IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA
CASE NO. 4D13-1472
L.T. CASE NO. 2013-005 FOF
DOAH Case No. 12-2527

AMERICAN BUSINESS USA CORP.,

Appellant,

v.

DEPARTMENT OF REVENUE,

Appellee.

INITIAL BRIEF OF APPELLANT AMERICAN BUSINESS USA CORP.

On Appeal from a Final Order of the State of Florida Department of Revenue

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CONSTITUTIONAL PROVISIONS

STATEMENT OF THE CASE AND FACTS

A. Introduction And Nature Of The Case

This appeal concerns the constitutional limitations of a state's power to collect sales tax. The Florida Department of Revenue ("DOR") lacks jurisdiction to collect sales tax on out-of-state sales, under both the Due Process Clause and the Dormant Commerce Clause of the United States Constitution. Here, the DOR assessed taxes against American Business USA Corp. ("American Business") for: (i) out-of-state flower sales, and (ii) out-of-state "pre-paid calling arrangement" sales. By doing so, the DOR assumed jurisdiction to tax sales that it lacks the authority to tax. Established case law from the United States Supreme Court prevents the State of Florida from implementing or enforcing a sales tax on activity outside of its territorial jurisdiction. Accordingly, this Court should vacate the DOR's tax assessment of $137,225.27 plus interest.

B. Statutes And Administrative Rule At Issue

The statutory grounding for the florist tax at issue in this appeal is found in section 212.05(1)(*l*), Florida Statutes, which provides that

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

Id. (emphasis added).

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

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

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

The "pre-paid calling arrangement" tax is governed by section 212.05(1)(e)(1)(a)(II),) (III), which provides a 6 percent tax and states that

> (II) **If the sale or recharge of the prepaid calling arrangement does not take place at the dealer's place of business, it shall be deemed to take place at the customer's shipping address or, if no item is shipped, at the customer's address or the location associated with the customer's mobile telephone number**.
>
> (III) The sale or recharge of a prepaid calling arrangement shall be treated as a sale of tangible personal property for purposes of this chapter, whether or not a tangible item evidencing such arrangement is furnished to the purchaser, and **such sale within this state subjects the selling dealer to the jurisdiction of this state for purposes of this subsection**.

Id. (emphases added).

C. The Proceedings Below

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

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

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

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

- American Business "did not charge its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered outside of Florida." [R1 at 58 ¶ 15] (emphases added);

- American Business "did not charge its customers sales tax on the prepaid calling arrangements it sold." [R1 at 58 ¶ 10].

The DOR filed a proposed Recommended Order which contended that the assessment against American Business was permissible because a "Florida florist" is liable for **sales tax when he gives instructions to a second florist outside Florida to deliver flowers outside Florida**, under Fla. Admin. Code R. 12A-1.047(2)(b). [R1 at 72, 85 ¶ 78] The DOR's proposed Recommended Order noted that American Business primarily sold to customers in Latin American markets. [R1 at 74 ¶ 6] American Business, in turn, filed its own proposed Recommended Order, which sought reversal of the proposed tax assessment on various grounds not presented on appeal. [R1 at 89-101]

The DOR filed evidence in support of its assessment. [R1 at 104; R2] In its Standard Audit Report, the DOR tax auditor noted that "[t]he taxpayer's customers are throughout the world primarily to Spanish speaking countries." [R2 at 11-12] The auditor further explained that "[i]nvoices are generated electronically for all sales (flower, gift baskets) except prepaid calling arrangements." [R2 at 13]

The auditor then charged all of American Business's prepaid calling arrangement sales to Florida, despite acknowledging that most did not occur in Florida. As an explanation, the audit report noted that "[t]he auditor could not

determine what State to charge those to so they were charged to Florida." [R2 at 14; Exhibit A01] The auditor found that American Business sold prepaid calling arrangements in $2.00, $5.00, $10.00, and $20.00 increments. [R2 at 14; Exhibit A01] However, some of American Business's sales (such as increments of $7.03 or $7.41), were explained to the auditor as "amounts where customers paid with foreign currency" and the conversion rate resulted in odd denominations. [R2 at 14; Exhibit A01]

