No. 16-_____

In the Supreme Court of the United States

AMERICAN BUSINESS USA CORP.,

Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

PETITION FOR WRIT OF CERTIORARI

MICHAEL D. SLOAN
COUNSEL OF RECORD
DEAN A. MORANDE
DAVID B. ESAU
BRIAN ROSNER
CARLTON FIELDS JORDEN BURT, P.A.
525 OKEECHOBEE BOULEVARD, STE. 1200
WEST PALM BEACH, FL 33401
(561) 659-7070
MSLOAN@CARLTONFIELDS.COM

OCTOBER 24, 2016 *COUNSEL FOR PETITIONER*

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QUESTION PRESENTED

This case involves the basic principle of territorial sovereignty, underlying this Court's Due Process Clause and dormant Commerce Clause precedents, that a State cannot impose a sales tax on a transfer of property that occurs outside its borders. Here, the State of Florida imposes a sales tax on flowers that are grown, stored, and delivered entirely within other States and Nations. The "nexus" that allegedly justifies this sales tax is the purchaser's placement of an order through an internet website operated by a corporation located within Florida. Florida's sales tax on flowers was held unconstitutional by the Florida Fourth District Court of Appeal, as a violation of the dormant Commerce Clause, and then reversed by the Florida Supreme Court.

The question presented is:

Can a State collect sales tax on out-of-state property ordered over the internet for out-of-state delivery, by relying on this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and the State's connection to the corporation that accepts the order and arranges the sale, or does such a tax violate both the Due Process Clause and dormant Commerce Clause of the United States Constitution by imposing a sales tax on the out-of-state transfer of tangible personal property?

PARTIES TO THE PROCEEDINGS

The petitioner is American Business USA Corp., who was the appellee and appellant in the proceedings below.

The respondent is the Florida Department of Revenue, who was the appellant and appellee in the proceedings below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner American Business USA Corp. states the following:

American Business USA Corp. is a privately-held corporation and it has no parent company or any publicly held company that owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

American Business USA Corp. ("American Business") respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Supreme Court.

OPINIONS BELOW

The opinion of the Florida Supreme Court is reported at 191 So. 3d 906 (App.1a–21a). The opinion of the District Court of Appeal of Florida, Fourth District ("Fourth District") is reported at 151 So. 3d 67 (App.22a–35a). The final order of the Department of Revenue of the State of Florida is unreported (App.36a–39a). The recommended order of the Division of Administrative Hearings of the State of Florida is also unreported (App.40a–55a).

JURISDICTION

The Florida Supreme Court issued its opinion on May 26, 2016. (App.1a). On August 15, 2016, Justice Thomas extended the time for filing a petition for a writ of certiorari to and including October 23, 2016. *See* No. 16A162. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The Commerce Clause of the United States Constitution provides:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes. . . .

U.S. Const. art. I, § 8, cl. 3.

The Florida statutory provision at issue—section 212.05(1)(*l*), Florida Statutes—is reproduced in its entirety in the appendix (App.56a), and provides that:

> 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.

§ 212.05(1)(*l*), Fla. Stat. (2012).

The Florida regulatory provision, Fla. Admin. Code R. 12A-1.047, which specifically authorizes the sales tax at issue, is reproduced in its entirety in the appendix (App.67a), and provides, in relevant part, that:

> 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).

INTRODUCTION

In a customary Due Process Clause or dormant Commerce Clause sales tax or use tax challenge under *Quill*, an out-of-state vendor challenges a State law that requires the vendor to collect sales or use tax for items delivered within the State, and the vendor's challenge is based on the vendor's lack of a physical presence within the State. *See e.g., Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). This case presents the inverse situation.[1] Here, a Florida corporation is accepting orders over the internet for the

[1] The pending petitions before this Court in *Direct Marketing Assn. v. Brohl*, Nos. 16-267 and 16-458, present circumstances similar to those presented in *Quill* and would offer the Court a companion case that complements the present case.

out-of-state delivery of out-of-state goods, and Florida is imposing a sales tax on the transactions.

By statute and administrative rule, the State of Florida requires Florida corporations that sell flowers to collect a sales tax when flowers are delivered from one out-of-state location to another out-of-state location, as long as the corporation that initially receives the order is located within Florida. § 212.05(1)(*l*), Fla. Stat. (2012) (App.56a); Fla. Admin. Code R. 12A-1.047(2)(b); (App.67a). This remains true even when, as in the present case, the Florida corporation has no inventory of flowers and uses a florist local to the out-of-state delivery location to fulfill the transaction.

This Court's review is necessary to confirm where the sale of tangible personal property occurs in the age of e-commerce.

A sales tax can be imposed by only one State. That State should have a connection to the tangible property being transferred. Allowing Florida's sales tax on flowers to stand would violate the fundamental territorial limits of State sovereignty under the Due Process Clause and dormant Commerce Clause. Just as a Florida court cannot issue a subpoena in California, a Florida agency may not tax a flower sale that is consummated in California. The decision below turns this inquiry on its head, relying on this Court's decision in *Quill* to support its holding that a Florida nexus exists for all business conducted with a Florida-based internet vendor. The Florida Supreme Court's decision thereby allows Florida to tax the sale of property that never actually enters Florida.

The Florida Supreme Court, relying on this Court's decision in *Quill Corp. v. North Dakota*, 504 U.S. 298

(1992), found that American Business's physical presence and receipt of payment within Florida rendered Florida's sales tax on flowers constitutionally permissible. That conclusion confuses this Court's decision in *Quill*.

In *Direct Mktg. Ass'n v. Brohl*, Justice Kennedy issued a concurring opinion to note that "[t]he legal system should find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*."[2] 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). This case presents the Court with such an opportunity.

In *Quill*, this Court decided whether North Dakota had a sufficient nexus with the party upon which it imposed a use tax collection requirement. North Dakota's nexus to impose a use tax on the property itself, which was enjoyed within North Dakota, was never at issue. The present case, however, involves a question about the State's nexus with the transaction itself: the out-of-state delivery of out-of-state property. Because the incidence of Florida's sales tax falls upon consumers, Florida cannot base its nexus upon a connection to the internet vendor that merely acts as a middle-man in the transaction.

The present case is important because the Florida Supreme Court's newly announced power has no limiting principle. If a State may tax flower sales based only on the State's connection to the internet retailer who accepts the order, then nothing will

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[2] *Natl. Bellas Hess, Inc. v. Dept. of Revenue of State of Ill.*, 386 U.S. 753 (1967) (ruling use tax unconstitutional based on vendor's lack of physical presence within State).

constrain the spread of this power to all e-commerce transactions. As a category, flowers are indistinguishable from other types of tangible personal property. The Florida Supreme Court's interpretation of *Quill* is, in fact, an invitation for State Legislatures to craft sales taxes on other out-of-state deliveries of out-of-state property.

The effects of this expanded authority would significantly alter the landscape of the States' power to collect sales tax. If a website is run by a corporation located within a State, that State would be able to collect sales tax on all the company's sales worldwide, without regard to the physical realities of the transactions. In their daily shopping, consumers would traverse a range of State jurisdictions, merely by crossing over to a website run by a company located within a particular State. The State of Washington could monopolize the collection of sales tax revenues by imposing a Washington sales tax on all items purchased from Amazon.com, regardless of where in the world the items are produced, stored, or delivered.

This Court's review is necessary to either overturn *Quill*, and thereby open the door for States to impose sales or use tax collection requirements on out-of-state vendors; or at least, to again announce that States may not impose sales tax on transfers of property that occur within other States or Nations, and thereby limit the disruptive power of the present tax from expanding into other areas of e-commerce.

STATEMENT OF THE CASE

The Florida Supreme Court has reached the unprecedented conclusion that a State is permitted to collect sales tax on the out-of-state transfer of tangible personal property. The Florida Supreme Court's decision is so broad that it allows Florida to tax out-of-state property ordered for out-of-state delivery by out-of-state consumers.

The following facts are drawn from the Recommended Order of the Department of Administrative Hearings (App.40a–55a), which was adopted by the Department of Revenue's Final Order (App.36a–39a). The following facts were presented to the Department below in the form of a Joint Stipulation of admitted facts between the parties, and were subsequently noted by the lower courts. (App.3a n.1; App.23a; App.41a); *Am. Bus. USA Corp. v. Dept. of Revenue*, 151 So. 3d 67, 69 (Fla. 4th Dist. App. 2014); *Florida Dept. of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 909 n.1 (Fla. 2016).

American Business is a Florida corporation that specializes in the sale of flowers, gift baskets, and other items of tangible personal property. (App.43a, ¶ 7). All of American Business's sales were initiated online. (App.43a, ¶ 8).

American Business "did not maintain any inventory of flowers, gift baskets and other items of tangible personal property." (App.43a, ¶ 13). When American Business "received an order over the [i]nternet for items of tangible personal property, [it]

relayed the order to a florist in the vicinity of the customer (the local florist). . . . [American Business] used a local florist to fill the order it had received for flowers, gift baskets, and other items of tangible personal property." (App.43a, ¶ 14). American Business "utilized the Internet or telephone to relay an order." (App.43a, ¶ 14).

American Business "charged its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered in Florida." (App.44a, ¶ 15). 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." (App.44a, ¶ 16).

American Business "sold to customers throughout Latin America, in Spain, and in the United States (including Florida)." (App.43a, ¶ 9). However, there is nothing in the record to demonstrate the location from which American Business's customers accessed American Business's website.

In February 2012, the Florida Department of Revenue issued a proposed assessment to American Business for uncollected sales tax on out-of-state deliveries of flowers and other items of tangible personal property. (App.46a, ¶ 36).[3]

In February 2013, the Division of Administrative Hearings recommended a validation of the full Florida Department of Revenue assessment for uncollected sales tax. (App.40a–55a).

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[3] The Department also issued a proposed assessment for uncollected sales tax on sales of pre-paid calling cards, which are no longer at issue in this case.

According to the Recommended Order's Conclusions of Law:

- The Division of Administrative Hearings "ha[d] jurisdiction over the subject matter of and the parties to this proceeding[.]" (App.48a, ¶ 45);
- "The Florida sales tax is an excise tax on the privilege of engaging in business in the state." (App.49a, ¶ 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." (App.49a, ¶ 52);
- American Business's "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.]" (App.52a–53a, ¶ 59).

In March 2013, the Florida Department of Revenue issued a final order adopting the recommendation of the Division of Administrative Hearings, in whole. (App.36a–39a).

American Business appealed to the Florida Fourth District Court of Appeal, arguing that Florida's sales tax violated this Court's Due Process Clause and dormant Commerce Clause precedents.[4]

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[4] Pursuant to Rule 14.1(g)(i), American Business first raised its Due Process and dormant Commerce Clause arguments in its Initial Brief to the Fourth District Court of Appeal. *See* Case No. 4D13-1472, Appellant's Initial Brief at 1 ("The Florida Department of Revenue ('DOR') lacks jurisdiction to collect

On November 12, 2014, the Fourth District reversed the sales tax assessment as a violation of the dormant Commerce Clause: "Florida impermissibly burdened interstate commerce when it taxed out-of-state customers for out-of-state deliveries of out-of-state tangible goods." *Am. Bus. USA Corp. v. Dept. of Revenue*, 151 So. 3d 67, 68 (Fla. 4th Dist. App. 2014), *decision quashed sub nom. Florida Dept. of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906 (Fla. 2016). Under the Due Process Clause, the Fourth District held that Florida's sales tax was permissible, based on *Quill*. *Id.* at 73-74.

The Fourth District recognized that "[b]ecause the flowers sold by the Florida-registered internet business were never stored in or brought into Florida, the imposition of taxes did not meet the 'substantial nexus' test and thus violated the dormant commerce clause." *Id.* at 68. The Fourth District explained that "[m]erely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute 'substantial nexus.'" *Id.* at 73. Importantly, the Fourth District noted that the flowers being taxed "were not grown in, stored in, or delivered from Florida, and do not have any type of connection to Florida." *Id.*

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sales tax on out-of-state sales, under both the Due Process Clause and the Dormant Commerce Clause of the United States Constitution."). Because the Fourth District reversed, the Florida Department of Revenue raised the constitutionality of Florida's tax on appeal to the Florida Supreme Court. *See* Florida Supreme Court, Case No. SC14-2404, Appellant's Initial Brief at 1-29.

The Department of Revenue appealed to the Florida Supreme Court.

The Florida Supreme Court agreed with the facts as stated by the Fourth District: all of American Business's "sales of flowers, gift baskets, and other items of tangible personal property were initiated online" and American Business "did not maintain any inventory of these items but would use florists that were local to the location of the delivery to fill the order." *Florida Dept. of Revenue v. Am. Bus. USA Corp.*, 191 So. 3d 906, 908 (Fla. 2016); *see also id.* at 909 n.1. The Florida Supreme Court determined that the sales tax assessment was constitutional because American Business had a physical presence in Florida and did business in Florida. *Id.* at 914, 917. The Florida Supreme Court also ruled that the tax assessment was not a due process violation, and that the tax met the remaining elements of the four-part dormant Commerce Clause test set forth by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). *Id.* at 913-17.

In reliance on its understanding of *Quill*, the Florida Supreme Court held that American Business's "presence" in Florida was the "substantial nexus" that authorized Florida to impose a sales tax on tangible personal property delivered in other States and Nations. *Id.* at 913-14, 917.

While noting the standard this Court has set for a State to impose a sales tax—that "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction"—the Florida Supreme Court did not analyze the standard correctly. *Id.* at 912-14, 917 (quoting

Oklahoma Tax Commn. v. Jefferson Lines, Inc., 514 U.S. 175, 184 (1995)).

