clause "was a means for limiting state burdens on interstate commerce."

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[13] That decision overruled Freeman v. Hewitt, 329 U.S. 249 (1946) and Spector Motor Service, Inc. v. O'Connor, 340 U.S. 602 (1951)

Quill, 504 U.S., at ___, 112 S.Ct. at 1913.

The U.S. Supreme Court then addressed the State of North Dakota's assertion, adopted by the Supreme Court of North Dakota, that the United States Supreme Court, in the twenty years since Bellas Hess, had retreated from "a stringent physical presence test in favor of a more **flexible subjective approach**." Quill, 504 U.S., at ___, 112 S.Ct. at 1914 (e.s.). North Dakota made this argument because of the growth of the mail order business and the need to expand the taxing authority to reach these sales. The Supreme Court rejected North Dakota's analysis for two reasons. First, the cases relied upon by North Dakota all had evidence of physical contacts with the taxing state. Id. Second, stating, that while in most Commerce Clause jurisprudence the Supreme Court had moved to balancing tests, the Court had not moved away from the Bellas Hess physical presence requirement for sales and use taxes. Quill, 504 U.S., at ___, 112 S.Ct. at 1914. In so stating, the Court upheld, in sales and use tax cases, the "bright-line" test articulated in Bellas Hess. The Court stated that the Bellas Hess "bright-line" test "furthers the ends of the Commerce Clause" by demarcating "a discrete realm of commercial activity that is free from interstate taxation." Quill, 504 U.S., at ___, 112 S.Ct. at 1914. The "bright-line" test creates "a safe harbor for vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail.' " Id. While the rule is artificial, the "artificiality, however, is more than offset by the benefits of a clear rule." Id., 504 U.S., at ___, 112 S.Ct. at 1915 (e.s.). The advantages for such a "bright-line" rule, the Court stated, include the establishment of "boundaries of legitimate state authority to impose a duty to collect

sales and use taxes and reduces litigation concerning those taxes" and "encourages settled expectations" for mail order vendors. Quill, 504 U.S., at ___, 112 S.Ct. at 1915. In summation, the Supreme Court closed its opinion saying

> [a]lthough in our cases subsequent to Bellas Hess and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that Bellas Hess established in the area of sales and use taxes.

Quill, 504 U.S., at ___, 112 S.Ct. at 1916. [14]

Thus, what we are today left with is the fact that the "bright-line" test is "the" test for nexus when a direct market vendor is involved with sales and use taxation. The Supreme Court rejected the use of any form of *subjective* analysis for both States and vendors to either require tax collection or escape tax collection. In a crude statement of the rule, the "bright-line," "physical presence," test has become the physical "state-line" test; a merchant is on notice that if all it does is contact its customers in the foreign state by telephone, mail or common carrier, it faces no duty to collect sale or use taxes. BUT, if that merchant voluntarily chooses to physically cross a state line to solicit, sell or deliver goods through the use of its employees or representatives, then the Supreme Court has allowed the States to require the merchant to collect sales and use taxes on the sales of the goods.

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[14] To fully understand the import of the "bright-line, physical-presence" test, all one has to do is read the dissenting opinion of Justice White in Quill, 504 U.S. at ___, 112 S.Ct. at 1916- 1922. Justice White's clearly points out, in sharp disagreement, that what the states and vendors are left with is a physical presence requirement; before the states can tax a vendor, the vendor must have some form of physical presence in the taxing state.

B. In the Matter of Orvis, 86 N.Y.2d, 654 N.E.2d 954 (1995)

Just recently the Court of Appeals of New York faced the same question pending before this Court; does physical presence with the intent to exploit the local market constitute "substantial nexus."[15]/ The court's decision in Orvis Co., Inc. v. Tax Appeals Tribunal of the State of New York, 86 N.Y.2d 165, 654 N.E.2d 945 (1995) is instructive for this case for it also does a complete and thorough analysis of Quill. Moreover, it is the only state supreme court to provide such a thorough analysis of Quill to date.

In Orvis, the Court of Appeals of New York had before it two Vermont vendors who had physical contacts with New York. Orvis, primarily a mail order retail seller of camping and hunting goods, also sold its products wholesale to certain licensed retailers of Orvis' products in New York. Id., 86 N.Y.2d at ___, 654 N.E.2d at 955. Orvis sent its personnel into New York to visit its retail partners. Id. Vermont Information Processing, Inc. ("VIP"), was a retailer of computer hardware and software to beverage distributors. Id. Most of VIP's sales orders were filled through mail order from Vermont. Id., 86 N.Y.2d at ___, 654 N.E.2d at 955-956. However, VIP did send its employees into New York to resolve problems, install software and provide additional instruction to its New York customers. Id., 86 N.Y.2d at ___, 654 N.E.2d at 956.

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[15]/ The California 1st District Court of Appeal, in setting forth the issue, stated "[t]he issue, as artfully stated by the trial court judge, 'is whether by virtue of California Revenue & Tax[ation] Code section 6203(g) [Current] *is one toe over the bright-line* created by National Bellas Hess, Inc. v. Department of Revenue of Ill., [supra] 386 U.S. 753, [87 S.Ct. 1389] . . .'" Current, Inc. v. State Board of Equalization, 24 Cal.App.4th 382, 29 Cal.Rptr. 407, 410 (Cal. 1st DCA 1994).

The State of New York issued two separate assessments against both Orvis and VIP for their mail order sales to New York residents because of Orvis' and VIP's physical presence in New York. The cases proceeded on separate paths to New York's court of intermediate appeals. The lower New York appellate court ruled in the separate cases that VIP's and Orvis' contacts did not satisfy the "substantial nexus" requirement of Quill because there was insufficient "substantial physical presence" in New York.[16/] Orvis, 86 N.Y.2d at ___, 654 N.E.2d at 955-956. The Court of Appeals rejected both of the lower appellate court rulings, finding "substantial nexus" with New York to require collection requirements. Id., 86 N.Y.2d at ___, 654 N.E.2d at 956 &962.

