K&L|GATES

PETITION FOR FORMAL HEARING

Name and address of Agency:

Florida Department of Revenue
5050 West Tennessee Street
Tallahassee, Florida 32399-0100

Name and address of Petitioner:

Rhinehart Equipment Company
3556 Martha Berry HWY NE
Rome, GA 30165-8635

Notice of Agency Decision:

On September 11, 2009 the Florida Department of Revenue (the "Department") issued a "Notice of Final Assessment" to Rhinehart Equipment Company for $229,695.00 for sales and use taxes (and $125,144.30 for accrued interest). The applicable time period for the assessment was July 1, 2002 through June 30, 2005. The Department issued its "Notice of Reconsideration" by letter dated March 9, 2011.

Disputed issues:

Nexus with the State of Florida and statue of limitations to assess taxes

Substantial interest as affected by agency determination:

Requirements to register as a Florida dealer. Requirements to collect and remit sales and use tax on behalf of its customers, and other past and future sales and use tax filing requirements.

Ultimate facts alleged:

Sales into the State of Florida because of delivery of goods to customers. The Supreme Court of Florida held that the out-of-state vendor's practice of personally delivering its merchandise to some of its Florida customers was insufficient to create a "substantial nexus" between the vendor and the State. See *Department of Revenue of the State of Florida v. Share Int'l, Inc.*, 676 So.2d 1362, 1363 (Fla. 1996).

Relief requested:

Determination that Rhinehart does not have nexus with Florida and that it is not required to collect and remit Florida sales and use tax on behalf of any of its customers. The statute of limitations for assessing sales and use tax (3 years) had also run. See Florida Statute § 95.091(3). The Department waited approximately 4 years to assess sales and use tax after Rhinehart originally notified the Department of its objections (to a finding of "nexus") in September 2005 (in a lengthy submission).

INTRODUCTION

We represent Rhinehart Equipment Company ("Rhinehart" or "Petitioner"), a C corporation organized under Georgia law. Petitioner has shown good faith to assist the Florida Department of Revenue ("Department") after receiving a random nexus questionnaire from the Atlanta Service Center in 2005. Petitioner relied on the good faith position of the Department to begin to pay Florida sales taxes even though it disagreed (and continues to disagree) with the legal position of the Department of Revenue.

FACTS

Rhinehart is a retail heavy equipment dealer located in Rome, Georgia. Rhinehart delivers its products to its customers in Florida using its own driver and commercial delivery vehicle (i.e., a truck). Rhinehart's driver does not solicit any sales in Florida, nor does the driver assemble the company's products for the Florida customers at the time of delivery. Rhinehart's driver simply delivers the company's products in Florida, and then he returns directly to Georgia. Aside from its delivery of goods to Florida customers through its own truck and driver, Rhinehart has absolutely no other connection with the State of Florida. Rhinehart does not have a physical location in Florida. Rhinehart provides no services of any kind in Florida. Rhinehart does not have a single employee living or working in Florida. Rhinehart has no inventory or

materials or goods in Florida. Rhinehart does not provide its Florida customers with any "after sale" services, such as assembly, technical advice, or maintenance. Rhinehart does not repair any tangible personal property in Florida. Rhinehart is not the owner, lessor, or lessee of any tangible personal property, or any real property in Florida.

On April 22, 2005, the Department informed Rhinehart by letter that it may have nexus with the State and that it may be required to register as a Florida dealer for sales and use tax purposes. Mr. Mark Easterwood, President of Rhinehart, was asked by the Department to complete a "Nexus Investigation Questionnaire." Mr. Easterwood completed the questionnaire which relayed the information that has been detailed above. On May 4, 2005, the Department advised Mr. Easterwood that Rhinehart had nexus with the State of Florida requiring Rhinehart to register as a dealer to collect and remit Florida sales and use tax. The Department stated, "This determination is based on the fact that your company makes sales to Florida customers and uses the company's own truck to deliver goods to customers in the State of Florida." On May 9, 2005, Mr. Scott Eastwood, Finance Manager for Rhinehart, acted in reliance on the accuracy of the information provided to him by the Department, and he filed an "Application to Collect and/or Report Tax in Florida" for Rhinehart. Rhinehart's registration with the State of Florida became effective as of July 1, 2005.

Since July 1, 2005, Rhinehart has been ("under protest") collecting sales tax from its customers. Rhinehart has remitted the sales tax collected to the Department. These remitted taxes should be considered Petitioner's payments of amounts not being contested as required in order to file this Petition, although Petitioner reserves the right to file a refund claim on behalf of its customers.

On September 5, 2005 (approximately 4 years before the Department issued its assessment against Rhinehart), Rhinehart submitted letter of protest to Ms. Marjorie Smith (Atlanta Taxpayer Service Center) that protested the Florida Department's imposition of sales and use tax as a result of Rhinehart's sales of heavy equipment to Florida customers (see Exhibit A, Attachment 4A). This original letter of protest still controls the matter. Rhinehart also reached out to Mr. Jim Johnson from the Department to discuss a settlement of the matter. As evidenced by a number of letters between Rhinehart's counsel and the Department from 2005-2009 (discussed in more detail below), the Department agreed to resolve the matter (see Exhibit A, Attachments 4, 5, and 6).

Despite the agreement between Rhinehart and the Department, the Department issued its "Notice of Final Assessment" to Rhinehart on September 11, 2009 (see Exhibit A, Attachment 1). On September 30, 2009, Rhinehart filed a formal protest to the final assessment explaining the agreed-to terms of the settlement and how the Department had handled the matter for the four preceding years (see Exhibit A).

On March 9, 2011, the Department issued its "Notice of Reconsideration" in which the Department's Tax Law Specialist, Leigh Ceci, stated facts that are simply not true, including references to Rhinehart's website which are inaccurate and based on assumptions as to Rhinehart's operations (see Exhibit B). For example, the Department's Tax Law Specialist asserts that Rhinehart's 2011 website states that Rhinehart "will" service the property that it sells and it "will" rent property to its customers. Accordingly, Ms. Ceci asserts *without any factual confirmation* that Rhinehart *must have* serviced property in Florida during the 2002-2005 tax period, and it *must have* rented property to Florida customers during this same period. Even if

some of the statements the Tax Law Specialist gathered from Rhinehart's current website were true in 2011 (which we do not believe to be the case), Rhinehart started collecting and remitting sales and use tax "under protest" in July 2005, and its 2011 activities would have nothing to do whether Rhinehart had substantial nexus with Florida for the 2002-2005 period.

Ms. Ceci also made some inaccurate statements about the conversations that took place between the Department and Rhinehart's outside counsel regarding the history of the matter. In such conversations, Rhinehart's counsel noted the very favorable nature of the facts in this case (i.e., Rhinehart delivered product into Florida using its own truck, and it had *no other connections* with the State). Rhinehart's counsel also noted that such a case, if litigated with such very favorable taxpayer facts, would create a strong precedent for taxpayers in the future. Finally, Rhinehart's expressed great concern with the Department's decision to ignore an agreement that it made many years earlier with Rhinehart's counsel to resolve the matter (discussed further below).

BACKGROUND

Through our contacts within the Department of Revenue, we were directed to reach out to Mr. Jim Johnson to reach a settlement of this matter. We had worked with Jim on other matters in the past.

Mr. Johnson and Rhinehart's counsel agreed many years ago to the fundamental terms of a closing settlement agreement. Several of our letters sent to Jim Johnson over the years confirm the terms of the deal, particularly, the letter that Rhinehart's counsel sent to Mr. Johnson on January 2, 2008 (see Exhibit A, Attachment 4). As per our discussions, our client would not contest the Department's nexus findings, and our client would comply with future tax filing

requirements (our client has been remitting sales and use taxes to the Department since July 2005). In exchange, the Department would not propose any assessments for periods prior to July 2005.

Back in 2005, however, when we originally raised concerns with the Department's position on "nexus," no final assessment had been issued against our client. In fact, the client had only received a random questionnaire which our client answered in an honest manner. Because the Department was procedurally incapable of settling the matter without an assessment (and our original July 2005 protest contesting the Department's position was filed before a final assessment had been made), Jim Johnson and Rhinehart's counsel agreed to submit the matter for an Internal Technical Advisement ("ITA") to obtain a position of the Department of Revenue (to set the background for a closing agreement). The sole reason for seeking the ITA was to obtain the means to resolve the matter in a favorable manner for both parties.

There would be no reason for our client to waste its time to seek an ITA when the "stated" position of the Department of Revenue (which we contest as legally invalid) has been clear against our client for years. When we agreed to obtain the ITA, we did not expect that the Department of Revenue would suddenly reverse its public position on nexus issues, but we did trust that we needed to follow this procedure at Jim's suggestion to resolve the matter. We confirmed with Jim Johnson that we were doing the right thing to resolve the matter, and we were assured that the ITA would not harm our client. Our client agreed to obtain the ITA solely to allow the Department to settle the matter.

LEGAL ANALYSIS

As discussed in our earlier letters (see Exhibit A, Tab 4A, 4B, and 4C), U.S. Supreme Court case directly supports our client's position, and a Florida Circuit Court case (affirmed by the 1st DCA) stands by this case for exact proposition that the Department now contests.

The Department's imposition of sales and use tax liability on Rhinehart violates the Commerce Clause of the United States Constitution. See U.S. Const. Art. I, § 8, cl.3. In order for the Department to find that Rhinehart had sufficient nexus with Florida to subject it to sales and use tax liability, the Department must find that Rhinehart's activities satisfy the two-prong test set forth in Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992). First, the Department must find that Rhinehart has sufficient "minimum contacts" with State of Florida as interpreted under the Due Process Clause of the 14th Amendment. See Quill, 504 U.S. at 305. Second, the Department must find that Rhinehart has "substantial nexus" with the State of Florida as interpreted under the Commerce Clause of the United States Constitution. See Id. Although it is unclear whether Rhinehart has established the requisite "minimum contacts" with the State for taxing purposes, **it has clearly not created "substantial nexus" with the State**. Accordingly, the Department's proposed imposition of sales and use tax on Rhinehart constitutes an "undue burden" on interstate commerce and is therefore unconstitutional.

I. Constitutional Requirements to Subject Foreign Corporations to State Use Tax Liability

A. The Commerce Clause

The United States Constitution limits the ability of states to impose taxes on interstate transactions to the extent that it burdens or regulates commerce. See U.S. Const. Art. I, § 8, cl.3.

The "Commerce Clause" states, "Congress shall have Power... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Id. "The very purpose of the Commerce Clause was to ensure a national economy free from... unjustifiable local entanglements." See National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753, 760 (1967). The National Bellas Hess Court continued, "Under the Constitution, this is a domain where Congress alone has the power of regulation and control." See Id.

In Complete Auto Transit, Inc. v. Brady, Chairman, Mississippi Tax Comm'n., 430 U.S. 274, 279 (1977), the Supreme Court created a four-part test to determine whether a state sales and use tax violates the Commerce Clause. The Complete Auto Court stated that a state's sales and use tax could withstand a Commerce Clause challenge only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." See Complete Auto, 430 U.S. at 279. The Commerce Clause and its nexus requirement are informed by "structural concerns about the effects of state regulation on the national economy." See Quill, 504 U.S. at 312.

B. The Due Process Clause

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See Miller Bros., 347 U.S. at 344. Abandoning more formalistic tests that focused on a defendant's physical presence within a State seeking to tax the defendant's activities, the Supreme Court now employs "a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the

context of our federal system of Government, to require it to defend the suit in that State." See Quill, 504 U.S. at 307.

C. The Tests for the Due Process Clause and the Commerce Clause Are Distinct

Although the Due Process Clause and the Commerce Clause have similarly phrased nexus requirements, "the nexus requirements of the Due Process and Commerce Clauses are not identical." See Quill, 504 U.S. at 305, *citing* National Bellas Hess, 386 U.S. at 756. "[W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." See Id., *citing* Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987). "[T]he 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce." See Id. at 313. The Quill Court continued, "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." See Id. The Quill Court also stated that while it has been suggested that "every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: A tax may be consistent with due process and yet unduly burden interstate commerce." See Id. at 313, fn.7, *citing* Tyler Pipe Industries, 483 U.S. at 232.

II. Rhinehart's Actions Have Not Created Nexus with the State of Florida

A. Self-Delivery of Goods by a Foreign Corporation Does Not Create Nexus

Rhinehart, a Georgia Corporation, has not created a "substantial nexus" with the State of Florida merely because it delivers its products to its Florida customers using its own truck and

driver. The U.S. Supreme Court has unequivocally stated that a sales and use tax placed upon mere possession of goods in transit by a vendor upon entering the taxing state is inconsistent with the Commerce Clause. See Miller Bros., 347 U.S. at 344.

In Miller Bros., supra, the Supreme Court held that the State of Maryland's imposition of sales and use tax liability on an out-of-state vendor violated the Due Process Clause of the 14th Amendment despite the fact that the out-of-state vendor used its own drivers and trucks to deliver its merchandise to its Maryland (in-state) customers. See Id. at 345-46. The Miller Bros. Court stated, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See Id. at 344-45. The Court held that Miller Bros.' delivery of merchandise into Maryland using its own trucks and drivers was insufficient to meet this fundamental requirement. See Id. at 345-46.

Not only was Miller Bros.' delivery of merchandise into Maryland inadequate to meet the "minimum contacts" requirement of the Due Process Clause by itself, but such delivery activities were also held to be inadequate even when viewed together with Miller Bros.'s additional contacts with the State of Maryland. See Id. For example, Miller Bros. occasionally mailed sales circulars to all its former customers, including customers in Maryland. See Id. at 342. Miller Bros. also employed a separate common carrier to make deliveries to Maryland. See Id. at 342. Taking all of these contacts in the aggregate, the Miller Bros. Court held that such contacts were insufficient to establish Maryland's power to impose a duty upon Miller Bros. to collect and remit a purchaser's use tax. See Id. at 345-46.

Rhinehart, like Miller Bros., admittedly delivers merchandise to its customers using its own driver and truck. Any effort by the Department to impose sales and use tax liability on

Rhinehart solely as a result of its mere trucking presence in Florida would be challenged and ultimately held unconstitutional as an undue burden on interstate commerce.

In Department of Revenue of the State of Florida v. Share Int'l, Inc., 676 So.2d 1362 (Fla. 1996), the Supreme Court of Florida was faced with a similar attempt by the Department of Revenue to impose a sales and use tax on an out-of-state vendor that personally delivered its merchandise to customers in Florida. The Supreme Court of Florida held that the out-of-state vendor's (Share International) practice of personally delivering its merchandise to some of its Florida customers was insufficient to create a "substantial nexus" between the vendor and the State. See Id. at 1363. Stating that "'[s]ubstantial nexus' exists only if the foreign corporation is present within the state conducting the activity to be taxed," the Florida Second Circuit Court held that the foreign vendor's practice of simply delivering its products to customers in Florida did not establish such a presence, and thus created no nexus. See Share Int'l, Inc. v. Department of Revenue, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993), *aff'd*, 667 So.2d 226 (Fla. 1st DCA 1995), *aff'd*, 676 So.2d 1362 (Fla. 1996). The lower court in Share Int'l (Florida Second Circuit Court) specifically cited Miller Bros. in its opinion for the proposition: **"delivery of goods within taxing state through use of own trucks and employees not sufficient nexus."** See Id.[1]

In addition to personally delivering its products into the State of Florida, Share International also held seminars in Miami Beach where its products were displayed, its mail order business was promoted, and its employees actually sold its products. See Id. Assessing

[1] The lower Florida court also stated that a foreign vendor's "presence in the State must be real, and cannot be slight or based on insubstantial activity." See Id. *citing* National Geographic Society v. California Bd. of Equalization, 97 S.Ct. 7386 (1977).

these activities in the aggregate, the Supreme Court of Florida held that, in spite of these additional connections with Florida, Share International's activities still did not create nexus with the State. See Share Int'l, 676 So.2d at 1363.

Conversely, Rhinehart's employees did not undertake the type of additional commercial activities that Share International's employees engaged in while in Florida. Rhinehart's employees simply drove the company's products from Georgia to its customers in Florida, then turned around and went home. As opposed to Share International, Rhinehart did not promote its products, nor solicit additional sales while in Florida. Rhinehart's activities in Florida are significantly less than that of Share International's activities, which the Florida Supreme Court held did not create nexus with the State. See Id.

B. Rhinehart's Employees Did Not "Exploit the Consumer Market" While in Florida

In holding the State of Maryland's imposition of sales and use tax liability against Miller Bros. unconstitutional, the Miller Bros. Court stated that the Delaware vendor's employees did not invade or exploit the consumer market in Maryland. See Miller Bros., 347 U.S. at 347. In holding the State of Florida's imposition of sales and use tax against Share International unconstitutional, the Share Int'l court also noted that the Texas vendor's employees did not solicit further customers while in Florida and "did nothing to further Share's market presence within the State of Florida." See Share Int'l, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993). Similar to Miller Bros.' employees and Share International's employees, Rhinehart's employees did nothing to solicit additional customers or further Rhinehart's market presence within the State of Florida. In fact, Rhinehart had far less contact with the State of Florida than Miller Bros. had

with Maryland, or Share International had with Florida. Rhinehart's employees simply delivered its products to its Florida customers, and then returned to Georgia. There was absolutely no "exploitation of the consumer market" in Florida by Rhinehart's employees. See Id. (quoting Miller Bros., 74 S.Ct. at 540).