American Business had argued that Florida was impermissibly imposing a sales tax on out-of-state transfers of tangible personal property. *Id.* at 915. The Florida Supreme Court defined the transaction and tax differently, and explained that "the transaction occurs in Florida where the business facilitated every stage of the transaction from advertising for customers, accepting their orders, receiving payment, and locating and transmitting the orders to third-party florists." *Id.* at 915. Believing it was bound to do so by *Quill*, the Florida Supreme Court concluded that the statute was lawful because it "taxes the transaction that occurs in Florida by the business engaging in business here, and not on the items sold or the activities occurring out of state[.]" *Id.* at 915-16.

In conclusion, the Florida Supreme Court reversed the Fourth District "to the extent that it holds that the assessment of sales tax on sales of flowers, gift baskets, and other items of tangible personal property ordered by out-of-state customers for out-of-state delivery violates the dormant Commerce Clause of the United States Constitution." *Id.* at 917.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to confirm the important principle that a State cannot collect sales tax on transfers of tangible personal property that occur wholly within another State or Nation. This

Court's precedents are clear, and they hold that allowing such taxes to be imposed would violate the territorial limits of State sovereignty under the Due Process Clause and the dormant Commerce Clause. There is nothing in the Florida Supreme Court's decision that should convince this Court to alter this well-reasoned and long-standing jurisprudence.

The issue presented is pressing. With the continuing expansion of e-commerce, and with trillions of dollars spent annually over the internet, States are understandably searching for ways to collect tax revenues from the internet-based sale of goods. The Florida Supreme Court has held that Florida can collect sales tax, permissibly under the Due Process Clause and dormant Commerce Clause, when out-of-state customers purchase out-of-state property for out-of-state delivery, as long as the internet-based company from which the order is initially placed is located within Florida.

Since a sales tax is imposed without apportionment on the entire value of a sale, only one State can be considered the location of the consummated sale. That State alone may collect sales tax on the transaction. American Business respectfully submits that a sale of tangible personal property cannot be consummated in a State where the property never enters, and Florida's attempt to collect sales tax for extraterritorial sales is constitutionally impermissible.

The Florida Supreme Court relied on this Court's decision in *Quill* to support its holding that a Florida company can be required to collect sales tax for sales made anywhere in the world. The Florida Supreme Court expressly relied on *Quill*'s "pre-

sence" requirement to justify its "substantial nexus" determination, despite the fact that *Quill* involved a North Dakota use tax for the enjoyment of property within North Dakota. The present case is different.

Justice Kennedy has called for the legal system to "find an appropriate case for this Court to reexamine *Quill* and *Bellas Hess*." *Direct Mktg. Ass'n v. Brohl*, 135 S.Ct. 1124, 1135 (2015) (Kennedy, J., concurring). American Business respectfully submits that this case offers such an opportunity.

By issuing a writ of certiorari, this Court can clarify the application of and reexamine its decisions in *Quill* and *Bellas Hess*, and clarify the law surrounding the taxation of e-commerce.

The present case is important because the power announced by the Florida Supreme Court—the power to impose sales tax on the transfer of out-of-state goods—has no limiting principle. If allowed to stand, there is no basis to constrain the spread of this power to all e-commerce transactions. It reflects an invitation for State Legislatures to craft sales taxes, outside the context of flowers, on other out-of-state transfers of tangible personal property.

This expanded authority would significantly alter the landscape of States' power to collect sales tax. The likely outcome would be chaos for consumers, as they face potential double taxation: a sales tax in the State where the sale is consummated, and a sales tax in the State where the company who received the initial order was incorporated. Because only one State may impose a sales tax, this Court's review is necessary to confirm that only the State where property is transferred may collect a sales tax. Otherwise, the system

of interstate sales tax collection will be left structurally unsound.

I. THE FLORIDA SUPREME COURT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS ON STATE SALES TAX NEXUS UNDER THE DUE PROCESS CLAUSE AND DORMANT COMMERCE CLAUSE

A. Florida's Sales Tax Violates The Fundamental Limits Of State Territorial Jurisdiction And Sovereignty

"'No principle is better settled than that the power of a state, even its power of taxation, in respect to property, is limited to such as is within its jurisdiction.'" *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954) (quoting *New York, L E & W R Co v. Com. of Pennsylvania*, 153 U.S. 628, 646 (1894)). "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." *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 342 (1954) (quoting *City of St. Louis v. Wiggins Ferry Co.*, 78 U.S. 423, 430 (1870)). "'Where there is jurisdiction neither as to person nor property, the imposition of a tax would be ultra vires and void.'" *Id.*

In the present case, the sales tax is imposed on the consumer, rather than American Business—§ 212.05 (1)(*l*) , Fla. Stat. (2012); § 212.07(1)(a), Fla. Stat. (2016) (App.56a, 57a, 67a)—and the property being transferred

never enters Florida. Florida's statute and administrative rule expand Florida's power beyond its borders, and Florida lacks any basis to tax consumers for out-of-state transfers of tangible personal property.

"[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 (1949) (citations omitted). "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 (1982) (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 (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 (1977).

While visible territorial boundaries do not always limit a state's jurisdiction, the State must have "some jurisdictional fact or event to serve as a conductor[.]" *Miller,* 347 U.S. at 343. In the context of a sales tax on goods, "a necessary condition for imposing the tax [is] the occurrence of 'a local activity, delivery of goods within the State upon their purchase for consumption.'" *Jefferson Lines*, 514 U.S. at 187 (quoting *McGoldrick v. Berwind-White Coal Mining Co.*, 309 U.S. 33, 58 (1940)).

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. Dir., Div. of Taxn.*, 504 U.S. 768, 778 (1992) (citing *Quill Corp. v. North Dakota*, 504 U.S. 298, 306-08 (1992)).

As this Court has noted, "the 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." *Am. Oil Co. v. Neill*, 380 U.S. 451, 459 (1965) (citation omitted); *compare with* (App.49a, ¶ 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."); *see also Florida Dept. of Revenue*, 191 So. 3d at 909, 911-12 (discussing Florida's sales tax on flowers as "privilege" of doing business).

Here, Florida has used a connection to one of its internet-based corporations as the bridge to collect sales tax from consumers worldwide for transfers of property that occur anywhere in the world.

The State of Florida lacks a sufficient connection to the flowers being transferred to impose a sales tax. As such, other States or Nations are the proper parties to collect sales tax on these transactions. American Business seeks a writ of certiorari to clarify the law on this issue of national importance.

B. A State May Collect Sales Tax Only On The Sale Of Tangible Personal Property Consummated Within That State

This Court has previously held that the Commerce Clause has a negative sweep—the so-called "dormant Commerce Clause"—that prohibits States from regulating interstate commerce even when Congress has failed to legislate on the subject. *Oklahoma Tax Com'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 179 (1995) (collecting cases). Similar to this Court's Due Process Clause precedent, the first element of this Court's dormant Commerce Clause precedent requires a State to demonstrate a nexus with the sale or activity it seeks to tax. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977); *see also Quill*, 504 U.S. at 311.[5] While the nexus inquiries under the Due Process Clause and dormant Commerce Clause are ultimately distinct, the lack of nexus in the present case is sufficient to fail both tests.

Here, as the Florida Supreme Court noted, American Business "did not maintain any inventory of these items but would use florists that were local to the location of the delivery to fill the order." *Florida Dept. of Revenue*, 191 So. 3d at 908. Consequently, in the words of the Fourth District, the sales tax was imposed on "out-of-state deliveries of out-of-state tangible goods." *Am. Bus. USA Corp.*, 151 So. 3d at 68.

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[5] Because American Business "sold to customers throughout Latin America, in Spain, and in the United States (including Florida)" (App.43a, ¶ 9), this case technically involves the dormant Foreign Commerce Clause, as well. *See Wardair Canada, Inc. v. Florida Dept. of Revenue*, 477 U.S. 1, 8 (1986).

The Florida Supreme Court held that such an extraterritorial sales transaction was nonetheless subject to a Florida sales tax because American Business engages in business within Florida (advertising, accepting orders, receiving payment, and transmitting orders to third-party florists), and thus the sales transaction "occurs in Florida[.]" *Id.* at 915.

That holding is contrary to the decisions of this Court.

The requisite "local activity" in this Court's precedents for sales taxes on goods has never been the mere placement of an order for property. It has been the actual transfer of the property being sold. This "transfer" requirement derives from "the very conception of the common sales tax on goods, operating on the transfer of ownership and possession at a particular time and place[.]" *Jefferson Lines*, 514 U.S. at 187. "It has long been settled that a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Jefferson Lines*, 514 U.S. at 184; *see* Black's Law Dictionary (9th ed. 2009) (defining "consummate" as "[t]o achieve; to fulfill").

The precedents for this "transfer" requirement are numerous. In *Jefferson Lines*, the bus ticket on which a sales tax was imposed was purchased in Oklahoma, and that was the location from which the bus service originated. *Jefferson Lines*, 514 U.S. at 184. In *McGoldrick*, the coal on which a sales tax was imposed was delivered in New York City, where title and possession passed from seller to buyer. *McGoldrick*, 309 U.S. at 44, 49. The present case, in contrast,

involves a tax on the transfer of flowers that are grown outside of Florida and are delivered to locations outside of Florida.

Similarly, in *State Tax Commn. of Utah v. P. State Cast Iron Pipe Co.*, 372 U.S. 605 (1963), the State of Utah imposed a sales tax deficiency upon a Nevada corporation, for the sale of goods that were delivered in Utah, where title to the property passed from seller to buyer. *Id.* at 605-06. The Supreme Court of Utah reversed the tax assessment. *Id.* at 606. This Court, in turn, reversed the Supreme Court of Utah and determined that the State of Utah could "levy and collect a sales tax, since the passage of title and delivery to the purchaser took place within the State." *Id.* at 606 (citing *Intl. Harvester Co. v. Dept. of Treas. of State of Ind.*, 322 U.S. 340, 345 (1944)).

To the same effect, in *Intl. Harvester Co. v. Dept. of Treas. of State of Ind.*, 322 U.S. 340 (1944), the State of Indiana imposed a gross income tax on corporations authorized to do business in Indiana, but that were incorporated in other States. *Id.* at 341. In upholding the tax assessment on certain types of sales, this Court explained that

> [D]elivery of the goods in Indiana is an adequate taxable event. When Indiana lays hold of that transaction and levies a tax on the receipts which accrue from it, Indiana is asserting authority over the fruits of a transaction consummated within its borders. These sales, moreover, are sales of Indiana goods to Indiana purchasers. While the contracts were made outside the State, the goods were neither just completing nor just

> starting an interstate journey. It could hardly be maintained that Indiana could not impose a sales tax or a use tax on these transactions.

Id. at 345.

Further, in *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327 (1944), this Court resolved a case involving "sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." *Id.* at 328. The Court noted that the items were shipped from Tennessee and that title passed upon delivery to a carrier in Tennessee. *Id.* In affirming the Arkansas Supreme Court's decision that the Commerce Clause precluded liability for the sales tax at issue, this Court explained that it "would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee. For Arkansas to impose a tax on such transactions would be to project its powers beyond its boundaries and to tax an interstate transaction." *Id.* at 330; *see also J. D. Adams Mfg. Co. v. Storen*, 304 U.S. 307, 313 (1938) (noting that a sales tax cannot be measured "by sales consummated in another state").

While aspects of this Court's Due Process Clause and dormant Commerce Clause precedents have evolved in the intervening decades, the underlying rule enunciated in these cases has not.

The Florida Supreme Court's decision conflicts with this Court's precedents and a writ of certiorari is necessary to correct and clarify the law in this important area.

C. The Florida Courts Misapplied *Quill*, Which Applies To Tax Imposed In The Customer's Home State Where Physical Delivery Or Enjoyment Of The Property Occurs

The Florida Supreme Court relied on this Court's decision in *Quill* to support its ruling that Florida maintains a sufficient nexus to collect sales tax on the out-of-state transfer of tangible personal property. The Florida Supreme Court held that, since American Business is physically located in Florida and operates its business from that location, the sale of out-of-state flowers could permissibly be taxed by Florida under the Due Process Clause and the dormant Commerce Clause. *Florida Dept. of Revenue*, 191 So. 3d at 914-17.

As noted above, however, the circumstances in *Quill* actually present the inverse of the circumstances presented in this case. In a *Quill*-based Due Process Clause or dormant Commerce Clause challenge, an out-of-state vendor challenges the authority of a State to impose a sales or use tax for items delivered within the State, based on the vendor's lack of a physical presence. *See e.g.*, *Quill Corp. v. North Dakota*, 504 U.S. 298, 301 (1992). Here, however, a Florida corporation is accepting orders for the out-of-state delivery of out-of-state goods. The Florida Supreme Court's reliance on *Quill* has no application.

In *Quill*, the State's nexus with the transaction itself was never in question. The issue in *Quill* was the State's nexus with the party, an out-of-state mail-order house, whom the State required to collect a use tax. *Quill*, 504 U.S. at 301. North Dakota's nexus with the transaction itself—the enjoyment of

property within North Dakota—was never at issue. *Id.* In the instant case, the physical presence of American Business within Florida has no bearing on Florida's nexus over the transaction. It is undisputed that Florida has a nexus with American Business. The sole issue of contention is whether Florida has a nexus with the transfers of property being taxed.

When determining the incidence of a tax, this Court examines the tax's practical operation. *Am. Oil Co. v. Neill*, 380 U.S. 451, 455-59 (1965). In this case, the Florida Supreme Court made no express determination on the incidence of Florida's sales tax on flowers, but held that "the statute taxes the transaction that occurs in Florida by the business engaging in business here, and not on the items sold or the activities occurring out of state[.]" *Florida Dept. of Revenue*, 191 So. 3d at 915-16; *see contra* § 212.05, Fla. Stat. (2012) (titled "Sales, storage, use tax"); § 212.05(2), Fla. Stat. (2012) ("The tax shall be collected by the dealer, as defined herein, and remitted by the dealer to the state at the time and in the manner as hereinafter provided" (emphasis added)).

