IN THE SUPREME COURT OF FLORIDA

CASE NO. SC14-2404
L.T. CASE NO. 4D13-1472

FLORIDA DEPARTMENT OF REVENUE,

Appellant,

v.

AMERICAN BUSINESS USA CORP.,

Appellee.

ANSWER BRIEF OF APPELLEE AMERICAN BUSINESS USA CORP.

On Appeal from the Fourth District Court of Appeal
Case No. 4D13-1472

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STATEMENT OF THE CASE AND FACTS

A. Introduction And Nature Of The Case

This appeal concerns the constitutional limitations of a state's power to collect sales tax. The Florida Department of Revenue ("DOR") assessed sales tax against American Business USA Corp. ("American Business") for out-of-state flower sales, which the DOR lacks jurisdiction to collect. All the flowers at issue were grown, stored, purchased, and delivered outside the State of Florida. No flowers ever entered Florida. No consumers ever entered Florida. The DOR does not contest these facts, but nonetheless characterizes the transactions as Florida-based. The State of Florida lacks any nexus to tax out-of-state tangible property purchased by an out-of-state consumer. Therefore, as determined by the Fourth District Court of Appeal, the florist tax violates the dormant Commerce Clause.

The DOR has confused the relevant inquiry here. For the florist tax to pass constitutional muster, the DOR must demonstrate a nexus with the sale sought to be taxed. Here, that is the purchase of out-of-state tangible goods by an out-of-state consumer. The DOR must show a connection to the sale it seeks to tax, not just a connection to American Business. It is irrelevant that American Business, as an entity, has a connection to the State of Florida. This case involves a sales tax, and the goods being taxed here have no connection to Florida. That is the ultimate issue. Therefore, the florist tax violates the dormant Commerce Clause contained

in Article I of the United States Constitution, or, alternatively, the Due Process Clause of the Fourteenth Amendment.

Under the florist tax, out-of-state buyers are taxed by the State of Florida for their purchase of out-of-state tangible goods. The sales tax is imposed on these buyers, not on florists who are simply obligated to collect the tax and remit it to the DOR. Under the dormant Commerce Clause, this is impermissible because Florida lacks any substantial nexus with the transaction being taxed. Under the Due Process Clause, the florist tax is also impermissible because these out-of-state buyers lack any minimum contacts with Florida. Further, the florist tax impermissibly asserts jurisdiction over out-of-state activities, persons, and property, which violates fundamental principles of federalism. The purchase of out-of-state property by out-of-state consumers should not be subject to Florida's sales tax.

Accordingly, this Court should affirm the Fourth District's decision holding the florist tax to be a violation of the dormant Commerce Clause. Alternatively, this Court should affirm the Fourth District's decision, on an alternative basis, because the florist tax violates the Due Process Clause of the Fourteenth Amendment.

B. The Statute And Administrative Rule At Issue

The statutory grounding for the florist tax at issue in this appeal is found in

section 212.05(1)(*l*), Florida Statutes, which provides that

> (*l*) Florists located in this state are liable for sales tax on sales to retail customers **regardless of where or by whom the items sold are to be delivered.** Florists located in this state are not liable for sales tax on payments received from other florists for items delivered to customers in this state.

Id. (emphasis added).

The administrative regulation that implements the florist tax is found in Florida Administrative Code Rule 12A-1.047(2)(b), and provides in relevant part that

> (2) Where florists conduct transactions through a florists' telegraphic delivery association, the following rules will apply in the computation of the tax, which will be **on the entire amount paid by the customer without any deductions whatsoever**:
>
> > (b) In cases where a **Florida florist** receives an order pursuant to which he **gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida, tax will likewise be owing with respect to the total receipts** of the sending florist from the customer who places the order.

Fla. Admin. Code R. 12A-1.047(2)(b) (emphases added).

C. <u>The Proceedings Below</u>

On February 16, 2012, the DOR issued a Notice of Proposed Assessment to American Business. [R1 at 1-2][1] American Business protested the assessment and filed an amended petition seeking its reversal. [R1 at 3, 8-10]

[1] Citations to the record on appeal are in the form R.[volume number] at [page number].

