STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOTION COMPUTING,	)	
	)	
Petitioners,	)	
	)	
vs.	)	Case No. 07-2667
	)	
DEPARTMENT OF REVENUE,	)	
	)	
Respondent.	)	
	)	

RECOMMENDED ORDER

This cause came on for formal proceeding and hearing, as noticed, before P. Michael Ruff, a duly-designated Administrative Law Judge of the Division of Administrative Hearings. The hearing was conducted in Tallahassee, Florida, on September 7, 2007. The appearances were as follows:

APPEARANCES

For Petitioner: Jeffrey O'Connor
Qualified Representative
8601 RR 2222 Building II
Austin, Texas 78730

For Respondent: Warren J. Bird, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Revenue Litigation Bureau
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUES

The issues to be resolved in this proceeding concern whether the Petitioner, a Delaware Corporation with its principal place of business and domicile in Texas, has an

obligation to collect and remit Florida sales taxes on sales it made to a Massachusetts-domiciled corporation, in view of the facts found below.

PRELIMINARY STATEMENT

This cause arose when the Respondent, the Department of Revenue, (Department), conducted an audit of the books and records of the Petitioner for the audit period April 1, 2003 to March 31, 2006. The audit was conducted by Xena Francis, an experienced auditor of the Department, who testified on behalf of the Department in this proceeding. The audit purportedly revealed that the Petitioner was not collecting sales tax on transactions where computer products were sold to entities who did not produce a certificate of exemption from collection of sales tax by Florida on the transaction, and when the product involved was shipped by the Petitioner into Florida by common carrier.

The Respondent, through the audit process, determined a deficiency based upon such transactions, and assessed the Petitioner for $72,447.29, including tax and interest through March 12, 2007. The tax was in the amount of $61,538.90, and interest thereon was in the amount of $10,908.39. The Department had adjusted its initial assessment downward based upon the Petitioner demonstrating that certain of the purported transactions for which taxes had not been paid were revealed by

the Petitioner to actually be exempt. The Petitioner paid the Respondent the sum of $39,064.24 on June 11, 2007. This represented payment of $37,941.94 of the tax assessment, as well as $1,122.30 for interest related to that amount of the tax assessment.

The Petitioner in essence contested the portion of the assessment related to its sales to Advantec Computer System, Inc., a Massachusetts limited liability company, with its principal place of business in Marlboro, Massachusetts. The Petitioner timely exercised its right to a proceeding pursuant to Section 120.569 and 120.57(1), Florida Statutes (2006), and its Petition was forwarded to the Division of Administrative Hearings and the undersigned Administrative Law Judge.

The cause came on for hearing as noticed. The Petitioner presented seven exhibits at the hearing six which were admitted into evidence. Exhibits two, three, and four were admitted on a limited basis. The Petitioner also testified on its own behalf through the testimony of Jeff O'Connor, C.P.A. The Respondent presented, as its witness, Xena Francis, the auditor who performed the audit at issue and presented Exhibit "A," the audit which was admitted into evidence.

Upon conclusion of the proceedings a transcript thereof was ordered and the parties availed themselves of their right to submit proposed recommended orders. After granting one

requested extension, the Proposed Recommended Orders were timely submitted and have been considered in the rendition of this Recommended Order. The Motion to Strike the Petitioner's Proposed Recommended Order is denied.

FINDINGS OF FACT

1. The Petitioner is a Delaware Corporation whose principal place of business is in Austin, Texas. The Petitioner designs, develops, and markets portable computer equipment, chiefly portable "tablet" personal computers with related "peripherals," which it sells and delivers in multiple states, including Florida. It sells these products to "re-sellers" and distributors, as well as to "end users." The Petitioner, by the Department's admission in Exhibit "A" (audit) does not maintain a physical presence in the State of Florida. It does employ one sales person for business in Florida, but maintains no warehouse or other facilities, vehicles nor other indicia of physical locations or operation in the state of Florida. The Petitioner is registered as a "dealer" with the State of Florida, Department of Revenue under the Florida Sales and Use Tax Law. The Petitioner does engage in some sales to Florida "end customers" or to re-sale purchasers in Florida. These transactions, however, are not at issue in this case. The dispute solely relates to transactions between the Petitioner and Advantec Computer System, Inc., of Marlboro, Massachusetts.