The court opened with a historical analysis of the United States Supreme Court's "nexus" decisions before Quill, noting that the Supreme Court was satisfied nexus was met as long as there was physical presence in the taxing state.[17/] Id., 86 N.Y.2d at ___, 654 N.E.2d at 956-957. But, as the court noted, the actual physical presence in the state was not "unduly exacting, " citing examples of the level of physical presence satisfying nexus. Id., 86 N.Y.2d at ___, 654 N.E.2d at 957.

[16/] See, Orvis Co. Inc., v. Tax Appeals Tribunal of State of New York, 204 A.D.2d 916, 612 N.Y.S.2d 503 (N.Y.A.D. 3rd Dept. 1994); Vermont Information Processing Inc., v. Tax Appeals Tribunal of State of New York, 206 A.D.2d 764, 615 N.Y.S.2d 99 (N.Y.A.D. 3rd Dept. 1994).

[17/] The Court of Appeals stated that in Bellas Hess, the Supreme Court "for the first time explicitly made some physical presence of the vendor in the taxing state a requirement under . . . the Commerce . . . Clause for charging the vendor with the duty of collecting a use tax on mail order purchases of that State." Orvis, 86 N.Y.2d at ___, 654 N.E.2d at 957.

The court then went into a detailed review of the facts and conclusions of Quill. It too noted that retention of the physical presence requirement of Bellas Hess was done with "some apparent reluctance."[18/] Id., 86 N.Y.2d at ___, 654 N.E.2d at 959. The court reached the conclusion the Supreme Court ruled as they did, rejecting North Dakota's "flexible approach" and retaining the more rigid approach, because the rigid approach furthers the ends of the Commerce Clause by continuing the "bright-line" test establishing the realm of tax free commercial activity used the past 20 years. Id. Thus, the Bellas Hess rule "serves to assure tax immunity to 'vendors whose only connection with customers in the [taxing] State is by common carrier or the United States mail,'" benefiting national commerce by avoiding litigation. Id. Furthermore, the court found the demands of stare decisis required adherence where the large mail order business had relied upon the rule for such a period of time. Id.,

The New York court went about debunking the lower appellate court's "substantial physical presence" test, where the lower court found that Quill had elevated the requirement for physical presence. The court lead off with the statement that "neither in Bellas Hess nor in cases preceding it, or succeeding it up to Quill did the [Supreme] Court express any insistence that the physical presence of the interstate vendor be substantial for a valid taxation of sales of or imposition of a use tax collection duty upon the vendor." Orvis, 86 N.Y.2d at ___, 654 N.E.2d at 959-960. It then cited

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[18/] The court cited Quill's comment that "[w]hile contemporaneous Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, Bellas Hess is not inconsistent with Complete Auto." Quill, 504 U.S. at, 112 S.Ct., at 1912.

cases where the United States Supreme Court found nexus. Id., 86 N.Y.2d at ___, 654 N.E.2d at 960. Repeating itself, the court again commented that, rather than elevating the physical presence standard, the Supreme Court's decision was a "somewhat begrudging retention of the Bellas Hess physical presence requirement."[19] Id.

The New York court then examined the effect of the lower court's "substantial physical presence" standard. Stated succinctly, such a subjective standard of substantial physical presence "would destroy the bright-line rule the Supreme Court in Quill thought it was preserving in declining to overrule Bellas Hess." Orvis., 86 N.Y.2d at ___, 654 N.E.2d at 960. As properly noted, such a subjective test would result in the very thing the Supreme Court sought to avoid by the bright-line test, a " ' case-by-case evaluation of the actual burden imposed' on the individual vendor . . . rather than the clear-cut line of demarcation the Supreme Court sought to keep intact by its decision in Quill." Orvis, 86 N.Y.2d at ___, 654 N.E.2d at 960, citing, Quill, 504 U.S., at ___, 112 S.Ct. At 1914. Continuing,

> [t]hus, ironically, the interpretation of Quill urged by the vendors here would undermine the principal justification the Supreme Court advanced for its decision in that case, the need to provide certainty in application of the standard and with it, repose from controversy and litigation for taxing States and the nearly $200 billion-a-year mail-order industry, with respect to sales and use taxes on interstate transactions.

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[19]/ The New York court cited to Oklahoma Tax Commission v. Jefferson Bus Lines, Inc., 514 U.S. ___, 115 S.Ct 1331 (1995) as support of its conclusion. Id., 86 N.Y.2d at ___, 654 N.E.2d at 960. If, as the New York Court opined, that the Supreme Court had changed its standard in Quill, why did it not apply a "substantial physical presence" test to the facts faced in the sale of the bus ticket subject to the Oklahoma sales tax?

Orvis, 86 N.Y.2d at ___, 654 N.E.2d at 960.

The court concluded the opinion by comparing the activities of Orvis and VIP and found that the physical activity in New York, with its intent to further the business objectives of each firm, was sufficient nexus to permit New York to impose collection requirements of Orvis and VIP.

II. PHYSICAL PRESENCE - WHAT IS IT?

There is no question that the Supreme Court long ago approved the imposition of a sales or use tax on items that have traveled in interstate commerce and have come to rest in the taxing state. If the property has been physically brought into to a state for use in that state, then a use tax can be applied. Henneford v. Silas Mason, Co., 300 U.S. 577 (1937). Thus, since a sales or use tax could be imposed on items coming into a state in interstate commerce for use in that state, the question then arose over who was responsible for collecting the sales or use tax?; thus began the odyssey which resulted in the establishment of the "physical presence" requirement explicitly stated in Bellas Hess.