On February 27, 2013, the Administrative Law Judge ("ALJ") issued its Recommended Order to uphold the entirety of the DOR's proposed assessment, totaling $137,225.27 plus interest. [R1 at 102-120] According to the Recommended Order's Findings of Fact:

- "There were two principal aspects of the Taxpayer's business . . . [(1)] sale of flowers, gift baskets, and other items of tangible personal property . . . [and (2)] the sale of 'prepaid calling arrangements' . . . ." [R1 at 106 ¶ 7];

- "All of the Taxpayer's sales were initiated online." [R1 at 106 ¶ 8];

- "The Taxpayer sold to customers throughout Latin America, in Spain, and in the United States (including Florida)." [R1 at 106 ¶ 9];

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

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

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

- "The Taxpayer did not charge its customers sales tax on the prepaid calling arrangements it sold." [R1 at 107 ¶ 20].

According to the Recommended Order's Conclusions of Law:

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

- Section 212.12(5)(b) authorized the DOR to "estimate based on the best information then available" American Business's tax liability. [R1 at 112 ¶ 48];

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

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

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

- American Business "specialized in the sale of prepaid calling arrangements . . . [and] did not collect or remit sales taxes[2] on those sales." [R1 at 117 ¶ 62].

[2] It is undisputed that some of American Business's prepaid calling arrangement sales were made to customers outside of Florida. [R1 at 106 ¶ 9; R2 at 14]

The ALJ recommended to validate the DOR's proposed assessment of $137,225.27 plus interest. [R1 at 104, 118] On March 15, 2013, American Business filed exceptions to the Recommended Order. [R1 at 121-22]

On March 29, 2013, the DOR issued a Final Order adopting the Recommended Order in whole. [R1 at 124-27] The DOR determined that it "ha[d] jurisdiction in this cause." [R1 at 124] Thereafter, the DOR adopted the Recommended Order's Findings of Fact and the Conclusions of Law. [R1 at 125] The DOR upheld the Recommended Order's assessment against American Business, in the amount of $137,225.27 plus interest. [R1 at 104, 118, 125]

On April 29, 2013, American Business timely filed its notice of appeal. [R1 at 148-49]

SUMMARY OF THE ARGUMENT

The DOR assessed a tax against American Business that it had no jurisdiction to assess. A state may not tax sales in other states or countries. Florida's territorial jurisdiction is limited by the Fourteenth Amendment's Due Process Clause and its power to tax activity ends at its border. With respect to out-of-state flower sales, the statute that forms the basis of the DOR's alleged power to tax – section 212.05(1)(*l*), Florida Statutes – is unconstitutional as written and as applied. The administrative regulation at issue – Florida Administrative Code Rule 12A-1.047(2)(b) – is similarly unconstitutional.

The florist statute and regulation also violate the Dormant Commerce Clause. First, Florida lacks any substantial nexus to the activity it seeks to tax – internet purchases by out-of-state consumers. Second, the tax at issue burdens interstate commerce by presenting a wholly unapportioned tax. Administrative Rule 12A-1.047 expressly disallows any "set-off" to account for other states' taxes, which violates Supreme Court precedent requiring an apportionment of state taxes under the Dormant Commerce Clause. Finally, Florida's taxation in this context is not fairly related to the services it provides, rendering it unconstitutional.

The statute that forms the basis of the DOR's alleged power to tax "pre-paid calling arrangements" – section 212.05(1)(e)(1)(a), Florida Statutes – expressly exempts sales to out-of-state customers. The DOR improperly assumed jurisdiction to tax all of American Business's pre-paid calling arrangement sales, when the record clearly demonstrates that American Business sold pre-paid calling arrangements to out-of-state customers. The DOR impermissibly invoked section 212.12(5)(b), Florida Statutes, to employ a "best estimate" of liability without any of the requisite wrongdoing from American Business. This alone supports a vacation of the assessment. Further the DOR's "best estimate" of tax liability under section 212.12(5)(b), Florida Statutes, cannot result in an answer that is necessarily wrong. The DOR's assessment necessarily taxed sales it cannot tax. Assuming jurisdiction over foreign sales, under the guise of a "best estimate,"

violates the DOR's empowering statute. It also violates the Due Process Clause and Dormant Commerce Clause for the same reasons as the florist tax.