The Florida Division of Administrative Hearings ("DOAH") set a final hearing and issued a pre-hearing order requiring the parties to stipulate to as many facts as possible. [R1 at 16-19, 54-56] Thereafter, the parties filed a Joint Pre-Hearing Stipulation, setting forth the admitted facts. [R1 at 57-68] In relevant part, the stipulation stated that:

- All of American Business's sales were initiated online. [R1 at 57 ¶ 5];
- American Business specialized in the sale of flowers, gift baskets and other items of tangible personal property. [R1 at 58 ¶¶ 6, 7];
- American Business "did not maintain any inventory of flowers, gift baskets and other items of tangible personal property." [R1 at 58 ¶ 11] (emphasis added);
- American Business "used local florists to fill the orders it received for flowers, gift baskets and other items of tangible personal property." [R1 at 58 ¶ 12] (emphasis added);
- American Business "charged its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered in Florida." [R1 at 58 ¶ 14] (emphases added);
- American Business "did not charge its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered outside of Florida." [R1 at 58 ¶ 15] (emphases added);

The DOR filed a proposed Recommended Order which contended that the assessment against American Business was permissible because a "Florida florist" is liable for **sales tax when he gives instructions to a second florist outside Florida to deliver flowers outside Florida**, under Fla. Admin. Code R. 12A-1.047(2)(b). [R1 at 72, 85 ¶ 78] The DOR's proposed Recommended Order noted

that American Business primarily sold to customers in Latin American markets. [R1 at 74 ¶ 6] American Business, in turn, filed its own proposed Recommended Order, which sought reversal of the proposed tax assessment on various grounds not relevant to this appeal. [R1 at 89-101]

The DOR filed evidence in support of its assessment. [R1 at 104; R2] In its Standard Audit Report, the DOR tax auditor noted that American Business sold to customers "throughout the world" and "primarily to Spanish speaking countries." [R2 at 11-12] The auditor further explained that "[i]nvoices are generated electronically for all sales (flower, gift baskets) except prepaid calling arrangements." [R2 at 13][2]

On February 27, 2013, the Administrative Law Judge ("ALJ") issued its Recommended Order to uphold the entirety of the DOR's proposed assessment. [R1 at 102-120] According to the Recommended Order's Findings of Fact:

- "There were two principal aspects of the Taxpayer's business . . . [(1)] sale of flowers, gift baskets, and other items of tangible personal property . . . [and (2)] the sale of 'prepaid calling arrangements' . . . ." [R1 at 106 ¶ 7];
- "All of the Taxpayer's sales were initiated online." [R1 at 106 ¶ 8];
- "The Taxpayer sold to customers throughout Latin America, in Spain, and in the United States (including Florida)." [R1 at 106 ¶ 9];

[2] The DOR's assessment related to pre-paid calling arrangements is not at issue in this appeal.

- "When the Taxpayer received an order over the Internet for items of tangible personal property, the Taxpayer relayed the order to a florist in the vicinity of the customer (the local florist). The Taxpayer utilized the Internet or telephone to relay an order." [R1 at 107 ¶ 14];

- "The Taxpayer charged its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered in Florida." [R1 at 107 ¶ 15];

- "The Taxpayer did not charge its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered outside of Florida." [R1 at 107 ¶ 16];

According to the Recommended Order's Conclusions of Law:

- The "DOAH ha[d] jurisdiction over the subject matter of and the parties to this proceeding . . . ." [R1 at 111 ¶ 45];

- "The Florida sales tax is an excise tax on the privilege of engaging in business in the state." [R1 at 113 ¶ 51];

- "It is the legislative intent that every person is exercising a taxable privilege who engages in the business of selling items of tangible personal property at retail in this state." [R1 at 113 ¶ 52];

