IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, TALLAHASSEE, FLORIDA

RHINEHART EQUIPMENT CO.,

Appellant,

vs.

CASE NO.: 1D14-3966
LT CASE NO.: 11-2567

FLORIDA DEPARTMENT OF REVENUE,

Appellee.

REPLY BRIEF OF APPELLANT RHINEHART EQUIPMENT CO.

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PRELIMINARY STATEMENT

In this brief, Appellant, Rhinehart Equipment Co., will be referred to as Appellant or by name. The Appellee, Florida Department of Revenue will be referred to as Appellee or Department or DOR.

Citations to the original record on appeal will be made by the letter "R" and the appropriate page number.

REPLY BRIEF STATEMENT OF THE CASE AND FACTS

Appellant – Rhinehart incorporates by reference the Statement of the Case and Facts set forth in its Initial Brief.

SUMMARY OF THE ARGUMENT

Rhinehart reiterates and incorporates by reference the "Summary of the Argument" set forth in its Initial Brief, to wit: To uphold the assessment and, thus the Amended Final Order in this proceeding, would require this Court to overturn a long-standing decision of the U.S. Supreme Court (*Miller Brothers Co.*) and to ignore the proper interpretation of the statute of limitations set forth in Section 95.091, Florida Statutes.

ARGUMENT

I. THE DUE PROCESS AND COMMERCE CLAUSES OF THE U.S. CONSTITUTION LIMIT THE JURISDICTION OF THE FLORIDA DEPARTMENT OF REVENUE TO TAX THE TRANSACTIONS AT ISSUE IN THIS CASE

Rhinehart reiterates the argument contained in its Initial Brief, to wit: To uphold the Amended Final Order in this case would be to effectively overrule the holding of U.S. Supreme Court in *Miller Bros. Co. v. Maryland*, 347 U.S. 340 (1954). However, based on certain misleading statements made by the Department in its Answer Brief regarding both the facts and proper interpretation of this well-known U.S. Supreme Court case, it is necessary for Rhinehart to respond on several points:

The Department attempts to distinguish the *Miller Bros. Co.* case from the case at hand on the "facts." However, while trying to distinguish *Miller Bros. Co.*, the Department highlights and relies on facts that were not relevant to the U.S. Supreme Court's ultimate decision in that case. The Department correctly notes in *Miller Bros. Co.* that (1) Maryland customers came to the Delaware store to look at and pay for the property and (2) the company generally did not take telephone orders. The Department argues that in this case, however, Rhinehart took telephone orders and "all sales were consummated in Florida" because delivery was in Florida. This argument is misleading because there are no facts in the record in *Miller Bros. Co.* to show where the sales in *Miller Bros. Co.* were legally

consummated. More importantly, the Department cites to no precedent where those factual distinctions relating to the place of delivery have any relevance to whether state tax nexus exists. Later in its brief, the Department tries to argue that the distance to the border of the adjoining State is relevant to the nexus analysis, again with absolutely no support or citation to authority. The Department is now asking this Court to rule that the geography of particular States is relevant to whether one State can constitutionally impose tax on vendors located in another State. The Department's argument would result in creation of a different Constitutional standard of state tax nexus for larger versus smaller states, as well as geographically longer and wider states.

The Department also tries to legally distinguish this case from the US Supreme Court cases in *Quill v. North Dakota*, 504 U.S. 298 (1992) and *National Bellas Hess, Inc. v. Illinois Rev. Dept.*, 386 U.S. 753 (1967) and the Florida Supreme Court case in *Share Int'l, Inc. v. Dep't of Revenue*, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993), *aff'd*, 667 So. 2d 226 (1st DCA 1995), *aff'd*, 676 So. 2d 1362 (Fla. 1996). Citing from the Recommended Order herein, the Department asserts: "the facts before the undersigned paint a significantly different picture than those presented in" the three cases. Certainly, many of the facts in those case are different than those in this case, however, the only relevant factual difference is that in this case, the out-of-state vendor used its own trucks for delivery. We know

from the U.S. Supreme Court in *Miller Bros. Co.*, that this fact does not compel a finding of nexus for the purpose of imposing a sales and use tax burden on that vendor.

Further, again, the Department improperly relies upon the decision in *Scripto, Inc. v. Carson*, 105 So.2d 775 (Fla. 1958), *aff'd*, 362 U.S. 207 (1960) to support its position. Quite simply, In *Scripto*, the out-of-state vendor had 10 representatives, with delineated territories, physically in Florida soliciting sales. In this case, again similar to the facts in *Miller Bros. Co.*, Rhinehart had no employees, agents or representatives physically present in Florida soliciting sales on behalf of any one. The delivery personnel in both *Miller Bros. Co.* and the case at hand were not selling anything to anyone. The *Scripto* decision actually supports Rhinehart's position to overturn the Amended Final Order.

Relying on *Miller Bros. Co.*, this Court should reject the Amended Final Order in *toto* and find there was no substantial nexus across all four years of the assessment. Although Rhinehart makes no concession that any of its sales to Florida customers created nexus, the years 2002 and 2003 (with 2 and 12 sales, respectively) should never have been considered by the Department as creating nexus.

In its Answer Brief, the Department incorrectly states that there is no authority to support judging each tax year separately. Not only did Rhinehart

(through its Initial Brief) provide this Court with a specific example in a Department Technical Assistance Advisement (*Technical Assistance Advisement No. 09A-058*, November 9, 2009), but the basic principles in *Quill* itself dictate that a State cannot impose a sales or use tax on an out of state vendor until that vendor has substantial physical presence in the taxing State. To accept the Department's position would, for example, allow Florida to impose a sales or use tax on an internet seller for all years it has sold tangible personal property to residents of Florida, even though that seller did not have any physical or other substantial presence until much later.

II. THE FLORIDA DEPARTMENT OF REVENUE IS BARRED BY THE APPLICABLE STATUTE OF LIMITATIONS FROM ASSESSING THE TAXES AT ISSUE IN THIS CASE

Rhinehart reiterates that the statute of limitations expired requiring the assessment at issue be withdrawn in its entirety. This Court should not fear creating any bad precedents by ruling that the Department cannot wait more than 3 years (or 50 years) after receiving a lengthy protest letter (with full taxpayer information) to issue an assessment. The Department was fully aware that the clock was running, and it chose to wait more than 3 years to issue its assessment (forcing Rhinehart to wait more than 3 years after it filed it protest letter to judicially appeal the Department's decision).

The second entry in the Department's Appendix is a copy of a sales tax return that Rhinehart filed in protest for a period after the assessment period at issue. The protest letter that Rhinehart filed on September 30, 2005, actually contains more information than this actual sales tax return contains. Not only did the protest letter contain Rhinehart's name and address and identification number, it stated that Rhinehart had no taxable sales in the State of Florida and thus, no sales tax, nor local discretionary tax, was due. As such, by the time the assessment was issued, the statute of limitations had expired and the Amended Final Order must be reversed.

CONCLUSION

As set forth above, the Amended Final Order of the Department of Revenue must be reversed. The Department lacks jurisdiction under the principles of state tax nexus to impose of sales and use tax on the transactions that form the basis of the amended final assessment at issue. The statute of limitations also expired prior to the issuance of the assessment that the Department attempts to enforce.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-mail delivery this 3rd day of February, 2015 to the following:

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