The State of Florida lacks jurisdiction to impose sales taxes on out-of-state transactions, and the DOR lacks jurisdiction to assess the taxes at issue. This Court should vacate the DOR's tax assessment.

STANDARD OF REVIEW

"Tax laws should be construed strongly in favor of the taxpayer and against the government with all ambiguities or doubts resolved in the taxpayer's favor." *Lloyd Enterprises, Inc. v. Department of Revenue*, 651 So. 2d 735, 739 (Fla. 5th DCA 1995) (citations omitted).

Whether a lower tribunal had subject matter jurisdiction is a question of law this Court reviews *de novo*. *Department of Revenue ex rel. Smith v. Selles*, 47 So. 3d 916, 918 (Fla. 1st DCA 2010) (citing *Seven Hills, Inc. v. Bentley*, 848 So. 2d 345, 350 (Fla. 1st DCA 2003)). "[L]ack of subject matter jurisdiction may be raised for the first time on appeal." *Selles*, 47 So. 3d at 918 (quoting *MCR Funding v. CMG Funding Corp.*, 771 So. 2d 32, 35 (Fla. 4th DCA 2000)).

"[D]eterminations concerning the constitutionality of statutes are pure questions of law subject to the de novo standard of review." *Abram v. State, Dept. of Health, Bd. of Medicine*, 13 So. 3d 85, 88 (Fla. 4th DCA 2009) (citation and quotation omitted); *Florida Fish & Wildlife Conservation Comm'n v. Caribbean*

Conservation Corp., Inc., 789 So. 2d 1053, 1054 (Fla. 1st DCA 2001) (noting that "[w]hether a state statute is constitutional is a pure issue of law, subject to de novo review."). "Jurisdiction is as necessary to valid legislative as to valid judicial action." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342, 74 S.Ct. 535, 537 (1954) (citation and quotation omitted).

ARGUMENT

I. The DOR Lacked Subject Matter Jurisdiction To Tax Out-Of-State Flower Sales.

A. The DOR's Jurisdiction Is Limited By Fourteenth Amendment Territorial Due Process

The statute and administrative rule at issue in this case expand the State's authority beyond the permissible bounds of Fourteenth Amendment territorial due process. The DOR lacks jurisdiction to implement and enforce the florist tax for out-of-state sales. The State of Florida lacks a sufficient nexus with the out-of-state activity sought to be taxed, and as a result, the tax violates due process.

"As a general principle, a State may not tax value earned outside its borders." *ASARCO Inc. v. Idaho State Tax Com'n*, 458 U.S. 307, 315, 102 S.Ct. 3103, 3108 (1982) (citations omitted). "[W]hen a state re[a]ches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction . . . And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce."

Treichler v. State of Wis., 338 U.S. 251, 256-57, 70 S.Ct. 1, 4 (1949) (citations omitted). "The limits on a State's power to enact substantive legislation are similar to the limits on the jurisdiction of state courts." *Edgar v. MITE Corp.*, 457 U.S. 624, 643 102 S.Ct. 2629, 2641 (1982) (plurality opinion). "[A]ny attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer v. Heitner*, 433 U.S. 186, 197, 97 S.Ct. 2569, 2576 (1977).

"[S]eizure of property by the State under pretext of taxation when there is no jurisdiction or power to tax is simple confiscation and a denial of due process of law." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342, 74 S.Ct. 535, 537 (1954). "If the legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limits and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition." *Id.* (citation and quotation omitted).

While "modern due process jurisprudence rejects a rigid, formalistic definition of minimum connection, [courts] have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax . . . ." *Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768, 778, 112 S.Ct.