Here, the only reasonable interpretation of Florida's statutory scheme is that consumers suffer the incidence of the tax. *See* § 212.07(1)(a), Fla. Stat. (2016) ("[t]he privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer" (emphasis added)); *see also* § 212.05, Fla. Stat. (2012) (declaring legislative intent that "every person is exercising a taxable privilege who engages in the business of selling tangible

personal property at retail in this state" (emphasis added)).

In fact, it would be a crime for American Business to hold out to the public that American Business will pay the consumer's sales tax, or to refund the sales tax. § 212.07(4), Fla. Stat. (2016) ("A dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. A person who violates this provision with respect to advertising or refund is guilty of a misdemeanor[.]").

Nonetheless, as previously recognized by this Court, "'[t]he state court could not render valid, by misdescribing it, a tax law which in substance and effect was repugnant to the federal Constitution[.]'" *McLeod v. J. E. Dilworth Co.*, 322 U.S. 327, 331 (1944) (quoting *Wagner v. City of Covington*, 251 U.S. 95, 102 (1919)).

The focus on American Business's connection to Florida, for purposes of the State's nexus inquiry, misses the point. American Business simply collects and remits the tax. It is not the entity called upon to pay the tax, so American Business's connection to Florida is not relevant. Only if American Business fails to collect the tax and remit it to the State, must American Business pay the tax with its own funds. Otherwise, consumers pay the tax.

If Florida cannot demonstrate a nexus with the sales it is taxing, then American Business cannot be forced to collect the tax or pay the tax when uncollected. American Business has no obligation to collect a tax from those who have no obligation to pay it.

For the large, though admittedly undetermined, number of purchasers in the present case who accessed American Business's website from a location outside of Florida, Florida's exercise of jurisdiction also violates this Court's minimum contacts jurisprudence, reflected in the foreseeability and purposeful availment requirements of the Due Process Clause. *See International Shoe Co. v. Washington*, 326 U.S. 310, 317-21 (1945) (setting forth "minimum contacts" standard); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-99 (1980) (explaining "minimum contacts" and "foreseeability" for purposes of state's jurisdiction); *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79 (1985) (holding that contract alone cannot automatically establish minimum contacts for out-of-state party under Due Process Clause); *see also Pres-Kap, Inc. v. System One, Direct Access, Inc.*, 636 So. 2d 1351, 1352-53 (Fla. 3d Dist. App. 1994) (applying due process "minimum contacts" standard to online computer services).

For purchasers who accessed American Business's website from within a location in Florida, the transaction is nonetheless consummated out-of-state. The location where a contract is formed does not govern the consummation of a sale. *Intl. Harvester Co.*, 322 U.S. at 345 (explaining that Indiana purchaser and seller made contract out-of-state, and that Indiana could nonetheless unquestionably impose a sales tax).

Because the Florida Supreme Court expressly relied upon *Quill*, this case presents the Court with an opportunity to clarify the proper scope and continued viability of its decisions in *Quill* and *Bellas Hess*. *See Brohl*, 135 S. Ct. at 1135 (2015) (Kennedy, J., concurring). A writ of certiorari would provide clarity in this area of rapidly increasing importance.

II. THIS CASE HAS BROAD SIGNIFICANCE FOR THE TAXATION OF E-COMMERCE BECAUSE IT ALLOWS A STATE TO COLLECT SALES TAX BASED ON A STATE'S CONNECTION TO A COMPANY THAT OPERATES AN INTERNET WEBSITE, RATHER THAN ANY CONNECTION TO THE PHYSICAL GOODS BEING TRANSFERRED

A. This Case Has Broad Significance, Based On The Number Of States That Have Enacted Taxes Of Varying Degrees Of Similarity To Florida's Sales Tax On Flowers

At least 36 other States and the District of Columbia have enacted sales taxes on flowers, which are of varying degrees of similarity to Florida's. *See* Ala. Admin. Code r. 810-6-1-.67 (a) (2014); Ariz. Admin. Code. R. 15-5-172; Ark. Code Ann. § 26-52-52-507 (2014); Cal. Code Regs. tit. xviii, § 1571(b)(1)-(2) (2007); Conn. Agencies Regs. § 12-426-4 (2014); D.C. Mun. Regs. tit. ix, § 441 (2014); Ga. Comp. R. & Regs. 560-12-2-.42(3) (2014); Idaho Admin. Code r. 35.01.02.059 (2014); 35 Ill. Comp. Stat. 120/1 (2014); Ill. Admin. Code tit. 86, § 130.1965 (2014); Ind. Code Ann. § 6-2.5-13-1(h) (2014); Kan. Admin. Regs. § 92-19-13a (2014); 103 Ky. Admin. Regs. 27:050 (2014); Me. Bureau of Taxation, Sales & Use Tax Instruction

Bulletin No. 21, 1989 WL 592717, at *1-2 (1989); Md. Code Regs. 03.06.01.18 (2014); Mich. Admin. Code R. 205.80 (2014); Minn. Stat. Ann. § 297A.668, Subd. 9 (2014); Minn. R. 8130.8900 (2014); 35-IV Miss. Code R. § 8.01 (2014); Mo. Code Regs. Ann. tit. 12, § 10-103.620 (2014); 316 Neb. Admin. Code § 1-052 (2014); Nev. Admin. Code § 372.230 (2014); N.J. Div. of Taxation, Out-of-State Sales & New Jersey Sales Tax, Publication ANJ-10 (rev. Mar. 2009); N.M. Stat. Ann. § 7-9-3.5A(2)(e) (West 2014); N.M. Code R. 3.2.1.15(H) (2014); N.Y. Comp. Codes R. & Regs. tit. 20, 526.7(e)(3) (2014); N.C. Gen. Stat. Ann. § 105-164.4B(d)(3) (West 2014); N.D. Admin. Code 81-04.1-04-21 (2014); Ohio Admin. Code 5703-9-31 (2014); Okla. Stat. Ann. tit. 68, § 1354(A)19. (West 2014); Okla. Admin. Code § 710:65-19-108 (2014); 61 Pa. Code § 31.24 (2014); 60-1. R.I. Code R. § 206:1 SU 07-49 (West 2014); S.C. Code Ann. Regs. 117-309.1 (2014); S.D. Admin. R. 64:06:02:32 (2014); Tenn. Code Ann. § 67-6-907 (West 2014); 34 Tex. Admin. Code § 3.307(c) (2014); Utah Admin. Code r. 865-19S-50 (2014); 23 Va. Admin. Code § 10-210-610 (2014); Wash. Admin. Code § 458-20-158 (2014); Wis. Admin. Code Dep't of Revenue § 11.945 (2014).

However, just like Florida, a number of these States otherwise impose sales tax based on the physical transfer of non-floral tangible goods. That conflict, underscored by this case, demonstrates the varying justifications for States' assertion of sales tax jurisdiction. As such, the issue presented here is of broad significance, even without examining the potential for the States' power in this regard to expand into other areas.

B. If Upheld, The Collection Of Sales Tax On Internet Sales, Relying On The Location Of The Corporation That Operates A Website, Is Likely To Proliferate In Other States And Other Contexts Outside Of Flower Sales

The rise of e-commerce has presented significant difficulties for States in their collection of sales tax revenue. Under this Court's decision in *Quill*, a State cannot exercise jurisdiction over an out-of-state vendor without a physical presence in the State. As such, a State cannot require these vendors to collect sales or use tax for sales within the State.

As a result, States have suffered significant revenue shortfalls. *See Brohl*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring). Understandably, States have sought out other methods to collect tax on the internet-based sale of goods. Some States, for example, look through the affiliates an out-of-state vendor uses within the State, in order to establish a physical presence. *See*, *e.g.*, *Overstock.com, Inc. v. New York State Dept. of Taxn. and Fin.*, 987 N.E.2d 621 (N.Y. 2013). Some States—like the State of Colorado in *Direct Marketing Ass'n. v. Brohl*—have imposed reporting requirements on out-of-state vendors to allow the collection of tax from in-state residents. *Direct Mktg. Ass'n v. Brohl*, 814 F.3d 1129 (10th Cir. 2016); *see also* Nos. 16-267 and 16-458.

The decision by the Florida Supreme Court, however, offers States a startling and different method to collect sales tax, which is unmoored to any physical connection to the transfer of goods and more disruptive in its effects. Under the power announced by the Florida Supreme Court, Florida can collect

sales tax on any sale, made anywhere in the world, by any consumer, as long as that sale originates with an order placed on a website operated by a company located within Florida. In Florida and many other States, this power is limited by statute to the context of flower sales.

There is, however, no principled distinction to make between flowers and other items of tangible personal property. And there is no limitation on the ability of State Legislatures to enact similar statutes regarding non-floral items of tangible personal property. The Florida Supreme Court's decision is, in fact, an invitation for State Legislatures to enact such taxes. If a State may permissibly tax flowers that never enter its borders, there is no constraint on taxing the transfer of other items of tangible personal property—including cars, clothes, and food—that never enter a State.

In their daily shopping, consumers on the internet would navigate a range of States' jurisdictions, merely by crossing over to a website run by a corporation incorporated within a certain State.

In the end, this Court's review is necessary to either open the door for States to impose sales or use tax collection requirements on out-of-state vendors by overturning *Quill*, or at least to limit the potential disruptive power of the Florida Supreme Court's ruling.

C. The Florida Supreme Court's Reasoning Would Drastically Expand The Authority Of States To Tax And Regulate Activity And Property Wholly Within Other States

The reasoning of the Florida Supreme Court's ruling would radically expand state authority to tax and regulate activity and property wholly located within other States and, indeed, Nations. In Florida, as it currently stands, if a resident of Venezuela ordered flowers for delivery in Venezuela through American Business's website, and the flowers were grown, stored, and delivered entirely within Venezuela, American Business would still be responsible to collect and remit Florida sales tax on the transaction. Similarly, if a resident of California or Florida ordered California flowers for delivery in California, American Business would still be responsible to collect and remit Florida sales tax on the transaction.

If Florida can impose a sales tax on a transaction based solely on the identity of the corporation that receives the order, then

- The State of Washington could require Amazon.com to collect a Washington sales tax on every item sold over its website anywhere in the world.
- The State in which a company that operates a food delivery website is located (*e.g.*, Grubhub or Seamlessweb) could collect a sales tax on all out-of-state food ordered for delivery and consumption though the website.

Because a sales tax is a tax on a discrete event—the transfer of goods at a particular time and place—

only one State may impose it and that State alone may tax the total value of the transaction. *Jefferson Lines*, 514 U.S. at 186-88. If States source transactions based on the State where the middle-man is located, that raises questions concerning the power of a State to collect tax where an actual transfer of property occurs. For example,

- If the State of Washington collected sales tax on all of Amazon.com's sales, could the State of Florida permissibly tax a sale of goods that originates from a Florida warehouse and is delivered to a Florida consumer?
- In *Brohl*, could the State of Colorado impose a use tax on the enjoyment of property in Colorado, if Florida had previously taxed the sale based on the location of the company that received the order?

States maintain their authority to collect other taxes on a domestic corporation like American Business, such as income taxes, without such a stringent analysis on the location of the corporation's sales. The question in the present case is only whether States may collect a sales tax, from a consumer, based solely on that consumer's interaction with a domestic corporation over the internet.

As it stands, there is no principle to limit the Florida Supreme Court's decision from being applied in the circumstances outlined above. This case presents an opportunity for this Court to clarify its decisions in *Quill* and *Bellas Hess*, and to address the appropriate method of State sales tax collection in the age of e-commerce.

III. THIS CASE PRESENTS AN EXCELLENT VEHICLE TO FURTHER DEFINE THE CONTOURS OF *QUILL* AND THE COLLECTION OF SALES TAX IN THE AGE OF E-COMMERCE

The present case offers the Court an excellent opportunity to define the contours of state sales tax collection in the internet age. As noted above, the facts of this case came in the form of a Joint Stipulation of admitted facts between the parties. (App.3a n.1); *Florida Dept. of Revenue*, 191 So. 3d at 909 n.1; *Am. Bus. USA Corp.*, 151 So. 3d at 69. American Business agrees with the facts as set forth by the lower courts. As such, if this Court accepts review, this case would allow the Court to focus exclusively on the law as it applies to the facts presented.

Furthermore, because this case presents the inverse circumstances from those presented in *Quill*, this case offers an opportunity for the Court to define the contours of *Quill's* application to domestic corporations. The pending petitions in *Brohl*—Nos. 16-267 and 16-458—would offer a complementary companion case to the present case, whereby the Court could further define the contours of these context-specific issues.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

MICHAEL D. SLOAN
COUNSEL OF RECORD
DEAN A. MORANDE
DAVID B. ESAU
BRIAN ROSNER
CARLTON FIELDS JORDEN BURT, P.A.
525 OKEECHOBEE BOULEVARD, STE. 1200
WEST PALM BEACH, FL 33401
(561) 659-7070
MSLOAN@CARLTONFIELDS.COM

COUNSEL FOR PETITIONER

OCTOBER 24, 2016

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OPINION OF THE SUPREME COURT OF FLORIDA (MAY 26, 2016)

SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE,

Appellant,

v.

AMERICAN BUSINESS USA CORP.,

Appellee.

No. SC14-2404

Before: LABARGA, C.J., PARIENTE, QUINCE, PERRY, LEWIS, CANADY, and POLSTON, JJ.

LABARGA, C.J.

This case is before the Court for review of the decision of the Fourth District Court of Appeal in *American Business USA Corp. v. Department of Revenue*, 151 So. 3d 67 (Fla. 4th DCA 2014). Because the district court expressly declared invalid a state statute, section 212.05(1)(l), Florida Statutes (2012), this Court has jurisdiction to review the decision. *See* art. V, § 3(b)(1), Fla. Const. For the reasons we explain, we quash the decision of the Fourth District and hold section 212.05(1)(l) constitutional.