- American Business's out-of-state "sale of flowers, wreaths, bouquets, potted plants, and other such items of tangible personal property were subject to sales tax pursuant to section 212.05(1)(*l*) and rule 12A-1.047(1) [of the Florida Administrative Code.]" *See* [R1 at 116 ¶ 59];

The ALJ recommended to validate the DOR's proposed assessment. [R1 at 104, 118] On March 15, 2013, American Business filed exceptions to the Recommended Order. [R1 at 121-22]

On March 29, 2013, the DOR issued a Final Order adopting the Recommended Order in whole. [R1 at 124-27] The DOR upheld the Recommended Order's assessment against American Business, in the amount of $137,225.27 plus interest. [R1 at 104, 118, 125]

On April 29, 2013, American Business timely filed a notice of appeal to the Fourth District Court of Appeal. [R1 at 148-49]

On November 12, 2014, the Fourth District Court of Appeal reversed the DOR's florist tax assessment.[3] *American Business USA Corp. v. Department of Revenue*, 151 So. 3d 67 (Fla. 4th DCA 2014). The Fourth District held that, as applied, the florist tax violated the dormant Commerce Clause. However, it held that the florist tax did not violate the Due Process Clause because American Business has substantial contacts with Florida.

In holding that the florist tax violated the dormant Commerce Clause, the Fourth District noted that "Florida impermissibly burdened interstate commerce when it taxed out-of-state customers for out-of-state deliveries of out-of-state tangible goods." *Id.* at 68. Further, "[b]ecause the flowers sold by the Florida-registered internet business were never stored in or brought into Florida, the imposition of taxes did not meet the 'substantial nexus' test and thus violated the dormant commerce clause." *Id.*

[3] The Fourth District affirmed the DOR's pre-paid calling card assessment, and that assessment is not at issue here.

In its well-reasoned decision, the Fourth District relied on established Supreme Court precedent dealing with the dormant Commerce Clause, and concluded that the internet transactions at issue in this case were "exclusively interstate in character." *Id.* at 71-73. The Fourth District went on to note that "[m]erely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute 'substantial nexus.'" *Id.* at 73. Importantly, the Fourth District held that the flowers taxed here by the DOR "were not grown in, stored in, or delivered from Florida, and do not have any type of connection to Florida." *Id.* Accordingly, the State of Florida lacks any nexus to tax the transactions implicated by the florist tax in this case.

SUMMARY OF THE ARGUMENT

The DOR assessed a tax against American Business that it had no jurisdiction to assess. The florist tax in this case taxes the sale of out-of-state tangible goods to an out-of-state consumer. The flowers are grown, stored, purchased, and delivered all outside the State of Florida. The State of Florida lacks any connection to the taxed transaction, and lacks any nexus to tax out-of-state tangible property purchased by an out-of-state consumer. Therefore, the Department of Revenue lacks jurisdiction to collect the florist tax because the florist tax violates the dormant Commerce Clause.

The DOR presents a variety of arguments and a litany of out-of-state statutes purporting to justify the tax at issue in this case. What the DOR does not and cannot present, however, is authority permitting one state to tax activities, persons, and property wholly within another state.

The florist tax violates the dormant Commerce Clause because Florida lacks any substantial nexus to the transactions it seeks to tax – internet purchases of out-of-state tangible property by out-of-state consumers. The DOR has confused the relevant inquiry here. The DOR must demonstrate a nexus with the sale it seeks to tax, not just a connection to American Business. It is irrelevant that American Business, as an entity, has a connection to the State of Florida. The transactions being taxed here have no connection to Florida.

Alternatively, this Court can affirm the Fourth District's decision based on the Due Process Clause. Under the florist tax, out-of-state buyers are taxed by the State of Florida for their purchase of out-of-state tangible goods. The tax is imposed on these buyers, not on Florida florists who are simply obligated to collect the tax and remit it to the DOR. The Fourth District considered only American Business's connection to Florida, rather than focusing on the consumers who actually pay the florist tax. The florist tax is impermissible because these out-of-state consumers lack any minimum contacts with Florida. The only connection these consumers have to Florida is through their use of a website run by a Florida

corporation. The florist tax also impermissibly asserts jurisdiction over out-of-state activities, persons, and property, which violates fundamental principles of federalism. A state may not tax sales in other states or countries.