2251, 2258 (1992) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08, 112 S.Ct. 1904, 1909-10 (1992)) (emphasis added). "[T]he State's power to tax an individual's or corporation's activities is justified by the protection, opportunities and benefits the State confers on those activities." *Id.* (citation and quotation omitted).

In *American Oil Co. v. Neill*, the United States Supreme Court decided whether Idaho could tax a licensed motor fuel "dealer," as defined by state law, for its out-of-state sales and transfers of gasoline marked for importation into the state. *American Oil Co. v. Neill*, 380 U.S. 451, 452, 85 S.Ct. 1130, 1131-32 (1965). The Supreme Court held that Idaho's taxation was "entirely unconnected with [the corporation's] business in that State" and, as such, the tax violated the Due Process Clause. *Neill*, 380 U.S. at 458-59, 85 S.Ct. at 1134-35. The Supreme Court noted, in part, that title passed outside the state and that "the contract called for delivery of the gasoline f.o.b. [free on board] Salt Lake City" in reaching its decision. *Id.*, 380 U.S. at 458, 85 S.Ct. at 1135. A corporation can "exempt itself [from being taxed] by a clear showing that there are no in-state activities connected with out-of-state sales." *Compare Neill*, 380 U.S. at 458, 85 S.Ct. at 1135 *with* [Recommended Order, R1 at 107 ¶ 16] ("The Taxpayer did not charge its customers sales tax on [internet] sales . . . of tangible personal property delivered outside of Florida.").

"[T]he granting by a state 'of the privilege of doing business there and its consequent authority to tax the privilege do not withdraw from the protection of the due process clause the privilege' of doing business elsewhere." *Compare Neill*, 380 U.S. at 459, 85 S.Ct. at 1135 (citation omitted) *with* [Recommended Order, R1 at 113, ¶ 52] ("It is the legislative intent that every person is exercising a taxable privilege who engages in the business of selling items of tangible personal property at retail in this state."). Further, a corporation's status as a "licensed dealer in Idaho" and "the fact that is otherwise engaged in business there" did not suffice to uphold the tax. *Neill*, 380 U.S. at 458, 85 S.Ct. at 1135.

The tax assessment at issue in this case violates the Due Process Clause because the Florida Legislature lacked the authority to enact it, the DOR lacked the administrative authority to implement it, and the DOAH and DOR lacked the jurisdiction to assess it. This case presents an extraterritorial sales tax, and the DOR cannot tax sales that take place outside Florida. *Shaffer*, 433 U.S. at 197, 97 S.Ct. at 2576 (noting that direct attempts to assert jurisdiction over out-of-state persons or property offend the power of sister States and exceed the limitations of state power). American Business's out-of-state sales are "entirely unconnected with its business in th[is] State" and cannot be taxed by the DOR. *See Neill*, 380 U.S. at 458-59, 85 S.Ct. at 1134-35. It is undisputed that the only flower sales for which American Business did not collect and remit taxes were to out-of-state or

international customers. [R1 at 107 ¶¶ 15, 16; 125] The parties stipulated to this fact. [R1 at 58 ¶¶ 14, 15]

The DOR lacks jurisdiction to tax the out-of-state sale and delivery of flowers because none of the relevant activity occurs in Florida. While American Business is a company incorporated in Florida, a state's power to tax must have a basis in "the activity itself, rather than a connection only to the actor the State seeks to tax." *Allied-Signal, Inc.*, 504 U.S. at 778, 112 S.Ct. at 2258 (citing *Quill*, 504 U.S. at 306-08, 112 S.Ct. at 1909-10). The internet is not located in Florida. American Business did not hold any flowers in the State of Florida. It did not use any Florida roads, bridges, or other infrastructure to deliver its products to out-of-state customers. As such, American Business is not subject to the tax in question. *Treichler*, 338 U.S. at 256-57, 70 S.Ct. at 4 ("[W]hen a state re[a]ches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction . . . And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce.") (citations omitted). American Business simply operated a website and connected people interested in purchasing flowers with their local vendors who could fill the orders.