FACTS AND PROCEDURAL HISTORY

This case commenced when the Florida Department of Revenue ("the Department") issued a proposed tax assessment on American Business USA Corp. ("American Business"), doing business as 1Vende.com in Wellington, Florida, for taxes and interest on the company's internet sales transactions between April 1, 2008, and March 31, 2011. American Business is a for-profit business incorporated in Florida and having its physical location and principal address in Florida. All the company's sales of flowers, gift baskets, and other items of tangible personal property were initiated online. The company did not maintain any inventory of these items but would use florists that were local to the location of the delivery to fill the order. The company charged its customers tax on flowers and other items delivered in Florida by local florists, but did not charge its customers sales tax on flowers and other items delivered outside of Florida.

The tax assessment was issued by the Department to American Business pursuant to section 212.05(1)(l), Florida Statutes (2012), which provides in pertinent part:

> Florists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items 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.

Under Florida Administrative Code Rule 12A-1.047(1), "[f]lorists are engaged in the business of selling tangible personal property at retail and their sales of

flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable." The statute and rule were relied on by the Department in this case.

After American Business filed a timely protest, a hearing was set before the Division of Administrative Hearings. The administrative law judge issued a pre-hearing order requiring the parties to stipulate to as many facts as possible. Accordingly, the parties filed a joint pre-hearing stipulation setting forth pertinent stipulated facts.[1] After the administrative hearing, at which the co-owners of the business testified and the Department offered exhibits, the administrative law judge issued an order recommending that the Department uphold the tax assessment. The Department subsequently entered a final order adopting the administrative law judge's recommended order in full. The order concluded that the tax required by section 212.05 is a tax on the privilege of engaging in business in Florida and is not a tax on the property

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[1] The parties stipulated as follows: American Business USA Corp. is a Florida corporation doing business as 1Vende.com; American Business's principal place of business and mailing address is in Wellington, Florida; all of American Business's sales were initiated online; American Business specialized in the sale of flowers, gift baskets, and other items of tangible personal property; American Business did not maintain any inventory of flowers, gift baskets, and other items of tangible personal property; American Business used local florists to fill the orders it received for flowers, gift baskets, and other items of tangible personal property; American Business charged its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered in Florida; 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.

sold. The order also noted that American Business "stipulated that it specializes in selling flowers and markets itself to the public as a company that sells flowers," rejecting the claim of American Business that, because of the manner in which it fills the orders, it is not a "florist" within the meaning of and subject to section 212.05(1)(l) or rule 12A-1.047.

American Business appealed the Department's final order to the Fourth District Court of Appeal where the company contended that the imposition of taxes on American Business for sales of flowers and other items of tangible personal property to be delivered out of state violated the due process clause of the Fourteenth Amendment and the "dormant Commerce Clause" emanating from article 1, section 8, of the United States Constitution.[2]

As to the challenge to section 212.05(1)(l) imposing a tax on florists, the Fourth District held that the imposition of taxes on sales to out-of-state customers for out-of-state flower and gift deliveries violates the dormant Commerce Clause; and that the tax is thus "unconstitutional as applied to [American Business's] sales to out-of-state customers for out-of-state delivery." *Am. Bus. USA*, 151 So. 3d at 70. In so holding, the Fourth District recognized the factors necessary to

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2 "[T]he Constitution's express grant to Congress of the power 'to regulate Commerce . . . among the several states,' Art. I, § 8, cl. 3, contains a 'further negative command, known as the dormant Commerce Clause,' . . . . This negative command prevents a State from 'jeopardizing the welfare of the Nation as a whole' by 'plac[ing] burdens on the flow of commerce across its borders that commerce wholly within those borders would not bear.'" *Am. Trucking Ass'ns, Inc. v. Mich. Pub. Serv. Comm'n*, 545 U.S. 429, 433 (2005) (citations omitted).

evaluate whether a tax complies with the 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. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008). When it comes to evaluating a tax regarding its compliance with the commerce clause, the decisions of the United States Supreme Court
>
> > have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an [1] 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.
>
> *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). This has come to be known as the *Complete Auto* test. If the state tax fails any prong of the four-part test, then the tax violates the dormant commerce clause. Thus, if the taxing state is able to show only three of the four prongs under *Complete Auto*, the tax will not be sustained under a commerce clause challenge.

Am. Bus. USA, 151 So. 3d at 71. After applying the *Complete Auto* test to the facts of the case, and

concluding the tax at issue here was an undue burden on interstate commerce, the district court stated, "Merely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute 'substantial nexus.'" *Am. Bus. USA*, 151 So. 3d at 73.

As to the Due Process Clause claim, the Fourth District, relying on the United States Supreme Court decision in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), noted that a tax on a vendor may violate the Commerce Clause but not the Due Process Clause

> because "the two, the Due Process clause and the Commerce Clause are analytically distinct." [*Quill Corp.*, 504 U.S. at 305]. "[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."

Am. Bus. USA, 151 So. 3d at 74 (quoting *Quill Corp.*, 504 U.S. at 313). In finding that due process was not violated in this case because minimum contacts were present, the Fourth District explained that "traditional notions of fair play and substantial justice were not offended because the taxpayer's company was registered in Florida and had a mailing address in Florida." *Id.* at 73. In distinguishing claims under the Commerce Clause from Due Process claims, the Fourth District noted that "the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." *Id.* at 74 (quoting *Quill Corp.*, 504 U.S. at 312).

In sum, the Fourth District concluded that American Business had minimum contacts with the State of Florida such that no due process violation occurred, but that the business activities lacked a "substantial nexus" to Florida to allow tax on sales involving out-of-state customers and out-of-state delivery of flowers, gift baskets, and tangible property that were never located in Florida. For the reasons discussed below, we disagree that the tax on American Business violates the dormant Commerce Clause.

ANALYSIS

The issue before this Court is whether section 212.05(1)(l), Florida Statutes, is unconstitutional as applied to certain activities of American Business. The constitutionality of a state statute is a pure question of law subject to de novo review. *City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002). This applies to a review of the constitutionality of a tax statute. *See Fla. Dep't of Revenue v. New Sea Escape Cruises, Ltd.*, 894 So. 2d 954, 957 (Fla. 2005) ("[T]he interpretation of . . . [a] tax statute . . . [is] subject to a de novo standard of review."). In this case, American Business brought a challenge to section 212.05(1)(l), which, because it is an as-applied challenge, involves both a determination of law and a determination of the facts to which the law will be applied. "[M]ixed questions of law and fact that ultimately determine constitutional rights should be reviewed by appellate courts using a two-step approach, deferring to the trial court on questions of historical fact but conducting a de novo review of the constitutional issue." *Davis v. State*, 142 So. 3d 867, 871 (Fla. 2014)

(quoting *Henry v. State*, 134 So. 3d 938, 946 (Fla. 2014)). However, where, as here, "the facts are not in dispute, the only issue before the court is a reconciliation of the statutory provisions on which the parties respectively rely . . . [and the] standard of review is de novo." *Boca Airport, Inc. v. Fla. Dept. of Revenue*, 56 So. 3d 140, 141-42 (Fla. 4th DCA 2011). Because the issue in this case is whether the tax statute is unconstitutional as applied to American Business, and because the operative facts are stipulated by the parties, the review by this Court remains de novo.

As in all constitutional challenges, the statute comes to this Court clothed with the presumption of correctness and all reasonable doubts about the statute's validity are to be resolved in favor of constitutionality. "While we review decisions striking state statutes de novo, we are obligated to accord legislative acts a presumption of constitutionality and to construe challenged legislation to effect a constitutional outcome whenever possible." *Crist v. Ervin*, 56 So. 3d 745, 747 (Fla. 2010) (quoting *Fla. Dep't of Revenue v. City of Gainesville*, 918 So. 2d 250, 256 (Fla. 2005) (quoting *Fla. Dep't of Revenue v. Howard*, 916 So. 2d 640, 642 (Fla. 2005))). With these standards in mind, we turn to the statute at issue.

Section 212.05, Florida Statutes (2012), provides in pertinent part that "every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, . . . " The statute further provides that "[f]or the exercise of such privilege, a tax is levied on each taxable transaction or incident." § 212.05(1), Fla. Stat. (2012) (emphasis added). Thus, the administrative law judge

and the Department are correct that the statute does not place a tax on the items sold, but on the sales transaction itself. Subsection (1)(l) then makes clear that "[f]lorists located in this state are liable for sales tax on sales to retail customers regardless of where or by whom the items are to be delivered." § 212.05 (1)(l), Fla. Stat. (2012) We turn first to the issue of whether section 212.05(1)(l) violates the dormant Commerce Clause as applied to American Business's internet sales of flowers, gift baskets, and other tangible personal property.

The Dormant Commerce Clause

The relevant inquiry into a claim of violation of the dormant Commerce Clause begins with the *Complete Auto* test. In *Complete Auto*, the United States Supreme Court addressed "'the perennial problem of the validity of a state tax for the privilege of carrying on within a state, certain activities' related to a corporation's operation of an interstate business." 430 U.S. at 274 (quoting *Colonial Pipeline Co. v. Traigle*, 421 U.S. 100, 101 (1975)). The Mississippi tax was to be levied on gross sales of any business within the state, and the law required that anyone liable for the tax is required to add it to the gross sales price and collect it at the time the sales price is collected. *Id.* at 276. The Supreme Court upheld the tax, which was imposed on a motor carrier transporting vehicles manufactured outside the state and shipped into the state by a company that did business within the state. The basis for affirmance announced in *Complete Auto* is the four-prong test that has come to be applied to determine if a taxing statute violates the dormant Commerce Clause. The Supreme Court in *Complete Auto* upheld

that tax because no claim or showing was "made that the activity is not sufficiently connected to the State to justify a tax, or that the tax is not fairly related to benefits provided the taxpayer, or that the tax discriminates against interstate commerce, or that the tax is not fairly apportioned." *Id.* at 287.

The Supreme Court in *Oklahoma Tax Commission v. Jefferson Lines, Inc.*, 514 U.S. 175 (1995), later explained that the Court has "often applied, and somewhat refined, what has come to be known as *Complete Auto*'s four-part test." *Jefferson Lines*, 514 U.S. at 183. As noted above, the Court explained the test as requiring in its first prong that "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Id.* at 184.

The second prong of the *Complete Auto* test, as interpreted in *Jefferson Lines*, looks at whether the tax is properly apportioned to ensure that each state taxes only its fair share of an interstate transaction. *Jefferson Lines*, 514 U.S. at 184. The Court explained that "[f]or over a decade now, we have assessed any threat of malapportionment by asking whether the tax is 'internally consistent' and, if so, whether it is 'externally consistent' as well." *Id.* at 185 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989)). The first component of prong two, internal consistency, "is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear." *Id.* The Supreme Court in *Jefferson Lines* concluded that the tax at issue was internally consistent because "[i]f every State were to impose a tax identical to Oklahoma's, that is,

a tax on ticket sales within the State for travel originating there, no sale would be subject to more than one State's tax." *Id.* The second component of prong two is external consistency, which looks "to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." *Id.* "[T]he threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching." *Id.*

The third prong of the *Complete Auto* test, whether the tax discriminates against interstate commerce, looks at whether the tax provides a direct commercial advantage to local business. *Jefferson Lines*, 514 U.S. at 197. As the Supreme Court in *Jefferson Lines* noted, such a discriminatory advantage was found in *American Trucking Ass'ns, Inc. v. Scheiner*, 483 U.S. 266, 285-86 (1987), where the tax imposed a cost per mile on trucks operated by an interstate motor carrier that was five times as heavy as the cost per mile borne by local trucks. *Jefferson Lines*, 514 U.S. at 197 (citing *Am. Trucking*, 483 U.S. at 269).

Finally, the fourth prong of the *Complete Auto* test looks at whether the tax is fairly related to the services provided by the State. *Id.* The Supreme Court in *Jefferson Lines* explained that "the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State." *Id.* at 199. However, "[t]he fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity."

Id. The Court further noted that "police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of the tax." 514 U.S. at 200 (citing *Goldberg*, 488 U.S. at 267). The test "asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State." *Id.* at 200.

The Department of Revenue in this case contends that only prong one of the *Complete Auto* test—substantial nexus—is at issue because prongs two through four were not contested by American Business. Even though American Business does not dispute that contention, we review whether all four prongs of the test have been met, and discuss each in turn.

(1) There Must be a "Substantial Nexus" with the State

The facts establish that American Business had more than a slight presence in Florida. Its economic activities and transactions transpired from its principal place of business in Florida, in taking internet orders for flowers, gift baskets, and other tangible personal property and arranging for those items to be located and delivered out of state. The Supreme Court in *National Bellas Hess*, *Inc. v. Department of Revenue*, 386 U.S. 753 (1967), held that the use tax in that case violated the dormant Commerce Clause because the taxing state lacked the required nexus to tax an out-of-state vendor under these circumstances. That case presented the question of taxation on an out-of-state seller whose only connection with customers in the taxing state was by common carrier or mail. Bellas

Hess owned no tangible property in the taxing state, and had no representatives or solicitors there. Orders were sent to a plant outside the taxing state. In holding taxation was improper in that case, the Supreme Court in *Bellas Hess* distinguished between sellers with retail outlets, solicitors, or property in the taxing state. *Id.* at 758. Ten years later, in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551 (1977), the Supreme Court affirmed the continuing vitality of *Bellas Hess*'s "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." *Nat'l Geographic Soc'y*, 430 U.S. at 559 (quoting *Bellas Hess*, 386 U.S. at 758). In 1992, the Supreme Court reaffirmed the *Bellas Hess* distinction, for purposes of the Commerce Clause, between businesses that have a physical presence in the state and those whose only contacts with the state are by mail or common carrier. *See Quill Corp.*, 504 U.S. at 314. American Business falls into the first category, having a business location, business property, and business activities in Florida.