In sum, the State of Florida lacks jurisdiction to impose sales taxes on out-of-state transactions, and the DOR lacks jurisdiction to assess the taxes at issue because the empowering legislation is unconstitutional. This Court should affirm the Fourth District's decision.

STANDARD OF REVIEW

The DOR properly states the applicable standard of review. However, the DOR fails to note that this Court may affirm the Fourth District's decision on any basis supported by the record. *Dade County School Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-45 (Fla. 1999).

ARGUMENT

The florist tax violates the dormant Commerce Clause because the State of Florida lacks any nexus with out-of-state consumers purchasing out-of-state flowers. This is true because a sales tax must be justified by a State's nexus with the sale sought to be taxed, not just the entity who collects the taxes paid by consumers.

As an alternative ground to affirm the Fourth District's decision, the florist tax violates the Due Process Clause of the Fourteenth Amendment because internet

consumers lack any minimum contacts with Florida. Further, the State of Florida cannot assert jurisdiction over the out-of-state activities, persons, or property at issue in this case.

In Section I, American Business combines its dormant Commerce Clause and Due Process arguments because, while the tests are distinct, the lack of nexus here is sufficient to fail both tests. The first element of the four-part dormant Commerce Clause test requires that a state demonstrate a nexus with the sale or activity it seeks to tax. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079 (1977); *see also Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S.Ct. 1904, 1912 (1992). The Due Process Clause also requires a state to have a nexus with the sale or activity it seeks to tax. *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 345-47, 74 S.Ct. 535, 538-39 (1954); *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 777-78, 112 S.Ct. 2251, 2258 (1992).

Section II focuses on the Due Process Clause, discussing internet consumers' lack of minimum contacts with Florida and the impermissibility of taxing persons or property wholly within another State.

I. The State Of Florida Lacks Any Nexus With Out-Of-State Consumers Purchasing Out-Of-State Flowers

The taxed transaction in this case is an out-of-state consumer purchasing out-of-state flowers over the internet. Here, the Department of Revenue contends that American Business's connection to Florida, as a Florida corporation, suffices

to uphold the florist tax. However, the DOR has confused the relevant inquiry. The Department of Revenue must justify the florist sales tax by demonstrating a nexus with the sale sought to be taxed, not just a connection to the entity who collects and remits the taxes. The DOR repeatedly focuses on American Business's status as a Florida corporation that has substantial contacts to the State of Florida. That is irrelevant to determine the constitutionality of the florist tax.

A State must demonstrate a nexus with a transaction it seeks to tax. *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778, 112 S.Ct. 2251, 2258 (1992). "[I]n the case of a tax on an activity, there **must be a connection to the activity** itself, **rather than a connection only to the actor** the State seeks to tax." *Id.* (emphases added) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306–308, 112 S.Ct. 1904, 1909–1910, 119 L.Ed.2d 91 (1992)); *see also Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079 (1977).

In this case, the DOR claims the authority to tax the sale of out-of-state tangible goods to an out-of-state consumer. The only alleged interaction that the consumer has with Florida is by shopping for flowers on a website operated by a company incorporated in Florida (American Business). No consumers enter Florida, and no flowers are stored in Florida.

American Business agrees with the DOR that a sale may be taxed on its full value where the sale is consummated. (Initial Br. at 17 (citing *Oklahoma Tax*

Com'n v. Jefferson Lines, Inc., 514 U.S. 175, 115 S.Ct. 1331 (1995)). In *Jefferson Lines*, however, a party purchased a bus ticket in Oklahoma, the state where the tax was imposed.[4] *Id.* at 184. In the present case, the sale is not consummated in Florida. Neither the consumer nor any of the property ever enter Florida.