A factual example of the activity the DOR claims the authority to tax may be illustrative:

> A person from New Mexico logs onto American Business's website and decides to purchase flowers. American Business forwards that order to a New Mexico florist, who fills the order using New Mexico flowers from its New Mexico warehouse, and then delivers the flowers using New Mexico's infrastructure.

In the situation above, the DOR claims the power to tax American Business for the entire value of the sale. That is wrong, and it flies in the face of the United States Supreme Court's clear instruction that "any attempt directly to assert extraterritorial jurisdiction over persons or property would offend sister States and exceed the inherent limits of the State's power." *Shaffer*, 433 U.S. at 197, 97 S.Ct. at 2576.

Florida lacks a sufficient nexus to assess the florist tax here. "[T]he State's power to tax an individual's or corporation's activities is justified by the protection, opportunities and benefits the State confers on those activities." *Allied-Signal, Inc.*, 504 U.S. at 778, 112 S.Ct. at 2258 (citation and quotation omitted). Florida simply has no connection to a transaction involving a New Mexico resident shopping on the internet for flowers, which are grown, stored, and delivered by a New Mexico florist.

Therefore, this Court should vacate the florist taxes assessed by the DOR for American Business's out-of-state flower sales.

B. Dormant Commerce Clause

"The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." *MeadWestvaco Corp. ex rel. Mead Corp. v. Illinois Dept. of Revenue*, 553 U.S. 16, 24, 128 S.Ct. 1498, 1505 (2008) (citations omitted). "The Commerce Clause also precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State." *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 102 S.Ct. 2629, 2641 (1982) (plurality opinion).

"It is now established beyond dispute that the Commerce Clause was not merely an authorization to Congress to enact laws for the protection and encouragement of commerce among the States, but by its own force created an area of trade free from interference by the States." *Boston Stock Exchange v. State Tax Commission*, 429 U.S. 318, 328, 97 S.Ct. 599, 606 (1977) (citation and quotation omitted). "The Commerce Clause even without implementing legislation by Congress is a limitation upon the power of the States." *Id.* (citation and quotation omitted). "The Commerce Clause forbids the States to levy taxes that discriminate against interstate commerce or that burden it by subjecting activities to multiple or unfairly apportioned taxation." *MeadWestvaco*, 553 U.S. at 24, 128 S.Ct. at 1505 (citations omitted).

Under the four-part test applied by the Supreme Court, a tax will be sustained against a Commerce Clause challenge if the tax "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, **and** [4] is fairly related to the services provided by the State." *Quill Corp. v. North Dakota By and Through Heitkamp*, 504 U.S. 298, 311, 112 S.Ct. 1904, 1912 (1992) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079 (1977)) (emphasis added).

In *Dell Catalog Sales L.P. v. N.M. Taxation & Revenue Dept.*, 145 N.M. 419, 199 P.3d 863 (N.M. Ct. App. 2008), the New Mexico Court of Appeals decided a Dormant Commerce Clause challenge brought by an out-of-state retailer for taxes assessed on its in-state sales. The taxpayer – Dell Catalog Sales L.P. – was a Texas limited partnership with its primary place of business in Texas. *Dell Catalog Sales*, 145 N.M. at 421, 199 P.3d at 865. Individual customers contacted Dell directly by telephone or over the internet to place orders. *Id.* Customers had the option to purchase an on-site repair service, provided by a third-party service provider who would dispatch technicians to customers' homes to respond to service calls. *Id.* at 421-22, 199 P.3d at 865-66. This third-party agent relationship, with its physical presence within New Mexico for purposes of in-

house service calls, ultimately supported jurisdiction in New Mexico. *Id.* at 427-29, 199 P.3d at 871-73.