This Court has applied the principle set forth in *National Geographic*, and the distinction discussed there concerning companies that only make sales in a state by mail or common carrier and have no physical presence in the state. In *Department of Revenue v. Share International, Inc.*, 676 So. 2d 1362 (Fla. 1996), we held that a "slight[] presence" of a company in Florida by way of attending a chiropractic seminar for several days each year would be an insufficient

nexus to enforce a use tax against the company that sold products by direct mail order to residents in Florida. The Court cautioned, however, that "[i]f such a company has additional connections to the taxing state, then those connections must be analyzed under the 'substantial nexus' test." *Id.* at 1363 (emphasis omitted). This Court reaffirmed the principle "that out-of-state mail order sales companies . . . which have no physical presence in the taxing state, are immune from state sales or use tax liability." *Dep't of Banking & Fin., State of Fla. v. Credicorp, Inc.*, 684 So. 2d 746, 751 (Fla. 1996) (citing *Quill Corp.*, *Nat'l Bellas Hess*, and *Share Int'l*).

Thus, the law is established that without any physical presence in Florida, the sales tax imposed on American Business in this case for its out-of-state sales to out-of-state customers would clearly be in violation of the dormant Commerce Clause. However, the record shows that American Business does have a physical presence in Florida—it is headquartered in Wellington, Florida, and has been doing business in Florida since 2001. From its Florida location, American Business accepts internet orders and arranges for delivery of out-of-state flowers and tangible personal property. Based on the facts of this case, we find that the "substantial nexus" test is met. We turn next to the second prong of the *Complete Auto* test.

(2) The Tax Must Be Fairly Apportioned

The internal consistency test, one component of prong two of the *Complete Auto* test, helps courts identify tax schemes that, in operation and application, would discriminate against interstate commerce.

The test "looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate." *Comptroller of the Treasury of Md. v. Wynne*, 135 S. Ct. 1787, 1802 (2015) (quoting *Jefferson Lines*, 514 U.S. at 185). "By hypothetically assuming that every State has the same tax structure, the internal consistency test allows courts to isolate the effect of a defendant State's tax scheme." *Id.* "[T]ax schemes that inherently discriminate against interstate commerce without regard to the tax policies of other States" are "typically unconstitutional." *Id.* "[T]ax schemes that create disparate incentives to engage in interstate commerce (and sometimes result in double taxation) only as a result of the interaction of two different but nondiscriminatory and internally consistent schemes" are not typically unconstitutional.[3] *Id.*

In the present case, if all states taxed only the entity initially receiving the order for flowers, and not the florist to whom the flower order and delivery is referred, then no florist would be taxed twice. *Jefferson Lines* also explained that a "failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax." 514 U.S. at 185. But,

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[3] However, the Supreme Court also noted, "Our cases have held that tax schemes may be invalid under the dormant Commerce Clause even absent a showing of actual double taxation." *Wynne*, 135 S. Ct. at 1802 n.5.

"[i]f every state were to impose [an identical tax] . . . no sale would be subject to more than one State's tax." *Id.* That principle applies equally to the tax at issue in this case.[4]

We are also mindful of the principle discussed in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970), that "[w]here the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive." *Id.* at 142. Thus, the Supreme Court has allowed some incidental effect on interstate commerce if the statute generally operates in an even-handed and non-discriminatory manner and the state is not attempting to take more than its

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[4] The tax, if enacted by all states in substantially the same form as Florida's, would not present a serious risk of multiple taxation. Amici cite the rare case where an out-of-state florist may travel into Florida to deliver the flower order it received in its home state and is determined under the statute to also be a florist "located in" Florida; or where a florist that has an out-of-state branch and a Florida branch, and is a registered dealer in both states, refers its out-of-state order to its Florida branch. We do not consider arguments raised by amici curiae that were not raised by the parties. *See*, *e.g.*, *Riechmann v. State*, 966 So. 2d 298, 304 n.8 (Fla. 2007). Even if we consider such argument, instances of possible multiple taxation due only to the specific business model of certain businesses, which may subject those businesses to multiple taxation in rare circumstances, do not demonstrate that the Florida tax is placing interstate commerce at the mercy of states that might impose the same tax; and these examples do not show that Florida is attempting to garner more than its fair share of taxes. Moreover, the facts upon which the as-applied challenge operates do not fall into either of the two examples of possible multiple taxation cited by the amici.

fair share of taxes. We conclude the same can be said of the tax at issue in this case.

As to the second component of prong two—external consistency—the Supreme Court explained in *Jefferson Lines* that "[e]xternal consistency . . . looks not to the logical consequences of cloning [the statute], but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State." 514 U.S. at 185.

American Business contends in this case—albeit in its argument concerning prong one of the *Complete Auto* test and not prong two—that it is being taxed on out-of-state sales that are not consummated until delivery is effected out of state, thus the Florida tax should not apply. The Department responds that it is the transaction occurring in Florida that is being taxed in Florida, and that the transaction occurs in Florida where the business facilitated every stage of the transaction from advertising for customers, accepting their orders, receiving payment, and locating and transmitting the orders to third-party florists. We agree with the Department that because the statute taxes the transaction that occurs in Florida by the business engaging in business here, and not on the items sold or the activities occurring out of state, prong two of the *Complete Auto* test is met.

(3) The Tax Must Not Discriminate Against Interstate Commerce

The Supreme Court in *Jefferson Lines* described a tax that discriminates against interstate commerce as one that provides a direct commercial advantage

to local business. 514 U.S. at 197. "States are barred from discriminating against foreign enterprises competing with local businesses . . . and from discriminating against commercial activity occurring outside the taxing State." *Id.* (internal citations omitted). Section 212.05(1)(l), Florida Statutes, contains no provision that affords preferential treatment or any commercial advantage to a Florida business over an out-of-state business. It simply requires that florists located in Florida are liable for sales taxes on sales transactions regardless of where or by whom the items are to be delivered. The statute exempts from the tax florists located in Florida that receive payments from other florists for items delivered to customers in this state. Thus, where a Florida florist receives an order and payment from another florist for delivery of flowers to customers in Florida, the Florida "delivering" florist will not pay the tax; and, if the other state has a statute similar to Florida's, the "referring" florist in that other state will be the one that is liable to remit the tax in that state if similar tax provisions apply. Similarly, where a Florida florist such as American Business sends an order for flowers or other items to an out-of-state florist to be delivered out of state, then the Florida florist is responsible for collecting and remitting the sales tax to the State of Florida.

Therefore, the statute does not discriminate against interstate commerce or provide a direct commercial advantage to local business. Finally, we examine prong four of the *Complete Auto* test.

(4) The Tax Must Be Fairly Related to the Services Provided by the State

The Department of Revenue contends that the tax in this case is fairly related to the services provided by the State because American Business, like other Florida residents or businesses, benefits from the state's resources and services. This inquiry is closely connected to the nexus prong and serves to ensure that a state's tax burden is not placed on persons who do not benefit from services provided by the State. *See Quill Corp.*, 504 U.S. at 313 ("The first and fourth prongs, which require a substantial nexus and a relationship between the tax and state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce."). As noted earlier, the Supreme Court in *Jefferson Lines* explained that "the Commerce Clause demands a fair relation between a tax and the benefits conferred upon the taxpayer by the State," but "[t]he fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity." 514 U.S. at 199. Also as we noted earlier, and as the Supreme Court explained in *Jefferson Lines*, "police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of the tax." *Id.* at 200 (citing *Goldberg*, 488 U.S. at 267). The test "asks only that the measure of the tax be reasonably related to the taxpayer's presence or activities in the State." *Id.* "[T]he constitutional power of a state to tax does not

depend upon the enjoyment of the taxpayer of any special benefit from the use of the funds raised by taxation." *Delta Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 317, 323 (Fla. 1984). The "practical operation" of the tax allows the State of Florida to exert powers relative to "opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." *Id.* (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)).

American Business is physically located in Wellington, Florida, and operates its business from that location. It benefits from the public safety agencies of the state, as well as other infrastructure and public amenities paid for by state taxes. It benefits from the orderly, civilized society that is afforded it by the State of Florida. American Business has by its presence and transactions in Florida availed itself of the opportunities and protections made possible in part by the taxes imposed on its sales transactions. Thus, there is a reasonable relationship between the company's presence and activities in the state and the tax at issue.

For all the foregoing reasons, we find that all four prongs of the *Complete Auto* test have been satisfied and section 212.05(1)(l) does not violate the dormant Commerce Clause.

Due Process Claim

American Business also claims that the tax at issue is a violation of the Due Process Clause of the United States Constitution. The district court found no violation of due process and we agree. Due process requires only that there be some minimal connection

between the State and the transaction it seeks to tax. The Supreme Court in *Quill Corp.*, citing *Bellas Hess*, essentially found that "some sort of physical presence within the State" is sufficient, and necessary, for jurisdiction under the Due Process Clause. *Quill Corp.*, 504 U.S. at 307.

In the present case, American Business has a physical presence and does business within the state. We have concluded that American Business's activities have a substantial nexus to Florida. Thus, the minimum connection required to satisfy due process is also met. No due process violation is present on the facts of this case.

CONCLUSION

Based on the foregoing analysis, we quash the decision of the Fourth District Court of Appeal in *American Business USA Corp. v. Department of Revenue* to the extent that it holds that the assessment of sales tax on sales of flowers, gift baskets, and other items of tangible personal property ordered by out-of-state customers for out-of-state delivery violates the dormant Commerce Clause of the United States Constitution.

It is so ordered.

PARIENTE, QUINCE, and PERRY, JJ., concur.

LEWIS, CANADY, and POLSTON, JJ., concur in result.

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, FOURTH DISTRICT (NOVEMBER 12, 2014)

DISTRICT COURT OF APPEAL OF FLORIDA,
FOURTH DISTRICT

AMERICAN BUSINESS USA CORP.,

Appellant,

v.

DEPARTMENT OF REVENUE,

Appellee.

No. 4D13–1472.

Before: LEVINE, GERBER and KLINGENSMITH, JJ.

LEVINE, J.

The issue presented for our review is whether the State of Florida's tax on the internet sale of flowers, which are ordered by out-of-state customers for out-of-state delivery, violates the commerce clause of the United States Constitution. We find that Florida impermissibly burdened interstate commerce when it taxed out-of-state customers for out-of-state deliveries of out-of-state tangible goods. Because the flowers sold by the Florida-registered internet business were never stored in or brought into Florida, the imposition of taxes did not meet the "substantial nexus" test and thus violated the dormant commerce clause. As such,

we reverse the order of the Florida Department of Revenue imposing a tax assessment on the sale of flowers to out-of-state customers for out-of-state delivery. As to the part of the order regarding the imposition of a tax assessment on the sales of prepaid calling arrangements, we affirm.

The Florida Department of Revenue ("the department") issued a proposed assessment on American Business USA Corp. ("the taxpayer') for taxes and interest on the taxpayer's sales transactions between April 1, 2008, and March 31, 2011. The taxpayer filed a timely protest and a final hearing was set in front of a Division of Administrative Hearings judge.

For the final hearing, the parties stipulated to the following facts: The taxpayer is a Florida corporation doing business as "1Vende.com," in Wellington, Florida. All of the company's sales were initiated online. The taxpayer specialized in the sale of flowers, gift baskets, and other items of tangible personal property, as well as "prepaid calling arrangements." The taxpayer "did not maintain any inventory of flowers, gift baskets and other items of tangible personal property."

The taxpayer would use "local florists to fill the orders it received for flowers, gift baskets and other items of tangible personal property." The taxpayer "charged its customers sales tax on sales of flowers, gift baskets and other items of tangible personal property delivered in Florida." However, the taxpayer "did not charge its customers sales tax on sales of flowers, gift baskets and other items on tangible personal property delivered outside of Florida." Finally, the taxpayer "did not charge its customers sales tax on the prepaid calling arrangements it sold."

The co-owners of the taxpayer, a husband and wife, both testified at the hearing. The department offered no witnesses but offered several exhibits into evidence. The department filed a proposed order which stated that the taxpayer was responsible for the sales tax when the business "receives an order pursuant to which [it] gives telegraphic instructions to a second florist located outside Florida for delivery of flowers to a point outside Florida," under Florida Administrative Code Rule 12A–1.047(2)(b). The department conceded that the business sold primarily to customers in Latin American markets. The department tax auditor noted that "[t]he taxpayer's customers are throughout the world primarily to [sic] Spanish speaking countries."

The administrative law judge issued its recommended order to uphold the department's proposed assessment and made the following findings of fact. There were two principal aspects of the taxpayer's business: (1) the sale of flowers, gift baskets, and tangible personal property, and (2) the sale of prepaid calling arrangements. All of the taxpayer's sales were initiated online. The taxpayer sold to customers throughout Latin America, Spain, and the United States, including Florida. The taxpayer charged its customers sales tax on the sale of flowers, gift baskets, and other items of tangible personal property when the items were delivered within Florida. The taxpayer did not charge its customers sales tax on the sales of flowers, gift baskets, and other items of tangible personal property delivered outside of Florida. Finally, the taxpayer did not charge sales tax on any of the prepaid calling arrangements it sold.

The administrative law judge upheld the department's assessment, finding that "[t]he taxpayer's 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)." The administrative law judge recommended to validate the department's proposed assessment. The department accepted the recommendation by entering a final order. An appeal of this final order ensues.

"Whether a lower tribunal had subject matter jurisdiction is a question of law which we review de novo." *Dep't of Revenue ex rel. Smith v. Selles*, 47 So.3d 916, 918 (Fla. 1st DCA 2010). "Lack of subject matter jurisdiction may be raised for the first time on appeal." *Id.* (citation omitted). Further, "judicial interpretation of statutes and determinations concerning the constitutionality of statutes are pure questions of law subject to the de novo standard of review." *Abram v. Dep't of Health, Bd. of Med.*, 13 So.3d 85, 88 (Fla. 4th DCA 2009) (citation omitted). Since this case involves an administrative agency, issues of the constitutionality of the tax statute may be raised for the first time on appeal. *See S. Alliance for Clean Energy v. Graham*, 113 So.3d 742, 748 (Fla.2013).