Over the years, the United States Supreme Court has examined many forms of physical presence in a taxing jurisdiction. It examined these forms in order to determine if the particular form of presence, combined with certain activity, equaled nexus with the taxing jurisdiction. The Court determined that the following facts or forms of physical presence were sufficient to create nexus with the taxing jurisdiction, thus *permitting the taxing jurisdiction to impose collection duties on the foreign vendors*: The employment of local resident representatives to do the company's solicitation along with payment of

expenses and rent - Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U.S. 62 (1937); retail sales stores in the taxing jurisdiction along with out-of-state mail-order operations - local stores collected the sales tax but mail-order operation refused to collect on mail-order sales - Nelson v. Sears, Roebuck & Co., 312 U.S. 359 (1941) ("Sears") and Nelson v. Montgomery Ward & Co., 312 U.S. 373 (1941) ("Ward")[20]/; sales in the taxing jurisdiction by company representatives who were **not** residents of the taxing state and no mention of any minimum time in the taxing state required, just visited the state "time to time" - General Trading Co. v. State Tax Commission of Iowa, 322 U.S. 335 (1944) [21]/; sales by independent contractors who were not employed by the company full time but in the taxing jurisdiction representing the seller[22]/ - Scripto v. Carson, 362 U.S. 207

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[20]/ The Court did, as a precursor, to Bellas Hess, state that there was a difference between Sears, who was doing business in Iowa with its stores, and those that are not so doing business. Sears received a benefit from Iowa but the others did not. Sears, 312 U.S. at 365.

[21]/ General Trading was a Minnesota company. It had no real property or resident representatives in Iowa. It did, from time to time, send traveling salesmen into Iowa from its Minnesota headquarters to solicit for business. Id., 322 U.S. at 337. The orders were subject to acceptance in Minnesota and shipped from Minnesota by common carrier. Id. Because of the physical presence of the salesmen in the state, Iowa asserted that General Trading was obligated to collect the taxes. Id. The Supreme Court held that the physical presence of the non-resident salesmen in Iowa was enough, that the presence of permanent retail stores, like in Sears, were "constitutionally irrelevant" and "[a]ll these distinctions are without constitutional significance." General Trading, 322 U.S. at 338.

[22]/ The Court noted in Scripto the factual differences between Scripto and the Court's earlier decision, based solely on due process, of Miller Brothers Co. v. State of Maryland, 347 U.S. 340 (1954). The Court found that Miller Brothers "had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like." Scripto, 362 U.S. at 212.

(continued...)

(1960).[23]/

Scripto solidified the rule of law on the requirement of physical presence to establish nexus. Bellas Hess followed 7 years later. Without repeating the holding of Bellas Hess, it is fair to state that the decision there is consistent with, and a reaffirmation of, the Commerce Clause physical presence requirement stated so well in Scripto. That is why the language on Bellas Hess, "do no more than communicate" by the mails and common carrier is so understandable. If all there is only communication and there is no physical presence in the state, there is no collection duty imposed on the foreign vendor. But if the vendor initiates physical presence, then the Scripto test has been met and collection duties can be imposed on the vendor.

Since Scripto, the Supreme Court has repeatedly examined various factual situations to determine if nexus has been established. See General Motors Corp. v. Washington, 377 U.S. 436 (1964), overruled on other grounds, Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) [district managers who worked out of their homes in Washington and service managers who advised dealers sufficient to find nexus]; Standard Pressed Steel Co. v. Washington

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[22](...continued)
The Court also noted that the sales made by the Miller Brothers were to Maryland residents while the Maryland residents were personally present in Delaware. Id. Stated succinctly, "Marylanders went to Delaware to make purchases - Miller [Brothers] did not go to Maryland for sales." Id.

[23]/ Ironically for this case, the Scripto case arose out of an appeal from the Florida Supreme Court case of Scripto, Inc. v. Carson, 105 So.2d 775 (Fla. 1958). Discussion of this case and its importance to the issues before this Court will be discussed later in this Brief.

Department of Revenue, 419 U.S. 560, 562 (1975) [Standard had within the state only one employee who worked out of his house. This employee did not take any orders for Standard but was a consultant for Standard servicing Standard's large Washington account, the Boeing Company. The Court instead focused on connection between the employee's activity in the state and the establishment and continuation of sales of Standard's products.[24]/]; National Geographic Society v. California Board of Equalization, supra [California could apply its use tax to sales made by the National Geographic's sale of tangible personal property to subscribers in California through the Society's mail order catalog even though its mail order operation was outside California and the items ordered by the public arrived by common carrier or the U.S. Mail. The Society's maintenance of two offices[25]/ in California to solicit advertisements for the monthly magazine was enough to establish nexus.[26]/ Id., 430 U.S. at 552.]; Tyler Pipe

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[24]/ The Court found that the employee "made possible the realization and continuation of valuable contractual relations between [Standard] and Boeing." Standard Pressed Steel, 419 U.S. at 562. Further, the employee's "services were substantial with relation to the establishment and maintenance of sales, upon which the tax was measured." Id., 419 U.S. at 563 (citations omitted). The Supreme Court concluded by stating that Standard's claimed lack of nexus "verges on the frivolous." Id. 419 U.S. at 562.

[25]/ The Court stated that the Geographic's offices, "without regard to the nature of their activities," had the same advantage of municipal and state police power protections as if they had local retail stores or their office assisted the mail order operation. Id.

[26]/ The Court cited its earlier cases of General Trading Co. v. Tax Commission, supra [sales were arranged by seller's local representatives working in the taxing state]; Nelson v. Sear, Roebuck & Co., supra and Nelson v. Montgomery Ward, supra [maintenance of local retail stores by taxpayer in taxing state] and Scripto, Inc. v.
(continued...)

Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987) [Tyler Pipe had no office in Washington, owned no property, and had no employee in the state. Id., 483 U.S., at 249. It did all its solicitations from out of state. Id. The only connection Tyler Pipe had with Washington was an "independent contractor" who was located in Seattle. Id.]; D.H. Holmes Company, Ltd. v. McNamara, 486 U.S. 24 (1988) [Use tax imposed on mail order catalogs shipped into Louisiana. Holmes was a department store chain in Louisiana, with 13 stores and 5000 employees in the state and also conducted a mail order business. The catalogs were manufactured totally outside of Louisiana and mailed to customers in the state. Physical contacts sufficient for finding of nexus.].

The inescapable conclusion from the United States Supreme Court cases is that where there is physical presence in a state combined with business activity, "substantial nexus" has been established by the foreign vendor.[27]/ The test to be used to determine "nexus" with a state is the factual realities of the business activities being

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(...continued)
Carson, supra [stating that Scripto had no office, no place of business, no property nor regular full time employees, yet soliciting business in Florida was sufficient].

[27]/ Of course, where there is no physical presence with intent to exploit the local market, no nexus has been established and no collection requirement can be imposed on the foreign vendor. See L.L. Bean, Inc. v. Commonwealth, 101 Pa.Cmwlth 435, 516 A.2d 820 (1986)[economic presence through non-presence systematic exploitation of the market not sufficient to find nexus; physical presence with intent to sell is required; L.L. Bean in Pa. To visit *manufacturer, not seller*, of its products]; Cally Curtis Company v. Groppo, 214 Conn. 292, 572 A.2d 302 (1990)[California mail order sales and rental of video tapes; no physical presence in Connecticut]; SFA Folio Collections, Inc. v. Tracy, 73 Ohio St.3d 119, 652 N.E.2d 693 (1995) [no physical presence of the foreign vendor].

carried on by a particular enterprise while physically present within the taxing state. If the business has a physical presence in the taxing state, whether in the form of employees or representatives or the vendor's products for sale or lease, and the business' activity is purposeful and aimed at exploiting the commercial market of the taxing state through the sale or lease of its property or products, the enterprise can constitutionally be required by the taxing jurisdiction to collect or pay its fair share of taxes in return for the services provided by the state that permits the enterprise to carry on its profit making operation within the taxing state.

State courts, prior to Quill, had consistently applied the Scripto and Bellas Hess standards to determine nexus. In Pearle Health Services, Inc. v. Taylor, 799 S.W.2d 655 (Tenn. 1990)[28/]; Ridgewood Log Homes v. Comptroller, 77 Md.App. 382, 550 A.2d 707, 711-12 (1988)[29/]; Cooey-Bentz Co. v. Lindley, 66 Ohio St.2d 54, 419 N.E.2d 1087 (1981)[30/]; and J.C. Penney Co., Inc. V. Hardesty, 264 S.E.2d 604 (W.Va. 1980)[31/]. [32/]

[28/] The Tennessee Supreme Court found nexus due to Pearle's non-resident representative's presence in Tennessee to visit Pearle's franchise owners.

[29/] The Maryland court found nexus existed to reach the foreign vendor because of the vendor's two resident sales representatives, a husband and wife team, soliciting business in Maryland.

[30/] The Ohio Supreme Court decided that nexus with Ohio existed for a West Virginia furniture dealer who purposely aimed its advertisements at the Ohio market by placing ads in the local Ohio newspapers, delivered its goods knowingly to Ohio in its own trucks and sent installers and repairmen to Ohio.

[31/] A series of three sales/use tax cases: 1) J.C. Penney: stores in West Virginia establish sufficient nexus; 2) Pittsburgh-Des Moines Steel: no offices, manufacturing or resident representatives in state, company installers enter state to

(continued...)

II. THE SOLICITATION AND SALES ACTIVITY OF SHARE WAS SUFFICIENT FOR THIS COURT TO FIND NEXUS WITH FLORIDA

A. SHARE'S FLORIDA PHYSICAL PRESENCE AND SALES ACTIVITY CLEARLY REVEAL THAT SHARE INTENDED TO COME TO FLORIDA FOR COMMERCIAL REASON

Stated bluntly, Share had actual contacts, activities and physical presence in Florida. Share's physical presence was not inadvertent, but represented a conscious decision by the owner of Share to enter Florida and tie Share's commercial interests with the educational seminars of the PCRF. Share's presence was not temporal, but were a regular, systematic and continuous business practice to physically be in Florida for the three days and then, year round and post-presence, continue its sales to Florida customers. All of Share's activities were in pursuit of an established company policy on

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[31](...continued)
install products in West Virginia, nexus found; 3) Richardson, Gordon and Associates: contractor working with state road department, physical visits to state enough to establish nexus.

[32]/ See also Burke & Sons Oil Co. v. Director of Revenue, 757 S.W.2d 278, 279 (Mo.App. 1988) [use tax] ("nexus" case - cites Miller Brothers and Scripto); Proficient Food Co. v. New Mexico Taxation and Revenue Dept., 107 N.M. 392, 758 P.2d 806, 807-08 (1988) [gross receipts tax] ("nexus" case); Rowe-Genereux, Inc. v. Vermont Department of Taxes, 138 Vt. 130, 411 A.2d 1345, 1348-1349 (1980); Good's Furniture House, Inc. v. Iowa State Board of Tax Review, 382 N.W.2d 145, 148-150 (Iowa 1986) [sales/use tax imposed upon Illinois furniture store; unlike Miller Brothers, extensive advertising by Good's into Iowa, free delivery to all Iowa purchasers, regular and systematic deliveries to Iowa, employees also assembled some furniture and made repairs]; Scholastic Book Clubs, Inc. v. State Board of Equalization, 207 Cal.App.3rd 734, 255 Cal.Rpt. 77 (1989) [sale/use tax; foreign vendor using local school teachers to sell books to students; teachers were representatives of vendor; In re State Sales or Use Tax Liability of Webber Furniture, Scottsbluff, Nebraska, 290 N.W.2d 865 (S.D. 1980).

a continuing basis, based upon an affirmative decision of the owner, to exploit the Florida market and increase Share's profitability.