The crux of the DOR's argument is that "with flower delivery, the sale takes place when the customer places the order." (Initial Br. at 7, 8-14). To the contrary, in the context of "flower delivery," the sale is consummated when the flowers are delivered. *See* Black's Law Dictionary (9th ed. 2009) (defining "consummate" as "[t]o achieve; to fulfill").

A sale is consummated where risk shifts from seller to buyer, because that is when title to the property shifts from seller to buyer. *Corat Intern., Inc. v. Taylor*, 462 So. 2d 1186, 1186-87 (Fla. 3d DCA 1985); *Ladex Corp. v. Transportes Aereos Nacionales, S.A.*, 476 So. 2d 763, 765 (Fla. 3d DCA 1985); *Department of Revenue v. U. S. Sugar Corp.*, 388 So. 2d 596 (Fla. 1st DCA 1980). In the present case, title could not pass within Florida, and the risk could not have shifted within Florida, because the flowers never entered Florida. Further, the transaction was

[4] The DOR also cites *Goldberg v. Sweet*, 488 U.S. 252 (1989) and *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1 (1986). (Initial Br. at 17). However, in *Goldberg* all parties agreed on the state's nexus, so it is irrelevant to the issues presented here. *Goldberg*, 488 U.S. at 260. Further, the dictum from *Goldberg* cited by the DOR has been repudiated by the Supreme Court. (Initial Br. at 18); *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1798 (2015). In *Wardair*, the aviation fuel was sold within Florida, in contrast to the out-of-state property at issue here. *Wardair*, 477 U.S. at 3-4.

not "fulfilled" until the flowers reached their final destination – outside the State of Florida. The State of Florida lacks any connection to the sales being taxed, and the taxes assessed in this case should not stand.

While the DOR argues that American Business "acknowledge[d]" its liability for sales tax on **in-state** flower deliveries by paying such taxes, that is irrelevant to the present inquiry. (Initial Br. at 13-14). First, compliance with the florist tax as it applies to in-state transactions is not an admission of anything. American Business is not required to avoid all Florida taxes to challenge the application of the florist tax in this case. Second, flowers delivered in-state have a transfer of title that takes place in Florida, rendering them appropriate for the State of Florida to tax.

The fact that title passes upon the shift of risk from seller to buyer, is the reason the Supreme Court noted that the gasoline in *American Oil Co. v. Neill*, 380 U.S. 451, 85 S.Ct. 1130 (1965), was "f.o.b." (or free-on-board) at a point outside of Idaho. This demonstrated that title to the property passed outside of Idaho, which had attempted to collect tax on the sale.

In *Neill*, the State of Idaho argued that a dealer "constructively receives" gasoline in Idaho upon its importation into the state. The Supreme Court rejected that argument and held that the "transfer of gasoline was unquestionably an out-of-state sale vis-a-vis Idaho" because:

> Each and every phase of the transaction had its locus outside of Idaho: invitations for bids were issued by the Government in Seattle, Washington; Utah Oil submitted its bids from Salt Lake City; the bids were accepted in Seattle; the contract called for delivery of the gasoline f.o.b. Salt Lake City; Utah Oil delivered the gasoline to Salt Lake City, and it was there that title passed.

Neill, 380 U.S. at 458, 85 S.Ct. at 1135. In the present case, none of the property even enters Florida. Therefore, title could not pass within Florida.

The DOR has presented nothing more than conclusory assertions that the sales in this case take place in Florida. All of the flower sales for which the DOR assessed tax to American Business involved out-of-state tangible property purchased by out-of-state consumers. No "sales" took place in Florida because the property being purchased never entered Florida. Regardless of the DOR's assertions to the contrary, it is beyond dispute that the record evidence here demonstrates that title to the flowers passed outside the State of Florida. With that, the sales necessarily occurred outside Florida, leaving the State of Florida without the necessary nexus to tax those goods.