As the Miller Bros. Court noted, a foreign vendor's practice of simply delivering its goods into the State seeking to impose sales and use tax liability is distinguishable from other additional activities that have been held to satisfy the substantial nexus requirement of the Commerce Clause. See Miller Bros., 347 U.S. at 346. In General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the Court held that an out-of-state merchant's practice of "entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers" was sufficient to bring the vendor within the taxing powers of the State. See Id. *citing* General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944). In distinguishing General Trading from the conduct of Miller Bros.' employees, the Miller Bros. Court stated "there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods... ." See Id. at 347. Similarly, there is a wide gulf between the type of active and aggressive business activities that have justified the imposition of sales and use tax liability on foreign vendors in the past and Rhinehart's occasional delivery of goods to its Florida customers.

C. The Holdings of Other State Courts

In 1998, the state of Utah issued an advisory opinion regarding the appropriate tax treatment to an out-of-state company whose only contact with Utah was the occasional delivery (through its own trucks) to a customer residing in Utah. See Utah Advisory Opinion, No. 98-

044, 7/13/1998. The company, like Rhinehart, maintained no sales outlets within the state, nor did it have any sales personnel or independent contractors located within the state. See Id. The Utah advisory opinion, finding Miller Bros. and other similar federal cases to be directly on point, stated that the mere delivery of goods into Utah by trucks owned by an out-of-state vendor did not create the "substantial nexus" required to support an imposition of Utah sales and use tax. See Id.

In Burke & Sons Oil Co. v. Director of Revenue, 757 S.W.2d 278 (Mo. Ct. App. 1988), the Missouri Court of Appeals decided a case with strikingly similar facts to the present situation involving Rhinehart. In that case, Burke & Sons (like Rhinehart) was an out-of-state company located in Kansas that occasionally made sales to clients located in Missouri (often delivering the orders in company-owned vehicles). Also like Rhinehart, Burke & Sons "never maintained, occupied or used any office, subsidiary, branch, place of distribution, warehouse, storage place, or other facility" in the taxing state and never had a "representative, agent, sales person, canvasser, or solicitor" engage in business within the taxing state. See Burke & Sons, 757 S.W.2d at 278. The only contact that Burke & Sons had with Missouri was the delivery of goods to Missouri customers through its own vehicles. After thoughtful consideration of the applicable federal case law including Miller Bros., the Court found that the facts did not support a finding of sufficient nexus to allow for the imposition of Missouri sales and use tax. See Id.

The Supreme Court of Colorado also decided another factually similar case in The Denver Dry Goods Company v. City of Arvada, 593 P.2d 1375 (Colo. 1979). The Denver Dry Goods Co. (The "Denver Company") delivered goods to customers in the taxing jurisdiction on company vehicles. The Denver Company did not directly, indirectly, or via subsidiary maintain

a physical presence (e.g. office, sales room, warehouse, or other place of business) within the taxing locality, nor did the Denver Company physically make sales within that locality. See Denver Dry Goods Co, 593 P.2d at 1376. The Supreme Court of Colorado quoted Miller Bros. to provide that "there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." See Denver Dry Goods Co, 593 P.2d at 1377; *citing* Miller Bros, 347 U.S. at 344. Accordingly, the Supreme Court of Colorado found that "delivery alone is an insufficient nexus." See Denver Dry Goods Co., 593 P.2d at 1377; *citing* City of Los Angeles v. Shell Oil Company, 480 P.2d 953 (Cal. 1971).

CONCLUSION

It is unclear to us how the Department has found new authority to make a final assessment for tax years that date back as far as 7 years (when the Department was placed on full notice of the situation in July 2005). Furthermore, the State of Florida may not impose sales or use tax on Rhinehart as a result of its sales of goods to Florida customers. See Miller Bros., 347 U.S. at 345-46. The Department's imposition of sales and use tax liability against Rhinehart constitutes an improper violation of the Due Process Clause as well as the Commerce Clause of the United States Constitution.

The Department's request to Rhinehart that it register as a Florida dealer was improper; Petitioner therefore submits this Petition for a Formal Hearing and asks the Department to make a determination that Rhinehart does not have nexus with Florida and that it is not required to collect and remit Florida sales and/or use tax on behalf of any of its customers, especially

K&L|GATES

because the Department agreed years ago to a settlement and then reneged, and Petitioner has relied on that agreement to its detriment.

Respectfully submitted,

Richard L. Winston
K&L Gates LLP
Southeast Financial Center
200 South Biscayne Boulevard, Suite 3900
Miami, Florida 33131-2399
Phone: 305.539.3350
Fax: 305.358.7095

ATTORNEY FOR PETITIONER

SUBMITTED MAY 9, 2011

EXHIBIT A

K&L|GATES

K&L Gates LLP
Wachovia Financial Center
200 South Biscayne Boulevard, Suite 3900
Miami, FL 33131-2399
T 305.539.3300 www.klgates.com

Richard L. Winston
D 305.539.3350
F 305.358.7095
richard.winston@klgates.com

September 30, 2009

Via Federal Express

Technical Assistance and Dispute Resolution
Section
Florida Department of Revenue
5050 West Tennessee Street
Tallahassee, Florida 32399-0100

Re: Rhinehart Equipment Company/Protest Letter
Account Number: 0002126172
FEI: 58-1189290

Dear Sir or Madam:

The above named taxpayer ("Rhinehart") hereby protests the "Notice of Final Assessment" issued by the Florida Department of Revenue (the "Department") dated September 11, 2009.

1. **Name and Address of Taxpayer**

Rhinehart Equipment Company
3556 Martha Berry HWY NE
Rome, GA 30165-8635

2. **Tax Period or Years Involved**

July 1, 2002 through June 30, 2005.

3. **Adjustments from Which the Taxpayer Seeks Relief**

The Department of Revenue has issued a final notice for $229,695.00 in sales and use taxes and interest of $125,144.30.

4. **Oral Presentation**

We request the right to have oral discussions with the Department. Due to the distance between Miami and Tallahassee, we hope that such discussions can be conducted by telephone.

5. **DR-835 (Power of Attorney)**

A Form DR-835 ("Power of Attorney") was submitted to the Florida Department of Revenue ("Department") on behalf of our client on August 8, 2005 (attached). A new Form DR-835 is also attached. In recent months, the Atlanta Service Center has been directly communicating with our client without our consent, and the Atlanta Service Center employees now assert that they did not have a Form DR-835 on file for us even though they have referenced multiple letters that we have previously sent to the Department regarding our client's matter (those letters all refer to a previously filed Form DR-835 on August 8, 2005).

6. **Factual and Legal Grounds for Objection to the Final Notice**

Our protest to the Notice consists of two parts. First, we have attached our original "protest" to the Department's informal position on "nexus" asserted against our client dated September 30, 2005 (four years ago). The contents of this September 2005 protest still control the matter. Through this protest, the Department of Revenue was put on full notice of our client's position for all periods dated prior to July 2005. A final assessment asserted against our client for tax periods pre-dating June 2005 (more than 4 years ago) is completely barred by the statute of limitations.

The second part of this protest discusses some "eyebrow raising" facts concerning the handling of this matter by the Department for the past 4 years. Through our contacts within the Department of Revenue (many of whom are no longer with the Department, but some of whom are still there), we were directed to reach out to Mr. Jim Johnson to reach a settlement of this matter. We had worked with Jim on other matters, and he has always been both a gentleman and great representative for the Department.

Mr. Johnson and I agreed many years ago to the fundamental terms of a closing settlement agreement. Several of our letters sent to Jim Johnson over the years confirm the terms of the deal. As per our discussions, our client would not contest the Department's nexus findings, and our client would comply with future tax filing requirements (our client has been remitting sales and use taxes to the Department since July 2005). In exchange, the Department would not propose any assessments for periods prior to July 2005.

Back in 2005, however, when we originally raised concerns with the Department's position on "nexus," no final assessment had been issued against our client. In fact, the client had only received a random questionnaire which our client answered in an honest manner. Because the Department was procedurally incapable of settling the matter without an assessment (and our original July 2005 protest contesting the Department's position was filed before a final assessment had been made), Jim Johnson and I agreed to submit the matter for an ITA to obtain a position of the Department of Revenue (to set the background for a closing agreement). The sole reason for seeking the ITA was to obtain the means to resolve the matter in a favorable manner for both parties.

There would be no reason for our client to waste its time to seek an ITA when the "stated" position of the Department of Revenue (which we contest as legally invalid) has been clear against our client for years. When we agreed to obtain the ITA, we did not expect that the Department of Revenue would suddenly reverse its public position on nexus issues, but we did trust that we needed to follow this procedure at Jim's suggestion to resolve the matter. We confirmed with Jim Johnson that we were doing the right thing to resolve the matter, and we were assured that the ITA would not harm our client. Our client agreed to obtain the ITA solely to allow the Department to settle the matter.

All of the communications with Mr. Johnson took place by telephone, and several other attorneys (e.g., my legal associates) were present as the discussions took place. At this point, we are asking the Department to honor its deal from several years ago.

Our client has shown good faith to assist the Department after receiving a random nexus questionnaire from the Atlanta Service Center in 2005. The company relied on the good faith position of the Department to begin to pay Florida sales taxes even though it disagreed (and continues to disagree) with the legal position of the Department of Revenue.

It is unclear to us how the Department has found new authority to make a final assessment for tax years that date back as far as 7 years (when the Department was placed on full notice of the situation in July 2005). The Department now threatens its credibility with all Florida Bar practitioners who seek to resolve matters in a manner that is mutually beneficial to all parties. The State's financial situation should not dictate a change in the manner in which practitioners and taxpayers should work together to resolve matters.

We are assuming that Jim Johnson will confirm our ongoing dialog over the years. We have sent many letters to Mr. Johnson (and others) to finalize a closing agreement (those letters are attached). We are aware of the recent delays at the Department in resolving matters (in which a final assessment has been issued within the statute of limitations), but the

passage of time at this point does not provide the justification to create a new set of rules for resolving tax matters.

The substantive merits of our legal position are clear. Our client has a perfect set of facts should we need to litigate the matter. A U.S. Supreme Court case directly supports our client's position, and a Florida Circuit Court case (affirmed by the 1st DCA) stands by this case for exact proposition that the Department now contests. We have resolved several matters over the years in a friendly manner with various federal and state revenue agents, and we have never been involved with a matter where the actions of the Department could overshadow the substance of the actual matter being adjudicated. We are hoping that this matter can be resolved in an amicable basis, and we consider that our client has just as much of a right to seek a refund from the State (for tax years post-July 2005, even if those years might be barred by the statute of limitations) for taxes improperly paid to the State as the State has the right to seek the collection of taxes from 2002 through July-2005.

We look forward to discussing this matter with you at your convenience.

Very truly yours,

Richard L. Winston

RLW/ac

Enclosures

cc: Compliance Enforcement Process Manager, Department of Revenue
Victoria Crean, Atlanta Service Center

K&L|GATES

SUMMARY OF ATTACHMENTS

1. Notice of Final Assessment Sales or Use Tax, Penalty, and Interest dated September 11, 2009;

2. Power of Attorney and Declaration of Representative (Form DR-835) dated September 30, 2009;

3. Older Power of Attorney and Declaration of Representative (Form DR-835) dated August 08, 2005;

4. Letter to James Johnson dated January 2, 2008, with attachments as follows:

   Tab A - Letter to Marjorie Smith dated September 30, 2005;

   Tab B - Letter to James Johnson dated August 16, 2006;

   Tab C - Letter to Rhinehart Equipment Co. dated December 6, 2006;

   Tab D - Letter to James Johnson dated January 12, 2007;

5. Fax to Jim Johnson dated November 7, 2006;

6. Fax to Jim Johnson dated December 4, 2006;

7. Letter to the Florida Department of Revenue dated July 17, 2006.

ATTACHMENT 1

FLORIDA DEPARTMENT OF REVENUE

DR-43
R. 06/01

NOTICE OF FINAL ASSESSMENT
SALES OR USE TAX, PENALTY, AND INTEREST

ATTN MR SCOTT EASTERWOOD CFO
Corporation/Business Name

9/11/09
Date

RHINEHART EQUIPMENT COMPANY
Taxpayer Representative's Name

400019813
Case Number

3556 MARTHA BERRY HWY NE
Address

0002126172
Account Number

ROME GA 30165-8635
City State Zip

58-1189290
FEI or SS Number

The Department of Revenue has reviewed certain records for the periods of 07/01/2002 - 06/30/2005 and finds that tax, penalty, and interest are due based on the activities described below.

EXPLANATION OF FINAL ASSESSMENT:

Sales into the State of Florida.

You are hereby notified that payment in full of all tax, penalties, and interest listed below is due. Failure to remit payment or request further review may result in enforcement action up to and including the seizure and sale of property.

Total Tax Due	$	229,695.00
Late filing penalty as provided in section 212.12(2), Florida Statues. For taxes or returns due on or after January 1, 1993, to June 30, 2003, the penalty is 10% for each additional 30 days or fraction thereof, not to exceed 50%. For taxes or returns due on or after July 1, 2003, the penalty is 10% of the amount of tax owed, but no less than $50.	$	0.00
A floating rate of interest applies to taxes due on or after January 1, 2000. For taxes due prior to January 1, 2000, the Interest rate is 12% per annum.	$	125,144.30
Additional specific penalty rate of _____ %. See explanation on next page.	$	0.00
Penalty – Other	$	0.00
Payment Received.	$	0.00
Total amount due with this assessment.	$	354,839.30

The bases for this notice of assessment are enumerated below:

- [X] Sales of tangible personal property as provided in sections 212.05 and 212.06, Florida Statutes.
- [X] Purchase or use of tangible personal property as provided in sections 212.05 and 212.06, Florida Statutes.
- [ ] Storage for use or consumption of tangible personal property as provided in sections 212.05 and 212.06, Florida Statutes
- [ ] Rental of tangible personal property as provided in sections 212.05 and 212.06, Florida Statutes.
- [ ] Rental of living accommodations as provided in section 212.03, Florida Statutes.
- [ ] Rental or license of living accommodations as provided in section 212.031, Florida Statutes.
- [ ] Rental of parking or docking spaces as provided in section 212.03, Florida Statutes.
- [ ] Manufacture or fabrication of tangible personal property used or consumed as provided in section 212.06, Florida Statutes.
- [ ] Other: _____

Bases For Any Specific Penalty

- ☐ Section 212.085, Florida Statutes, states that any person who shall fraudulently, for the purpose of evading tax, issue to a vendor or to any agent of the state a certificate or statement in writing in which he claims exemption from sales tax, such person is, in addition to being liable for payment of the tax, subject to a mandatory penalty of 200 percent of the tax.
- ☐ Making a false or fraudulent return with a willful intent to evade payment of tax as provided in section 212.12(2), Florida Statutes (2000).
- ☐ Making a false or fraudulent return or a willful intent to evade payment of tax as provided in section 212.12(2), Florida Statutes (1999).
- ☐ Officer or director of a corporation having administrative control over the collection and payment of the tax and willfully directing an employee to fail to collect, pay over, evade, defeat, or truthfully account for tax as provided in section 213.29, Florida Statutes.
- ☐ Person who willfully fails to collect, pay over, evade, defeat, or truthfully account for tax or payment thereof as provided in section 213.29, Florida Statutes.

If you do not agree with this notice of assessment, you may request a review by filing a protest with the Technical Assistance and Dispute Resolution Section, P.O. Box 7443, Tallahassee, FL 32314-7443; and the Compliance Enforcement Process Manager, 5050 W. Tennessee Street, Bldg. G, Tallahassee, FL 32399-0100, within 20 days of the date of this notice.

Your protest must state: 1) the taxpayer's name, address, account number, and federal employer identification number (if applicable); 2) the type and dollar amount of tax, interest, or penalty challenged; 3) the period covered under the assessment and the amount of tax protested; 4) the factual and legal grounds for the objection and any contested factual issue; and 5) if oral presentation and argument are requested. You must also enclose a copy of this notice of assessment with your protest.

This notice of assessment applies only to the transactions or events referenced in this document. This action does not preclude an audit of taxpayer books and records and shall not preclude audit assessments or other assessments for tax deficiency.