The rules of Bellas Hess had been in effect for nearly twenty years before Share came into Florida. Share had every opportunity to apprise itself of the "settled expectations" set by Bellas Hess. It knew that if all Share did was communicate by mail or common carrier, Share could stay in the "safe harbor" of foreign vendors; Florida could not impose any collection duty on Share. However, and in spite of the settled history on the issue and the known consequences for a vendor to cross a state line with the intent to solicit or sell its products, Share voluntarily chose to enter Florida. It voluntarily chose to enter Florida and engage in sales activities calculated to increase Share's profits.

This case should focus on the facts surrounding the two primary issues stated by the United States Supreme Court to be dispositive of the issue of state tax collection for foreign vendors: physical presence in the state and the activity while physically present. A conscious decision was made by the owners of the Parker Chiropractic Resources Foundation that the Foundation would hold seminars in Florida during the winter months. (R:165) The decision was made "for the purpose of targeting chiropractors who practice in the northeastern United States and Canada." (R:165). Share[33]/ brought inventory and offered for sale each year **between 500-1000 different**

[33]/ Parker Chiropractic Resources Foundation is jointly owned by Dr. James W. Parker and his son, Dr. William Karl Parker. (R:153) Dr. James Parker is the sole shareholder, President and Director of Share International, Inc. (R:153)

chiropractic supplies and products made or sold by Share at these seminars to the doctors attending the seminars. (R:80-81, 154-155, 184-185)

The decision to come to Florida was **not** fortuitous, but was planned and calculated to reach a specific audience who would be the purchasers of Share's products. (R: 165 - warm state, marketing to doctors from cold climates) To call the planning of the seminars in Florida anything less than calculated and purposeful would be a lie. Florida in the winter is a "magnet" for vacationers of the colder climates. If it were not, why did Share not choose another location? Share's choice of Florida was made with the intent to reach a particular audience at a time of year when the attendees would locate in a specific area.

It is without question that Share crossed the state line and physically entered Florida. While Share was physically in Florida it

a. sent employees or representatives authorized to sell Share's products into Florida;
b. sent some of Share's samples and unsold merchandise (between 500-1000 items) for display and sale;
c. offered and permitted Share's products to be sold in the state[34]/; and
d. its employees or representatives took orders for some of Share's products, physically offered for sale in Florida, which Share then shipped from its Texas headquarters to the Florida customer.

It is also without question that Share registered as a retail dealer with the Department, collected sales taxes on the sale of Share products sold and delivered in Florida at the seminars and remitted the taxes to the Department.

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[34]/ A typical three day seminar in Florida generated sales amounting to over 4.6% of Share's total annual revenue. Not included in this total were the value of the items sold in Florida and delivered later and the value of the pure mail order sales.

Between the yearly Florida PCRF seminars, Share also directly sold products from its offices in Texas to Florida residents. The post-presence sales activity was assisted by the catalog, one supplement and approximately 15 flyers sent into Florida. (R:155). Orders were sent from the Florida customer to Share either through the mail, telephone or common carrier (R: 81).

The Supreme Court's test of physical presence and calculated business activity have been met in this case. The amount of time in Florida, the amount of money collected and to whom the products were sold is irrelevant to the issue of nexus. The fact of physical presence along with purposeful business activity to take advantage of the market satisfies the Supreme Court's requirement for collection of sales taxes. Share had the opportunity to stay in its Texas "safe harbor," it chose not to do so. The distinct parameters of the Bellas Hess rule are clear for both the foreign vendor and the state. Having stepped over the bright-line together with purposeful business activity, Share forfeited the protections of the "safe harbor" and subjected itself to Florida's collection requirement. Having entered Florida, Share has been merely put on the same plane as resident Florida vendors. All must collect sales taxes from Florida sales.

B. LENGTH OF TIME VENDOR PRESENT IN THE STATE AND RESIDENCE OF THE BUYER

In its decision, the District Court made as important, and determinative of this case, the fact that Share was physically in the State for only three (3) days each year and that 84% of the purchasers lived permanently outside Florida at the time they purchased Share's products in Florida. The District Court cites no case law whatsoever

to support its decision or reasoning as why these factors were important or determinative. It did not do so because no case law from the United States Supreme Court or other state supreme courts has ever denied nexus based on the amount of time physically in a state by the vendor or the permanent residence of the purchaser. These are simply of no constitutional import to the Supreme Court. The fact of physical presence linked with purposeful exploitation of the commercial market is all the analysis that matters.

1 LENGTH OF TIME

To date, no court has ever discussed, much less decided, a nexus case based on the length or span of time a foreign vendor was in a state. If the vendor was in the state with the intent to solicit and sell its products, the inquiry was over; nexus was established. It matters not whether the sale took place in 3 seconds or 3 days, once a sale takes place Section 212.05 and Section 212.07, Florida Statutes, impose a sales tax on the sale and a collection duty on the vendor. Under the District Court's decision, a vendor of Japanese construction equipment headquartered in California could hypothetically fly into Orlando for less than 6 hours and make sales in the millions, go back to California and sell additional equipment for millions and not be required to collect Florida sales tax on the post-presence sales. That same vendor could even not make one sale in Orlando but on return to California complete sales to the persons he solicited in Orlando and not collect the Florida sales tax. Under the District Court's theory, a Mobile, Alabama vendor could be the far-and-away dominate seller of a product in Pensacola but yet still not be required to collect Florida sales taxes because

the vendors physically entered Pensacola for only a few days a year. That is simply **not** the law.

