FILED
SID J. WHITE
JAN 3 1996
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

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

Petitioners,

vs. Case No. 86,481

SHARE INTERNATIONAL, INC.,

Respondent.
_______________________________/

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

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ARGUMENT

Share goes to great lengths in attempting to convince this Court that Share has not engaged in deliberate, systematic commercial activity in Florida. This is simply not the case. Thus, in deciding this case, this Court must be mindful of the facts of Share's commercial activity in the State of Florida and its interplay with the Parker Chiropractic Resource Foundation ("PCRF"). Both Share and PCRF are owned by Dr. James W. Parker. (R:157). 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).

PCRF conducts educational seminars for chiropractors. Share engages in the business of the manufacture, distribution, and sale of chiropractic supplies to chiropractic physicians. The market for Share's products is chiropractic doctors, including those chiropractors practicing in Florida. 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 and up to 1000 different items for display and sale in Florida. (R: 184-185). Share's inventory would be placed in a room on long tables for display. (R: 183-184). The doctors would then roam, as in any retail store, 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's sales during its physical presence in Florida were: November, 1986 - $195,860.80; November, 1987 - $150,951.80; November, 1988 - $118,263.50; and November, 1989 - $116,491.50.[1/] (R: 81). Each of the above-stated amounts of direct Florida sales, were 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. But that was not the end of Share's commercial activity in Florida; Share then sent catalogs and flyers to its Florida customers on a regular basis to encourage further sales in this State.

These facts of Share's activity while physically in Florida are important to this case. They reveal that, contrary to Share's assertion, Share's commercial activity goes far beyond any case relied upon by Share to claim they do not have substantial nexus with Florida. Share consistently claims it has not invaded the Florida market yet the facts show that Share chose to come to Florida and sold nearly 5% of its total annual sales. Share claims it did not "exploit" the market yet it was Dr. Parker's business scheme to have PCRF "entice" chiropractors to come to Florida and then have Share

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

be the only business selling to the chiropractors present. Share argues that the seminars were not open to the Florida public yet the seminars were open to the "only" public and market Share wanted to exploit - *chiropractors*. Share aimed at and sold to the very class of "consumers" it created its business for. Share actively solicited and sold to chiropractors while physically in Florida and then, in a regular and systematic manner, mailed advertising materials to the Florida chiropractors to further Share's commercial activities with the targeted market.[2/] But no matter how stated by Share, Share had a sales force in Florida for the purpose of making sales and establishing a market for the products Share manufactures, displays and sells.

I. THE APPELLATE COURT'S DECISION AND SHARE'S ARGUMENT MISUNDERSTAND THE HOLDINGS OF BELLAS HESS AND QUILL

Share's argument to this Court confuses the issue and the holdings of 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). Contrary to Share's belief that substantial nexus means "continuing presence within the taxing state and is actively soliciting it residents" (Resp. Brief, p.11), Quill and Bellas Hess stand for the proposition that substantial nexus exists if the foreign vendor has **physical** presence in the taxing state and is advancing its business concerns. Quill, 112 S.Ct., at 1912 ("a vendor whose only contacts with the taxing State are by mail or common carrier lacks "substantial nexus"). The United States Supreme Court has never in all its

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2/ The percentage of foreign v. Resident chiropractors is a "red herring." The facts show Florida chiropractors were in attendance at the shows and did receive the later catalog flyers.

nexus decision required "permanent" presence, "continuing presence," or that sales have to be to the "residents" of the taxing state.[3]/

Share's basic failure of understanding Quill is its failure to comprehend that the Supreme Court intended that the "bright-line" test be a rather inflexible, black & white test.[4]/ In fact, that was the whole underpinning of Quill; the Supreme Court's rejection of North Dakota's attempt to replace the "stringent physical presence test [of Bellas Hess] in favor of a more flexible substantive approach" and the reaffirmation of Bellas Hess' "physical presence" test. Quill, 112 S.Ct., at 1914. This point is key and crucial to the understanding of Quill and in deciding the outcome in this case.

The Court noted that all its prior cases finding state taxing authority in sales and use tax cases involved taxpayers with physical presence in the state. Id. While it had adopted "flexible balancing analyses" in other cases, the Court said it did not reject all "bright-line" tests. Id. In particular, the Court noted that the "bright-line test of Bellas Hess further the ends of the dormant Commerce Clause" by, in the sales tax area, permitting the "demarcation of a **discrete** realm of commercial activity that is free from taxation." Id. (e.s) The Court stated:

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[3]/ Quill did not "mandate" "continuing physical presence in the State." Resp. Brief, p. 16. Share has failed to make any direct, specific cite to any language in Quill supporting this statement.