If you agree with this assessment, return a copy of the assessment within 20 days from the date of this notice, along with your remittance of the amount assessed plus additional daily interest. For taxes due on or after January 1, 2000, a floating rate of interest applies to underpayments and late payments of tax. The rate is updated January 1 and July 1 of each year by using the formula established in section 213.235, Florida Statutes. To obtain interest rates: 1) visit the Department's Internet site at www.myflorida.com/dor ; 2) call Taxpayer Services, Monday-Friday, 8:00 a.m. to 7:00 p.m., ET at 1-800-352-3671 (in Florida only) or 850-488-6800. Hearing or speech impaired persons should call our TDD at 1-800-367-8331 or 850-922-1115. Your check or money order should be made payable to the Florida Department of Revenue.

If you do file a protest in compliance with all of the above requirements, you will be preserving your right to initiate an administrative hearing or judicial action at the conclusion of the protest process. However, you may bypass the protest process and contest the assessment by either filing an action in circuit court or filing a petition for an administrative hearing. If you choose this option, either must be filed within 60 days of the date of this assessment and in compliance with the requirements of Chapter 72, Florida Statutes. Applications for an administrative hearing must, in addition, be in compliance with the requirements of Chapter 120, Florida Statutes, and Rule 12-6, Florida Administrative Code. Your petition for an administrative hearing must be delivered to the Office of the General Counsel, Department of Revenue, 501 S. Calhoun Street, Room 204, Tallahassee, FL 32301-0284.

In the event you do not avail yourself of the informal protest provisions, or available judicial administrative review provisions, this assessment will become permanently binding on the 60th day after the date of this notice, and no relief can be granted beyond the 60th day by the Department of Revenue, the Division of Administrative Hearings, or the courts of this state.

Please remit payment with a copy of this assessment and mail to:

JANICE ESCRIBANO
as Agent for Department of Revenue

Tax Auditor III
Title

VICTORIA CREAN
Approved By

Revenue Service Center Manager II - SES
Title

JANICE ESCRIBANO

180 INTERSTATE NORTH PKWY SE

ATLANTA GA 30339-2190

Certified Mail #

Compliance Enforcement

FLORIDA
DEPARTMENT OF REVENUE
Promoting Fairness
Last Updated

Atlanta Service Center
180 Interstate North Parkway SE, Suite 480
Atlanta, GA 30339-2102

September 11, 2009

Rhinehart Equipment Company
Mr. Scott Easterwood
PO Box 1701
Rome, GA 30165

Re: Rhinehart Equipment Company
BP: 2126172 FEI: 58-1189290

Dear Mr. Easterwood:

This letter is in response to your previous letters and subsequent telephone conversations between the Department, Mr. Richard L. Winston, and you regarding "nexus" of Rhinehart Equipment Company relative to the collection of Florida Sales and Use Tax.

On December 5, 2006, ITA06A-030 was issued by Department's Technical Assistance and Dispute Resolution section confirming the Department's position that Rhinehart has substantial nexus in Florida and as such, should be registered to collect and remit tax in Florida. In your letters of January 12, 2007 and January 2, 2008 you offered to resolve any liability prior to July 2005 by entering into a closing agreement with the Department agreeing not to seek sales and use taxes for all periods prior to when Rhinehart registered and started remitting sales and use tax. This is not acceptable to the Department.

Therefore, we have issued a Final Assessment for the period July 1, 2002 through June 30, 2005. Please pay the $354,839.30 amount. If you wish to protest, follow the instructions on the Notice of Final Assessment and also send a copy of the protest to this office.

If you have any further questions, please contact me or Janice Escribano.

Sincerely,

Victoria Crean
Service Center Manager

ATTACHMENT 2

REMOVED

ATTACHMENT 3

REMOVED

ATTACHMENT 4

Hughes
Hubbard

Hughes Hubbard & Reed LLP
201 South Biscayne Boulevard
Miami, Florida 33131-4332
Telephone: 305-358-1666
Fax: 305-371-8759
hugheshubbard.com

Richard L. Winston
Counsel
Direct Dial: 305-379-5564
winston@hugheshubbard.com

January 2, 2008

VIA FEDERAL EXPRESS

Mr. James Johnson
Florida Department of Revenue
5050 West Tennessee Street
Building D-1
Tallahassee, Florida 32399-0100

Re: Rhinehart Equipment Company

Dear Jim:

As you know, we represent Rhinehart Equipment Company ("Rhinehart" or "client"), a C corporation organized under Georgia law. We submitted a Form DR-835 ("Power of Attorney") to the Florida Department of Revenue (the "Department") on August 8, 2005.

On September 30, 2005, we submitted a letter to the Department objecting to an initial finding by the Atlanta Service Center that our client may have "nexus" with Florida. We have attached the letter as Attachment A.

Prior to our client's initial contact with the Department, it had not been collecting and remitting sales and use tax to the Department. The specific facts of our client's case are further discussed in the September 30, 2005 letter (Attachment A), but as a quick recap, that the Atlanta Service Center determined that our client had "nexus" with Florida solely because our client drove its own truck into Florida a very limited number of times to deliver used heavy tractor equipment (e.g., Bobcat tractor) to Florida customers who ordered the equipment through a catalog.

Since July 1, 2005 (very shortly after the Atlanta Service Center advised our client that it may have nexus with Florida), our client has been filing "protective" sales and use tax returns with the Department. Each "protective" filing contains a letter stating that the sales and use tax amounts are being collected and remitted "under protest." To date, the total amount collected and remitted to the Department "under protest" equals approximately $208,000. The amount collected and remitted (under protest) has been unusually large due to a high sales volume of heavy equipment to Florida customers in the aftermath of several large hurricanes that hit Florida

in 2005. The sales of our client's heavy equipment to Florida customers in 2007 are now substantially reduced (e.g., no sales last quarter).

On August 16, 2006, we sent a letter to you proposing a closing agreement to resolve all "nexus" issues raised by the Department. The letter is attached as Attachment B. Through the proposed settlement, our client would waive its rights to claim a refund of all amounts paid "under protest." It would continue to collect and remit taxes relating to sales to all Florida customers. In exchange, the Department would not seek to collect amounts that our client, *arguendo*, may have been required to collect and remit to the Department for periods prior to July 2005.

In subsequent conversations, we determined that it may be in the best interest of both parties to settle this matter, but such a settlement was not procedurally possible because there was no actual tax assessment made against our client for prior years. Our client agreed to submit the matter for an RTA to obtain a finding from the Department. We received ITA 06A-030 on December 6, 2006. It is attached as Attachment C.

On January 12, 2007, we sent a letter to you (in response to the RTA) proposing the terms of a closing agreement to resolve the matter. The letter is attached as Attachment D. The key paragraphs of the January 12, 2007 letter read:

> Rhinehart has been remitting sales and use tax returns "under protest" since the issue of "nexus" was raised by the Department. To resolve this matter, Rhinehart would release all rights to recover the prior amounts of sales and use tax paid. The Department would agree not to seek sales and use taxes for all periods prior to the point when Rhinehart started remitting sales and use tax. Rhinehart would continue to collect remit sales and use tax to Florida to the extent that it continues to sell tangible personal property to Florida residents.
>
> The issue of corporate "nexus" was not raised by the RTA, and there are many additional legal issues regarding corporate tax nexus that would need to be considered even, *arguendo*, Rhinehart has "sales and use" tax nexus with Florida. To resolve this matter, Rhinehart would agree to concede "corporate" nexus with Florida starting in 2007.

We are hoping that we can enter into a closing agreement with the Department under the suggested terms proposed above. Effectively, the closing agreement would place our client in complete compliance with the Department's view of the law dating back to July 2005 when it started to remit sales and use tax to the Department. The Department would waive its rights to collect prior year taxes for period in which our client unknowingly did not collect taxes from Florida customers.

Although we believe that the facts in our client's case are extremely favorable (because they are clean and simple), and our legal position is supported by both the U.S. Supreme Court and the Florida Second Circuit Court, we have a very strong interest to enter into a closing agreement with the Department. We understand that there are many situations (where the facts may be a little different than our own) where it may be appropriate for the Department to raise

"nexus" issues, and we do not wish to set any negative legal precedents for the Department when it wishes to assert those claims.

We appreciate all of the assistance that you have provided on this matter, and we look forward to working with you to resolve all outstanding issues.

Very truly yours,

Richard L. Winston

RLW/cjv

enclosures

TAB A

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001

RICHARD L. WINSTON, P.A.
PARTNER
DIRECT DIAL: 305.577.7025
RWINSTON@SSD.COM

September 30, 2005

VIA FEDERAL EXPRESS

Ms. Marjorie Smith, Tax Auditor
Nexus Investigation & Compliance Education
State of Florida
Department of Revenue
Atlanta Taxpayer Service Center
180 Interstate North Parkway, Suite 450
Atlanta, GA 30339

Re: Rhinehart Equipment Company--Protest Letter

Dear Ms. Smith:

We represent the Rhinehart Equipment Company ("Rhinehart"). We submitted a Form DR-835 ("Power of Attorney") on behalf of Rhinehart in a letter addressed to you dated August 8, 2005. Rhinehart is a C corporation organized under Georgia law. We are protesting your May 4, 2005 determination that Rhinehart has nexus with the State of Florida (which would subject it to sales and use tax collection responsibilities). The determination by the Florida Department of Revenue (the "Department") that Rhinehart has nexus with Florida represents a violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, and is antithetical to the U.S. Supreme Court's holding in Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535 (1954) and the Supreme Court of Florida's holding in Department of Revenue v. Share Int'l Inc., 676 So.2d 1362 (Fla. 1996).

FACTS

Rhinehart is a retail heavy equipment dealer located in Rome, Georgia. Rhinehart delivers its products to its customers in Florida using its own driver and commercial delivery vehicle (i.e., a truck). Rhinehart's driver does not solicit any sales in Florida, nor does the driver assemble the company's products for the Florida customers at the time of delivery. Rhinehart's driver simply delivers the company's products in Florida, and then he returns directly to Georgia. Aside from its delivery of goods to Florida customers through its own truck and driver, Rhinehart has absolutely no other connection with the State of Florida. Rhinehart does not have

a physical location in Florida. Rhinehart provides no services of any kind in Florida. Rhinehart does not have a single employee living or working in Florida. Rhinehart has no inventory or materials or goods in Florida. Rhinehart does not provide its Florida customers with any "after sale" services, such as assembly, technical advice, or maintenance. Rhinehart does not repair any tangible personal property in Florida. Rhinehart is not the owner, lessor, or lessee of any tangible personal property, or any real property in Florida.

On April 22, 2005, the Department informed Rhinehart by letter that it may have nexus with the State and that it may be required to register as a Florida dealer for sales and use tax purposes. Mr. Mark Easterwood, President of Rhinehart, was asked by the Department to complete a "Nexus Investigation Questionnaire." Mr. Easterwood completed the questionnaire which relayed the information that has been detailed above. On May 4, 2005, the Department advised Mr. Easterwood that Rhinehart had nexus with the State of Florida requiring Rhinehart to register as a dealer to collect and remit Florida sales and use tax. The Department stated, "This determination is based on the fact that your company makes sales to Florida customers and uses the company's own truck to deliver goods to customers in the State of Florida." On May 9, 2005, Mr. Scott Eastwood, Finance Manager for Rhinehart, acted in reliance on the accuracy of the information provided to him by the Department, and he filed an "Application to Collect and/or Report Tax in Florida" for Rhinehart. Rhinehart's registration with the State of Florida became effective as of July 1, 2005.

Since July 1, 2005, Rhinehart has been ("under protest") collecting sales tax from its customers. Rhinehart will be remitting the sales tax collected to the Department, although it reserves the right to file a refund claim on behalf of its customers pending the resolution of the issues presented in this letter.

DISCUSSION AND ANALYSIS

The Department's imposition of sales and use tax liability on Rhinehart violates the Commerce Clause of the United States Constitution. See U.S. Const. Art. I, § 8, cl.3. In order for the Department to find that Rhinehart had sufficient nexus with Florida to subject it to sales and use tax liability, the Department must find that Rhinehart's activities satisfy the two-prong test set forth in Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992). First, the Department must find that Rhinehart has sufficient "minimum contacts" with State of Florida as interpreted under the Due Process Clause of the 14th Amendment. See Quill, 504 U.S. at 305. Second, the Department must find that Rhinehart has "substantial nexus" with the State of Florida as interpreted under the Commerce Clause of the United States Constitution. See Id. Although it is unclear whether Rhinehart has established the requisite "minimum contacts" with the State for taxing purposes, it **has clearly not created "substantial nexus" with the State.** Accordingly, the Department's proposed imposition of sales and use tax on Rhinehart constitutes an "undue burden" on interstate commerce and is therefore unconstitutional.

I. Constitutional Requirements to Subject Foreign Corporations to State Use Tax Liability

A. The Commerce Clause

The United States Constitution limits the ability of states to impose taxes on interstate transactions to the extent that it burdens or regulates commerce. See U.S. Const. Art. I, § 8, cl.3. The "Commerce Clause" states, "Congress shall have Power... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Id. "The very purpose of the Commerce Clause was to ensure a national economy free from... unjustifiable local entanglements." See National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753, 760 (1967). The National Bellas Hess Court continued, "Under the Constitution, this is a domain where Congress alone has the power of regulation and control." See Id.

In Complete Auto Transit, Inc. v. Brady, Chairman, Mississippi Tax Comm'n., 430 U.S. 274, 279 (1977), the Supreme Court created a four-part test to determine whether a state sales and use tax violates the Commerce Clause. The Complete Auto Court stated that a state's sales and use tax could withstand a Commerce Clause challenge only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." See Complete Auto, 430 U.S. at 279. The Commerce Clause and its nexus requirement are informed by "structural concerns about the effects of state regulation on the national economy." See Quill, 504 U.S. at 312.

B. The Due Process Clause

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See Miller Bros., 347 U.S. at 344. Abandoning more formalistic tests that focused on a defendant's physical presence within a State seeking to tax the defendant's activities, the Supreme Court now employs "a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State." See Quill, 504 U.S. at 307.

C. The Tests for the Due Process Clause and the Commerce Clause Are Distinct

Although the Due Process Clause and the Commerce Clause have similarly phrased nexus requirements, "the nexus requirements of the Due Process and Commerce Clauses are not identical." See Quill, 504 U.S. at 305, *citing* National Bellas Hess, 386 U.S. at 756. "[W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." See Id., *citing* Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987). "[T]he 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a

proxy for notice, but rather a means for limiting state burdens on interstate commerce." See Id. at 313. The Quill Court continued, "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." See Id. The Quill Court also stated that while it has been suggested that "every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: A tax may be consistent with due process and yet unduly burden interstate commerce." See Id. at 313, fn.7, *citing* Tyler Pipe Industries, 483 U.S. at 232.

II. Rhinehart's Actions Have Not Created Nexus with the State of Florida

A. Self-Delivery of Goods by a Foreign Corporation Does Not Create Nexus

Rhinehart, a Georgia Corporation, has not created a "substantial nexus" with the State of Florida merely because it delivers its products to its Florida customers using its own truck and driver. The U.S. Supreme Court has unequivocally stated that a sales and use tax placed upon mere possession of goods in transit by a vendor upon entering the taxing state is inconsistent with the Commerce Clause. See Miller Bros., 347 U.S. at 344.

In Miller Bros., supra, the Supreme Court held that the State of Maryland's imposition of sales and use tax liability on an out-of-state vendor violated the Due Process Clause of the 14th Amendment despite the fact that the out-of-state vendor used its own drivers and trucks to deliver its merchandise to its Maryland (in-state) customers. See Id. at 345-46. The Miller Bros. Court stated, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See Id. at 344-45. The Court held that Miller Bros.' delivery of merchandise into Maryland using its own trucks and drivers was insufficient to meet this fundamental requirement. See Id. at 345-46.

Not only was Miller Bros.' delivery of merchandise into Maryland inadequate to meet the "minimum contacts" requirement of the Due Process Clause by itself, but such delivery activities were also held to be inadequate even when viewed together with Miller Bros.'s additional contacts with the State of Maryland. See Id. For example, Miller Bros. occasionally mailed sales circulars to all its former customers, including customers in Maryland. See Id. at 342. Miller Bros. also employed a separate common carrier to make deliveries to Maryland. See Id. at 342. Taking all of these contacts in the aggregate, the Miller Bros. Court held that such contacts were insufficient to establish Maryland's power to impose a duty upon Miller Bros. to collect and remit a purchaser's use tax. See Id. at 345-46.

Rhinehart, like Miller Bros., admittedly delivers merchandise to its customers using its own driver and truck. Any effort by the Department to impose sales and use tax liability on Rhinehart solely as a result of its mere trucking presence in Florida would be challenged and ultimately held unconstitutional as an undue burden on interstate commerce.