2. The Respondent is an agency of the State of Florida charged with the regulation, control, administration, and enforcement of the sales and use tax laws of the State of Florida embodied in Chapter 212, Florida Statutes, and as implemented by Florida Administrative Code Chapter 12A-1. The Respondent conducted an audit of the books and records of the Petitioner, resulting in this proceeding, for the audit period April 1, 2003 to March 31, 2006. That audit was conducted by Xena Francis, and revealed, according to the Department's position, a purported sales tax payment deficiency on the part of the Petitioner in the above-referenced amounts. The Department, upon completion of the audit, issued a Notice of Intent to Make Audit Changes, thus advising the Petitioner of the amount of the tax penalty and interest it was assessing as a result of the audit.

3. The transactions which the Department maintained were questionable, in terms of taxes not being paid with regard thereto, were those where the Petitioner sold computer products to entities who did not produce to the Petitioner a certificate of exemption from collection of sales tax by Florida on that transaction, and where the product was shipped by the Petitioner into Florida by common carrier. The Department essentially takes the position that, since the Petitioner has a state sales and use tax "dealer certificate," that it is responsible to

prove any transactions as being exempt from the relevant taxing provisions of Chapter 212, Florida Statutes, and the above rule chapter. The Department apparently presumes as a part of this position that the fact that the product in question was shipped to ultimate users in Florida by common carrier from the Petitioner's place of business outside the state that such were Florida sales tax transactions. It thus contends that the burden is on the Petitioner to prove that they are exempt from such tax and collection.

4. After it was advised of the audit findings and the basis for the assessment, the Petitioner provided to the Department certain exemption certificates for a number of the entities and transactions for which shipment had not been made into Florida. The Department accepted these and the assessment was adjusted downward to reflect the exempt status of those transactions, pursuant to the further information provided the Department by the Petitioner.

5. The other disputed transactions for which no exemption certificate was provided by the Petitioner, were deemed by the auditor to be taxable. In essence, the auditor took the position, as does the Department, that every person making sales into the State of Florida is subject to sales and use tax unless specifically exempt and that it is incumbent upon the selling dealer (which it maintains is the Petitioner) to establish the

exempt status of the transaction, at the time of sale, with a supporting re-sale certificate or some documentation to support the transactions, exempt status.[1/]

6. The sales which are the subject of this dispute are exclusively those between the Petitioner and Advantec Computer Systems, Inc. Advantec is a Massachusetts Incorporated and domiciled corporation. It apparently does not possess a Florida "re-sale certificate" or "dealer certificate." The Petitioner sold various computers and related products, as shown by the invoices in evidence, to Advantec. The invoices and the testimony adduced by the Petitioner established that those sales were between the Petitioner and Advantec, the Massachusetts corporation. Advantec, in turn, sold the products or some of them to Florida customers. Those customers did not pay the Petitioner for the sales, but paid Advantec. Advantec directed that delivery from the Petitioner be made not to Advantec itself, but to its Florida-end customer via common carrier from the Petitioner's out-of-state location or from its overseas supplier. In any event, delivery was made from outside Florida to the Florida Advantec customers by common carrier.

7. The Petitioner billed no Florida customer and had no relationship with any Florida customer of Advantec. Instead it invoiced and billed Advantec for the price of the products involved on a "net 30-day" basis. Advantec would then pay the

Petitioner for the amount invoiced by the Petitioner to Advantec. As to the Advantec sales at issue, there was no nexus, substantial or otherwise, between the Petitioner and Advantec's customers in Florida, except that the product was "drop shipped" from the Petitioner's relevant location out of the State of Florida to the Florida customer by common carrier, not by any vehicle owned, leased, or operated by any person or entity affiliated with the Petitioner. In fact, the deliveries in question were made by Federal Express as a drop shipment.