While cases revealing the taxability of such sales operations were cited by the Department to the District Court, that court either ignored the case cite or missed the issue in the cited case. As stated by the Department earlier, General Trading Co. v. State Tax Commission of Iowa, supra, long ago resolved the issue that neither a "resident" agent or the amount of time spent in a state was of importance; physical presence with intent to sell was all that was important. General Trading came to the Supreme Court from the Supreme Court of Iowa. The facts in the case were well stated in State Tax Commission v. General Trading Co., 233 Iowa 877, 10 N.W.2d 659 (1943). General Trading was a Minnesota company selling under the name of Minneapolis Iron Store. Id, 10 N.W.2d at 660. General had no offices, resident employees or representatives, warehouse or other property in Iowa. Id. General conducted business in Iowa by sending General's salesmen, **residents of Minnesota**, into Iowa to solicit orders for General. Id. General's answer to the state's complaint, when addressing the frequency of visits, stated the salesmen entered Iowa "from time to time." Id. After the orders were taken, the orders were sent to Minneapolis for acceptance and shipping by common carrier. Id. General first argued that it was not a "retailer maintaining a place of business" in Iowa because it did not have resident representatives, only non-resident traveling salesmen. Id., at 661. The Iowa Supreme Court rejected this argument because the statute contemplated even temporary periods of time as long as there was some physical presence. Id. Next General argued that Iowa could not force

General to collect Iowa's use tax. The supreme court also rejected that contention, first relying on Nelson v. Sears, Roebuck & Co., supra, for the proposition that General was involved in "local [sales] activity." The court then turned to Felt & Tarrant, supra, stating that the facts of the two cases "were very similar to those of defendant herein, *except that the general agents, who solicited orders to be accepted or rejected in California, were residents of California, and had permanent offices there.*" General Trading, 10 N.W.2d, at 662. The supreme court upheld the collection requirements on General Trading in spite of the fact that the salesmen were not residents of Iowa and that their presence in Iowa was only temporary.

The United States Supreme Court reviewed the Iowa Supreme Court's decision. General Trading Co. v. State Tax Commission of Iowa, supra. Agreeing with the Iowa Supreme Court that Felt & Tarrant was controlling, the Supreme Court stated that "[t]he [Felt & Tarrant] case is indistinguishable . . ." and that the fact that Sears "also had retail stores in Iowa, whose sales were subjected to the sale tax, is constitutionally irrelevant to the right of Iowa sustained in those cases to exact a use tax from purchasers on mail order goods forwarded into Iowa from without the State." General Trading, 322 U.S., at 338. Thus, the Court ruled, it was permissible for Iowa to require General Trading to collect Iowa's sales tax on General's sales to Iowa's residents. [35]/

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[35]/ As stated in Justice Jackson's dissenting opinion, this appears to be the first Supreme Court decision allowing states to impose tax collection duties on a foreign vendor whom the taxing state may not have the legal right to directly tax. General Trading, 322 U.S., at 339 (J. Jackson, dissenting). This Court has approved of this situation in Scripto v. Carson, 105 So. 2d 775, 781-782 (1958).

This Court did not take as constitutionally important the residency of the salesmen or the amount of time the salesmen spent in the State. Scripto v. Carson, 105 So. 2d 775, 782 (1958). This Court just did not think it important to the matter. Rather, this Court followed the United States Supreme Court decision in General Trading. The Court stated that the "factual situation in General Trading Company is almost identical to the situation presented here." Id., at 782. Rather than discussing the fact that General Trading's salesmen were Minnesota residents and spent little time in Iowa, this Court noted the "sole difference" between the two cases was that Scripto was represented in the taxing state by commission merchants and General Trading was represented by employees which, this Court summed up as "offer[ing] no distinguishing characteristics that would preclude the application of the rule of that case to the situation presented by the case at bar. " Id. Thus, this Court found nexus, or sufficient contacts, based upon physical presence in the State and the sales activities of the salesmen, *not* on the actual residence of the salesmen or the time in Florida selling their products.[36]/ Finally, this Court noted a distinction between the facts of Scripto and

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[36]/ This Court cited with approval the case of Topps Garment Mfg. Corp. V. State of Maryland, 212 Md. 23, 128 A.2d 595 (1957) in supporting the Court's decision. Topps was an Indiana company selling uniforms. Id., 128 A.2d at, 596. Topps had no office, property or warehouse in Maryland. Id. Topps sold its uniforms in Maryland strictly through solicitors, "some of whom are Maryland residents." Id. These solicitors were not on Topps payroll nor was there any accounting for their time in selling. Id. Like this Court, the Maryland court rejected the distinction between an employee salesman and "independent contractors not under supervision and . . . part time employees who often represented other vendors." Id., at 598. As summed up, the "test is the nature and extent of the activities" in the state. Id. The court went on to cite many other cases and law review articles where the foreign vendor, once physical (continued...)

Miller Brothers, supra. In Miller Brothers Co. , this Court noted, there was no actual solicitation of business in the taxing state by representatives of the Delaware corporation; the non-resident corporation maintained no representation whatsoever in the taxing state." Scripto, 105 So. 2d, at 783. **Actual physical presence is important, *not* the amount of time of physical presence.** [37]/

2. RESIDENCY OF THE PURCHASER

The District Court also determined that it was important that 84% of the attendees to the PCRF seminars lived outside of Florida, thus concluding that this did not show an exploitation of the Florida market. Share, 20 Fla. L. Weekly, at D1913. That decision of the District Court is the one and only decision in the entire jurisprudence of tax law in the United States to have ever focused on the *residency of the purchaser* at the time of the purchase. It is standard legal analysis in nexus cases to determine the residency of the vendor and identify the state in which that vendor usually carries on its business activities, but once the state of business activity is identified and the vendor placed physically in that state no one has ever then

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[36](...continued)
presence is found in the taxing state, is required to collect the state's sales tax.