[4]/ To the extent that Share claims that the Department says the "bright-line" test is the "state-line", Share is correct." That is because if Quill and Bellas Hess **require physical presence** in a state, then the foreign vendor who crosses the state line into the taxing jurisdiction to conduct business activities has knowingly left its "safe harbor."

> Bellas Hess followed the latter approach and created a safe harbor for vendors '*whose only connection with customers in the [taxing] State is by common carrier or the United States Mail.* (e.s.)

Id. Thus, the "tax-free" realm of commercial activity is strictly limited to those foreign vendors who physically remain outside of the taxing state by doing no more than communicate with their customers by common carrier and the U.S. mail.

To the complaints that this inflexible, black & white rule seemed harsh and artificial, the Court stated that its harshness and artificiality is more than offset by its benefits to commerce. Id., at 1915. The benefits were two-fold: the rule "firmly establishes the boundaries of legitimate state authority to impose a duty to collect sales and use taxes" and it "encourages *settled expectations*" , thus, "foster[ing] investment by businesses and individuals." Id. The Supreme Court admitted the "bright-line" test's artificiality, stating that a state's taxing authority to

> compel a vendor to collect a sales or use tax *may*[5/] turn on the [physical] presence in the taxing state of a small sales force, plant, or office. (e.s.)

Id., at 1914.

Share, by its use of the phrase "continuing presence," is attempting to change the test of physical presence to one of continuing physical presence. In other words, a state must show ongoing physical presence before the collection duty could be

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[5/] Share, unfortunately, attempts to avoid the true meaning of this statement by changing the words of the Court's statement in its Brief. On page 15, Share substitutes the Supreme Court's discretionary word "may" with its own mandatory word "would." Share apparently did this to fit its argument, unsupported by the case law, that the Supreme Court requires a certain type of business presence before substantial nexus is found. But as the case reflects, there is no support for Share's narrow interpretation.

imposed. That is simply not supported by Quill. What the Supreme Court requires is "physical presence" of the foreign vendor coupled with "commercial" activity in the state by the vendor. Scripto v. Carson, 362 U.S. 207 (1960). This "commercial activity" can include "regular, systematic displaying of its products by catalogs, samples or the like." Id., at 212.

In this case, the Petitioners have clearly shown that Share was physically in Florida through the physical presence of its officers, sales agents, and unsold products actually displayed for sale.[6] The business activity of Share was the open display of its some 500-1000 products to its customers, chiropractors, resident and non-resident, present in Florida, the offering of the sale of the products, the sales and orders of the products, and the delivery of products. Share continued its business activity by sending to its customers in Florida flyers on the products it is offering to sell on the average of one every 3 or 4 months.

Based upon the "bright-line" test, Share left its "safe harbor" in Texas and came to Florida. Share knowingly came to Florida to display, offer, and sell its products here, and sold products here. Share had connections with its customers in Florida far

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[6] In footnote 8 of its Brief, Share now asserts to this Court that "[h]ere, Share has no salesmen or sales force to solicit sales in Florida." This statement is directly contrary to the facts of the case and Share's own admissions. See, e.g. Stipulation, No's 5-9 (R:); Trial Memorandum, p. 10 [It is not disputed that Share sells its products each year at the annual seminars held in Florida."](R:); Answer Brief, p. 4-6). Even the Circuit Court and District Court recognized that Share's products were sold in Florida. The 500-1000 items did not come to Florida by themselves nor did they sell themselves; someone, acting for Share sold the items. This meets the standard set forth in Scripto.

beyond "those of a vendor whose only contacts with the taxing State are by mail or common carrier." Quill, 112 S.Ct.,at 1912.

The Petitioners have shown that Share has gone beyond the "bright-line."[7] Share had physical presence in Florida and had deliberate commercial activity during the audit period. The Quill test has been met. This Court must reverse the decisions of the courts below.

II. SHARE'S PHYSICAL PRESENCE IN FLORIDA GOES FAR BEYOND "SLIGHTEST PRESENCE"; SHARE HAS "SUBSTANTIAL NEXUS" WITH FLORIDA

In order to avoid the fact that Share was physically present in Florida offering and selling its products followed by continuous mail order solicitation through flyers to Florida chiropractors, Share now argues that its physical presence was "minimal" or of the "slightest presence." After a comparison of the facts of this case with those cases in which "minimal" or "slightest presence" was found, it will be clear that Share's presence and activity was far beyond "slightest."