8. Advantec's principal business activity is the re-sale and distribution of computers and related products. It has no presence in Florida and is not a registered dealer in Florida. When the Petitioner made the sales to Advantec Computer Systems, as shown by the invoices and testimony in evidence, it billed Advantec for the sales and did not collect sales tax. While the Petitioner has in its possession Advantec's Massachusetts-issued tax-exempt certificate, the Petitioner does not have a Florida tax-exempt certificate on-file for Advantec, because Advantec is not registered in Florida, and the sale by the Petitioner to Advantec is a Massachusetts sale with no Florida nexus.

9. The Petitioner offered three Technical Assistance Advisements (TAA) into evidence, which it obtained from the Department in support of the fact that the transactions in question are not taxable. (See Exhibits 2, 3, 4 in evidence.)

These exhibits were admitted on a limited basis over the Department's objection as being possibly material to a determination as to the weight and credibility of the Department's evidence in this case, but not as being legally binding or constituting legal precedent, which last quality is precluded by Section 213.22(1), Florida Statutes (2006).

10. Additionally, the Petitioner offered and had admitted Petitioner's Exhibit 7, which was an e-mail received from a representative of the Department, in response to an inquiry by the Petitioner. This was admitted over hearsay objection as a party statement offered by the opposing party.[2/] In that exchange between the Petitioner and the Department, the Petitioner, as shown by testimony and the exhibit, related the facts involved in the sales to Advantec. The Department's response indicated that, if indeed, the buyer and seller were both located outside the State of Florida and the goods when purchased were outside the State of Florida, then the sale is not a Florida sale, between the out-of-state buyer and the out-of-state seller (the Petitioner). If the goods were then delivered by common carrier to the out-of-state buyer's ultimate customers in Florida, from the Petitioner's out-of-state location, then the transaction between the Petitioner and the out-of-state buyer is not subject to the Florida sales tax law

and, in essence, is non-jurisdictional, not as a "Florida nexus sale."

11. In summary, the Petitioner sold the goods in question to Advantec and invoiced Advantec at its Massachusetts domicile and address on "net 30-day" term. No Florida customer, person, or entity was billed for the sales in question, nor was any payment collected from any individual or business entity located in the State of Florida. Once the sale was consummated between the Petitioner and Advantec, the Petitioner merely "dropped shipped," by common carrier, the goods purchased by Advantec to Advantec's ultimate customer located in the State of Florida.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2006).

13. Section 212.21(2), Florida Statutes (2006), provides that it is the specific legislative intent to tax every sale provided for in that Chapter except such as shall be proven to be specifically exempted by provisions of Chapter 212.

14. Section 212.02, Florida Statutes (2006), provides as follows:

> Section 212.02 definitions.- The following terms and phrases when used in this chapter have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.

* * *

> (15) 'Sale' means and includes:
>
> (a) Any transfer of title or possession or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration.

15. Pursuant to Section 212.18, Florida Statutes, any person desiring to engage in or conduct business in Florida as a dealer, as defined in Chapter 212, Florida Statutes, must obtain a certificate of registration from the Department, and the certificate issued by the Department grants dealers the privilege of conducting business in the state and imposes an obligation to collect and timely remit sales tax. See also Fla. Admin. Code R. 12A-1.060.

16. Florida Administrative Code Rule 12A-1.038 provides that transactions that result in shipment of tangible personal property into the State of Florida are subject to sales and use tax unless specifically exempt, and the selling dealer must establish the exempt status of a transaction at the times of sale with a supporting re-sale certificate or some documentation to support the exempt status of the transaction. The Department thus takes the position that if the seller does not produce evidence of exemption from the applicable sales tax, then the sales in question are subject to the tax.