[37]/ Other examples of cases where nexus has been found when the actual physical presence in the state is temporary or infrequent include Thompson v. Rhodes-Jennings Furniture Co., 223 Ark. 705, 268 S.W.2d 376 (1954), cert denied, Branyan & Peterson v. Thompson, 348 U.S. 872 (1955) [traveling salesmen from various Tennessee businesses entering into Arkansas to solicit products]; Pearle Health Services, Inc. v. Taylor, supra [no company owned stores, offices or property in Tennessee; sales of optical merchandise to franchise stores in Tennessee; out-of-state inspector visited the stores every 15-18 months; out-of-state representative came to state every 6-8 weeks to show goods].

questioned the residency of the purchaser in the taxing state. There have been no such inquires because the residency of the purchaser is totally irrelevant.

All sales tax states, like Florida, have in their laws the fact that the sales tax is applied to all state sales made in the state and delivery is turned over to the purchaser in that state. Section 212.05, Florida Statutes; Rule 12A-1.064(1)(a), F. A.C. The sales tax applies at the moment of the sale and delivery. Section 212.05 and section 212.07, Florida Statutes. A sale to an out-of-state purchaser is only exempt from the Florida sales tax if the purchaser never takes possession in the State and the item is placed by the Florida vendor, in strict compliance with the Rule, in the mails or with a common carrier for delivery out of the State.[38/] See Rule 12A-1.064(1)(a), F.A.C.

The District Court was in error on using this fact to determine nexus. As the Department has repeatedly cited, the test is not the residency of the buyer but whether an out-of-state vendor physically entered a state and solicited or offered his goods for sale in that state to *anyone*.

C. THE DECISION OF THE DISTRICT COURT DESTROYS THE VERY MEANING OF QUILL

The decision of both the Circuit Court and District Court are in error. Both are directly counter to the Supreme Court's ruling in Quill and other nexus cases. In fact, the situation created by the express language of the District Court is exactly like that

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[38/] One of the Department assessments against Share was for not collecting sales taxes on sales made in Florida for future delivery. To reemphasize, this assessment was against only those sales that reflected a Florida delivery address. The assessment did **not** include sales made at the seminars where the delivery was to be made outside Florida.

created by the lower appellate court in Orvis. The Department believes that this Court, in following the ruling of Quill, must do exactly as the Court of Appeals of New York did in Orvis and reverse the lower appellate court, finding that Florida, like New York, does not need to establish a new subjective test to determine physical presence but rather merely follow the Supreme Court's dictates of Bellas Hess and Quill and this Court's decision in Scripto.

The District Court's following statement, if not directly, implicitly creates a subjective "substantial physical presence" test for which the District Court cited no support in Quill or other Supreme Court nexus case:

> The Department correctly notes that the Supreme Court has never required permanent presence in the state to establish "substantial nexus" for the purpose of the Commerce Clause. We reject, however, the Department's argument that once an out-of-state vendor crosses the "bright line" established in Bellas Hess by doing anything more than communicate with its customers by mail or common carrier that it will be liable to the taxing state to collect its sales tax or use tax. If the "bright line" is crossed and the out-of-state vendor no longer falls within the safe harbor, **it must then be determined whether the vendor's activities within the state establish a substantial nexus with the taxing state such that imposing the duty to collect and remit the tax on sales to residents of the taxing state does not violate the Commerce Clause**." (e.s.)

Florida Department of Revenue v. Share, 20 Fla. L. Weekly, at D1911. Having admitted that Share had both crossed the "bright-line" and left the "safe harbor," the District Court demands more of the Department. This is exactly what happened in the lower New York appellate cases and that Court's decision was rejected in Orvis, supra.

The District Court here elevates the proof of activity far beyond the demarcated, rigid, "bright-line" that created the settled expectations of the rules for both the mail

order industry and the states. While clearly admitting that the Department's position that there is no need for permanent presence is correct, and acknowledging that Share physically entered Florida with its employees/representatives with unsold Share merchandise and sold that merchandise in Florida, the District Court then states this "activity" by Share was not enough. Id.

Like the thesis advanced by Orvis and VIP, the position advanced by Share and adopted by the courts below actually "destroy[s] the bright-line rule the Supreme Court in Quill thought it was preserving in declining to overrule Bellas Hess." Orvis., 86 N.Y.2d at ___, 654 N.E.2d at . The Supreme Court in Quill wanted to preserve that certainty created by the Bellas Hess rule; it wanted to retain the "settled expectations" of the industry and vendors. It did so by **rejecting** North Dakota's attempt to use subjective measures to get around the physical presence requirement. Yet now the District Court has required the Department to engage in a "subjective" test beyond showing that Share has physically entered the State by its employees and unsold goods, that the obvious intent of entering Florida was to increase Share's business environment, that the goods were displayed, marketed and sold in Florida, that future delivery sales were made in the State, that names of customers were collected in the State and that mail order sales were made to Florida residents.

The District Court states that Share's presence for three days each year through its employees and products is not enough. Share, 20 Fla. L. Weekly, at D1913. Why were these facts not "substantial nexus?" The District Court neither denies Share's physical presence, either in personnel or products, nor active sales activity in Florida.

Yet it decides these uncontested facts are not enough. The court does not state why the Department's facts fail, only that they fail.