While the rather inflexible "bright-line" test was meant to establish a clear area of "settled expectations" in the area of sales and use tax collection, allowing both the states and vendors to know when the duty to collect tax was required, it was not devised as a trap to catch a foreign vendor who did not intend to enter the state on any regular basis and subject the vendor to the collection requirement. The holdings of the

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[7] Share, on the other hand, did not present this Court with any definition or description of what the term "bright-line" meant. Share did not address the clearness and crispness of that term used by the Supreme Court. Rather, Share runs from the inflexibility of the rule in order escape the rule's effect on Share's commercial activity.

Supreme Court allow for a "minimal," "trivial" or "slightest presence" without allowing a state to impose a collection duty on a vendor. But this exception is very narrow and based on the infrequent or isolated conduct of the vendor. Share's conduct does not fall into this narrow exception.

This narrow exception appears to have its genesis in Miller Brothers, Co. v. Maryland, 347 U.S. 340 (1954)[8]/ and as explained in Scripto, supra. Miller Brothers was a furniture store in Delaware. It sold all of its goods out of the Delaware store and did not take mail or telephone orders. Miller Brothers, 347 U.S. at 341. Most goods were taken by the customers there but "some [were] delivered to [customers] in Maryland by common carrier, and others by [Miller's] own trucks."[9]/ Id. All public advertising was done through Delaware outlets, though some reached Maryland, and "occasional" circulars were mailed to Maryland customers. Id., at 342. The Court noted that it had held that domicile or residence, "more substantial than mere presence in

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[8]/ In footnote 7 of its Brief, Share claims that Miller Brothers is still persuasive and approved by Quill. A look a Quill reveals 1) that Miller Brothers was cited in Part III, the Due Process discussion of Quill; 2) that to the extent courts have read Miller Brothers to require physical presence in order to satisfy the Due Process Clause, the Court overruled that proposition in Quill, 112 S.Ct., at 1911; and 3) Miller Brothers was not cited at all by the Supreme Court in Quill's Commerce Clause discussion, Part IV. Petitioners stand by their belief that the validity of Miller Brothers, after Quill, is highly suspect.

[9]/ Share attempts to characterize the activities of Miller Brothers in Maryland as "would often deliver the products . . . by use of its own trucks." Resp. Brief, p. 21. This statement is not only directly contrary to the Supreme Court own statement of the facts on pages 341 and 342 ["it delivered other purchases by its own vehicles to Maryland locations] but also to the Court's characterization of the facts as "the occasional delivery of goods sold at an out-of-state . . " 347 U.S. at 347.

transit or sojourn," is a sufficient basis for taxation. Id., at 345. The Court was unable to find any precedence for sustaining the sales tax collection requirement against Miller Brothers, id., because this was "not the case of a merchant entering a state to maintain a branch and engaging in admittedly taxable retail sales." Id., at 346. The Court noted the wide gulf between aggressive operation in a state and the "occasional" delivery of goods and general advertising. There was no exploitation of the consumer market in Maryland.

The Supreme Court revisited Miller Brothers in Scripto. Noting the facts distinguishing Scripto and General Trading Co. v. State Tax Commission, 322 U.S. 335 (1944) and Miller Brothers, the Court restated that Miller Brothers had no solicitors in Maryland, no exploitation of the Maryland consumer market, and no regular, systematic display of goods by catalogs or display in Maryland, but only an occasional delivery of goods and occasional mailing of notices of sales to former customers. Scripto, 362 U.S., at 212. But the distinguishing factor that caused the Court to find the "trivial," "minimal" or "slightest" presence of Miller Brothers in Maryland was the fact that it was the Maryland customers that went "personally" to Miller Brothers' store in Delaware. Id. Stating it succinctly, yet forcibly, the Court said "Marylanders went to Delaware to make purchases - Miller did not go to Maryland for sales." Id.