In discussing where the "sale" of the computer products took place for purposes of the taxing statute, the New Mexico Court of Appeals looked to "the leading treatise on state and local taxation" and explained that

> Although the American retail sales tax is hardly a model of a good consumption tax, by and large it embraces the destination principle in its application to the sale of goods. "Imports" shipped from outside the state to purchasers within the state generally are subject to sales or use tax in the state of destination, and "exports" shipped from within the state to purchasers outside the state generally are exempt from sales or use tax in the state of origin.

Dell Catalog Sales, 145 N.M. at 425, 199 P.3d at 869 (quoting Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 18.02[1] (3d ed. 2002)) (emphasis added).

The court embraced the so-called "destination principle" of taxation, which seeks fair treatment between in-state and out-of-state sellers and "promot[es] neutrality by treating all goods consumed in the state in the same way, regardless of the location from which they were shipped." *Dell Catalog Sales*, 145 N.M. at 425, 199 P.3d at 869 (citation, quotation, and alteration omitted). As such, the court held that "the destination principle applies to determine whether an interstate transaction is a taxable sale under our gross receipts tax laws." *Id.*

Here, imposing a sales tax on American Business for the full value of its sales to out-of-state customers violates the Supreme Court's four-part Dormant Commerce Clause test. First, the florist tax is not "applied to an activity with a substantial nexus with the taxing State." *Quill Corp.*, 504 U.S. at 311, 112 S.Ct. at 1912 (quoting *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079). As explained above, Florida lacks any substantial nexus with a transaction involving a New Mexico resident shopping on the internet for flowers, which are delivered by a local florist using local infrastructure. No customer enters Florida to purchase flowers, and American Business stores no flowers in Florida. Florida lacks a substantial nexus with out-of-state residents making an out-of-state purchase from an internet vendor. The "delivery principle" is founded upon the concept of nexus and properly limits state jurisdiction to transactions consummated within its borders. The out-of-state flower sales at issue in this appeal were not consummated in Florida. As such, the florist tax violates the Dormant Commerce Clause.

Second, the florist tax is not "fairly apportioned." *Quill Corp.*, 504 U.S. at 311, 112 S.Ct. at 1912 (quoting *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079). The florist tax requires that tax be paid "on the entire amount paid by the customer without any deductions whatsoever." Fla. Admin. Code R. 12A-1.047(2)(b). Because the administrative regulation requires taxation on the entire

amount paid by the customer, it necessarily requires double taxation any time another tax is assessed. Taxing the entire value of the transaction, without any allowance whatsoever for double-taxation set-offs, facially violates the Dormant Commerce Clause by requiring fundamentally unapportioned taxation. When a state, such as New Mexico, taxes American Business's sales to New Mexico residents, Florida's florist tax requires double-taxation. If Florida interjects itself into the transaction, then two sovereigns would be taxing the same activity, at the same time, rendering the activity much less commercially desirable for market participants. This is what the Dormant Commerce Clause prohibits and protects against. States cannot inhibit interstate commerce with their taxation schemes. There is no mechanism within the florist tax to provide set-offs. As a result, the florist tax is fundamentally unapportioned and violates the Dormant Commerce Clause.

Finally, the tax is not "fairly related to the services provided by the State." *Quill Corp.*, 504 U.S. at 311, 112 S.Ct. at 1912 (quoting *Complete Auto Transit*, 430 U.S. at 279, 97 S.Ct. at 1079). Florida provides no services as it relates to American Business's out-of-state flower sales. These out-of-state sales are not made possible by Florida's police protection, marketplace, or infrastructure. As such, the State of Florida does not provide services to American Business for its out-of-state sales that would support the attendant taxation of that activity.

Accordingly, this Court should also vacate the DOR's florist tax assessment, pursuant to the Dormant Commerce Clause.