In Department of Revenue of the State of Florida v. Share Int'l, Inc., 676 So.2d 1362 (Fla. 1996), the Supreme Court of Florida was faced with a similar attempt by the Department of Revenue to impose a sales and use tax on an out-of-state vendor that personally delivered its merchandise to customers in Florida. The Supreme Court of Florida held that the out-of-state vendor's (Share International) practice of personally delivering its merchandise to some of its Florida customers was insufficient to create a "substantial nexus" between the vendor and the State. See Id. at 1363. Stating that "'[s]ubstantial nexus' exists only if the foreign corporation is present within the state conducting the activity to be taxed," the Florida Second Circuit Court held that the foreign vendor's practice of simply delivering its products to customers in Florida did not establish such a presence, and thus created no nexus. See Share Int'l, Inc. v. Department of Revenue, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993), *aff'd*, 667 So.2d 226 (Fla. 1st DCA 1995), *aff'd*, 676 So.2d 1362 (Fla. 1996). The lower court in Share Int'l (Florida Second Circuit Court) specifically cited Miller Bros. in its opinion for the proposition: "**delivery of goods within taxing state through use of own trucks and employees not sufficient nexus.**" See Id.[1]

In addition to personally delivering its products into the State of Florida, Share International also held seminars in Miami Beach where its products were displayed, its mail order business was promoted, and its employees actually sold its products. See Id. Assessing these activities in the aggregate, the Supreme Court of Florida held that, in spite of these additional connections with Florida, Share International's activities still did not create nexus with the State. See Share Int'l, 676 So.2d at 1363.

Conversely, Rhinehart's employees did not undertake the type of additional commercial activities that Share International's employees engaged in while in Florida. Rhinehart's employees simply drove the company's products from Georgia to its customers in Florida, then turned around and went home. As opposed to Share International, Rhinehart did not promote its products, nor solicit additional sales while in Florida. Rhinehart's activities in Florida are significantly less than that of Share International's activities, which the Florida Supreme Court held did not create nexus with the State. See Id.

B. Rhinehart's Employees Did Not "Exploit the Consumer Market" While in Florida

In holding the State of Maryland's imposition of sales and use tax liability against Miller Bros. unconstitutional, the Miller Bros. Court stated that the Delaware vendor's employees did not invade or exploit the consumer market in Maryland. See Miller Bros., 347 U.S. at 347. In holding the State of Florida's imposition of sales and use tax against Share International unconstitutional, the Share Int'l court also noted that the Texas vendor's employees did not

[1] The lower Florida court also stated that a foreign vendor's "presence in the State must be real, and cannot be slight or based on insubstantial activity." See Id. *citing* National Geographic Society v. California Bd. of Equalization, 97 S.Ct. 7386 (1977).

solicit further customers while in Florida and "did nothing to further Share's market presence within the State of Florida." See Share Int'l, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993). Similar to Miller Bros.' employees and Share International's employees, Rhinehart's employees did nothing to solicit additional customers or further Rhinehart's market presence within the State of Florida. In fact, Rhinehart had far less contact with the State of Florida than Miller Bros. had with Maryland, or Share International had with Florida. Rhinehart's employees simply delivered its products to its Florida customers, and then returned to Georgia. There was absolutely no "exploitation of the consumer market" in Florida by Rhinehart's employees. See Id. (quoting Miller Bros., 74 S.Ct. at 540).

As the Miller Bros. Court noted, a foreign vendor's practice of simply delivering its goods into the State seeking to impose sales and use tax liability is distinguishable from other additional activities that have been held to satisfy the substantial nexus requirement of the Commerce Clause. See Miller Bros., 347 U.S. at 346. In General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the Court held that an out-of-state merchant's practice of "entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers" was sufficient to bring the vendor within the taxing powers of the State. See Id. *citing* General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944). In distinguishing General Trading from the conduct of Miller Bros.' employees, the Miller Bros. Court stated "there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods... ." See Id. at 347. Similarly, there is a wide gulf between the type of active and aggressive business activities that have justified the imposition of sales and use tax liability on foreign vendors in the past and Rhinehart's occasional delivery of goods to its Florida customers.

C. The Holdings of Other State Courts

In 1998, the state of Utah issued an advisory opinion regarding the appropriate tax treatment to an out-of-state company whose only contact with Utah was the occasional delivery (through its own trucks) to a customer residing in Utah. See Utah Advisory Opinion, No. 98-044, 7/13/1998. The company, like Rhinehart, maintained no sales outlets within the state, nor did it have any sales personnel or independent contractors located within the state. See Id. The Utah advisory opinion, finding Miller Bros. and other similar federal cases to be directly on point, stated that the mere delivery of goods into Utah by trucks owned by an out-of-state vendor did not create the "substantial nexus" required to support an imposition of Utah sales and use tax. See Id.

In Burke & Sons Oil Co. v. Director of Revenue, 757 S.W.2d 278 (Mo. Ct. App. 1988), the Missouri Court of Appeals decided a case with strikingly similar facts to the present situation involving Rhinehart. In that case, Burke & Sons (like Rhinehart) was an out-of-state company located in Kansas that occasionally made sales to clients located in Missouri (often delivering the orders in company-owned vehicles). Also like Rhinehart, Burke & Sons "never maintained,

occupied or used any office, subsidiary, branch, place of distribution, warehouse, storage place, or other facility" in the taxing state and never had a "representative, agent, sales person, canvasser, or solicitor" engage in business within the taxing state. See Burke & Sons, 757 S.W.2d at 278. The only contact that Burke & Sons had with Missouri was the delivery of goods to Missouri customers through its own vehicles. After thoughtful consideration of the applicable federal case law including Miller Bros., the Court found that the facts did not support a finding of sufficient nexus to allow for the imposition of Missouri sales and use tax. See Id.

The Supreme Court of Colorado also decided another factually similar case in The Denver Dry Goods Company v. City of Arvada, 593 P.2d 1375 (Colo. 1979). The Denver Dry Goods Co. (The "Denver Company") delivered goods to customers in the taxing jurisdiction on company vehicles. The Denver Company did not directly, indirectly, or via subsidiary maintain a physical presence (e.g. office, sales room, warehouse, or other place of business) within the taxing locality, nor did the Denver Company physically make sales within that locality. See Denver Dry Goods Co, 593 P.2d at 1376. The Supreme Court of Colorado quoted Miller Bros. to provide that "there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." See Denver Dry Goods Co, 593 P.2d at 1377; *citing* Miller Bros, 347 U.S. at 344. Accordingly, the Supreme Court of Colorado found that "delivery alone is an insufficient nexus." See Denver Dry Goods Co., 593 P.2d at 1377; *citing* City of Los Angeles v. Shell Oil Company, 480 P.2d 953 (Cal. 1971).

CONCLUSION

The State of Florida may not impose a sales or use tax on Rhinehart as a result of its sales of goods to Florida customers. See Miller Bros., 347 U.S. at 345-46. The Department's imposition of sales and use tax liability against Rhinehart constitutes an improper violation of the Due Process Clause as well as the Commerce Clause of the United States Constitution. The Department's request to Rhinehart that it register as a Florida dealer was improper, and it asks the Department to make a determination that Rhinehart does not have nexus with Florida and that it is not required to collect and remit Florida sales and use tax on behalf of any of its customers.

Very truly yours,

Richard L. Winston, P.A.

RLW:lbr

TAB B

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001

Direct: +1.305.577.7025
RWinston@ssd.com

August 16, 2006

VIA TELECOPY & U.S. MAIL

Mr. James Johnson
Florida Department of Revenue
5050 West Tennessee Street
Building D-1
Tallahassee, Florida 32399-0100

Re: **Rhinehart Equipment Company**

Dear Jim:

We appreciate the time that you have spent to assist us to resolve the sales and use tax issues involving Rhinehart Equipment Corporation ("Rhinehart), a Georgia Corporation. Per your request, we asked our client to determine the hypothetical sales and use taxes that would be imposed on sales of products to Florida customers (if our client were found to have "nexus" with Florida for the three year period immediately preceding the period in which our client began to file "protective" remittances of Florida sales and use tax). The tax would amount to $159,800.31.

As we discussed, our client wishes to enter into a closing agreement in which the Florida Department of Revenue (the "Department") will forgive any hypothetical sales and use tax amounts that the Department believes that Rhinehart may owe to the state of Florida for the period before it began to file "protective" sales and use tax returns. Rhinehart will, in turn, drop its right to challenge the Department's position that Rhinehart has "nexus" with Florida. Rhinehart will not file a refund claim for the amounts that it has been remitting to the Department for nearly a year "under protest." Rhinehart will continue to remit sales and use tax to Florida to the extent that it continues to use its own trucks to deliver products to Florida customers.

We look forward to further discussing these issues with you at your earliest convenience. I have a meeting with Mark Zych and others on another client matter on September 8, 2006 in your offices, and it would be a pleasure to meet with you on that day (or even present a signed closing agreement on that day if we can hammer out the details before that time).

Sincerely,

SQUIRE, SANDERS & DEMPSEY L.L.P.

Richard L. Winston, P.A.

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.

200 South Biscayne Boulevard Suite 4000
Miami, FL 33131-2398
Office: +1.305.577.7000
Fax: +1.305.577.7001

Preferred Fax: ____
If Problems: ____

August 2, 2006

PLEASE DELIVER THESE PAGES IMMEDIATELY

Number of Pages (including cover): 8

TO: Mr. Jim Johnson — FAX NO.: (850) 488-4654

COMPANY: Florida Department of Revenue — PHONE NO.: (850) 922-4744

FROM: Richard L. Winston, P.A. — DIRECT DIAL NO.: +1.305.577.7025

E-MAIL: RWinston@ssd.com

RE: Rhinehart Equipment Company

Message:

Pursuant to our conversation, I have attached a copy of the September 30, 2005 Protest letter we sent to Gary Gray. Please feel free to call me if you have any questions.

Sender No.: 20195 — 80985.02133 (Account No.) — Return to Office

Job No: ____

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STAFL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001

RICHARD L. WINSTON, P.A.
PARTNER
DIRECT DIAL: 305.577.7025
RWINSTON@SSD.COM

September 30, 2005

VIA FEDERAL EXPRESS

Ms. Marjorie Smith, Tax Auditor
Nexus Investigation & Compliance Education
State of Florida
Department of Revenue
Atlanta Taxpayer Service Center
180 Interstate North Parkway, Suite 450
Atlanta, GA 30339

Re: Rhinehart Equipment Company--Protest Letter

Dear Ms. Smith:

We represent the Rhinehart Equipment Company ("Rhinehart"). We submitted a Form DR-835 ("Power of Attorney") on behalf of Rhinehart in a letter addressed to you dated August 8, 2005. Rhinehart is a C corporation organized under Georgia law. We are protesting your May 4, 2005 determination that Rhinehart has nexus with the State of Florida (which would subject it to sales and use tax collection responsibilities). The determination by the Florida Department of Revenue (the "Department") that Rhinehart has nexus with Florida represents a violation of the Commerce Clause of the United States Constitution, Article I, § 8, cl. 3, and is antithetical to the U.S. Supreme Court's holding in Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 S. Ct. 535 (1954) and the Supreme Court of Florida's holding in Department of Revenue v. Share Int'l Inc., 676 So.2d 1362 (Fla. 1996).

FACTS

Rhinehart is a retail heavy equipment dealer located in Rome, Georgia. Rhinehart delivers its products to its customers in Florida using its own driver and commercial delivery vehicle (i.e., a truck). Rhinehart's driver does not solicit any sales in Florida, nor does the driver assemble the company's products for the Florida customers at the time of delivery. Rhinehart's driver simply delivers the company's products in Florida, and then he returns directly to Georgia. Aside from its delivery of goods to Florida customers through its own truck and driver, Rhinehart has absolutely no other connection with the State of Florida. Rhinehart does not have

a physical location in Florida. Rhinehart provides no services of any kind in Florida. Rhinehart does not have a single employee living or working in Florida. Rhinehart has no inventory or materials or goods in Florida. Rhinehart does not provide its Florida customers with any "after sale" services, such as assembly, technical advice, or maintenance. Rhinehart does not repair any tangible personal property in Florida. Rhinehart is not the owner, lessor, or lessee of any tangible personal property, or any real property in Florida.

On April 22, 2005, the Department informed Rhinehart by letter that it may have nexus with the State and that it may be required to register as a Florida dealer for sales and use tax purposes. Mr. Mark Easterwood, President of Rhinehart, was asked by the Department to complete a "Nexus Investigation Questionnaire." Mr. Easterwood completed the questionnaire which relayed the information that has been detailed above. On May 4, 2005, the Department advised Mr. Easterwood that Rhinehart had nexus with the State of Florida requiring Rhinehart to register as a dealer to collect and remit Florida sales and use tax. The Department stated, "This determination is based on the fact that your company makes sales to Florida customers and uses the company's own truck to deliver goods to customers in the State of Florida." On May 9, 2005, Mr. Scott Eastwood, Finance Manager for Rhinehart, acted in reliance on the accuracy of the information provided to him by the Department, and he filed an "Application to Collect and/or Report Tax in Florida" for Rhinehart. Rhinehart's registration with the State of Florida became effective as of July 1, 2005.

Since July 1, 2005, Rhinehart has been ("under protest") collecting sales tax from its customers. Rhinehart will be remitting the sales tax collected to the Department, although it reserves the right to file a refund claim on behalf of its customers pending the resolution of the issues presented in this letter.

DISCUSSION AND ANALYSIS

The Department's imposition of sales and use tax liability on Rhinehart violates the Commerce Clause of the United States Constitution. See U.S. Const. Art. I, § 8, cl.3. In order for the Department to find that Rhinehart had sufficient nexus with Florida to subject it to sales and use tax liability, the Department must find that Rhinehart's activities satisfy the two-prong test set forth in Quill Corp. v. North Dakota, 504 U.S. 298, 312 (1992). First, the Department must find that Rhinehart has sufficient "minimum contacts" with State of Florida as interpreted under the Due Process Clause of the 14th Amendment. See Quill, 504 U.S. at 305. Second, the Department must find that Rhinehart has "substantial nexus" with the State of Florida as interpreted under the Commerce Clause of the United States Constitution. See Id. Although it is unclear whether Rhinehart has established the requisite "minimum contacts" with the State for taxing purposes, **it has clearly not created "substantial nexus" with the State.** Accordingly, the Department's proposed imposition of sales and use tax on Rhinehart constitutes an "undue burden" on interstate commerce and is therefore unconstitutional.

I. Constitutional Requirements to Subject Foreign Corporations to State Use Tax Liability

A. The Commerce Clause

The United States Constitution limits the ability of states to impose taxes on interstate transactions to the extent that it burdens or regulates commerce. See U.S. Const. Art. I, § 8, cl.3. The "Commerce Clause" states, "Congress shall have Power... [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." Id. "The very purpose of the Commerce Clause was to ensure a national economy free from... unjustifiable local entanglements." See National Bellas Hess, Inc. v. Dept. of Revenue, 386 U.S. 753, 760 (1967). The National Bellas Hess Court continued, "Under the Constitution, this is a domain where Congress alone has the power of regulation and control." See Id.

In Complete Auto Transit, Inc. v. Brady, Chairman, Mississippi Tax Comm'n., 430 U.S. 274, 279 (1977), the Supreme Court created a four-part test to determine whether a state sales and use tax violates the Commerce Clause. The Complete Auto Court stated that a state's sales and use tax could withstand a Commerce Clause challenge only "when the tax is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State." See Complete Auto, 430 U.S. at 279. The Commerce Clause and its nexus requirement are informed by "structural concerns about the effects of state regulation on the national economy." See Quill, 504 U.S. at 312.

B. The Due Process Clause

The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See Miller Bros., 347 U.S. at 344. Abandoning more formalistic tests that focused on a defendant's physical presence within a State seeking to tax the defendant's activities, the Supreme Court now employs "a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of Government, to require it to defend the suit in that State." See Quill, 504 U.S. at 307.

C. The Tests for the Due Process Clause and the Commerce Clause Are Distinct

Although the Due Process Clause and the Commerce Clause have similarly phrased nexus requirements, "the nexus requirements of the Due Process and Commerce Clauses are not identical." See Quill, 504 U.S. at 305, *citing* National Bellas Hess, 386 U.S. at 756. "[W]hile a State may, consistent with the Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the Commerce Clause." See Id., *citing* Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232 (1987). "[T]he 'substantial nexus' requirement is not, like due process' 'minimum contacts' requirement, a

proxy for notice, but rather a means for limiting state burdens on interstate commerce." See Id. at 313. The Quill Court continued, "a corporation may have the 'minimum contacts' with a taxing State as required by the Due Process Clause, and yet lack the 'substantial nexus' with that State as required by the Commerce Clause." See Id. The Quill Court also stated that while it has been suggested that "every tax that passes contemporary Commerce Clause analysis is also valid under the Due Process Clause, it does not follow that the converse is as well true: A tax may be consistent with due process and yet unduly burden interstate commerce." See Id. at 313, fn.7, *citing* Tyler Pipe Industries, 483 U.S. at 232.

II. Rhinehart's Actions Have Not Created Nexus with the State of Florida

A. Self-Delivery of Goods by a Foreign Corporation Does Not Create Nexus

Rhinehart, a Georgia Corporation, has not created a "substantial nexus" with the State of Florida merely because it delivers its products to its Florida customers using its own truck and driver. The U.S. Supreme Court has unequivocally stated that a sales and use tax placed upon mere possession of goods in transit by a vendor upon entering the taxing state is inconsistent with the Commerce Clause. See Miller Bros., 347 U.S. at 344.