Since then, the United States Supreme Court and other courts have exempted businesses that had trivial or slightest presence in a state from that state's collection requirements. See e.g. Quill, supra [license of a few disks of software not sufficient to establish substantial nexus]; National Geographic Society v. California Board of

Equalization, 430 U.S. 551 (1977) ["slightest presence" not sufficient]. More recent cases offer further examples of such "trivial" connection with a state. The case of In Re Laptops, Etc. Corporation, 164 B.R. 506 (D. Md. 1993) is a good factual example. In that case the District of Columbia attempted to force Laptops into collecting DC's sales and use tax for sales from a Virginia retail store. Laptops was a Virginia corporation with retail locations in Virginia and Maryland. Id., at 510. Laptops never had any stores or other property in DC nor did it store any stock of goods there. Id. Laptops sold laptop computers from the Virginia store. Id. It did not have employees or agents engage in any solicitation of business in DC. Id. Other than advertising in the Washington Post, no ads were sent into DC. Id. The business practice of Laptops was for customers to go into Virginia to patronize the Virginia store where the computer was either purchased or leased, the sales or lease price paid and the Virginia sales tax collected; the computer was either picked up at the Virginia store or it was shipped to the customer by common carrier[10]/; a customer could also mail or FAX an order from DC whereby the computer was placed with a common carrier for delivery into DC to the customer. Id. All sales, leases and repairs were made in Virginia or Maryland; nothing took place in DC. Id. The evidence revealed only a rare delivery of a computer or part by Laptops into DC. Id., at 511. As the court summed up, "these instances were isolated and were rare exceptions to the manner in which deliveries were effectuated."

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[10]/ The court found it was company policy to deliver by common carrier since Laptops' insurance policy only covered the computers while in the hands of the common carrier. Id., at 511.

Id. There was no company pattern of installation or instruction in DC. The court then went into a Commerce Clause analysis based on the Quill decision. The court noted that the threshold question was whether there was physical presence by Laptops in DC. Id., at 520. Comparing the facts with all the Supreme Court cases, that court came to the conclusion that the "occasional" delivery did not establish substantial nexus. Id., at 521. While it was not the fact of physical presence that was lacking, it was the intent and business practice in which the physical presence did occur in DC that was controlling in the case. The practice of all sales in Virginia coupled with the practice of delivering all computers to a common carrier showed that the few deliveries into the District were "trivial" and not in accord with the business practice of Laptops. Like in Miller Brothers, the District went to Virginia, Laptops did not go to the District. Other cases[11]/ include Cally Curtis Company v. Groppo, 214 Conn. 292, 572 A.2d 302 (1990). In that case, a California mail order company that made sales and rental of video tapes merely sent a few tapes into Connecticut for approval. There was no other physical presence in Connecticut or any attempt to exploit the market from other physical presence.

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[11]/ Share is incorrect in its reliance on L.L. Bean, Inc. v. Commonwealth, 101 Pa.Cmwlth. 435, 516 A.2d 820 (1986). There Pennsylvania attempted to use economic presence through non-presence systematic exploitation of the market. The court rejected the physical presence of L.L. Bean employees because the employees physical presence in Pennsylvania had nothing to with the exploitation of the consumer market; L.L. Bean was in Pennsylvania to visit a *manufacturer, not seller*, of its products. SFA Folio Collections, Inc. v. Tracy, 73 Ohio St.3d 119, 652 N.E.2d 693 (1995) is also not applicable. The Ohio Supreme Court made the specific ruling that the retail vendor against whom Ohio sought to require collection duties had no physical presence in Ohio.

In attempting to resolve the "slightest" presence question, it may be instructive to look at another Supreme Court case that also retained a strict, bright-line test and discussed an exception to the bright-line. In Wisconsin Department of Revenue v. William Wrigley, Jr., 504 U.S. , 112 S.Ct. 2447 (1992), decided just after Quill, the Supreme Court had before it a question concerning state income taxation of interstate sales under Public Law 86-272, 15 U.S.C. Sec. 381(a). Under P.L. 86-272, states are not permitted to impose an income tax if a company does no more than solicit sales in a state.[12]/ Wrigley, 112 S.Ct., at 2453. After discussing the definition of what was the solicitation of orders, the Court found that Wrigley had engaged in activities other than solicitation. But that raised the question of whether the level of those activities was enough to take the company out of the protection of P.L. 86-272?

The language of P.L. 86-272 appeared clear and unambiguous and did not allow for exceptions; just as the meaning "bright-line" appears to be. In coming to a workable solution, the Court stated that the "venerable maxim *de minimis non curat lex* ('the law cares not for trifles') is part of the established background of legal principles against which all enactments (absent contrary indication) are deemed to accept. Wrigley, 112 S.Ct., at 2457-2458 (citations omitted). The Court determined that activity other than the solicitation of orders establishes a "nontrivial additional connection" with the taxing state causes the protections of P.L. 86-272 to be lost.