17. The problem with the position of the Department is that, although a sale clearly took place, the sales which the Department attempts to tax, transacted between the Petitioner and Advantec, were not "transactions that result in shipment of tangible personal property into the state of Florida." It was the transaction between Advantec and its Florida-end customer (the re-sale), which actually resulted in the shipment of the property into the state. The Petitioner's only connection with the Florida Advamtec customers and the transactions between such customers and Advantec was its depositing of the goods on a common carrier for delivery via interstate commerce into Florida from a non-Florida location.

18. The sales which the Department seeks to tax were sales to the Massachusetts company, which is not registered as a dealer in the State of Florida, or with the State of Florida. These were clearly Massachusetts sales. The Petitioner had no contact with the State of Florida with regard to these sales during the course of the transactions since it merely delivered the goods to the common carrier for delivery to Advantec's Florida sale customer. The Petitioner did not sell the merchandise in Florida or directly to any Florida customers. The title to the goods and the consideration for them were exchanged between the Petitioner and Advantec. It is Advantec who made sales into Florida that resulted in tangible personal

property being shipped into the state of Florida. It is thus Advantec who would potentially be responsible for collecting sales tax from the Florida customers or, since Advantec is not a registered "Florida dealer," it might be that the Department must look to the end customer of Advantec in Florida for collection of the use tax. See § 212.06(4), Fla. Stat.

19. It has been determined that the taxability of a transaction made by an out-of-state vendor into Florida resulting in shipment of the goods which are the subject of the transaction into Florida, depends on the out-of-state vendor's "substantial nexus" with the state. Thus, the cases of National Bellas Hess, Inc., v. Illinois Department of Revenue, 386 U.S. 753 (1967) and Quill Corporation v. North Dakota, 504 U.S. 298 (1992) (which re-affirmed the holding in the National Bellas Hess opinion) stand for the proposition that if an out-of-state vendor only has a connection with customers in the taxing state by common carrier or mail, used in delivering goods to customers in the state, then the state, where the goods are delivered, may not compel the out-of-state vendor to collect a sales or use tax. This is because a vendor whose only contacts with the taxing state or by mail or common carrier lacks the "substantial nexus" to the taxing state required by the cases interpreting the commerce clause of the United States Constitution. See Complete Auto Transit, Inc., v. Brady, 430 U.S. 274 (1977),

which sets out the test whereby a state-imposed tax could be sustained against a challenge under the commerce clause, which test included the requirement of a substantial nexus with the taxing state.

20. The principle running through these cases was affirmed and followed in Florida in more recent times in Florida Department of Revenue v. Share International, Inc., 667 So. 2d 226 (Fla. App. 1st Dist. 1995). The court, speaking through Judge Barfield (concurred in by Judges Kahn and Shivers) followed this "substantial nexus" test, established through the above decisions. The factual situation in that case involved the presence of the appellee Share International, Inc., in Florida for three days a year at a seminar it conducted. The seminars were conducted for chiropractors during the winter months in Florida. Share International sold certain items in Florida during the seminars, registered with the Department and collected and remitted the sales tax on those items sold in Florida during the seminars. It did not, however, collect Florida Sales taxes on sales or orders made by telephone or mail from residents in Florida, but delivered by mail or common carrier, or on orders received during the Florida seminars but later delivered by mail or common carrier. The court upheld the trial judge's finding that imposition and collection of the sales tax on this out-of-state vendor would be unconstitutional

in terms of imposing a burden on interstate commerce in violation of the federal commerce clause. This was because the presence in the State for approximately three days per year of Sharer employees and products, under the circumstances presented in that case did not establish a substantial nexus with Florida which would permit the State of Florida to impose on Share the duty to collect and remit taxes on its mail order sales to Florida residents. The court, through Judge Barfield's opinion, after affirming the trial judge, certified the question to the Florida Supreme Court, as to whether, under the facts of that case, "substantial nexus," within the meaning set forth in the Quill Corporation, and National Bellas Hess decisions, existed which would permit Florida to require Share to collect sales and use taxes on all goods sold to Florida residents. In due course, the Florida Supreme Court in Florida Department of Revenue v. Share International, Inc., 676 So. 2d 1362 (Fla. 1996), speaking through Justice Anstead, affirmed and adopted the holding of the First District Court of Appeal. The Department of Revenue later petitioned for Writ of Certiorari to the United State Supreme Court. The United States Supreme Court in Department of Revenue v. Share International, 519 U.S. 1056 (1997), denied certiorari.