In Miller Bros., supra, the Supreme Court held that the State of Maryland's imposition of sales and use tax liability on an out-of-state vendor violated the Due Process Clause of the 14th Amendment despite the fact that the out-of-state vendor used its own drivers and trucks to deliver its merchandise to its Maryland (in-state) customers. See Id. at 345-46. The Miller Bros. Court stated, "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." See Id. at 344-45. The Court held that Miller Bros.' delivery of merchandise into Maryland using its own trucks and drivers was insufficient to meet this fundamental requirement. See Id. at 345-46.

Not only was Miller Bros.' delivery of merchandise into Maryland inadequate to meet the "minimum contacts" requirement of the Due Process Clause by itself, but such delivery activities were also held to be inadequate even when viewed together with Miller Bros.'s additional contacts with the State of Maryland. See Id. For example, Miller Bros. occasionally mailed sales circulars to all its former customers, including customers in Maryland. See Id. at 342. Miller Bros. also employed a separate common carrier to make deliveries to Maryland. See Id. at 342. Taking all of these contacts in the aggregate, the Miller Bros. Court held that such contacts were insufficient to establish Maryland's power to impose a duty upon Miller Bros. to collect and remit a purchaser's use tax. See Id. at 345-46.

Rhinehart, like Miller Bros., admittedly delivers merchandise to its customers using its own driver and truck. Any effort by the Department to impose sales and use tax liability on Rhinehart solely as a result of its mere trucking presence in Florida would be challenged and ultimately held unconstitutional as an undue burden on interstate commerce.

In Department of Revenue of the State of Florida v. Share Int'l, Inc., 676 So.2d 1362 (Fla. 1996), the Supreme Court of Florida was faced with a similar attempt by the Department of Revenue to impose a sales and use tax on an out-of-state vendor that personally delivered its merchandise to customers in Florida. The Supreme Court of Florida held that the out-of-state vendor's (Share International) practice of personally delivering its merchandise to some of its Florida customers was insufficient to create a "substantial nexus" between the vendor and the State. See Id. at 1363. Stating that "'[s]ubstantial nexus' exists only if the foreign corporation is present within the state conducting the activity to be taxed," the Florida Second Circuit Court held that the foreign vendor's practice of simply delivering its products to customers in Florida did not establish such a presence, and thus created no nexus. See Share Int'l, Inc. v. Department of Revenue, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993), *aff'd*, 667 So.2d 226 (Fla. 1st DCA 1995), *aff'd*, 676 So.2d 1362 (Fla. 1996). The lower court in Share Int'l (Florida Second Circuit Court) specifically cited Miller Bros. in its opinion for the proposition: **"delivery of goods within taxing state through use of own trucks and employees not sufficient nexus."** See Id.[1]

In addition to personally delivering its products into the State of Florida, Share International also held seminars in Miami Beach where its products were displayed, its mail order business was promoted, and its employees actually sold its products. See Id. Assessing these activities in the aggregate, the Supreme Court of Florida held that, in spite of these additional connections with Florida, Share International's activities still did not create nexus with the State. See Share Int'l, 676 So.2d at 1363.

Conversely, Rhinehart's employees did not undertake the type of additional commercial activities that Share International's employees engaged in while in Florida. Rhinehart's employees simply drove the company's products from Georgia to its customers in Florida, then turned around and went home. As opposed to Share International, Rhinehart did not promote its products, nor solicit additional sales while in Florida. Rhinehart's activities in Florida are significantly less than that of Share International's activities, which the Florida Supreme Court held did not create nexus with the State. See Id.

B. Rhinehart's Employees Did Not "Exploit the Consumer Market" While in Florida

In holding the State of Maryland's imposition of sales and use tax liability against Miller Bros. unconstitutional, the Miller Bros. Court stated that the Delaware vendor's employees did not invade or exploit the consumer market in Maryland. See Miller Bros., 347 U.S. at 347. In holding the State of Florida's imposition of sales and use tax against Share International unconstitutional, the Share Int'l court also noted that the Texas vendor's employees did not

[1] The lower Florida court also stated that a foreign vendor's "presence in the State must be real, and cannot be slight or based on insubstantial activity." See Id. *citing* National Geographic Society v. California Bd. of Equalization, 97 S.Ct. 7386 (1977).

solicit further customers while in Florida and "did nothing to further Share's market presence within the State of Florida." See Share Int'l, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993). Similar to Miller Bros.' employees and Share International's employees, Rhinehart's employees did nothing to solicit additional customers or further Rhinehart's market presence within the State of Florida. In fact, Rhinehart had far less contact with the State of Florida than Miller Bros. had with Maryland, or Share International had with Florida. Rhinehart's employees simply delivered its products to its Florida customers, and then returned to Georgia. There was absolutely no "exploitation of the consumer market" in Florida by Rhinehart's employees. See Id. (quoting Miller Bros., 74 S.Ct. at 540).

As the Miller Bros. Court noted, a foreign vendor's practice of simply delivering its goods into the State seeking to impose sales and use tax liability is distinguishable from other additional activities that have been held to satisfy the substantial nexus requirement of the Commerce Clause. See Miller Bros., 347 U.S. at 346. In General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944), the Court held that an out-of-state merchant's practice of "entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers" was sufficient to bring the vendor within the taxing powers of the State. See Id. *citing* General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944). In distinguishing General Trading from the conduct of Miller Bros.' employees, the Miller Bros. Court stated "there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods... ." See Id. at 347. Similarly, there is a wide gulf between the type of active and aggressive business activities that have justified the imposition of sales and use tax liability on foreign vendors in the past and Rhinehart's occasional delivery of goods to its Florida customers.

C. The Holdings of Other State Courts

In 1998, the state of Utah issued an advisory opinion regarding the appropriate tax treatment to an out-of-state company whose only contact with Utah was the occasional delivery (through its own trucks) to a customer residing in Utah. See Utah Advisory Opinion, No. 98-044, 7/13/1998. The company, like Rhinehart, maintained no sales outlets within the state, nor did it have any sales personnel or independent contractors located within the state. See Id. The Utah advisory opinion, finding Miller Bros. and other similar federal cases to be directly on point, stated that the mere delivery of goods into Utah by trucks owned by an out-of-state vendor did not create the "substantial nexus" required to support an imposition of Utah sales and use tax. See Id.

In Burke & Sons Oil Co. v. Director of Revenue, 757 S.W.2d 278 (Mo. Ct. App. 1988), the Missouri Court of Appeals decided a case with strikingly similar facts to the present situation involving Rhinehart. In that case, Burke & Sons (like Rhinehart) was an out-of-state company located in Kansas that occasionally made sales to clients located in Missouri (often delivering the orders in company-owned vehicles). Also like Rhinehart, Burke & Sons "never maintained,

occupied or used any office, subsidiary, branch, place of distribution, warehouse, storage place, or other facility" in the taxing state and never had a "representative, agent, sales person, canvasser, or solicitor" engage in business within the taxing state. See Burke & Sons, 757 S.W.2d at 278. The only contact that Burke & Sons had with Missouri was the delivery of goods to Missouri customers through its own vehicles. After thoughtful consideration of the applicable federal case law including Miller Bros., the Court found that the facts did not support a finding of sufficient nexus to allow for the imposition of Missouri sales and use tax. See Id.

The Supreme Court of Colorado also decided another factually similar case in The Denver Dry Goods Company v. City of Arvada, 593 P.2d 1375 (Colo. 1979). The Denver Dry Goods Co. (The "Denver Company") delivered goods to customers in the taxing jurisdiction on company vehicles. The Denver Company did not directly, indirectly, or via subsidiary maintain a physical presence (e.g. office, sales room, warehouse, or other place of business) within the taxing locality, nor did the Denver Company physically make sales within that locality. See Denver Dry Goods Co, 593 P.2d at 1376. The Supreme Court of Colorado quoted Miller Bros. to provide that "there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." See Denver Dry Goods Co, 593 P.2d at 1377; *citing* Miller Bros, 347 U.S. at 344. Accordingly, the Supreme Court of Colorado found that "delivery alone is an insufficient nexus." See Denver Dry Goods Co., 593 P.2d at 1377; *citing* City of Los Angeles v. Shell Oil Company, 480 P.2d 953 (Cal. 1971).

CONCLUSION

The State of Florida may not impose a sales or use tax on Rhinehart as a result of its sales of goods to Florida customers. See Miller Bros., 347 U.S. at 345-46. The Department's imposition of sales and use tax liability against Rhinehart constitutes an improper violation of the Due Process Clause as well as the Commerce Clause of the United States Constitution. The Department's request to Rhinehart that it register as a Florida dealer was improper, and it asks the Department to make a determination that Rhinehart does not have nexus with Florida and that it is not required to collect and remit Florida sales and use tax on behalf of any of its customers.

Very truly yours,

Richard L. Winston, P.A.

RLW:lbr

TAB C

DEPARTMENT OF REVENUE
Jim Zingale
Executive Director

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Atlanta Service Center
180 Interstate North Parkway, Suite 450
Atlanta, GA 30339
(770) 858-3080
Fax (678) 627-9861
http://myflorida.com/dor/taxcat/

General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

December 6, 2006

Rhinehart Equipment Co.
Mr. Scott Easterwood
PO Box 1701
Rome, GA 30162-1701

Dear Mr. Easterwood:

Please find enclosed Internal Technical Advisement 06A-030 issued by our Technical Assistance and Dispute Resolution section in Tallahassee, Florida.

If we can be of further assistance, please let us know.

Sincerely,

COPY

Janice Escribano, Tax Auditor
Nexus Investigation & Compliance Education

Enclosure
cc: Richard L. Winston, Steel Hector & Davis LLP

FLORIDA
DEPARTMENT OF REVENUE
Jim Zingale
Executive Director

General Tax Administration
Child Support Enforcement
Property Tax Administration
Administrative Services
Information Services

December 5, 2006

MEMORANDUM

TO: Jim Johnson, RPA II, Compliance Enforcement Process
John Keda, Manager, Region Six,
Compliance Enforcement Process

THROUGH: Mark Zych, Director
Technical Assistance and Dispute Resolution

THROUGH: Vincent Aldridge, Deputy Director
Technical Assistance and Dispute Resolution

THROUGH: Gary Gray, Revenue Program Administrator I
Technical Assistance and Dispute Resolution

FROM: Jonathan E. Swift, Tax Law Specialist
Technical Assistance and Dispute Resolution

SUBJECT: Internal Technical Advisement (I.T.A.) 06A-030

TAXPAYER: Rhinehart Equipment Company
FEI: 58-1189290
BP: 2126172
Service Notification Number: Not under audit
Tax: Sales and Use Tax

This is in response to your memorandum dated August 23, 2006, requesting advice on whether sales tax nexus exists under a particular set of facts for a Georgia corporation.

ISSUE

The only issue is whether a Georgia company achieves sales and use tax nexus with Florida by regularly making sales to Florida customers and delivering its products to its Florida customers, in its own trucks.

STATEMENT OF FACTS

The taxpayer is represented by Richard L. Winston, PA. of Squire, Sanders & Dempsey L.L.P., including Steel Hector & Davis LLP. A Power of Attorney is on file. The taxpayer's representative has filed a letter of protest dated September 30, 2005.

According to the facts presented in the letter of protest (Exhibit A), Rhinehart Equipment Company (hereinafter referred to as REC) is a heavy equipment dealer located in Rome, Georgia. REC delivers its products to Florida customers in its own trucks. Its driver does not solicit any sales in Florida, nor does he assemble the company's products at the time of delivery.

Other than delivering the products to Florida customers and returning directly to Georgia, REC has "absolutely no other connections with the State of Florida." It has no physical location in Florida. REC further explains in its letter of protest that it:

> . . . provides no services of any kind in Florida. Rhinehart does not have a single employee living or working in Florida, Rhinehart has no inventory or materials or goods in Florida. Rhinehart does not provide its Florida customers with any "after sale" services, such as assembly, technical advice, or maintenance. Rhinehart does not repair any tangible personal property in Florida. Rhinehart is not the owner, lessor, or lessee of any tangible personal property, or any real property in Florida.

The Florida activities of REC were identified by the Nexus Investigation and Compliance Enforcement (NICE) Team of the Florida Department of Revenue. The Department informed REC by letter dated April 22, 2005, that it may have nexus with the State and enclosed a Nexus Investigation Questionnaire for the company to complete. Mr. Mark Easterwood, president of REC, completed and submitted the questionnaire (Exhibit B). Based upon the information provided by Mr. Easterwood, the Department informed REC that it had nexus with the State of Florida, which required the company to register to collect Florida sales and use tax. The basis for the determination is that REC makes sales to Florida customers and delivers its products in its own trucks.

Consequently, REC has filed an Application to Collect and/or Report Tax in Florida (Form DR-1) with an effective date of July 1, 2005. Since that date, REC has been collecting sales tax from its Florida customers and filing sales tax returns and making payment under protest (Exhibit C). The extent of its Florida activities is revealed in a sample of RECs sales tax returns filed for the quarters ended September 2005, December 2005 and March 2006, reflecting Florida sales of $821,940.00, $706,383.00, and $440,882.00, respectively.

It should be noted that the company has also filed documentary stamp tax returns. Section F of Form DR-1 filed by REC, reveals that the company makes sales, finalized by written agreements, that do not require recording by the Clerk of the Court, but do require documentary stamp tax to be paid, and that the company anticipates five or more transactions subject to documentary stamp tax per month.

Other documentation provided by the NICE team reveals that REC solicits Florida business through at least one medium, trade publications. Specifically, it advertises in the Florida Edition of the Heavy Equipment Trader (Exhibit D).

Finally, the company has a web page at http://rhinehartequipmentcompany.com. At its Service link, REC states that it services the products it sells.

TAXPAYER POSITION

It is the position of REC that the imposition of sales and use tax liability against the company violates the Due Process Clause and the Commerce Clause of the United States Constitution. Rhinehart states that the Florida activities of REC do not create nexus with Florida and, therefore, REC is not required to collect and remit Florida sales and use tax on Florida sales.

Rhinehart Equipment Company states the following:

> In order for the Department to find that Rhinehart had sufficient nexus with Florida to subject it to sales and use tax liability, the Department must find that Rhinehart's activities satisfy the two-prong test set forth in Quill Corp. v. North Dakota, 504, US. 298, 312 (1992). First, the Department must find that Rhinehart has sufficient "minimum contacts" with the State of Florida as interpreted under the Due Process Clause of the 14th Amendment. See Quill, 504 U.S. at 305. Second, the Department must find that Rhinehart has "substantial nexus" with the State of Florida as interpreted under the Commerce Clause of the United States Constitution. See Id.

In support of its position, REC relies principally upon the decision in Miller Bros. Co. v. Maryland, 347 U.S. 340, 74 S.Ct. 535 (1954). Rhinehart asserts that the mere delivery of REC products to Florida customers in its own trucks has not created "substantial nexus" with the State of Florida.

The decision rendered in Department of Revenue v. Share Int'l Inc., 676 So. 2d 1362 (Fla. 1996), is also considered by the taxpayer to support its assertion that the delivery of REC products to Florida customers in its own trucks has not created "substantial nexus" with the State of Florida. The taxpayer relies upon the opinion of the Supreme Court of Florida that Share's practice of personally delivering its own goods to some of its Florida vendors lacked the "substantial nexus" between the vendor and the State of Florida. See Id. at 1363.

REC therefore requests that the Department "make a determination that Rhinehart does not have nexus with Florida and that it is not required to collect and remit Florida sales and use tax on behalf of any of its customers."

ATLANTA SERVICE CENTER'S POSITION, AS SUMMARIZED:

Section 212.06, Florida Statutes, provides that sales tax is collectable from all dealers. This statutory provision defines "dealer" as any person who imports tangible personal property into this state for sale at retail. (See Section 212.06(2)(b), F.S.) Section 212.18, F.S., specifically provides that all persons must be registered dealers before engaging in business in Florida.

The definition of "nexus" is any activity, relationship, connection, link, or tie which subjects a person to the taxing powers of Florida. Nexus is also a term which may be used to describe the degree of business activity that must be present before Florida has the right to impose a tax. Accordingly, the question is whether or not there is some in-state activity or event to serve as a conductor for the state's taxing power.

This in-state activity or event is the continual delivery of REC's goods in its own trucks to Florida customers. An important incident of these sales is that physical possession actually occurs in Florida. This requires REC's physical presence in this state, the use of Florida roads, and the concomitant reliance on police protection and other similar state and local services. This fact is distinguishable from cases in which the out-of-state vendor delivers its goods to a common carrier in the vendor's state. Also, some of the Florida sales have financing agreements subject to Florida Documentary Stamp Tax. These financing agreements usually contain retain title provisions. Since a company with these types of agreements retains title to the property until the obligation is satisfied, the company therefore owns property in Florida.