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[12]/ There are other requirements that must be met for the protections of P.L. 86-272 to apply. Those requirements are not important to the discussion which follows.

A similar question of substantial nexus versus slight presence arose in the income tax case of Marx v. Truck Renting and Leasing Association, 520 So. 2d 1333 (Miss. 1987). The Mississippi Supreme Court was faced with the question of the application of the Mississippi income tax to Ryder Truck Company, among others, when Ryder did not do business in the state. In particular, the Court noted that Ryder had no physical facilities in the state, no employees stationed in the state, or entered into contracts with lessees who had residences or businesses in the state or where Ryder knew its property would be physically taken to the state. Id., 520 So. 2d at 1343. The leases that were sought to be taxed were all entered into outside of Mississippi. Ryder's sole presence in the state were their trucks on Mississippi's highways when they were being driven by the employees of the lessees who took the trucks to and through Mississippi. Id. This case is an example of a vendor, while physically present in the state, not making a purposeful decision to enter that state with its property; Ryder did not intend to exploit the Mississippi marketplace.

The lesson that is to be learned from the "trivial" or "slightest" presence cases is that there exists in these cases an absence of intent or purpose on the part of the business to physically go into a state for the purpose of making retail sales or other commercial activity intending to advance the commercial success of the business in some manner, be it by soliciting, providing repairs or service, instruction or free delivery of goods to the taxing state. This recognizes that an infrequent, isolated, or unintentional presence in a state should not be activity that triggers a sales and use tax collection requirement. Consequently, foreign vendors are on notice that when they

make intentional physical incursions into a state to advance their business interests, they will be required to collect the sales and use taxes on mail-order sales they make in the taxing state.

Here, the facts belie Share's assertion of "slightest" presence. The intentional, conscious business decision by Dr. Parker to entice chiropractors into Florida and then have Share sell its goods is an "invasion" of the market. It was an "invasion" to advance the commercial success of Share. And it was a calculated invasion as the seminar was set up to attract the very, and only, class of consumer that Share ever intended; chiropractors! Unlike Miller Brothers or Laptops, Share came to Florida, Florida did not go to Texas; a particular consumer market niche was targeted and exploited. The decision was not only to come physically to Florida but to continue to encourage the very limited market to continue its purchase of supplies from a foreign vendor.

Share's activity was neither "trivial" (as nearly 5% of its total annual income was derived during the 3 day presence) nor infrequent, isolated or unintended. This is the very type of calculated, hard business decision that the Supreme Court meant to be affected by the "bright-line" rule. Share could have stayed in Texas, in its "safe harbor," by only having contact with its Florida customers by mail or common carrier. It had the "settled expectation" that, had it stayed in Texas, Florida would not be able to require it to collect sales or use taxes. BUT, Share made the decision to physically enter Florida to go after a class of consumer and did in fact exploit that class. They also chose to continue that exploitation, in the words of Scripto, by a regular, systematic display of

goods by sending catalogs and flyers to Florida chiropractors. Share's choice to enter Florida coupled with the intent to exploit Florida's market has allowed Florida to require Share to collect sales and use taxes from all of its sales into Florida.

III. ONCE SUBSTANTIAL NEXUS IS FOUND TO EXIST, IT CONTINUES TO EXIST FOR A REASONABLE TIME AND UNTIL THE FOREIGN VENDOR MAKES A SHOWING THAT IT NO LONGER HAS SUBSTANTIAL NEXUS WITH THE STATE.

Share continues to raise an issue not decided upon by the trial court or the District Court. Share makes the argument that nexus is a "month by month" occurrence. Share turns what is in fact an administrative practice and procedure to insure the remittance of the collected sales and use tax into a hard and fast requirement of nexus. Share's assertion would not only create an administrative nightmare for taxing authorities but also would totally undercut the very reasoning of the United States Supreme Court in Bellas Hess and Quill.

Section 212.11(a) and (b), Florida Statutes, and Rules 12A-1.054 and 12A-1.056, Florida Administrative Code, speak for themselves. They require the collection of the sale or use tax at the time of the sale and then require the remittance of the collected taxes on or before the 20th day of the month following the sales transaction. Rules 12A-1.054(1) and 12A-1.056(1), Florida Administrative Code. These laws are meant for ease of administration and efficient remittance of the funds into the General Revenue for use by the State. These laws are not the least bit aimed at "nexus" or taxable status as a dealer.