In upholding the assessment of the sales tax, the department relied on section 212.05(1)(l), Florida Statutes (2012), and Florida Administrative Code Rule 12A–1.047(1). Section 212.05(1)(l) states:

> 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.

Rule 12A–1.047(1), the administrative regulation that implements the florist tax, states that "[f]lorists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable."

The taxpayer contests the imposition of taxes on out-of-state sales of flowers, gift baskets, and other tangible personal property. The taxpayer claims that the imposition of taxes violates the due process clause of the Fourteenth Amendment and the dormant commerce clause emanating from Article 1, Section 8 of the United States Constitution. For the same reasons, the taxpayer also contests the imposition of taxes on the prepaid calling arrangements and disputes the department's determination that the taxpayer's books and records were inadequate and that the taxpayer did not retain statutorily mandated records of transactions.

We affirm that part of the department's order that assessed taxes for the calling arrangements, and we determine that the failure to maintain adequate records was sufficient grounds to affirm. We also find that the imposition of taxes did not violate the due process clause of the Fourteenth Amendment. We do find, however, that the imposition of taxes on out-of-state customers for out-of-state flower deliveries violates the dormant commerce clause, and we reverse that part of the tax assessment which emanates from the sale and delivery of flowers entirely outside Florida. We further find that the tax is unconstitutional as applied to the taxpayer's sales to out-of-state customers for out-of-state delivery.

At the beginning of the Republic, the Framers were acutely concerned with impermissibly burdening the commerce between the states. Hamilton famously wrote in Federalist No. 22 that

> [t]he interfering and unneighborly regulations of some States, contrary to the true spirit of the Union, have, in different instances, given just cause of umbrage and complaint to others, and it is to be feared that examples of this nature, if not restrained by a national control, would be multiplied and extended till they became not less serious sources of animosity and discord than injurious impediments to the intercourse between the different parts of the Confederacy.

The Federalist No. 22, at 140 (Alexander Hamilton) (Clinton Rossiter ed., 1999). Prior to the adoption of the Constitution, "[u]nder the Articles of Confederation, state taxes and duties hindered and suppressed interstate commerce; the Framers intended the Commerce Clause as a cure for these structural ills." *Quill Corp. v. N. Dakota*, 504 U.S. 298, 312 (1992).

Hamilton, in referring to the Articles of Confederation, was highlighting one of the glaring weaknesses of the governing structure during the times before the passage of the Constitution. Hamilton warned about interstate barriers on interstate commerce:

> Though the genius of the people of this country might never permit this description to be strictly applicable to us, yet we may reasonably expect from the gradual conflicts of State regulations that the citizens of each

> would at length come to be considered and treated by the others in no better light than that of foreigners and aliens.

The Federalist No. 22, at 140–41.

Madison, writing in a letter in 1829, stated that the commerce clause "grew out of the abuse of the power by the importing States in taxing the non-importing, and was intended as a negative and preventive provision against injustice among the states themselves, rather than as a power to be used for the positive purposes of the General Government, in which alone, however, the remedial power could be lodged." Letter from James Madison to Joseph C. Cabell, (Feb. 13, 1829).

To be sure, Article 1, Section 8, Clause 3 of the United States Constitution "says nothing about the protection of interstate commerce in the absence of any action by Congress. Nevertheless, as Justice Johnson suggested in his concurring opinion in *Gibbons v. Ogden*, 9 Wheat. 1, 231–232, 239, 6 L.Ed. 23 (1824), the Commerce Clause is more than an affirmative grant of power; it has a negative sweep as well." *Quill*, 504 U.S. at 309. Thus, the dormant commerce clause has come to be understood as prohibiting "certain state actions that interfere with interstate commerce." *Id.*

"The Commerce Clause and the Due Process Clause impose distinct but parallel limitations on a State's power to tax out-of-state activities." *Mead Westvaco Corp. ex rel Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 24 (2008). When it comes to evaluating a tax regarding its compliance with the commerce clause, the decisions of the United States Supreme Court

> have considered not the formal language of the tax statute but rather its practical effect, and have sustained a tax against Commerce Clause challenge when the tax is applied to an [1] 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.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 279 (1977). This has come to be known as the *Complete Auto* test. If the state tax fails any prong of the four-part test, then the tax violates the dormant commerce clause. Thus, if the taxing state is able to show only three of the four prongs under Complete Auto, the tax will not be sustained under a commerce clause challenge.

Among the taxes levied by states are the sales tax and the use tax. Sales tax is "any tax which includes within its scope all business sales of tangible personal property at either the retailing, wholesaling, or manufacturing stage, with the exceptions noted in the taxing law." Jerome R. Hellerstein & Walter Hellerstein, State Taxation ¶ 12.01 (3d ed. 2014) (citation omitted). "Compensating use taxes are functionally equivalent to sales taxes. They are typically levied upon the use, storage, or other consumption in the state of tangible personal property that has not been subjected to a sales tax." *Id.* at ¶ 16.01[2]. "Because the use tax complements the sales tax, it generally applies only to the use of goods and, in some states, to services that have not already been subjected to sales tax. Consequently, the use tax applies

principally to goods and services purchased outside the state." *Id.* (footnotes omitted).

Thus, "[g]enerally, the power of a state to collect sales taxes is limited to transactions occurring within that state, and states cannot collect a sales tax on purchases made outside the state, such as those made through mail orders." Geoffrey E. Weyl, Quibbling with Quill: Are States Powerless in Enforcing Sales and Use Tax-Related Obligations on Out-of-State Retailers?, 117 *Penn St. L.Rev.* 253, 257 (2012). The genesis of this prohibition can be traced in large measure to the commerce clause which

> 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. In *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775, 65 S.Ct. 1515, 1523, 89 L.Ed.1915 (1945), the Court struck down on Commerce Clause grounds a state law where the "practical effect of such regulation is to control [conduct] beyond the boundaries of the state.

Edgar v. MITE Corp., 457 U.S. 624, 642–43 (1982) (plurality opinion). *See also Am. Oil Co. v. Neill*, 380 U.S. 451, 455 (1965) ("When passing on the constitutionality of a state taxing scheme it is firmly established that this Court concerns itself with the practical operation of the tax, that is, substance rather than form.").

In *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753, 754 (1967), the Supreme Court considered the constitutionality of a use tax imposed

on customers within the taxing state, where the only contact between the company and the in-state customers was "via the United States mail or common carrier." The Supreme Court found the use tax was in violation of the dormant commerce clause. It determined that the taxing state lacked the required "substantial nexus" to tax an out-of-state vendor, whose only contact to the taxing state was by U.S. mail or common carrier. The Supreme Court in *Bellas Hess*, decades before the advent of the internet, postulated that "it is difficult to conceive of commercial transactions more exclusively interstate in character than the mail order transactions here involved." *Id.* at 759. Because *Bellas Hess* failed the first prong of the Complete Auto four-part test, the tax could not be sustained. The Supreme Court concluded that if the taxing state in *Bellas Hess* "can impose such burdens, so can every other State, and so, indeed, can every municipality, every school district, and every other political subdivision throughout the Nation with power to impose sales and use taxes." *Id.*

Like in *Bellas Hess*, the sales tax in the present case fails the first prong of the Complete Auto test. The instant case involves an in-state internet vendor selling to out-of-state customers for delivery of flowers out-of-state. The vendor's only connection to the taxing state is that it is registered as a corporation in Florida. The only interaction the out-of-state customer has with the taxing state is by shopping for flowers on a website operated by a company incorporated in Florida. The taxpayer does not maintain any inventory of flowers, gift baskets, or items of tangible personal property within Florida. These goods were not grown in, stored in, or delivered from Florida, and do not have any type of connection to Florida.

As we determine "by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes," we conclude that the taxes imposed here are an undue burden on interstate commerce, as there is not a "substantial nexus" between the activity of the taxpayer and the taxing state. *Quill*, 504 U.S. at 315. *Cf. Oklahoma Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995) (finding Oklahoma's tax on a bus ticket for travel from Oklahoma to another state satisfied the first prong of the Complete Auto because "Oklahoma is where the ticket is purchased, and the service originates there. These facts are enough for concluding that '[t]here is "nexus" aplenty here.'"). Merely registering in a state does not give the taxing state the right to assess sales taxes on transactions without any other facts to constitute "substantial nexus." Further, the Court in *Bellas Hess* characterized mail order transactions as "exclusively interstate in character." 386 U.S. at 759. It follows then that the internet transactions at issue here are even more "exclusively interstate in character."

The department argues that other states have taxing schemes similar to this one. Of course, the many taxes, in their many variations, is one of the concerns previously expressed by the Supreme Court. "The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle [the taxpayer's] interstate business in a virtual welter of complicated obligations to local jurisdictions." *Id.* At 759–60 (footnotes omitted). We recognize, within our constitutional framework of federalism, that "Congress has the ultimate power to resolve" and "evaluate the burdens that use taxes impose on interstate commerce, [and] remains free to

disagree with" the conclusions of the judiciary. *Quill*, 504 U.S. at 318.

Unlike the sale of flowers ordered by out-of-state customers with delivery at an out-of-state location, the prepaid calling arrangements have the required "substantial nexus" to the taxing state. *See Complete Auto*, 430 U.S. at 279. Taxes on prepaid calling arrangements are governed by section 212.05(1)(e), Florida Statutes (2012). In contrast with tangible personal property, prepaid calling arrangements are sold and delivered by the taxpayer through the internet. Delivery is effectuated by the taxpayer sending an authorization code directly to the customer via the internet. This makes the sale of prepaid calling arrangements unlike the sale of tangible personal property, such as flowers and gift baskets.

We also find that the imposition of taxes did not violate the due process clause of the Fourteenth Amendment. The standard for due process analysis under the Fourteenth Amendment, as adopted by the United States Supreme Court, is the same standard as announced in *International Shoe*, *i.e.*, whether maintenance of the suit would offend "traditional notions of fair play and substantial justice." *Quill*, 504 U.S. at 307 (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). In this case, traditional notions of fair play and substantial justice were not offended because the taxpayer's company was registered in Florida and had a mailing address in Florida.

Thus, in *Quill*, the Supreme Court found that imposing tax on a vendor may violate the commerce clause but, at the same time, not violate the due process clause, where the vendor solicits business by catalogs and delivers merchandise within the taxing

state by mail and common carrier. *Id.* at 305. That is because "the two, the Due Process clause and the Commerce Clause are analytically distinct." *Id.* "[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." *Id.* at 313.

The Supreme Court in *Quill* further explained:

> Due process centrally concerns the fundamental fairness of governmental activity. We have, therefore, often identified "notice" or "fair warning" as the analytic touchstone of due process nexus analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy.

Id. at 312. The Supreme Court concluded that the "continuous and widespread solicitation of business" within the taxing state was enough to pass muster under a due process analysis. *Id.* at 308. At the same time, the Court found that the taxing state failed to demonstrate a "substantial nexus and a relationship between the tax and state-provided services" in order to "limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce." *Id.* at 313.

In summary, we find that assessment of sales taxes on the sale of flowers, gift baskets, and tangible personal property outside Florida, ordered by out-of-state customers for out-of-state delivery, violates the

commerce clause of the United States Constitution. As such, we reverse and remand for further proceedings consistent with this opinion. We affirm the other aspects of the assessment as it relates to prepaid calling arrangements.

Affirmed in part, reversed in part, and remanded.

LEVINE, J.

GERBER and KLINGENSMITH, JJ., concur.

FINAL ORDER OF THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA (MARCH 29, 2013)

STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

AMERICAN BUSINESS USA CORP.,

Petitioner,

v.

DEPARTMENT OF REVENUE,

Respondent.

DOAH Case Number: 12-2527
Audit Number: 200105422

Before: Marshall STRANBURG,
Interim Executive Director

This cause came before the State of Florida, Department of Revenue (the Department) for the purpose of issuing a Final Order. The Administrative Law Judge ("ALJ") assigned by the Division of Administrative Hearings ("DOAH") heard this cause and submitted a Recommended Order ("Order") to the Department. A copy of the Order, issued on February 27, 2013 by Judge Claude B. Arrington, is attached to this order and incorporated by reference as if fully set forth herein as Exhibit 1.

The deadline for exceptions to the Order to be filed with the Department was March 14, 2013. Although the Order clearly directs that exceptions should be filed with the agency that will issue the final order, the Petitioner filed a "Notice of Filing Exceptions to Recommended Order and Motion for Re-Hearing" as well as a "Request for Extension/Motion for Leave to Amend Exceptions to Recommended Order" with the DOAH on March 15, 2013. These pleadings were not received by the Department until March 19, 2013. As the DOAH no longer had jurisdiction upon the issuance Order, the Motion for Re-Hearing is moot. Petitioner's exceptions were received by the Department four (4) days beyond the deadline, in violation of Rule 28-106.217, Florida Administrative Code. No amended exceptions were filed with the Department, and no response to exceptions was filed. Although not timely filed with the Department, Petitioner's exceptions have been addressed herein. A copy of Petitioner's exceptions is attached to this order as Exhibit 2. The Department has jurisdiction in this cause.

RULINGS ON EXCEPTIONS

On March 15, 2013, Petitioner filed its exceptions to the Order with the DOAH. Pursuant to subsection 120.57(1)(k), Florida Statutes, a Final Order issued as a result of a Recommended Order:

> [S]hall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and spe-

cific citations to the record. (Emphasis added)

This statutory pleading requirement provides a three-prong threshold for exceptions to a recommended order that must be explicitly ruled upon in a Final Order. While each of Petitioner's exceptions sufficiently identifies the specific paragraphs to which exception is being taken, none include a specific citation to the record, and most do not include any legal basis for the exception. Thus, Petitioner's exceptions are denied pursuant to subsection 120.57(1)(k), Florida Statutes.

FINDINGS OF FACT

The Department adopts and incorporates in this Final Order the Findings of Fact set forth in the Recommended Order as if fully set forth herein.