The Supreme Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S.Ct. 1904 (1992) further supports this result. *Quill* involved a state's attempt to require an out-of-state mail-order house, without outlets or sales representatives within that state, to collect and pay a use tax on goods purchased for use within the state. The Supreme Court determined that Quill Corp. had purposefully directed its activities at North Dakota residents, such that the magnitude of its contacts

sufficed for taxation under the Due Process Clause. *Quill Corp.*, 504 U.S. at 306-08, 112 S.Ct. at 1909-11. However, under the dormant Commerce Clause, the Supreme Court determined 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. *Quill Corp.*, 504 U.S. at 311-18, 112 S.Ct. at 1912-16.

Here, an out-of-state purchaser whose only contacts with the taxing state (Florida) are by internet, similarly lacks the substantial nexus required by the Commerce Clause. Such a purchaser, differently than Quill Corp., also does not have sufficient contacts with Florida to justify the tax under the Due Process Clause. This purchaser pays the tax, American Business only collects it.

Miller Bros. Co. v. State of Md., 347 U.S. 340, 345, 74 S.Ct. 535, 539 (1954) also supports this result. *Miller Bros.* involved an attempt to collect use tax from a Delaware corporation for all the sales it made to Maryland residents, regardless of how they were delivered. The Supreme Court held that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros.*, 347 U.S. at 344-45, 74 S.Ct. at 539. The Supreme Court further noted that Maryland could not reach such out-of-state sales with a sales tax, and that it would be incongruous to allow such a liability to attach for use, when a tax on the sale would be unconstitutional. *Miller*

Bros., 347 U.S. at 345-46, 74 S.Ct. at 539. Accordingly, the out-of-state use tax in *Miller Bros.* was held unconstitutional as a violation of the Due Process Clause.

Allied-Signal, Inc. v. Director, Div. of Taxation, 504 U.S. 768, 112 S.Ct. 2251 (1992) supports the Fourth District's decision, and involved the power of a state to tax the multi-state income of a non-domiciliary corporation. While the case involved an income tax, the Supreme Court did not limit its discussion of Due Process and Commerce Clause case law in that manner. *Allied-Signal*, 504 U.S. at 777-79, 112 S.Ct. at 2258. Setting forth the general parameters of this case law, the Supreme Court stated:

> The principle that a State may not tax value earned outside its borders rests on the fundamental requirement of both the Due Process and Commerce Clauses that there be 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' *Miller Brothers Co. v. Maryland*, 347 U.S. 340, 344–345, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954). The reason the Commerce Clause includes this limit is self-evident: In a Union of 50 States, to permit each State to tax activities outside its borders would have drastic consequences for the national economy, as businesses could be subjected to severe multiple taxation. But the Due Process Clause also underlies our decisions in this area. Although our modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax, see *Quill Corp. v. North Dakota*, 504 U.S. 298, 306–308, 112 S.Ct. 1904, 1909–1910, 119 L.Ed.2d 91 (1992). The constitutional question in a case such as *Quill Corp.* is whether the State has the authority to tax the corporation at all. The present inquiry, by contrast, focuses on the guidelines necessary to circumscribe the reach of the State's legitimate power to tax. We are guided by the basic principle that the State's power to tax an

> individual's or corporation's activities is justified by the 'protection, opportunities and benefits' the State confers on those activities. *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444, 61 S.Ct. 246, 250, 85 L.Ed. 267 (1940).

Allied-Signal, 504 U.S. at 777-78, 112 S.Ct. at 2258.

The Supreme Court's reasoning applies with equal force here. The issue is whether the State of Florida has the authority to tax the out-of-state purchase of out-of-state tangible property, and whether Florida's power to tax is justified by the protection, opportunities, or benefits it confers on those activities. In this case, Florida has no connection to the transaction being taxed, and Florida confers no benefit on the consumer or the activity being taxed. The Fourth District's decision properly determined that the florist tax was unconstitutional.

It is important to note that this case is not an attempt to avoid all taxes. taxes. The question is whether the State of Florida, having chosen to implement its florist tax as a sales tax, has demonstrated a sufficient nexus with the sale sought to be taxed. It has not.