21. That case and its facts are closely akin to those in the instant situation. Here the only nexus that the out-of-

state vendor, the Petitioner, had with the State of Florida as to the transactions in question, was the drop shipment of the relevant goods into Florida by common carrier.

22. The Petitioner does maintain one sales representative in the State of Florida (it is undisputed that the Petitioner actually conducted some Florida sales of its own, taxation of which is not in dispute in this case). The First District Court of Appeal in the Share, supra, decision noted a number of decisions by the U.S. Supreme Court concerning out-of-state sales by an out-of-state vendor into a taxing state and in those prior decisions the requisite nexus for the taxing state was shown where, for instance, out-of-state sales were arranged by local agents of the seller while working in the state. The same nexus was found where maintenance in the state of local retail store outlets was provided by the out-of-state mail order sellers and in the case of an out-of-state company that had 10 salesmen conducting continuous local solicitations. The court also mentioned the example of the maintenance in a taxing state of only a single employee, an engineer, whose office was in his home and whose responsibility was to consult with one of the out-of-state vendor's customers regarding its anticipated need of the out-of-state vendor's product. (citation omitted.) These cases show that it is at least fairly debatable whether a substantial nexus would be shown with Florida by the fact of the

Petitioner's maintaining only one sales representative in Florida.

23. The pivotal consideration, however, is that the subject sales transactions which the Department attempts to tax involved in this proceeding are one step removed from the situation in the Share International case and in the cases cited and discussed therein. This is not a situation where the sales were made into Florida to Florida customers. Rather, the sales at issue were made to Advantec, Inc., a Massachusetts purchaser. The sales were Massachusetts nexus sales, not Florida ones and were invoiced as such. The only sales which "resulted in" the shipment of the goods into Florida was the sale between Advantec and its Florida customers. Those sales are not the subject of this proceeding and are likely the sales with which the Department might have a substantial taxing nexus and the authority to at least collect sales or use tax from the Florida end-customer.

24. It is thus patently apparent that this is not a situation where the certificated or registered dealer, the Petitioner, is under a burden to establish an exemption of the sales in question from Florida taxation. Rather, the sales are not even jurisdictional. That is, even if the Petitioner is determined to have a "substantial nexus" as an out-of-state vendor with the State of Florida through a single sales

representative and a dealer certificate, that substantial nexus has no relevant relationship to the sales Florida is here seeking to tax, that is, the sales between the Petitioner with another foreign corporation, Advantec, which sales occurred, therefore, in Massachusetts.

25. If Florida were to tax those transactions based upon the mere fact that the seller, the Petitioner, in those transactions, shipped the goods to Advantec's Florida customers by interstate commerce common carrier, such, under the principal running through the Share International case and the cases cited therein going back to the National Bellas Hess opinion, would constitute an undue burden on interstate commerce in violation of the Federal Commerce Clause. The Department simply has no jurisdiction to tax these transactions because they are not Florida sales. The transactions, for the purposes of the above-cited rule, did not result in the shipment of the tangible personal property into the state of Florida. Rather, the re-sales between Advantec and the Florida customers resulted in the tangible personal property being shipped into the State of Florida.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, the candor and

demeanor of the witnesses, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Revenue, vacating and dismissing the assessment of the subject sales tax and interest to the Petitioner, Motion Computing, Inc.

DONE AND ENTERED this 24th day of December, 2007, in Tallahassee, Leon County, Florida.

S

P. MICHAEL RUFF
Administrative Law Judge
Division of Administrative Hearings
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Filed with Clerk of the
Division of Administrative Hearings
this 24th day of December, 2007.

ENDNOTES

1/ Florida Administrative Code Rule 12A-1.038.

2/ § 90.803.18, Fla. Stat. (2006)

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.