The extent of REC's physical presence in Florida satisfies the physical presence requirement of the Due Process Clause of the United States Constitution. Due Process is satisfied when an entity has either physical presence or economic presence in the taxing state.

Economic presence is satisfied when a business purposefully, on its own or through a representative, avails itself of the benefits of an economic market. REC has met this standard by directly competing with Florida retailers in establishing and maintaining a market for its sales. An example of the extent of these sales is provided in the above Statement of Facts. This sales activity is sustained by placing advertisements in Florida trade publications and providing Florida financing accommodations.

The taxpayer asserts the ". . ..Department must find that Rhinehart has 'substantial nexus' with the State of Florida as interpreted under the Commerce Clause of the United States Constitution..." In order to meet this substantial nexus standard, a company must demonstrate more than a 'slightest presence' in the taxing state. This can he accomplished by the presence of the entity's property or the conduct of economic activity, in the state. We believe the activities of REC, as described above, demonstrate more than a slightest presence in Florida.

APPLICABLE LAW

Section 212.06, F.S., provides that sales tax is collectible from all dealers. This statutory provision defines "dealer" as including any person who imports tangible personal property into this state for sale at retail. Section 212.18, F.S., provides that all persons must be registered dealers before engaging in business in Florida.

Section 212.16, F.S., entitled "Importation of goods; permits; seizure for noncompliance; procedure; review," provides in part:

(1) For the protection of the revenue of this state, to prevent the illegal importation of tangible personal property which is subject to tax in this state, and to strengthen and make more effective the manner and method of enforcing payment of the tax imposed by this chapter, the department is hereby authorized and empowered to put into operation a system of permits whereby any person or dealer as defined in this chapter may import tangible personal property by truck, automobile, or other means of transportation other than a common carrier, without having said truck, automobile, or other means of transportation, seized and subjected to legal proceedings for its forfeiture. Such system of permits shall require the person or dealer who desires to import tangible personal property into this state, which property is subject to tax imposed by this chapter, to apply to the department or its designated agent for a certificate of registration and a permit . . .

DISCUSSION

Due Process Clause

When Florida asserts its jurisdiction to impose sales tax on the taxpayer, the Due Process Clause requires a definite link, some minimum contact, between Florida and the taxpayer. See Quill v. North Dakota, 504 U.S. 298, 306 (1992). The concern is whether the taxpayer has minimum contacts with Florida so that the maintenance of a suit does not offend "traditional notions of fair play and substantial justice." Id. at 312, citing to International Shoe Co. v. Washington, 326 U.S. 310, 316 (1945). Due process is satisfied, even if there is no physical presence in the State, "[s]o long as a commercial actor's efforts are 'purposefully directed' toward residents of another State." Burger King Corp., 471 U.S. 462 at 476 (1985). Here, the taxpayer sells its equipment to Florida customers and the taxpayer solicits Florida business through trade publications, specifically the Florida Edition of the Heavy Equipment Trader. By allowing its equipment to be used in Florida, the taxpayer "purposefully avail[ed] itself of the benefits of an economic market in [Florida]." Quill, 504 U.S. 298 at 307. Therefore, Florida satisfies the due process standard.

Commerce Clause

The commerce clause analysis is distinct from the considerations of due process. While due process is centered on principles of fundamental fairness to individuals, the commerce clause focuses on the "effects of state regulation on the national economy." Quill, 504 U.S. at 312. The commerce clause of the United States Constitution gives Congress the power to regulate commerce among the States. U.S. Const., art. I, section 8, cl. 3. The United States Supreme Court has consistently interpreted this grant as implicitly containing a negative command, the dormant commerce clause, which limits a State's power to tax interstate commerce when the State's taxation is restrictive or discriminatory. The Commerce Clause imposes a more demanding nexus standard than that required by due process. To withstand an allegation that it has unconstitutionally burdened interstate commerce, a state tax must satisfy the four-part test articulated by the United States Supreme Court in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). The test requires that the tax: 1. Be applied to an activity with a substantial nexus

with the taxing state; 2. Be fairly apportioned; 3. Not discriminate against interstate commerce; and 4. Be fairly related to the services provided by the state.

The issue in this case is whether taxpayer's sales of equipment to Florida customers have substantial nexus with Florida. States may require a foreign (out-of-state) corporation to collect sales or use tax if that business has a substantial nexus with the state. The definition of "substantial nexus" has evolved over time, based on several U.S. Supreme Court decisions.

In National Bellas Hess, Inc. v. Illinois Rev. Dept., 386 U.S.753, 87 S.Ct. 1389, 18 L.Ed.2d 505 (1967), the Court explicitly made the requirement that for nexus to exist the vendor must have "some" physical presence in the taxing state. This case established tax immunity to vendors "whose only connection with customers in the [taxing] State is by common carrier or the United States mail." In Quill v. North Dakota, 504 U.S. 298 at 315, the United States Supreme Court reaffirmed the "bright line, physical presence" rule set out in Bellas Hess that a State may not impose interstate taxation on business activities that are not based on the physical presence of a "small sales force, plant, or office" in the taxing State. The court determined that Quill's ownership of floppy disks in North Dakota that allowed customers to place orders for out-of-state sales constituted the "slightest presence" but did not rise to the level of substantial nexus required under the Commerce Clause. 504 U.S. 298 at 315, n.8. In Comptroller of the Treasury of the State of Maryland v. Furnitureland South, Inc. 97-37872, 8/13/99, the Maryland Circuit Court noted that ". . . in referring to the U.S. mail or a "common carrier," the United States Supreme Court in Bellas Hess and Quill was . . . referring . . . to a delivery service that holds itself out to all potential customers, retains control over the time, manner and means of delivery and does not engage in substantial contacts with the receiving party, including post-delivery service." Id. The physical presence requirement still exists. Exactly how much presence constitutes "some physical," to establish more than a "slight" physical presence has been addressed in subsequent cases.

In the case of National Geographic Society v. California Board of Equalization, 430 U.S. 551, 97 S. Ct. 1386, 51 L.Ed. 2d 631 (1977), the court held that physical presence in the state need not be "substantial" but simply more than the "slightest presence." "It may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." Orvis v. State of New York, 654 N.E. 2d 954, 961 (1995). The decision of the Supreme Court in the case of Oklahoma Tax Commission v. Jefferson Lines, 514 U.S. at 200, 131 L. Ed. 2d at 281, 115 S. Ct., confirmed the doctrine that physical presence need not be substantial but only that it must be more than the "slightest presence." In that case, the United States Supreme Court applied the substantial nexus requirement of Complete Auto and focused on the in-state activity involved in the taxed transaction, such as the location of origination and consummation of the transaction being taxed, rather than on the interstate bus company's location. The court concluded that there was plenty of nexus in the case, because Oklahoma is where the bus ticket was purchased and where the service originated. Id. at 184. In McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 58 (1940), the United States Supreme Court upheld a tax on the sale of coal where the coal was shipped by the seller outside the taxing jurisdiction. The court stated that "the tax is conditioned upon a local activity[,] delivery of goods within the State[,]

upon their purchase for consumption." In Goldberg, the court determined that local nexus requirement was met, because the tax was restricted to telephone calls originating or terminating in Illinois and charged to an Illinois service address. 488 U.S. 252 at 263.

In the Illinois case of Brown's Furniture Inc. v. Wagner, 171 ILL. 2d 410, 665 N.E. 2d 795 (1996) the court found the physical presence requirement satisfied when a Missouri furniture retailer physically sent its representatives to Illinois to make frequent and regular deliveries of furniture with its own trucks to customers in Illinois. The court reasoned, in finding that Brown's Furniture satisfied the substantial nexus requirement, that "[t]hrough its deliveries, Brown's Furniture is physically present in Illinois on an almost continuous basis, directly competing with in-state retailers in establishing and maintaining a market for its furniture sales in Illinois." Citing to Quill, the court noted that "it is apparent that Brown's Furniture has travelled (sic) well beyond the safe harbor [created] for vendors 'whose only connection with customers in the [taxing] State is by common carrier or the United States mail.'"

In the present case, the taxpayer has substantial nexus with Florida. The taxpayer is physically present in Florida, through its regular deliveries of equipment to Florida customers by its own representatives. The taxpayer's website indicates that it services the products that it sells. The taxpayer advertises directly to Florida customers, through at least one trade publication, and it is directly competing with in-state retailers in establishing and maintaining a market for its furniture sales in Florida. Taxpayer's sales to Florida customers for the sample quarters ending September 2005, December 2005 and March 2006, reflecting Florida sales delivered to Florida by taxpayer's trucks of $821,940, $706,383 and $440, 882, respectively, indicate that the taxpayer has more than a "slightest presence" with Florida.

Brown Furniture, like the present taxpayer, cited to Miller Brothers Co. v. Maryland, 347 U.S. 340 (1954), in support of its position that Brown Furniture does not have substantial nexus with Illinois. In Miller Brothers, the store's sales to Maryland customers were all made in Delaware; there were no employees or agents of the store soliciting sales in Maryland. The store did not advertise directly in Maryland, but did occasionally send sales circulars to its Maryland customers. The store also delivered merchandise in Maryland, sometimes using its own trucks, and sometimes using common carriers. The U.S. Supreme Court determined that Miller Brothers did not have to collect a use tax. In Brown Furniture, the Illinois Supreme court noted that the U.S. Supreme Court's decision in Miller Brothers, was **based only on due process grounds**. The court stated that, "[b]ecause Quill made clear that under contemporary due process doctrine a company is no longer required to be physically present within a state before use tax collection duties may be imposed, the continued authority of Miller Brothers is in considerable doubt" and cites to Orvis. Furthermore, to the extent that Miller Brothers remains relevant precedence, the Illinois Supreme Court stated that Miller Brothers is factually distinguishable from Brown Furniture. The Illinois Supreme Court noted that the U.S. Supreme Court described Miller Brothers' activities in Maryland as "the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising. There was no invasion or exploitation of the consumer market in Maryland." Miller Brothers, 347 U.S. at 347. However, the Illinois Supreme Court determined that Brown's Furniture's deliveries in Illinois were not

"occasional" or sporadic and Brown Furniture's extensive advertising in Illinois media outlets were not "Incidental." Furthermore, contrary to Miller Brothers, Brown Furniture "directly and actively solicited and procured the consumer market in Illinois." Therefore, the Illinois Supreme Court determined that Miller Brothers is appositive and does not present a bar to its determination that Brown Furniture has sufficient physical presence with Illinois to meet the substantial nexus requirement. Likewise, Miller Brothers does not affect the Department's determination that the taxpayer has substantial nexus with Florida.

The taxpayer also cites to Department of Revenue v. Share International, Inc., 676 So.2d 1362 (Fla. 1996), in support of its position that it does not have substantial nexus with Florida. It is the Department's position that there were unique factual circumstances in Share Int'l that do not apply to the case at hand. The principals of Share International, a Texas chiropractic supply company, attended a seminar in Florida three days in five different years. Eighty-four percent of the attendees (chiropractors) were from out-of-state. Under those particular facts, the court held that substantial nexus was not created. The Florida Supreme Court further stated that "the bright line test adopted in National Bellas Hess only serves to clearly insulate from state taxation out-of-state vendors whose sole activities in the taxing state are mail order sales. If such a company has additional connections to the taxing state, then those connections must be analyzed under the "substantial nexus" test discussed above. It is the Department's position that the other cases cited by the taxpayer in support of its position are factually distinguishable from the present case.

CONCLUSION

Based on the stated facts of this case, the taxpayer, by delivering equipment to Florida customers in its own trucks, does have a physical presence in this state. The presence is on-going and continuous and would qualify as sufficient physical presence with Florida to meet the substantial nexus requirement. These deliveries are not isolated or infrequent, or provide a "slightest presence" with Florida. When making these reoccurring deliveries in its own trucks, the taxpayer benefits from Florida's roads, judicial system, and police protection. These benefits provide further justification for the requirement to collect Florida's sales and use tax. Substantial nexus is therefore found to exist.

Control No. 23839

TAB D

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001
Direct: +1.305.577.7025
RWinston@ssd.com

January 12, 2007

VIA TELECOPY & U.S. MAIL

Mr. James Johnson
Florida Department of Revenue
5050 West Tennessee Street, Building D-1
Tallahassee, Florida 32399-0100

Re: **Rhinehart Equipment Company**
Business Partner Number—2126172

Dear Jim:

We received a copy of the RTA for the Rhinehart Equipment Company ("Rhinehart"). We would like to discuss this matter with you at your earliest convenience. Although Rhinehart may not agree with the conclusions reached by the RTA, the company would be interested in resolving the matter through a settlement that covers all past tax years.

Rhinehart has been remitting sales and use tax returns "under protest" since the issue of "nexus" was raised by the Department. To resolve this matter, Rhinehart would release all rights to recover the prior amounts of sales and use tax paid. The Department would agree not to seek sales and use taxes for all periods prior to the point when Rhinehart started remitting sales and use tax. Rhinehart would continue to collect remit sales and use tax to Florida to the extent that it continues to sell tangible personal property to Florida residents.

The issue of corporate "nexus" was not raised by the RTA, and there are many additional legal issues regarding corporate tax nexus that would need to be considered even, *arguendo*, Rhinehart has "sales and use" tax nexus with Florida. To resolve this matter, Rhinehart would agree to concede "corporate" nexus with Florida starting in 2007.

We look forward to working with you to settle all prior year issues for Rhinehart. Please feel free to give us a call at your earliest convenience.

Very truly yours,

SQUIRE, SANDERS & DEMPSEY L.L.P.

Richard L. Winston, P.A.

RLW:bsm

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

Squire, Sanders & Dempsey L.L.P.
Including
Steel Hector & Davis LLP
200 South Biscayne Boulevard Suite 4000
Miami, Florida 33131-2398
Office: +1.305.577.7000
Fax: +1.305.577.7001

Date: January 12, 2007

Send To: Mr. Jim Johnson

Firm:

Fax No.: 850-488-4654

Phone No.: 850-922-4744

Total Pages Including Cover Sheet: 2

Originator: Richard L. Winston Originator's Phone No.: 305.577.7025

Message:

Client / Matter Number: 80985.02133 Faxed By:

ATTACHMENT 5

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

Squire, Sanders & Dempsey L.L.P.
Including
Steel Hector & Davis LLP
200 South Biscayne Boulevard Suite 4000
Miami, Florida 33131-2398
Office: +1.305.577.7000
Fax: +1.305.577.7001

Date:	November 7, 2006
Send To:	Mr. Jim Johnson
Firm:	Florida Department of Revenue
Fax No.:	850-488-4654
Phone No.:	850-922-4744

Total Pages Including Cover Sheet: 11

Originator: Richard L. Winston Originator's Phone No.: 305.577.7025

Message:

Client / Matter Number: 80985.02133 Faxed By:

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001

Richard L. Winston, P.A.
Direct: (305) 577-7025
rwinston@ssd.com

November 7, 2006

VIA TELECOPY

Mr. James Johnson
Florida Department of Revenue
5050 West Tennessee Street
Building D-1
Tallahassee, FL 32390-0100

Re: **Rhinehart Equipment Company**

Dear Jim:

Per our conversation this morning, I have attached a copy of the notices of deficiency that our client received (sales and use tax and solid waste tax). With respect to the sales and use tax notice, we have attached our client's return and cancelled check for the sales and use tax paid "under protest." With respect to the solid waste return, we do not believe that our client filed the return (our client owed no solid waste tax for the period in question). We understand that the solid waste return should be filed "under protest" even if our client does not owe any tax, and we are advising our client to file the return. Our client filed the solid waste return for the subsequent period in October 2006.

We appreciate your assistance with respect to these notices while the RTA is still outstanding.

Very truly yours,

SQUIRE SANDERS & DEMPSEY, L.L.P.

Richard L. Winston, P.A.

RLW/bsm
Attachment

07634

DEPARTMENT OF REVENUE

Florida Department of Revenue
Sales and Use Tax Return
NOTICE OF DELINQUENCY

DR-33010X
R. 01/0X
09/13/200X

Our records indicate we have not received a *Sales and Use Tax Return* for 06/2006 , due 07/01/2006

- You must file a return even if no tax is due during that collection period.
- You must file a return even if you submitted your payment by Electronic Funds Transfer (EFT).

If you have not filed for the period stated above, complete the return below and submit it immediately.

RHINEHART EQUIPMENT COMPANY
ATTN SCOTT EASTERWOOD
PO BOX 1701
ROME GA 30162-1701

Certificate Number	: 78-8013348254-9
Business Partner	: 2126172
Contract Object	: 13348254
Collection Period Begin	: 04/01/2006
Collection Period End	: 06/30/2006
Return Due Date	: 07/01/2006
Date of Notice	: 09/13/2006

Location Address:
3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

ANY RETURN RECEIVED AFTER 09/13/2006 HAS NOT BEEN CREDITED TO YOUR ACCOUNT.
If you filed after this date, please disregard this notice.