In sum, the primary issue in this case comes down to where the sale is consummated. The sale of delivery flowers here is consummated at delivery, and that delivery occurs outside the State of Florida. Similarly, the consumer placing the order is not in Florida, the vendor filling the order is not in Florida, the flowers are not in Florida, and the end user is not in Florida. Nonetheless, the florist tax purports to assess a sales tax concerning out-of-state persons, property, and

transactions to which the State of Florida has no connection. Accordingly, this Court should affirm the Fourth District's decision reversing the florist tax assessment, under either the dormant Commerce Clause or the Due Process Clause.

II. The Florist Tax Violates The Due Process Clause

A. The Florist Tax Is Paid By Internet Consumers Who Lack Any Minimum Contacts With Florida.

While the Fourth District held that the florist tax does not violate the Due Process Clause, it focused its inquiry on American Business's connections to Florida. However, the florist tax is not a tax on American Business. *See Florida Dept. of Revenue v. Naval Aviation Museum Foundation, Inc.*, 907 So. 2d 586, 587 (Fla. 1st DCA 2005) ("The legal incidence of the Florida sales tax falls upon the purchaser or consumer"). The florist tax is paid by out-of-state consumers who purchase out-of-state flowers over the internet.

Under section 212.05(1)(*l*), Florida Statutes, the florist tax itself notes that "[f]lorists located in this state are **liable** for sales tax on sales to retail customers regardless of where or by whom the items sold are to be delivered." *Id.* (emphasis added). However, immediately following this provision the statute notes that "[t]he tax shall be **collected** by the dealer, as defined herein, and remitted by the dealer to the state at the time and in the manner as hereinafter provided." § 212.05(2), Fla. Stat. (emphasis added). Accordingly, the florist tax is simply collected by the florist, not paid by the florist.

Reflecting this view is section 212.07, Florida Statutes,[5] which provides that "[t]he privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer." § 212.07(1)(a), Fla. Stat. Further, section 212.07(4), makes it a misdemeanor to hold out to the public that a retailer will absorb such a tax and not pass it on to the consumer. *Id.* American Business simply collects and remits sales tax to the DOR, it does not pay the tax itself.

Moreover, as a practical matter all sales taxes are, in the end, paid by consumers, whether directly or in the form of increased prices. *Neill*, 380 U.S. at 455, 85 S.Ct. at 1133 (holding that the practical operation of a tax controls). Here, the DOR asserts that it has authority to collect this sales tax paid by out-of-state consumers, and that American Business is required to collect and remit such taxes to the DOR. That is wrong.

The State of Florida may not exercise jurisdiction over the sale of out-of-state tangible property to out-of-state consumers, when neither the persons nor the property ever enter Florida. The consumers impacted by the florist tax lack any minimum contacts with Florida and have not purposefully availed themselves of Florida's laws and protections. *International Shoe Co. v. Washington*, 326 U.S. 310, 317-21, 66 S.Ct. 154, 159-60 (1945) (setting forth "minimum contacts"

[5] This statute is entitled "[s]ales, storage, use tax; tax added to purchase price; dealer not to absorb; liability of purchasers who cannot prove payment of the tax; penalties; general exemptions[.]" § 212.07, Fla. Stat.

standard); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-99, 100 S.Ct. 559, 561-68 (1980) (explaining "minimum contacts" and "foreseeability" for purposes of state's jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185 (1985) (holding that contract alone cannot automatically establish minimum contacts for out-of-state party under Due Process Clause); *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351 (Fla. 3d DCA 1994) (applying due process "minimum contacts" standard to internet-based transactions).