CONCLUSIONS OF LAW

The Department adopts and incorporates in this Final Order the Conclusions of Law set forth in the Recommended Order as if fully set forth herein.

Accordingly, it is ORDERED that the assessment of sales and use tax against Petitioner is hereby upheld, with statutory interest thereon continuing to accrue until the amount due is paid in full.

NOTICE OF RIGHT TO JUDICIAL REVIEW

Any party to this Order has the right to seek judicial review of the Order pursuant to Section 120.68, Florida Statutes, by filing a Notice of Appeal pursuant to Rule 9.110 Florida Rules of Appellate Procedure, with the Agency Clerk of the Department of Revenue in the Office of the General Counsel, P.O. Box 6668,

Tallahassee, Florida 32314-6668 [FAX (850) 488-7112], AND by filing a copy of the Notice of Appeal accompanied by the applicable filing fees with the appropriate District Court of Appeal. The Notice of Appeal must be filed within 30 days from the date this Order is filed with the Clerk of the Department.

DONE AND ENTERED in Tallahassee, Leon County, Florida this 29th day of March, 2013.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

/s/ Marshall Stranburg
Interim Executive Director

RECOMMENDED ORDER OF THE DIVISION OF ADMINISTRATIVE HEARINGS OF THE STATE OF FLORIDA (FEBRUARY 27, 2013)

STATE OF FLORIDA DIVISION OF ADMINISTRATIVE HEARINGS

AMERICAN BUSINESS USA CORP.,

Petitioner,

v.

DEPARTMENT OF REVENUE,

Respondent.

Case No. 12-2527

Before: Claude B. ARRINGTON, Administrative Law Judge

Pursuant to notice, a formal hearing was held in this case on January 10, 2013, in Miami, Florida, before Administrative Law Judge Claude B. Arrington of the Division of Administrative Hearings (DOAH).

STATEMENT OF THE ISSUE

Whether the Department of Revenue's (Department) assessment of tax and interest against American Business USA Corp. (Taxpayer) is valid and correct.

PRELIMINARY STATEMENT

Following an audit, the Department assessed against the Taxpayer additional sales and use taxes in the sum of $137,225.27, plus interest. No penalty is being sought. The Taxpayer denied liability and requested a formal administrative hearing to challenge the assessment. The matter was referred to DOAH, and this proceeding followed.

Prior to the formal hearing, the parties filed a Joint Pre-Hearing Stipulation that contained factual stipulations that are incorporated in the Findings of Fact section of this Recommended Order.

The Taxpayer asserts that it is not liable for the assessed sales taxes because it is not a "florist" within the meaning of Florida Administrative Code Rule 12A-1.047. The Taxpayer also asserts that it relied on advice and instruction from the Department when it failed to collect sales tax on prepaid calling arrangements, and should not be subject to any taxes or penalties as a result of its reasonable reliance.

At the formal hearing, Mauricio Gomez and Blanca Nino, the owners of the Taxpayer, testified on behalf of the Taxpayer. The Taxpayer offered no exhibits. The Department presented no witnesses, but offered 16 exhibits, each of which was admitted into evidence.

No transcript has been filed. Each party timely filed a Proposed Recommended Order, which has been duly considered by the undersigned in the preparation of this Recommended Order.

Unless otherwise noted, all statutory references are to Florida Statutes (2012). There has been no

change to the statutes cited in this Recommended Order at any time relevant to this proceeding.

FINDINGS OF FACT

1. The Department is the agency responsible for administering the revenue laws of the state of Florida, including the imposition and collection of the state's sales and use taxes pursuant to chapter 212, Florida Statutes.

2. The Taxpayer is an active for-profit corporation with its principal address and mailing address at 12805 Newton Place, Wellington, Florida 33414-6226.

3. The Taxpayer is a "dealer" as that term is defined by section 212.06(2). The Taxpayer has a federal employer identification number and a certificate of registration number.[1]

4. The Taxpayer began doing business in Florida in January 2001, but did not register with the Department as a sales tax dealer until February 19, 2004. The Taxpayer does business as "1Vende.com."

5. The Department audited the Taxpayer for sales and use tax compliance. The audit period was April 1, 2008, through March 31, 2011.

Facts Related to the Audit Period

6. Mr. Gomez and Ms. Nino, who are husband and wife, each hold 50 percent of the shares in the Taxpayer.

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[1] Those numbers were set forth in paragraph 4 of the Joint Pre-Hearing Stipulation.

7. There were two principal aspects of the Taxpayer's business during the audit period. First, the Taxpayer specialized in the sale of flowers, gift baskets, and other items of tangible personal property. Second, the Taxpayer specialized in the sale of "prepaid calling arrangements," within the meaning of section 212.05(1)(l).

8. All of the Taxpayer's sales were initiated online.

9. The Taxpayer sold to customers throughout Latin America, in Spain, and in the United States (including Florida).

10. All payments to the Taxpayer were made by credit card or wire transfer.

11. The Taxpayer generated electronic invoices for all its sales.

12. The Taxpayer marketed itself to the public on its website as a company that sells flowers.

13. The Taxpayer did not maintain any inventory of flowers, gift baskets, or other items of tangible personal property.

14. 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. The Taxpayer did not use telegraph. The Taxpayer used a local florist to fill the order it had received for flowers, gift baskets, and other items of tangible personal property.

15. The Taxpayer charged its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered in Florida.

16. 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.

17. The Taxpayer did not charge sales tax on the delivery fee it charged its customers on orders of flowers, gift baskets, and other items of tangible personal property.

18. The Taxpayer primarily sold prepaid calling arrangements in $2.00, $5.00, $10.00, and $20.00 increments.

19. When customers purchased prepaid calling arrangements, the Taxpayer sent them an authorization number by email.

20. The Taxpayer did not charge its customers sales tax on the prepaid calling arrangements it sold.

The Audit

21. The Taxpayer filed its federal tax returns on an accrual basis with the fiscal year ending December 31.

22. The taxpayer's accountant recorded sales on the federal tax returns (form IRS 1120) based on the deposits recorded on the bank statements.

23. Mr. Gomez prepared the Florida sales and use tax returns (form DR-15) for the Taxpayer and calculated the tax due by multiplying its taxable sales by the applicable tax rate.

24. On May 9, 2011, the Department mailed the Taxpayer a Notice of Intent to Audit Books and Records, form DR-840, for audit 200105422.

25. The Department requested Mr. Gomez provide for audit the Taxpayer's chart of accounts, general ledgers, cash receipt journals, sales journals, resale certificates, general journals, federal tax returns, state sales tax returns, shipping documents, and bank statements.

26. Along with the DR-840, the Department mailed the Taxpayer a Pre-audit Questionnaire and Request for Information and Electronic Audit Survey.

27. On May 23, 2011, the Taxpayer returned to the Department the completed Pre-audit Questionnaire and Request for Information and Electronic Audit Survey.

28. On June 15, 2011, the Department's auditor and Mr. Gomez had a pre-audit interview, in which they discussed auditing techniques and records available for audit.

29. Mr. Gomez provided for audit a download of the Taxpayer's electronic records, including its sales database, bank statements, and federal tax returns.

30. The Taxpayer did not keep for audit books and records that would allow the Department to reconcile the sales in the electronic database to the deposits on the bank statement.

31. The Department determined that the Taxpayer's books and records were inadequate for audit and relied upon the "best information then available" of the Taxpayers' sales tax liability, in accordance with

section 212.12(5)(b). The Taxpayer did not maintain sales invoices, sales journals, or general ledgers.

32. On August 8, 2011, the Department's auditor met with Mr. Gomez and discussed the audit findings regarding sales.

33. On August 18, 2011, the Department's auditor met with Mr. Gomez and discussed the taxability of the prepaid calling arrangements.

34. On October 31, 2011, the Department mailed the Taxpayer a Notice of Intent to Make Audit Changes, form DR-1215, for audit number 200105422.

35. Prior to issuing the DR-1215, the Department compromised in full the assessed penalty.

36. On February 16, 2012, the Department mailed the Taxpayer a Notice of Proposed Assessment for audit number 200105422. The Department assessed the Taxpayer $102,508.28 in sales tax and interest through February 16, 2012, in the amount of $18,097.52. Interest accrues at $19.62 per day until the tax is paid in full.[2]

Estoppel

37. In its Amended Petition, the Taxpayer asserts that it "relied on advice and instruction from [the Department] when it failed to collect Telecommunication tax and should not be subject to any taxes or penalties as a result of their [sic] reasonable reliance."

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2 The Taxpayer asserts that it is not liable for sales taxes on the grounds discussed in this Recommended Order. The Taxpayer has not attacked the auditor's calculations of the sales taxes and interest due.

38. Mr. Gomez and Ms. Nino made three visits to the Department's service centers, but only one of those three visits pre-dated the audit period. The other two visits were after the audit period.

39. In February 2001 they visited the service center in Miami, Florida, where they talked to someone named "Maria" about the taxability of their new business.

40. Both Mr. Gomez and Ms. Nino testified that as a result of the first visit with "Maria" in 2001, the Taxpayer only charged customers sales tax on the sales of flowers, gift baskets, and other items of tangible personal property delivered in Florida. The owners testified that they relied on advice given to them by "Maria."

41. "Maria" did not testify at the formal hearing. There was no written confirmation of the advice given by "Maria."

42. After the audit period while the audit was ongoing (between August 8 and August 18, 2011) they visited the service center in Coral Springs, Florida, where they spoke to someone named "Paula" about the ongoing audit.

43. The third and final visit was on August 18, 2011, when they met with Everald Thomas at the service center in West Palm Beach. Mr. Thomas was the Department's auditor in this case. The owners talked to him about the taxability of the prepaid calling arrangements.

44. The Taxpayer timely filed its Amended Petition for Administrative Hearing. The Taxpayer continues to dispute the assessment.

CONCLUSIONS OF LAW

45. DOAH has jurisdiction over the subject matter of and the parties to this proceeding pursuant to sections 120.569, 120.57(1), and 212.18, Florida Statutes.

46. Section 212.06(2) defines the term "dealer." There is no dispute that the Taxpayer is a dealer within the meaning of that definition.

47. The Department is authorized to prescribe the books and records to be kept by all dealers that are subject to sales and use tax. § 212.12(6)(a), Fla. Stat. The Department is authorized to audit or inspect the books and records of dealers and, if a deficiency exists, to make an assessment and collect it. § 212.12(5)(a), Fla. Stat.

48. Pursuant to section 212.12(5)(b), if a dealer fails or refuses to make its records available for inspection so that no audit or examination has been made of the books and records, the Department has the affirmative duty to make an assessment of taxes due from an estimate based on the best information then available to it for the audit period, together with interest, plus penalty. The Department must collect such tax, interest, and penalty on the basis of such assessment, which shall be considered prima facie correct, and the burden to show the contrary rests upon the dealer.

49. The Department bears the initial burden to demonstrate that the assessment has been made against the Taxpayer, and the factual and legal grounds upon which the Department made the assessment. The Department met that burden in this proceeding. The burden shifted to the Taxpayer to demonstrate by a

preponderance of the evidence that the assessment is incorrect. *See IPC Sports, Inc. v. Dept of Revenue*, 829 So. 2d 330, 332 (Fla. 3d DCA 2002). The Taxpayer did not meet that burden.

50. Section 120.80(14)(b)2. pertains to taxpayer challenges to assessments made by the Department, and provides as follows:

> 2. In any such administrative proceeding, the applicable department's burden of proof, except as otherwise specifically provided by general law, shall be limited to a showing that an assessment has been made against the taxpayer and the factual and legal grounds upon which the applicable department made the assessment.

51. The Florida sales tax is an excise tax on the privilege of engaging in business in the state. The sales tax is not a tax on the property sold. §§ 212.05 and 212.06, Fla. Stat.

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. § 212.05, Fla. Stat. Florida Administrative Code Rule 12A-1.038(1).is clear that each sale is taxable unless such sale is specifically exempt.

53. A tax, at the rate of six percent of the sales price of each item of tangible personal property is levied on each taxable transaction when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state. § 212.05(1)(a) 1.a., Fla. Stat.

54. Section 212.02 provides the following definitions:

> (15) "Sale" means and includes:
>
> (a) Any transfer of title or possession, or both, exchange, barter, license, lease, or rental, conditional or otherwise, in any manner or by any means whatsoever, of tangible personal property for a consideration . . . .
>
> (16) "Sales price" means the total amount paid for tangible personal property, including any services that are a part of the sale, valued in money, whether paid in money or otherwise, and includes any amount for which credit is given to the purchaser by the seller, without any deduction therefrom on account of the cost of the property sold, the cost of materials used, labor or service cost, interest charged, losses, or any other expense whatsoever.
>
> [. . .]
>
> (19) "Tangible personal property" means and includes personal property which may be seen, weighed, measured, or touched or is in any manner perceptible to the senses . . . .

55. Section 212.05(1)(l) pertains to florists in Florida and provides as follows:

> (1) 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 pay-

ments received from other florists for items delivered to customers in this state.

56. Florida Administrative Code Rule 12A-1.047(1) and (2) pertain to florists in Florida and provide, in relevant part, as follows:

(1) Florists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable.

(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:

(a) On all orders taken by a Florida florist and telegraphed to a second florist in Florida for delivery in the state, the sending florist is held liable for the tax.

(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.

(c) In cases where telegraphic instructions located either within or for delivery of flowers, florist will not be held liable for tax with respect to any receipts which

> he may realize from the transaction. In this instance, if the order originated in Florida, the tax will be due from and payable by the Florida florist who first received the order and gave telegraphic instructions to the second florist.

57. The Taxpayer asserts that it is not a florist within the meaning of section 212.05(1)(l) or rule 12A-1.047 because of the manner in which it fills the orders it receives. That assertion is rejected. The Taxpayer stipulated that it specializes in selling flowers and markets itself to the public as a company that sells flowers.