It does not follow "logically and necessarily" that each month is a separate and distinct taxing period in which nexus must be proved by the State. It would be an administrative burden for any State to constantly audit each foreign taxpayer each month to insure that the vendor is collecting and remitting the proper taxes. Further, this would undercut the very reasoning in Bellas Hess and Quill. If each month were a separate and distinct tax period, why did the Court go to such great lengths to discuss the types of commercial activities a firm could do to subject themselves to the taxing jurisdiction? If each month were a separate time period, the Court could have just said so and require physical presence in each and every taxing month. It did not.

This is also a further attempt by Share to create what the Supreme Court has never required; continuing physical presence in a state. The Supreme Court has in no case required "continuous physical presence." Rather, in Scripto, the Court clearly stated that regular, systematic commercial activity could, after physical presence was effected, be established by the "displaying of its products by catalogs, samples or the like" in the taxing state. Scripto, 362 U.S., at 212. Share would have this Court ignore both the Supreme Court's statement and Share's systematic and regular "displaying of [Share's] products by catalogs, samples or the like" by Share's mailings of advertising materials and inducements to its Florida chiropractic customers.

The Department's position is that once physical presence in Florida, with the deliberate, conscious intent to exploit the market in some manner to further the profitability of the vendor, is shown, "substantial nexus" has been established with Florida and contiunes with this State for a reasonable time until the foreign vendor halts

its exploitation of the Florida market. The Department's assessment reflects that position. Share came to Florida on a regular basis. After Share's physical presence in Florida, with the deliberate, conscious intent to exploit the market in some manner to further the profitability of Share, had been shown, "substantial nexus" with Florida had been established and would continue until Share proved it no longer was exploiting the Florida market. However, that was not the case. Share not only repeatedly physically entered Florida and sold products over a 4 year period of time, Share continued during the audit period, between the annual physical visits, to send inducements to its Florida chiropractic customers on a regular and systematic mailing time schedule. This deliberate business decision by Share to continue mailing flyers to Florida customers merely solidified the Department's assessment that Share was exploiting the Florida market.

Share's assertion that it was here only one month a year is without substance. Further, Share's commercial activity after its 1989 physical visit would allow assessment during 1990 to November 30, 1990, as the mailing of flyers by Share to the Florida customers during 1990 was connected with the past continuous physical presence in Florida. Share may have an argument for no assessment after November 1990, but not before.[13]

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[13] Share apparently forgets that Dr. Parker testified that Share returned to Florida again in November, 1991, to continue its long standing pattern of commercial activity in Florida.

Finally, the weakness of Share's argument here, and through out all of the case, is revealed in footnote 15 on page 39 of it brief. Share wants this Court to recede from its holding in Scripto and ignore all Supreme Court cases to the contrary when Share makes the assertion that an order taken in Florida, but processed, accepted, and approved in Texas, somehow has some importance to the question of nexus. Share has forgotten that that was the exact same fact situation in Scripto: orders in Florida were accepted in Georgia, and the out-of-state approval was rejected by this Court and the Supreme Court as having any effect on the sales tax collection requirement.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court reverse the decisions of the Circuit Court of the Second Judicial Circuit Court and the First District Court of Appeal and find that the facts established in this case reveal that Share's repetitive and continuing physical presence in Florida for the purpose of displaying and selling of Share's chiropractic merchandise in this State, when coupled with the systematic and regular displaying of its goods by catalogs throughout the entire audit period, revealed a calculated, deliberate, non-trivial business decision made with the intent to exploit the Florida market of chiropractors and advance the profitability of Share.

Respectfully submitted,

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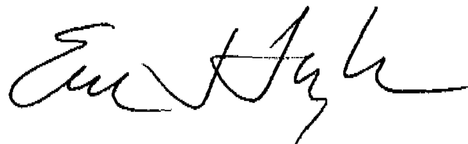

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to: LISA R. DAUGHERTY, Esquire, Davis, Scott, Weber & Edwards, 2 South Biscayne Boulevard, Suite 1500, Miami, Florida 33131; GEORGE S. ISAACSON, Esquire, MARTIN I. EISENSTEIN, Esquire, and DAVID BERTONI, Esquirem Brann & Isaacson, Post Office Box 3070, Lewiston, Maine, 04240; and STEPHEN M. CARLISLE, Esquire, 415 S.E. 12th Street, Fort Lauderdale, Florida 33316, this 2nd day of January, 1996.

ERIC J. TAYLOR