Direct payments and/or inquiries to:
FLORIDA DEPARTMENT OF REVENUE
5050 WEST TENNESSEE STREET
TALLAHASSEE, FL 32399-0100
800-352-3671 or 850-488-6800

If your return was filed **on or before** this date, please provide us with a photocopy of the front and back of your tax return as filed, front and back of your canceled check, processed money order (requested from the issuing company), or the Department of Revenue cash receipt. Failure to resolve this delinquency may result in further collection activity up to and including the filing of a tax lien and/or referral of your account to a collection agency.

If you filed electronically, please provide a photocopy of your confirmation or acknowledgment and your verification code and amount paid.

Effective with the June 2003 collection period, you must include penalty of 10% of the Amount Due or $50, whichever is greater, along with applicable interest. The minimum penalty of $50 applies even if no tax is due. **NOTE:** For collection periods prior to June 2003, the minimum penalty is $10 for monthly filers and $5 for quarterly, semiannual, and annual filers and applies even if no tax is due.

If you closed or sold your business prior to the collection period in question, please complete the "Closing or Sale of Business or Change of Legal Entity" form on the back of this document.

Certificate Number: 78-8013348254-9 **SALES AND USE TAX RETURN** HD/PM Date: / / DR-15 R. 01/06

Florida	1. Gross Sales	2. Exempt Sales	3. Taxable Amount	4. Tax Collected
A. Sales/Services	.	.	.	.
B. Taxable Purchases	Include use tax on Internet / out-of-state untaxed purchases →		.	.
C. Commercial Rentals	.	.	.	.
D. Transient Rentals	.	.	.	.
E. Food & Beverage Vending	.	.	.	.

Transient Rental Rate: .0600 Surtax Rate: VARIES Collection Period: JUN 2006

5.	Total Amount of Tax Collected	.
6.	**Less Lawful Deductions**	.
7.	Total Tax Due	.
8.	**Less Est Tax Pd / DOR Cr Memo**	.
9.	Plus Est Tax Due Current Month	.
10.	Amount Due	.
11.	**Less Collection Allowance**	.
12.	Plus Penalty	.
13.	Plus Interest	.
14.	**Amount Due with Return**	.

3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

RHINEHART EQUIPMENT COMPANY
ATTN SCOTT EASTERWOOD
PO BOX 1701
ROME GA 30162-1701

Do Not Write In the Space Below

Due: 07/01/2006
Late After: 07/20/2006
☐ Check here if payment was

For Information and Forms

Information and forms are available on our Internet site at

www.myflorida.com/dor

To receive forms by mail:

- Order multiple copies of forms from our Internet site at **www.myflorida.com/dor/forms** *or*
- Fax your form request to the DOR Distribution Center at 850-922-2208 *or*
- Call the DOR Distribution Center at 850-488-8422 *or*
- Mail your form request to:
  Distribution Center
  Florida Department of Revenue
  168A Blountstown Hwy
  Tallahassee FL 32304-3702

To speak with a Department of Revenue representative, call Taxpayer Services, Monday through Friday, 8 a.m. to 7 p.m., ET, at 800-352-3671 or 850-488-6800.

For a written reply to your tax questions, write:
Taxpayer Services
Florida Department of Revenue
1379 Blountstown Hwy
Tallahassee FL 32304-2716

TDD Persons with hearing or speech impairments may call the TDD line at 800-367-8331 or 850-922-1115.

Department of Revenue service centers host educational seminars about Florida's taxes. To get a schedule of upcoming seminars or to register for one,

- Visit us online at **www.myflorida.com/dor** *or*
- Call the service center nearest you.

Closing or Sale of Business or Change of Legal Entity

☐ The legal entity changed on ____/____/____. **If you change your legal entity and are continuing to do business in Florida, you must register online or complete and mail a new** *Application to Collect and/or Report Tax in Florida* **(Form DR-1).**

☐ The business was closed *permanently* on ____/____/____. (The Department will cancel your sales tax certificate number as of this date.)
Are you a corporation/partnership required to file corporate income tax or corporate intangible tax returns? ☐ Yes ☐ No

☐ The business will close/was closed temporarily on ____/____/____. I plan to reopen on ____/____/____. ☐ This year only ☐ Recurring every year
Forwarding Address: _____
City: _____ State: _____ ZIP: _____

☐ The business was sold on ____/____/____. The new owner information is:
Name of New Owner: _____ Telephone Number of New Owner: (____) _____
Mailing Address of New Owner: _____
City: _____ County: _____ State: _____ ZIP: _____

Sales and Use Tax Certificate Number ☐☐☐☐☐☐☐☐☐☐☐☐ **FEIN** ☐☐ ☐☐☐☐☐☐☐

Business Partner Number _____

▶ Signature of Taxpayer **(Required)**: _____ Date: _____ Telephone Number: (____) _____

I hereby certify that this return has been examined by me and to the best of my knowledge and belief is a true and complete return.

_____ Signature of Taxpayer _____ Date _____ Signature of Preparer _____ Date

Discretionary Sales Surtax (Lines 15(a) through 15(d))

15(a) [illegible]
15(b) [illegible]
15(c) [illegible]
15(d) Total Amount of Discretionary Sales Surtax Collected (Included in Column A) ..... 15(d)

16. Total Enterprise Zone Jobs Credits (included in Line 6) ..... 16.
17. Taxable Sales/Untaxed Purchases of Electric Power or Energy — 7% Rate (included in Line A) ..... 17.
18. Taxable Sales/Untaxed Purchases of Dyed Diesel Fuel — 6% Rate (included in Line A) ..... 18.
19. Taxable Sales from Amusement Machines (included in Line A) ..... 19.
20. Rural and/or Urban High Crime Area Job Tax Credits ..... 20.

00411

DEPARTMENT OF REVENUE

Florida Department of Revenue
Solid Waste and Surcharge Return
NOTICE OF DELINQUENCY

DR-330107
R. 01/06
09/13/2006

Our records indicate you have not filed a ***Solid Waste and Surcharge Return*** for 06/2006 , due 07/01/2006
- You must file a return even if no tax or fee is due for that collection period.
- You must file a return even if you submitted your payment electronically.

If you have not filed a return, complete the return below and submit it immediately with any payment that is due.

RHINEHART EQUIPMENT COMPANY
ATTN SCOTT EASTERWOOD
PO BOX 1701
ROME GA 30162-1701

Certificate #	: 78-8013348254-9
Business Partner #	: 2126172
Contract Object #	: 13348254
Collection Period Begin	: 04/01/2006
Collection Period End	: 06/30/2006
Return Due Date	: 07/01/2006
Date of Notice	: 09/13/2006

ANY RETURN RECEIVED AFTER 09/13/2006 HAS NOT BEEN CREDITED TO YOUR ACCOUNT.
If you filed after this date, please disregard this notice.

Location Address:
3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

If you filed and can provide proof of payment, complete the following:

☐ 1. Paid by **check.**

☐ 2. Paid by **cash:**

Receipt No. _____

Service center location_____

☐ 3. Paid by **money order.**

☐ 4. Paid **electronically.**

Direct payments and/or inquiries to:
FLORIDA DEPARTMENT OF REVENUE
5050 WEST TENNESSEE STREET
TALLAHASSEE, FL 32399-0120
800-352-3671 or 850-488-6800

Attach a photocopy of the front and back of your canceled check, cash receipt, money order, or your confirmation or acknowledgment. Complete the return below and attach it, also.

Effective with the June 2003 collection period, you must include penalty of 10% of the Net Amount Due or $50, whichever is greater, along with applicable interest. The minimum penalty of $50 applies even if no tax is due. **NOTE:** For collection periods prior to June 2003, the minimum penalty is $10 for monthly filers and $5 for quarterly, semiannual, and annual filers and applies even if no tax is due.

If your business status has changed, complete and submit the **"Closing or Sale of Business or Change of Legal Entity"** form on the reverse side.

Detach coupon and return with payment

Florida Department of Revenue | **Solid Waste and Surcharge Return** | DR-15SW R. 01/06

Certificate Number
78-8013348254-9

Collection Period
06/2006

DR-15SW

DOR USE ONLY
☐☐/☐☐/☐☐
postmark or hand delivery date

RHINEHART EQUIPMENT COMPANY
3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

5. Total amount collected (from Line 5 on reverse side)	☐,☐☐☐,☐☐☐.☐☐
6. Less credits	☐,☐☐☐,☐☐☐.☐☐
7. Net amount due	☐,☐☐☐,☐☐☐.☐☐
8. Plus penalty	☐,☐☐☐,☐☐☐.☐☐
9. Plus interest	☐,☐☐☐,☐☐☐.☐☐
10. Amount due with return	☐,☐☐☐,☐☐☐.☐☐

Due: 07/01/2006
Late After: 07/20/2006
☐ Check here if payment was made electronically.

Do not write in this space.

0000 0 20060630 0038003031 7 40000001334 6254 2

For Information and Forms

Information and forms are available on our Internet site at

www.myflorida.com/dor

To receive forms by mail:

- Order multiple copies of forms from our Internet site at **www.myflorida.com/dor/forms** *or*
- Fax your form request to the DOR Distribution Center at 850-922-2208 *or*
- Call the DOR Distribution Center at 850-488-8422 *or*
- Mail your form request to:
  Distribution Center
  Florida Department of Revenue
  168A Blountstown Hwy
  Tallahassee FL 32304-3702

To speak with a Department of Revenue representative, call Taxpayer Services, Monday through Friday, 8 a.m. to 7 p.m., ET, at 800-352-3671 or 850-488-6800.

For a written reply to your tax questions, write:
Taxpayer Services
Florida Department of Revenue
1379 Blountstown Hwy
Tallahassee FL 32304-2716

TDD Persons with hearing or speech impairments may call the TDD line at 800-367-8331 or 850-922-1115.

Department of Revenue service centers host educational seminars about Florida's taxes. To get a schedule of upcoming seminars or to register for one,

- Visit us online at **www.myflorida.com/dor** *or*
- Call the service center nearest you.

Closing or Sale of Business or Change of Legal Entity

☐ The legal entity changed on ____/____/____. **If you change your legal entity and are continuing to do business in Florida, you must register online or complete and mail a new** Application to Collect and/or Report Tax in Florida (**Form DR-1**).

☐ The business was closed permanently on ____/____/____. (The Department will cancel your solid waste certificate number as of this date.)
Are you a corporation/partnership required to file corporate income tax or corporate intangible tax returns? ☐ Yes ☐ No

☐ The business will close/was closed temporarily on ____/____/____. I plan to reopen on ____/____/____. ☐ This year only ☐ Recurring every year
Forwarding Address: _____
City: _____ State: _____ ZIP: _____

☐ The business was sold on ____/____/____. The new owner information is:
Name of New Owner: _____ Telephone Number of New Owner: (____) _____
Mailing Address of New Owner: _____
City: _____ County: _____ State: _____ ZIP: _____

Solid Waste Certificate Number ☐☐☐☐☐☐☐☐☐☐☐☐ **FEIN** ☐☐ ☐☐☐☐☐☐☐

Business Partner Number _____

▶ Signature of Taxpayer (**Required**): _____ Date: _____ Telephone Number: (____) _____

Solid Waste and Surcharge Return

	Column A	Column B Rate or Fee	Column C - Amounts Collected
1. Dry-cleaning gross receipts subject to tax (see schedule below)	☐☐☐,☐☐☐.☐☐	X 2% =	☐☐☐,☐☐☐.☐☐
2. Number of new tires subject to fee	☐☐☐,☐☐☐	X $1.00 =	☐☐☐,☐☐☐.00
3. Number of batteries subject to fee	☐☐☐,☐☐☐	X $1.50 =	☐☐☐,☐☐☐.☐0
4. Total rental days subject to surcharge	☐,☐☐☐,☐☐☐	X $2.00 =	☐,☐☐☐,☐☐☐.00

Schedule of Gross Receipts Tax on Dry-Cleaning/Laundering

a. Total of gross receipts	☐☐☐,☐☐☐.☐☐
b. Less exempt receipts	☐☐☐,☐☐☐.☐☐
c. Taxable gross receipts (a minus b, carry to Line 1, Column A above)	☐☐☐,☐☐☐.☐☐

5. Total collected (enter on front, Line 5) ☐,☐☐☐,☐☐☐.☐☐

I hereby certify that this return has been examined by me and to the best of my knowledge and belief is a true and complete return.

Signature of Taxpayer _____ Date

Signature of Preparer _____ Date

ATTACHMENT 6

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

Squire, Sanders & Dempsey L.L.P.
Including
Steel Hector & Davis LLP
200 South Biscayne Boulevard Suite 4000
Miami, Florida 33131-2398
Office: +1.305.577.7000
Fax: +1.305.577.7001

Date: December 4, 2006

Send To: Mr. Jim Johnson

Firm:

Fax No.: 850-488-4654

Phone No.: 850-922-4744

Total Pages Including Cover Sheet: 3

Originator: Richard L. Winston Originator's Phone No.: 305.577.7025

Message:

Client / Matter Number: 80985.02133 Faxed By:

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001
Direct: +1.305.577.7025
RWinston@ssd.com

December 4, 2006

VIA TELECOPY & U.S. MAIL

Mr. James Johnson
Florida Department of Revenue
5050 West Tennessee Street
Building D-1
Tallahassee, Florida 32399-0100

Re: **Rhinehart Equipment Company**
Business Partner Number—2126172

Dear Jim:

Our client, Rhinehart Equipment Company ("Rhinehart"), received the attached "Letter of Inquiry—Second Notice" last week. The letter is seeking Rhinehart's Florida corporate income tax return for the 2005 tax year.

In light of the fact that the Department is presently analyzing whether Rhinehart has sales and use tax "nexus" with Florida, we ask that the Department delay a review of Rhinehart's corporate income tax situation until we have reached a resolution of the sales and use tax issues. We believe that Rhinehart is presently allocating and apportioning 100% of its corporate income to Georgia.

We are providing a copy of this letter to the general corporate income tax division so they are also aware that our client's "nexus" issues are pending in your office.

Very truly yours,

SQUIRE, SANDERS & DEMPSEY L.L.P.

Richard L. Winston, P.A.

Attachment

Cc: Corporate Income Tax Division

00715

DEPARTMENT OF REVENUE

Florida Department of Revenue
Corporate Income/Franchise and Emergency Excise Tax

DR-715
R. 11/03

LETTER OF INQUIRY
SECOND NOTICE

RHINEHART EQUIPMENT COMPANY
ATTN SCOTT EASTERWOOD
PO BOX 1701
ROME GA 30162-1701

Business Partner: 2126172
Contract Object: 13348253
FEIN: 58-1189290
Applied Period(s): 12/2005

RESPOND IMMEDIATELY.

A review of our records indicates you did not file a Florida corporate income tax return (Form F-1120 or F-1120A) or a request for extension of time to file (Form F-7004) for the period(s) referenced above. Generally, if you are required to file a federal return for the period(s) in question, you are also required to file a Florida return, even if no tax is due. Check one of the appropriate responses below and mail this notice to: Florida Department of Revenue, 5050 W. Tennessee Street, Tallahassee, FL 32399-0135.

I. If our records are in error and the return or extension of time has been filed, please attach a copy of the completed and signed return and/or extension of time. Attach a copy of the front and back of the canceled check, if applicable, and complete the following:

Business name on return: _____

FEIN (if different from above): _____ Date filed: _____

II. If you were not required to file a return, please indicate why:

☐ Business Closed ___/___/___ (MO DAY YR)

☐ Date Incorporated ___/___/___ (MO DAY YR)

☐ Tax Exempt — Attach copy of Determination Letter from IRS.

☐ S Corporation — Attach copy of the first four pages of federal Form 1120S.

☐ Homeowners Association — Attach copy of page 1 of federal Form 1120H.

☐ Consolidated Filer — Attach an Affiliations Schedule, Form F-851 or federal Form 851.

☑ Other No nexus with Florida (See attached letter)

III. If you have not filed, please attach Form F-1120 or F-1120A and supporting federal return to this notice and mail to the Florida Department of Revenue. See reverse side for information on how to obtain forms.

If you have any questions, contact the Department at 800-352-3671 or 850-488-6800, Monday through Friday, 8 a.m. to 7 p.m., ET.

PLEASE RESPOND IMMEDIATELY. Failure to resolve this matter may result in further collection activity, up to and including the filing of a tax lien and/or referral of your account to a private collection agency.