58. The Department construes the Taxpayer's activity to be that of a florist. Since the collection of sales and use tax from florists is based on statutes for whose administration the Department is responsible, the Department's interpretation of the statute and validly adopted rules related to the statute will not be disturbed unless the interpretation is clearly erroneous. *See State Contracting and Eng'g Corp. v. Dep't of Transp.*, 709 So. 2d 607, 610 (Fla. 1st DCA 1988). From the general principle of deference follows the more specific principle that an agency's interpretation need not be the sole interpretation or even the most desirable one; it need only be within the range of permissible interpretations. *See State Bd. of Optometry v. Fla. Soc. of Ophthalmology*, 538 So. 2d 878, 885 (Fla. 1st DCA 1988) and *Suddath Van Lines, Inc. v. Dep't of Envtl.Prot.*, 668 So. 2d 209, 212 (Fla. 1st DCA 1996).

59. The Taxpayer's 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).

60. The undersigned rejects the Taxpayer's argument that rule 12A-1.047 does not apply to it because the Taxpayer does not communicate using the telegraph. It is apparent that the rule is illustrative, and was meant to apply to florists who communicate via telephone and Internet.

This conclusion is even more compelling in light of the very clear language of section 212.05(1)(l).

61. Florida also imposes sales tax at the rate of six percent on charges for prepaid calling arrangements pursuant to section 212.05(1)(e)1., which requires that the tax on charges for prepaid calling arrangements be collected at the time of the sale and remitted to the Department by the selling dealer. The term "prepaid calling arrangements" is defined by section 212.05(1)(e)1.a.(I) as follows:

> (I) "Prepaid calling arrangement" means the separately stated retail sale by advance payment of communications services that consist exclusively of telephone calls originated by using an access number, authorization code, or other moans that may be manually, electronically, or otherwise entered and that are sold in predetermined units or dollars whose number declines with use in a known amount.

62. The taxpayer stipulated that it specialized in the sale of prepaid calling arrangements within the meaning of the statutory definition and that it did not collect or remit sales taxes on those sales.

63. Section 212.054 authorizes Florida counties to impose a discretionary surtax on sales. In addition to the sales tax at the rate of six percent, the Taxpayer was also required to collect and remit any applicable surtax, and it was appropriate for the auditor to factor in surtaxes in calculating the assessment.

64. The undersigned rejects the Taxpayer's contention that the doctrine of equitable estoppels prevents the Department from making the subject assessment. The court in *Dep't of Revenue v. Anderson*, 403 So. 2d 397, 400 (Fla. 1981), made the following observations as to the doctrine of equitable estoppels.

> As a general rule, equitable estoppel will be applied against the state only in rare instances and under exceptional circumstances . . . . Another general rule is that the state cannot be estopped through mistaken statements of the law . . . . In order to demonstrate estoppel, the following elements must be shown: 1) a representation as to a material fact that is contrary to a later-asserted position; 2) reliance on that representation; and 3) a change in position detrimental to the party claiming estoppel, caused by the representation and reliance thereon . . . .
>
> [Citations omitted.]

65. The elements necessary to constitute equitable estoppel have not been established in this proceeding.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a final order that validates the assessment against American Business USA Corp.

DONE AND ENTERED this 27th day of February, 2013, in Tallahassee, Leon County, Florida.

/s/ Claude B. Arrington
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the Division of Administrative Hearings this 27th day of February, 2013.

RELEVANT STATUTORY PROVISIONS

West's F.S.A. § 212.05
Effective July 6, 2011 to June 30, 2013

- **212.05. Sales, storage, use tax**

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

[. . .]

(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.

[. . .]

(2) The tax shall be collected by the dealer, as defined herein, and remitted by the dealer to the

state at the time and in the manner as hereinafter provided.

West's F.S.A. § 212.07
Effective July 1, 2014

- **212.07. Sales, Storage, Use Tax; Tax Added to Purchase Price; Dealer Not to Absorb; Liability of Purchasers Who Cannot Prove Payment of the Tax; Penalties; General Exemptions**

(1)

(a) The privilege tax herein levied measured by retail sales shall be collected by the dealers from the purchaser or consumer.

(b) A resale must be in strict compliance with s. 212.18 and the rules and regulations adopted thereunder. A dealer who makes a sale for resale that is not in strict compliance with s. 212.18 and the rules and regulations adopted thereunder is liable for and must pay the tax. A dealer who makes a sale for resale shall document the exempt nature of the transaction, as established by rules adopted by the department, by retaining a copy of the purchaser's resale certificate. In lieu of maintaining a copy of the certificate, a dealer may document, before the time of sale, an authorization number provided telephonically or electronically by the department, or by such other means established by rule of the department. The dealer may rely on a resale certificate issued pursuant to s. 212.18(3)(d), valid at the time of receipt from the purchaser, without seeking annual

verification of the resale certificate if the dealer makes recurring sales to a purchaser in the normal course of business on a continual basis. For purposes of this paragraph, "recurring sales to a purchaser in the normal course of business" refers to a sale in which the dealer extends credit to the purchaser and records the debt as an account receivable, or in which the dealer sells to a purchaser who has an established cash or C.O.D. account, similar to an open credit account. For purposes of this paragraph, purchases are made from a selling dealer on a continual basis if the selling dealer makes, in the normal course of business, sales to the purchaser at least once in every 12-month period. A dealer may, through the informal protest provided for in s. 213.21 and the rules of the department, provide the department with evidence of the exempt status of a sale. Consumer certificates of exemption executed by those exempt entities that were registered with the department at the time of sale, resale certificates provided by purchasers who were active dealers at the time of sale, and verification by the department of a purchaser's active dealer status at the time of sale in lieu of a resale certificate shall be accepted by the department when submitted during the protest period, but may not be accepted in any proceeding under chapter 120 or any circuit court action instituted under chapter 72.

(c) Unless the purchaser of tangible personal property that is incorporated into tangible personal property manufactured, produced, compounded, processed, or fabricated for one's own use and subject to the tax imposed under s. 212.06(1)(b) or is purchased for export under s. 212.06(5)(a) 1. extends a certificate in compliance with the rules of the department, the dealer shall himself or herself be liable for and pay the tax.

(2) A dealer shall, as far as practicable, add the amount of the tax imposed under this chapter to the sale price, and the amount of the tax shall be separately stated as Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale. Such tax shall constitute a part of such price, charge, or proof of sale which shall be a debt from the purchaser or consumer to the dealer, until paid, and shall be recoverable at law in the same manner as other debts. Where it is impracticable, due to the nature of the business practices within an industry, to separately state Florida tax on any charge ticket, sales slip, invoice, or other tangible evidence of sale, the department may establish an effective tax rate for such industry. The department may also amend this effective tax rate as the industry's pricing or practices change. Except as otherwise specifically provided, any dealer who neglects, fails, or refuses to collect the tax herein provided upon any, every, and all retail sales made by the dealer or the dealer's agents or employees of tangible personal property or services which are

subject to the tax imposed by this chapter shall be liable for and pay the tax himself or herself.

(3)

(a) A dealer who fails, neglects, or refuses to collect the tax or fees imposed under this chapter by himself or herself or through the dealer's agents or employees, in addition to the penalty of being liable for paying the tax or fee, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(b) A dealer who willfully fails to collect a tax or fee after the department provides notice of the duty to collect the tax or fee is liable for a specific penalty of 100 percent of the uncollected tax or fee. This penalty is in addition to any other penalty that may be imposed by law. A dealer who willfully fails to collect taxes or fees totaling:

1. Less than $300:

a. For a first offense, commits a misdemeanor of the second degree, punishable as provided in s. 775.082 or s. 775.083.

b. For a second offense, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

c. For a third or subsequent offense, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

2. An amount equal to $300 or more, but less than $20,000, commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

3. An amount equal to $20,000 or more, but less than $100,000, commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

4. An amount equal to $100,000 or more, commits a felony of the first degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

(c) The department shall provide written notice of the duty to collect taxes or fees to the dealer by personal service or by sending notice to the dealer's last known address by registered mail. The department may provide written notice using both methods described in this paragraph.

(4) A dealer engaged in any business taxable under this chapter may not advertise or hold out to the public, in any manner, directly or indirectly, that he or she will absorb all or any part of the tax, or that he or she will relieve the purchaser of the payment of all or any part of the tax, or that the tax will not be added to the selling price of the property or services sold or released or, when added, that it or any part thereof will be refunded either directly or indirectly by any method whatsoever. A person who violates this provision with respect to advertising or refund is guilty of a misdemeanor of the sec-

ond degree, punishable as provided in s. 775.082 or s. 775.083. A second or subsequent offense constitutes a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.

(5)

(a) The gross proceeds derived from the sale in this state of livestock, poultry, and other farm products direct from the farm are exempted from the tax levied by this chapter provided such sales are made directly by the producers. The producers shall be entitled to such exemptions although the livestock so sold in this state may have been registered with a breeders' or registry association prior to the sale and although the sale takes place at a livestock show or race meeting, so long as the sale is made by the original producer and within this state. When sales of livestock, poultry, or other farm products are made to consumers by any person, as defined herein, other than a producer, they are not exempt from the tax imposed by this chapter. The foregoing exemption does not apply to ornamental nursery stock offered for retail sale by the producer.

(b) Sales of race horses at claiming races are taxable; however, if sufficient information is provided by race track officials to properly administer the tax, sales tax is due only on the maximum single amount for which a horse is sold at all races at which it is claimed during an entire racing season.

(6) It is specifically provided that the use tax as defined herein does not apply to livestock and livestock products, to poultry and poultry products, or to farm and agricultural products, when produced by the farmer and used by him or her and members of the farmer's family and his or her employees on the farm.

(7) Provided, however, that each and every agricultural commodity sold by any person, other than a producer, to any other person who purchases not for direct consumption but for the purpose of acquiring raw products for use or for sale in the process of preparing, finishing, or manufacturing such agricultural commodity for the ultimate retail consumer trade shall be and is exempted from any and all provisions of this chapter, including payment of the tax applicable to the sale, storage, use, or transfer, or any other utilization or handling thereof, except when such agricultural commodity is actually sold as a marketable or finished product to the ultimate consumer; in no case shall more than one tax be exacted.

(8) Any person who has purchased at retail, used, consumed, distributed, or stored for use or consumption in this state tangible personal property, admissions, communication or other services taxable under this chapter, or leased tangible personal property, or who has leased, occupied, or used or was entitled to use any real property, space or spaces in parking lots or garages for motor vehicles, docking or storage space or spaces for boats in boat docks or marinas, and cannot prove that the tax levied by this chapter

has been paid to his or her vendor, lessor, or other person is directly liable to the state for any tax, interest, or penalty due on any such taxable transactions.

(9)

(a) If a purchaser engaging in transactions taxable under this chapter did not pay tax to a vendor based on a good faith belief that the transaction was a nontaxable purchase for resale or the transaction was exempt as a purchase by an organization exempt from tax under this chapter, except as provided in paragraph (b), neither the purchaser nor the vendor is directly liable for any tax, interest, or penalty that would otherwise be due if the following conditions are met:

1. At the time of the purchase, the purchaser was not registered as a dealer with the department or did not hold a consumer's certificate of exemption from the department.

2. At the time of the purchase, the purchaser was qualified to register with the department as a dealer or to receive a consumer's certificate of exemption from the department.

3. Before applying for treatment under this subsection, the purchaser has registered with the department as a dealer or has applied for and received a consumer's certificate of exemption from the department.

4. The purchaser establishes justifiable cause for failure to register as a dealer or to obtain a consumer's certificate of exemption before making the purchase. Whether a purchaser has established justifiable cause for failure to register depends on the facts and circumstances of each case, including, but not limited to, such factors as the complexity of the transaction, the purchaser's business experience and history, whether the purchaser sought advice on its tax obligations, whether any such advice was followed, and any remedial action taken by the purchaser.

5. The transaction would otherwise qualify as exempt under this chapter except for the fact that at the time of the purchase the purchaser was not registered as a dealer with the department or did not hold a consumer's certificate of exemption from the department.

6. Relief pursuant to this subsection is applied for:

    a. Before the department has initiated any audit or other action or inquiry in regard to the purchaser or the vendor; or

    b. If any audit or other action or inquiry of the purchaser or the vendor has already been initiated, within 7 days after being informed in writing by the department that

the purchaser was required to be registered or to hold a consumer's certificate of exemption at the time the transaction occurred.

(b) In lieu of the tax, penalties, and interest that would otherwise have been due, the department shall impose and collect the following mandatory penalties, which the department may not waive:

1. If a purchaser or vendor applies for relief before the department initiates any audit or other action or inquiry, the mandatory penalty is the lesser of $1,000 or 10 percent of the total tax due on transactions that qualify for treatment under this subsection.

2. If a purchaser or vendor applies for relief after an audit or other action or inquiry has already been initiated by the department, the mandatory penalty is the lesser of $5,000 or 20 percent of the total tax due on transactions that qualify for treatment under this subsection.

The department may impose and collect the mandatory penalties from either the purchaser or the vendor that failed to obtain proper documentation at the time of the transaction.

(c) The department may adopt forms and rules to administer this subsection.

Fla. Admin. Code r. 12A-1.047

- **12A-1.047. Florists**

(1) Florists are engaged in the business of selling tangible personal property at retail and their sales of flowers, wreaths, bouquets, potted plants and other such items of tangible personal property are taxable.

(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:

(a) On all orders taken by a Florida florist and telegraphed to a second florist in Florida for delivery in the state, the sending florist is held liable for the tax.

(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.

(c) In cases where Florida florists receive telegraphic instructions from other florists located either within or outside of Florida for delivery of flowers, the receiving florist will not be held liable for tax with respect to any receipts which he may realize from the transaction. In this instance, if the order

originated in Florida, the tax will be due from and payable by the Florida florist who first received the order and gave telegraphic instructions to the second florist.

(3) All retail sales of cut flowers and potted plants by florists are taxable.