II. The DOR Lacked Subject Matter Jurisdiction To Tax Out-Of-State Sales Of Prepaid Calling Arrangements.

The DOR admitted that many of American Business's prepaid calling arrangement sales were made to customers located outside Florida. [R1 at 74 ¶ 6, 75 ¶ 14] The DOR then impermissibly taxed all sales without differentiating between Florida and non-Florida sales. [R1 at 106 ¶¶ 7, 9, 107 ¶ 20]

Section 212.05(1)(e)(1)(a)(II), (III), Florida Statutes, provides that

> (II) **If the sale or recharge of the prepaid calling arrangement does not take place at the dealer's place of business, it shall be deemed to take place at the customer's shipping address or, if no item is shipped, at the customer's address or the location associated with the customer's mobile telephone number**.
>
> (III) The sale or recharge of a prepaid calling arrangement shall be treated as a sale of tangible personal property for purposes of this chapter, whether or not a tangible item evidencing such arrangement is furnished to the purchaser, and **such sale within this state subjects the selling dealer to the jurisdiction of this state for purposes of this subsection**.

Id. (emphases added).

Therefore, when a customer lives outside Florida, a prepaid calling arrangement sale is "deemed to take place at the customer's shipping address or . . . at the customer's address or the location associated with the customer's mobile telephone number." § 212.05(1)(e)(1)(a)(II), Fla. Stat. Only sales "within this

state subjects the selling dealer to the jurisdiction of this state . . . ." § 212.05(1)(e)(1)(a)(III), Fla. Stat. The tax auditor in this case charged all of American Business's prepaid calling arrangement sales to Florida because "[t]he auditor could not determine what State to charge those to so they were charged to Florida." [R2 at 14; Exhibit A01]

While, under certain circumstances the DOR may rely on a "best estimate" to arrive at its tax assessment, section 212.12(5)(b) does not apply in this case. The DOR impermissibly employed section 212.12(5)(b)'s "rather Draconian provisions[.]" *Lloyd Enterprises, Inc. v. Department of Revenue*, 651 So.2d 735, 739 (Fla. 5th DCA 1995). The "best estimate" provisions of section 212.12(5)(b), "should not come into operation unless the dealer or person to be charged has done something wrong or obstructive to prevent the Department from making a fair or ordinary audit." *Id.* (emphasis omitted). The statute allows "for a best estimate when the dealer or other person charged fails to make 'his records' available, fails to make a required report, or makes a false or grossly incorrect report." *Id.* (citing § 212.12(5)(b), Fla. Stat.) (emphasis omitted). Without wrongdoing on the part of the taxpayer, the DOR is not excused from its failure to seek adequate records from another source. *Lloyd Enterprises*, 651 So.2d at 738-40. As such, section 212.12(5)(b) does not excuse the DOR's failure to excise non-taxable sales from its estimated pre-paid calling arrangement assessment.

Furthermore, a "best estimate" cannot be one that is necessarily wrong. The DOR expressly lacks the authority to tax calling arrangement sales made to customers outside Florida. § 212.05(1)(e)(1)(a)(II), (III), Fla. Stat. American Business undisputedly sold calling arrangements outside of Florida. The DOR erroneously taxed all of American Business's sales. This necessarily included sales to out-of-state customers that the DOR lacks authority to tax. The DOR cannot employ a "best estimate" to act beyond its expressly limited statutory jurisdiction.

The tax on out-of-state calling arrangement sales also violates the Due Process Clause and the Dormant Commerce Clause for the same reasons as the florist tax discussed above. Florida's administrative procedure, which allows for the use of a "best estimate," does not obviate express statutory restrictions or constitutional limitations to state jurisdiction.

Therefore, this Court should vacate the prepaid calling arrangement taxes assessed by the DOR.

CONCLUSION

For the reasons stated herein, Appellant American Business USA Corp. respectfully requests that this Court vacate the DOR's tax assessment of $137,225.27 plus interest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document has been furnished to: Carrol Y. Cherry, (carrol.cherry@myfloridalegal.com), Attorney for the Department of Revenue, Office of the Attorney General, Revenue Litigation Bureau, The Capitol, Plaza Level 01, Tallahassee, FL, 32399, via electronic mail on the 25th day of November, 2013.

/s/ Michael D. Sloan
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CERTIFICATE OF COMPLIANCE

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

/s/ Michael D. Sloan
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