[signature] (power of attorney filed) — Signature of individual providing information

outside counsel — Title

12/4/06 — Date

(305) 577-7035 — Telephone number

Confirmation Report

Page : 001
Date & Time: 12-04-2008 02:51pm
Line 1 :
Line 2 :
Machine ID : SSD

Nbr.	Job	Date	Time	Duration	pgs	To	Dept.nbr	Account	Comm. code	Status
161	767	12-04	02:50pm	00/41	003	18504884654#			EC 603	OK

ATTACHMENT 7

SQUIRE SANDERS | LEGAL COUNSEL WORLDWIDE

SQUIRE, SANDERS & DEMPSEY L.L.P.
Including
STEEL HECTOR & DAVIS LLP

200 South Biscayne Boulevard, Suite 4000
Miami, Florida 33131-2398

Office: +1.305.577.7000
Fax: +1.305.577.7001

Direct: +1.305.577.7025
RWinston@ssd.com

July 17, 2006

VIA FEDERAL EXPRESS

Florida Department of Revenue
5050 W. Tennessee Street
Tallahassee, FL 32399-0120

Re: Rhinehart Equipment Company--Remittance of Sales and Use Tax "Under Protest"

Dear Florida Department of Revenue:

We represent the Rhinehart Equipment Company ("Rhinehart"), a corporation with its principal place of business in Rome, Georgia. Attached is a Form DR-835 ("Power of Attorney"). On September 30, 2005, we submitted a "protest letter" to Ms. Marjorie Smith (Atlanta Taxpayer Service Center) on behalf of Rhinehart. We are protesting the Florida Department of Revenue's imposition of sales and use tax upon Rhinehart as a result of its sales of heavy equipment to Florida customers (delivered into Florida by its own delivery trucks).

During the period that Rhinehart's "protest letter" is being reviewed by the Florida Department of Revenue, Rhinehart will be remitting sales and use tax "under protest." Rhinehart reserves all rights, pending the final outcome of its protest, to seek a refund of any overpaid taxes so that it may return such overpaid taxes to its customers.

We have enclosed two checks (#1469 and #1470) in the amounts of $12,442.00 and $684.03. We ask that you keep separate records of checks #1469 (sales and use) and #1470 (documentary stamp tax return) in the event that our client later files a refund claim for the return of these same payment amounts.

Please feel free to call me directly at the phone number listed above if I can provide any additional assistance on this matter.

Sincerely,

SQUIRE, SANDERS & DEMPSEY L.L.P.

Richard L. Winston, P.A.

cc w/o documents:
Mr. Gary Gray
Florida Department of Revenue
Post Office Box 7443
Tallahassee, Florida 32314-7443

RLW/sz

MIAMI/4170628
07/17/06

Bobcat.
Rhinehart Equipment Company
P.O. Box 1701 / 3600 Martha Berry Hwy. N.W.
Rome, Georgia 30165-1701

AMSOUTH BANK OF GEORGIA

1469

TWELVE THOUSAND FOUR HUNDRED FORTY TWO AND 00/100 DOLLARS

DATE 07/14/06

AMOUNT $*****12,442.00

PAY TO THE ORDER OF
FLORIDA DEPARTMENT OF REVE
5050 W TENNESSEE STREET
TALLAHASSEE, FLORIDA 32399-0125

SECURITY FEATURES INCLUDED. DETAILS ON BACK.

⑈001469⑈ ⑆261170740⑆ 0044356145⑈ ⑈0001244200⑈

AMSOUTH BANK
062000019
100917549
21 012 4501 004 062416 000001334 8234

BANK OF AMERICA
0500683141

Certificate Number: 78-8013348254-9

SALES AND USE TAX RETURN

HD/PM Date: / / DR-15 R. 01/06

Florida	1. Gross Sales	2. Exempt Sales	3. Taxable Amount	4. Tax Collected
A. Sales/Services	264,251.	63,744.	200,507.	12,472.
B. Taxable Purchases	Include use tax on Internet / out-of-state untaxed purchases →		.	.
C. Commercial Rentals	.	.	.	.
D. Transient Rentals	.	.	.	.
E. Food & Beverage Vending	.	.	.	.

Transient Rental Rate: .0600 Surtax Rate: Varies

Collection Period: APR - JUN 2006

5.	Total Amount of Tax Collected	12,472.
6.	Less Lawful Deductions	0.
7.	Total Tax Due	12,472.
8.	Less Est Tax Pd / DOR Cr Memo	.
9.	Plus Est Tax Due Current Month	.
10.	Amount Due	12,472.
11.	Less Collection Allowance	30.
12.	Plus Penalty	.
13.	Plus Interest	.
14.	Amount Due with Return	12,442.

RHINEHART EQUIPMENT COMPANY
3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

FLORIDA DEPARTMENT OF REVENUE
5050 W TENNESSEE ST

Do Not Write in the Space Below

Due: JUL 01 2006
Late After: JUL 20 2006

☐ Check here if payment was made electronically.

0000 0 20060630 0001003031 5 4000001334 8254 2

I hereby certify that this return has been examined by me and to the best of my knowledge and belief is a true and complete return.

[signature] Signature of Taxpayer	7/14/06 Date	*[signature]* Signature of Preparer	7/14/06 Date

Discretionary Sales Surtax (Lines 15(a) through 15(d))

[redacted]

17.	Taxable Sales/Untaxed Purchases of Electric Power or Energy — 7% Rate (Included in Line A)	17.	0
18.	Taxable Sales/Untaxed Purchases of Dyed Diesel Fuel — 6% Rate (Included in Line A)	18.	0
19.	Taxable Sales from Amusement Machines (Included in Line A)	19.	0
20.	Rural and/or Urban High Crime Area Job Tax Credits	20.	0
21.	Other Authorized Credits	21.	0

[redacted]

Confirmation Report

Page : 001
Date & Time: 11-07-06 11:45am
Line 1 : +
Line 2 : +
Machine ID : SSD

Nbr.	Job	Date	Time	Duration	pgs	To	Dept.nbr	Account	Comm. code	Status
572	794	11-07	11:42am	02/32	011	18504884654#			EC 603	OK

EXHIBIT B

FLORIDA
DEPARTMENT OF REVENUE

Executive Director
Lisa Vickers

March 9, 2011

K & L Gates, LP
Attn.: Mr. Richard L. Winston
Wachovia Financial Center
200 South Biscayne Boulevard, Suite 3900
Miami, FL 33131-2399

Re: Notice of Reconsideration
RHINEHART EQUIPMENT COMPANY
BPN: 0002126172
SN #: 400019813
Sales and Use Tax
Period: 07/01/2002 - 06/30/2005

Proposed Assessment Amount:		$	354,839.30
Sustained Amount:		$	354,839.30
Balance Due:	*	$	380,967.89

*Includes payments and updated interest through 03/08/2011. Interest continues to accrue at $44.05 per day until the postmark date of payment. Daily interest is subject to change every January 1 and July 1.

Dear Mr. Winston:

This is the Department's response to the petition for reconsideration postmarked September 30, 2009, filed against the referenced assessment. The petition for reconsideration, the case file, and other available information have been carefully reviewed. This reply constitutes the issuance of our Notice of Reconsideration, pursuant to the provisions of Rule 12-6.003, F.A.C. It represents our position based on applicable law to the issues under protest.

FACTS

Rhinehart Equipment Company ("Taxpayer") is a heavy equipment dealer located in Rome, Georgia. Taxpayer's website (www.rhinehartequipment.com) provides that it is an authorized dealer for Bobcat, Kubota, and New Holland products. Taxpayer's website further provides that it has an extensive inventory of new and used equipment, comprehensive parts inventory and service department, as well as equipment rentals. Taxpayer does not have a location in Florida, nor does Taxpayer have any employees residing in the state.

Taxpayer's website provides that it will deliver to the job site and pick up. Taxpayer delivers its products to its Florida customers using its own trucks. Taxpayer's website provides that Taxpayer will service all of the products it sells.

Taxpayer has filed documentary stamp tax returns. Section F of Taxpayer's Form DR-1, reveals that Taxpayer makes sales finalized by written agreements that do not require recording by the Clerk of the Court, but do require documentary stamp tax to be paid, and that Taxpayer anticipates five or more transactions subject to documentary stamp tax per month.

Taxpayer solicits business in Florida through at least one trade publication. Taxpayer advertises in the Florida edition of the Heavy Equipment Trader.

The Nexus Investigation and Compliance Enforcement Team (NICE) of the Florida Department of Revenue informed Taxpayer in a letter, dated April 22, 2005, that it may have nexus in Florida and enclosed a Nexus Investigation Questionnaire for Taxpayer to complete. The questionnaire was completed by Mr. Mark Easterwood, president of REC, and submitted to the NICE team. Based on the responses provided in the nexus questionnaire, Taxpayer was informed that it had sufficient nexus in Florida to require it to register to collect and remit Florida Sales and Use Tax. Taxpayer was then given the opportunity to conduct a self analysis of its sales and use tax activities in Florida. Taxpayer filed a Form DR-1, Application to Collect and/or Report Tax in Florida and was given an effective registration date of July 1, 2005. Taxpayer began collecting and remitting Florida sales tax under protest effective July 1, 2005. A sample of Taxpayer's Florida activities for the quarters ending September 2005, December 2005, and March 2006, reflected Florida sales of $821,940.00, $706,383.00, and $440,882.00, respectively.

Taxpayer submitted a protest letter, dated September 30, 2005, in which Taxpayer protested the Department of Revenue's determination that it had nexus in Florida. In response to this protest, Taxpayer was issued Internal Technical Advisement (ITA) 06A-30 on December 5, 2006. This ITA ruled that based on Taxpayer's facts, Taxpayer had sufficient presence in Florida to establish Florida nexus. The Department issued a Notice of Final Assessment on September 11, 2009, in which $229,695.00 in tax was assessed and $125,144.30 in interest was assessed for a total due of $354,839.30. The audit period for the assessment was July 1, 2002 - June 30, 2005. I called you on February 9, 2011, to discuss Taxpayer's protest. I left a message for you to return my call. I called you again on February 15, 2011, and left you a message that I would call again on February 22, 2011, to discuss this protest. On February 22, 2011, you and I discussed the protest. You indicated that the protest was not so much a protest over the technical issue of nexus, but rather a protest that a verbal agreement between you and an employee of the Department that was never fulfilled which would have resolved this protest. In discussing this with the employee, he asserted that he, nor the Department, entered into a verbal agreement or settlement with the Taxpayer. On March 4, 2011, you and I again discussed this protest. You again expressed concern over the verbal agreement you assert was agreed to by this employee which would have resolved this protest.

ISSUE

Was tax correctly assessed in the Notice of Final Assessment?

TAXPAYER ARGUMENT

Taxpayer argues that it does not have sufficient presence in Florida to create nexus in Florida. Taxpayer contends that it should not be required to pay tax prior to July 2005.

CONCLUSION

The tax was correctly assessed in the Notice of Final Assessment due to the fact Taxpayer has substantial nexus in Florida. The audit period for the Notice of Final Assessment was July 1, 2002, through June 30, 2005.

As provided in the ITA issued by the Department, Taxpayer is physically present in Florida through its regular deliveries of equipment to Florida customers by its own trucks. Taxpayer's website furthermore provides that Taxpayer will service the equipment it sells and the website provides that Taxpayer rents equipment. Both the servicing of equipment in Florida and the rental of equipment in Florida would further add to Taxpayer's presence in Florida and solidify Taxpayer's nexus in Florida. Taxpayer's employees would be present in Florida to service the equipment. Also, the rental of equipment in Florida is viewed as the Taxpayer owning tangible personal property in Florida. In further support of Taxpayer having sufficient nexus in Florida, it is apparent that some of Taxpayer's Florida sales have financing agreements subject to Florida Documentary Stamp Tax. These financing agreements usually contain retain title provisions. Since a company like Taxpayer with these types of agreements retains title to the property until the obligation is satisfied, Taxpayer would therefore own property in Florida. All of these activities being conducted in Florida support the Department's position that Taxpayer has substantial nexus in Florida. Furthermore, Taxpayer advertises directly to Florida customers through at least one trade publication, Heavy Equipment Trader. Through this medium, Taxpayer is directly competing with in-state retailers in establishing and maintaining a market for its equipment sales in Florida.

Enclosed for your convenience is an enforcement remittance coupon. Payment, including interest to the postmark date of payment, should be returned in the enclosed envelope, along with the enforcement remittance coupon. The check should reflect the audit number.

TAXPAYER APPEAL RIGHTS

You are notified that this Notice of Reconsideration constitutes the final position of this Department, prior to court action or administrative proceeding, regarding the assessment you have protested. Pursuant to Sections 72.011(2) and 120.575, F.S., and Rule Chapter 12-6, F.A.C., as of the date of this Notice of Reconsideration the assessment is final for purposes of court action or administrative proceeding. Pursuant to Sections 72.011(2), and 120.575, F.S., and Rule Chapter 12-6, F.A.C., no court action or administrative proceeding may be brought to contest the assessment after sixty (60) days from the date of this Notice of Reconsideration.

The assessment reflected in the Notice of Reconsideration is final, and you have three alternatives for further review:

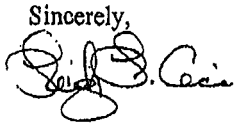
1) Pursuant to Section 72.011, F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in circuit court by filing a complaint with the clerk of the court. THE COMPLAINT MUST BE RECEIVED BY THE CLERK OF THE CIRCUIT COURT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF RECONSIDERATION. Section 72.011(3), F.S., provides that no circuit court action may be brought unless you pay to the Department the amount of taxes, penalties, and accrued interest assessed by the Department that are uncontested and tender or post a bond for the remaining disputed amounts unless a waiver is granted as provided in that section. Failure to pay the uncontested amounts will result in the dismissal of the action and imposition of an additional penalty in the amount of twenty-five percent (25%) of the tax assessed. The requirements of Chapter 72, F.S., are jurisdictional;

2) Pursuant to Sections 72.011, 120.569, 120.57, and 120.80(14), F.S., and Rule Chapter 12-6, F.A.C., you may contest the assessment in an administrative forum by filing a petition for a Chapter 120 administrative hearing with the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668. THE PETITION MUST BE RECEIVED BY THE DEPARTMENT WITHIN SIXTY (60) DAYS OF THE DATE OF THIS NOTICE OF RECONSIDERATION. The petition should conform to the requirements of the Uniform Rules promulgated pursuant to Section 120.54(5), F.S. Section 120.80(14), F.S., provides that before you file a petition under Chapter 120, F.S., you must pay to the Department the amount of taxes, penalties, and accrued interest that are not being contested. Failure to pay those amounts will result in the dismissal of the petition and imposition of an additional penalty in the amount of twenty-five percent (25%) of the tax assessed. Mediation pursuant to Section 120.573, F.S., is not available. The requirements of Section 72.011(2) and (3)(a), F.S., are jurisdictional for any action contesting an assessment or refund denial under Chapter 120, F.S.; OR

3) Pursuant to Section 120.68, F.S., you may contest the assessment in the appropriate district court of appeal by filing a Notice of Appeal meeting the requirements of Rule 9.110, Florida Rules of Appellate Procedure, with i) the Clerk of the Department of Revenue, Office of General Counsel, Post Office Box 6668, Tallahassee, FL 32314-6668 and ii) with the clerk of the appropriate district court of appeal, accompanied by the applicable filing fee. THE NOTICE OF APPEAL MUST BE FILED WITH BOTH THE DISTRICT COURT OF APPEAL AND THE DEPARTMENT OF REVENUE WITHIN THIRTY (30) DAYS OF THE DATE OF THIS NOTICE OF RECONSIDERATION. For appellate review purposes, the Department will treat factual matters asserted in a protest or petition for reconsideration as allegations, not as established facts.

Should you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,



Leigh Ceci
Tax Law Specialist
Technical Assistance & Dispute Resolution
(850)717-6363

Enclosure: Enforcement Remittance Coupon

NOTICE UNDER THE AMERICANS WITH DISABILITIES ACT

Persons needing an accommodation to participate in any proceeding before the Technical Assistance and Dispute Resolution Office should contact that office at 850-617-8346 (voice), or 800-DOR-8331 (TDD), at least five working days before such proceeding. You may also call via the Florida Relay System at 800-955-8770 (voice), or 800-955-8771 (TDD).

DR-845
N. 04/05

FLORIDA
DEPARTMENT OF REVENUE

Enforcement Remittance Coupon

ATTN MR SCOTT EASTERWOOD CFO
RHINEHART EQUIPMENT COMPANY
3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

Service Notification: 400019813
Tax Type : Sales and Use Tax
Business Partner: 0002126172
Period: 07/01/2002 - 06/30/2005

To ensure proper credit, please detach and include the preprinted remittance coupon below when submitting payments.

If additional interest is applicable, please refer to the additional interest instructions on the enclosed correspondence.

Detach For Processing

DR-845

Enforcement Remittance Coupon

Service Center:
Atlanta Service Center
Service Notification:
400019813
Business Partner:
0002126172

Make check or money order payable to:
Florida Department of Revenue
5050 West Tennessee Street
Tallahassee, Florida 32399-0100

Check Number:
Tax Type:
Sales and Use Tax
Remittance Total:

ATTN MR SCOTT EASTERWOOD CFO
RHINEHART EQUIPMENT COMPANY
3556 MARTHA BERRY HWY NE
ROME GA 30165-8635

0600 0 20050630 0001003187 8 64000019813 0000 6