But what are enough facts? What combination of factors, once physical presence is shown, must the Department show? The problem with the District Court's opinion is that it not just invites, but mandates a case-by-case determination of every vendor's activities **after** the vendor's physical presence has been established in Florida. This resulting need for litigation does two things, which the Orvis court pointed out, the Supreme Court in Quill sought to strenuously avoid. First, there are no settled expectations; what will cause a vendor to be required to collect Florida sales and use tax is now unknown. After the vendor has entered the State, what will trigger the duty to collect? Is it the amount of days in the State? The number of employee representatives it sends to Florida? Is it the amount of sales? Who will make these decisions? Secondly, the very nature of the uncertainty of the just-stated questions will lead to the very litigation the Supreme Court sought to avoid. With settled expectations the positions and duties of the parties is known. But if physical presence exists and *still* the state must show certain activity, this subjectivity leads to the unsettledness the "bright-line" rule sought to avoid.

Another point undercutting the District Court's opinion is the fact that Bellas Hess and Quill were written primarily to provide business with protections from state taxation. These two decisions are not aimed at enhancing state tax activity. The very thrust of the decisions is that it is up to a business, and the business alone, to decide if it will "do more than communicate with its customers through the mail or by common carrier." If

the business chooses to "do no more than" communicate, it is the settled expectation of the business, and, thus, indirectly of the taxing states, that the business is in the "safe harbor" away from the reach of state tax collection duties. **BUT**, if the business, and the business alone, chooses to leave its protected "safe harbor" by deciding, for its own business reasons, to physically enter a state, both the business and the state have the settled expectation that the business is voluntarily submitting itself to that state's tax collection requirements. Thus, if the business does not want to be forced to collect the sales or use tax, it must physically stay out of the state and do all its solicitation through the mail or common carrier.

D. RETAINING THE DISTRICT COURT'S DECISION WOULD ALSO TURN REVENUE ADMINISTRATION INTO A QUAGMIRE

Share did register as a dealer in Florida. Share properly sent in the following December of each year the required Department forms stating the amount of sale made during November and a check for the collected sales tax. Now comes the 20th day of January, the registered dealer, Share, has not submitted the monthly form listing the company's sales and no check for sales taxes collected arrives at the Department. Is this because the company has failed to follow the law or has it just not made any Florida sales?

What this "now I'm here, now I"m not" position of Share will create is a tremendous administrative burden on the Department. While not specifically mentioned by the Supreme Court, this very burden is a direct spinoff from the bright-line test that the United States Supreme Court wished to avoid. If a foreign vendor stays within the

"safe harbor" outside of Florida, it is free from state tax laws and rules. The Department does not have an administrative responsibility when the vendor stays out of Florida. But under Bellas Hess, when the vendor crosses the bright-line and conducts business activities in the state, the vendor totally submits to the state's tax laws and rules, including registration, compliance and reporting. Its either all or nothing.

The point that a vendor can come into Florida enough to register and submit tax forms for some activity and then leave and sell via the mail and common carrier and not submit tax forms only sends a government tax authority into an administrative quagmire. When is the vendor here?; when is it not? How does the state taxing authority decide? Again, by this situation both the vendors and the states have lost the "settled expectations" of the known laws and how each are to act depending on the decisions of the vendors.

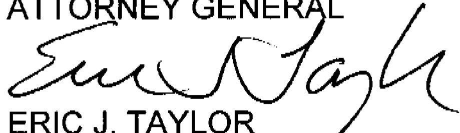
CONCLUSION

The very point of Bellas Hess and Quill was to put foreign vendors at ease and clearly set out the parameters of state taxing authority. The Supreme Court did this by creating a "black and white" test that was easy and simple for both the vendors and the states to follow. The vendors would have a "safe harbor," free from all state taxation requirements, if the vendor did "no more than communicate" with its customers by the mails or common carrier. The Supreme Court set the test of state tax authority at "physical presence" of the vendor. Bellas Hess, thus, created the "settled expectations" by which all would follow. Quill reaffirmed that earlier rule of law. It did so based both on the long established "settled expectations" of the vendors and stare decisis.

The District Court of Appeal has now come along an destroyed in Florida all the rules of the game. By establishing its "substantial physical presence" test, the court has created confusion and uncertainty for the vendors and the Department that will require years of litigation to straighten out. This is not what Quill, Bellas Hess, or Scripto stand for. Thus, for the reasons stated above, this Court must reverse the District Court's decision and place the law of this State in conformity with the decisions of this Court and the United States Supreme Court. By doing so, this Court will bring back to Florida the bright-line test the District Court ejected by its decision. Then vendors and the Department will again have "settled expectations" that any physical presence with the intent to exploit the Florida market will subject the vendor to Florida's collection requirements. But if the vendor chooses to physically remain outside of Florida and do no more than communicate, the vendor and the Department will know that the vendor is in the "safe harbor" free from the reach of Florida's taxing authority.

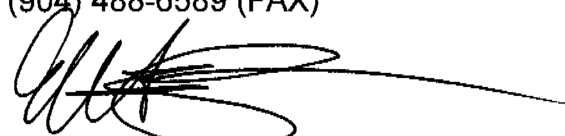
Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



ERIC J. TAYLOR
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 337609

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol, Special Projects
Tallahassee, Florida 32399-1050
(904) 488-5899
(904) 488-6589 (FAX)



ELIZABETH T. BRADSHAW
ASSISTANT ATTORNEY GENERAL
Fla. Bar No. 833274

OFFICE OF THE ATTORNEY GENERAL
State of Florida
The Capitol, Tax Section
Tallahassee, Florida 32399-1050
(904) 487-2142
(904) 488-5865 (FAX)

Counsel for Petitioners

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: LISA R. DAUGHERTY, Esquire, Miami Center, 66 West Flagler Street, Suite 1100, Miami, Florida 32130, this 27th day of October, 1995.

ERIC J. TAYLOR