In *Pres-Kap, Inc. v. System One, Direct Access, Inc.*, the Third District decided a personal jurisdiction case that involved an out-of-state defendant whose only contacts with Florida came from: (1) forwarding rental payments to the plaintiff's billing office in Miami, and (2) accessing the plaintiff's computer database which was located in Miami. *Pres-Kap*, 636 So. 2d at 1353. The Third District stated

> Across the nation, in every state, customers of 'on-line' computer information networks have contractual arrangements with out-of-state supplier companies, putting such customers in a situation similar, if not identical, to the defendant in the instant case. Lawyers, journalists, teachers, physicians, courts, universities, and business people throughout the country daily conduct various types of computer-assisted research over telephone lines linked to supplier databases located in other states. Based on the trial court's decision below, users of such 'on-line' services could be haled into court in the state in which supplier's billing office and database happen to be located, even if such users, as here, are solicited, engaged, and serviced entirely instate by the supplier's local representatives. Such

> a result, in our view, is wildly beyond the reasonable expectations of such computer-information users, and, accordingly, the result offends traditional notions of fair play and substantial justice.

Pres-Kap, 636 So. 2d at 1353 (emphasis added; footnote omitted).

Here, the alleged minimum contacts are nothing more than contracting with a Florida corporation (American Business), over the internet, for the delivery of out-of-state flowers. That is insufficient to uphold the florist tax. The DOR could not hale out-of-state consumers into Florida courts to force them to pay the florist tax, and it should not be allowed to use a Florida corporation as an intermediary to do what it cannot do directly.

B. The State Of Florida Cannot Assert Jurisdiction Over Out-Of-State Activity And Out-Of-State Property.

The State of Florida has no jurisdiction to tax the out-of-state tangible property at issue in this case. "As a general principle, a State may not tax value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Com'n*, 458 U.S. 307, 315, 102 S.Ct. 3103, 3108 (1982) (citations omitted). "[W]hen a state re[a]ches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction . . . And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce." *Treichler v. State of Wis.*, 338 U.S. 251, 256-57, 70 S.Ct. 1, 4 (1949) (citations omitted). "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar v. MITE Corp.*,

457 U.S. 624, 643, 102 S.Ct. 2629, 2641 (1982) (plurality opinion). "[A]ny attempt 'directly' to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576 (1977).

Further, in *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 74 S.Ct. 535 (1954), the Supreme Court stated

> No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.' *New York, L.E. & W.R. Co. v. Com. of Pennsylvania*, 153 U.S. 628, 646, 14 S.Ct. 952, 958, 38 L.Ed. 846. 'Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void. If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action.' *City of St. Louis v. Wiggins Ferry Co.*, 11 Wall. 423, 430, 20 L.Ed. 192.

Miller, 347 U.S. at 342, 74 S.Ct. at 537. The Supreme Court went on to explain that while visible territorial boundaries do not always limit a state's jurisdiction, the state must have "some jurisdictional fact or event to serve as a conductor . . ." *Id.* at 343, 74 S.Ct. at 538. In the present case, the DOR seeks to tax the citizens and property of another State as if the persons and property were located in Florida. *See Miller*, 347 U.S. at 342, 74 S.Ct. at 537. The DOR has no jurisdictional basis to do so, because the DOR's empowering legislation is

unconstitutional. American Business cannot be obligated to collect a tax from those who have no obligation to pay it.

CONCLUSION

For the reasons stated herein, Appellee American Business USA Corp. respectfully requests that this Court affirm the Fourth District Court of Appeal's decision reversing the DOR's florist tax assessment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic mail this 29th day of May, 2015, to: Allen Winsor, allen.winsor@myfloridalegal.com; Jeffrey M. Dikman, jeffrey.dikman@myfloridalegal.com; Rachel Nordby, rachel.nordby@myfloridalegal.com; *Counsel for the Department of Revenue, Office of the Attorney General*, The Capitol, Plaza Level 01, Tallahassee, FL, 32399; and, James H. Sutton, Jr., jamessutton@floridasalestax.com, Moffa, Gainor & Sutton, P.A., 8875 Hidden River Parkway, Suite 300, Tampa, FL 33637, *Amicus Counsel for American Association of Attorney-Certified Public Accountants, Inc. and Florida Association of Attorney-Certified Public Accountants, Inc.*

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief complies with the font requirements set forth in Florida Rule of Appellate Procedure 9.210 by using Times New Roman 14-point font.

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