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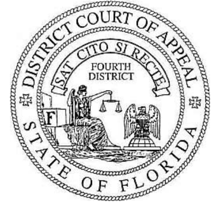

IN THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT OF FLORIDA

AMERICAN BUSINESS USA CORP.,

Appellant,

v. CASE NO. 4D13-1472

DEPARTMENT OF REVENUE,

Appellee.

ANSWER BRIEF OF APPELLEE DEPARTMENT OF REVENUE

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PRELIMINARY STATEMENT

The Petitioner below and the Appellant in this appeal is American Business USA Corp., who will be referred to as "American Business" or "Appellant" in this Answer Brief.

The Respondent below and the Appellee in this appeal is the State of Florida Department of Revenue, which will be referred to as the "Department" in this Answer Brief.

The lower tribunal was the State of Florida Department of Revenue, which will be referred to as the "Department" in this Answer Brief.

References to the Record on Appeal will be prefixed with Vol., followed by the appropriate volume number, then the letter R, followed by the appropriate page number, e.g., Vol. II, R. 100-121. References to the Initial Brief will be prefixed with the letters IB, which in turn will be followed by the appropriate page number, e.g., IB-12-18.

All references herein to the *Florida Statutes* (in sentences) or "Fla. Stat." (in citations) are to the Florida Statutes (2012), unless otherwise noted. All references to the administrative rules are to the administrative rules promulgated in the Florida Administrative Code during the audit period.

STATEMENT OF THE CASE AND FACTS

Appellant's Statement of the Case and Facts is incomplete. Pursuant to Florida Rule of Appellate Procedure 9.210(c), the Department provides the following statement of additional material facts.

I. Appellant's Activities in Florida.

American Business is an active Florida for-profit corporation with its principal address and mailing address at 12805 Newton Place, Wellington, Florida 33414-6226. Vol. I, R. 156 (¶ 2). Appellant is a "dealer" as that term is defined by section 212.06(2), *Florida Statutes*. Vol. I, R. 156 (¶ 3). Appellant began doing business in Florida in January 2001, but did not register with the Department as a sales tax dealer until February 19, 2004. Vol. I, R. 156 (¶ 4). Appellant does business online as "1Vende.com." *Id.*

The Department audited American Business for sales and use tax compliance for the period of April 1, 2008 through March 31, 2011. Vol. I, R. 157 (¶ 5). Appellant's business consisted of two activities. Vol. I, R. 157 (¶ 7). First, Appellant specialized in the sale of flowers, gift baskets, and other items of tangible personal property. *Id*. Second, Appellant specialized in the sale of "prepaid calling arrangements," *id.,* within the meaning of section

212.05(1)(e)1.a.(I), *Florida Statutes*. All of Appellant's sales were initiated online. Vol. I, R. 157 (¶ 8).

The Appellant did not charge its customers sales tax on sales of flowers, gift baskets, and other items of tangible personal property delivered outside of Florida. Vol. I, R. 158 (¶ 16). Nor did the Appellant charge customers sales tax on the prepaid calling arrangements it sold. Vol. I, R. 158 (¶ 20).

The Florida sales tax applies to "[a]ny transfer of title or possession, or both . . . in any manner or by any means whatsoever, of tangible personal property for a consideration." § 212.02(15)(a), Fla. Stat. At all pertinent times, section 212.05(1)(l), *Florida Statutes*, provided:

> **(*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.

Vol. I, R. 165 (¶ 55). (emphasis added).[1]

At all pertinent times, section 212.02, *Florida Statutes,* provides the following definitions:

[1] This sourcing statute was enacted by Chapter 98-140, Laws of Florida, Section 1. Ch. 98-140, § 1, at 1016-17, Laws of Fla.

> (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…

Vol. I, R. 165 (¶ 54).

At all pertinent times, Florida Administrative Code Rule 12A-1.047(1) and (2) provided, 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 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.

Vol. I, R. 165-66 (¶ 56).

The Administrative Law Judge, after conducting an evidentiary hearing, determined that "[Appellant'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(l)(l), and rule 12A-l.047(1)." Vol. I, R. 167 (¶ 59).

II. **Facts Concerning Appellant's Flower Sales.**

The facts concerning Appellant's flower sales are accurately stated in Appellant's Initial Brief.

III. **Facts Concerning Appellant's Prepaid Calling Arrangements.**

Florida also imposes sales tax at the rate of six percent on charges for prepaid calling arrangements pursuant to section 212.05(l)(e)l., *Florida Statutes,* 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(l)(e)l.a.(I), *Florida Statutes,* 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 means 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.

Appellant did not charge its customers sales tax on the prepaid calling arrangements it sold. Vol. I, R. 158 (¶ 20). It further stipulated that it did not remit the tax. Vol. I, R. 168 (¶ 62).

At all pertinent times section 212.13(2), *Florida Statutes*, established taxpayer record keeping duties. It provided in pertinent part:

> (2) Each dealer, as defined in this chapter, shall secure, maintain, and keep as long as required by s. 213.35 a complete record of tangible personal property or services received, used, sold at retail, distributed or stored, leased or rented by said dealer, together with invoices, bills of

> lading, gross receipts from such sales, and other pertinent records and papers as may be required by the department for the reasonable administration of this chapter; all such records which are located or maintained in this state shall be open for inspection by the department at all reasonable hours at such dealer's store, sales office, general office, warehouse, or place of business located in this state. Any dealer who maintains such books and records at a point outside this state must make such books and records available for inspection by the department where the general records are kept. Any dealer subject to the provisions of this chapter who violates these provisions is guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. If, however, any subsequent offense involves intentional destruction of such records with an intent to evade payment of or deprive the state of any tax revenues, such subsequent offense shall be a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083.

At all pertinent times, section 212.12(6)(a) and (b), *Florida Statutes*, further provided in pertinent part:

> (a) The department is given the power to prescribe the records to be kept by all persons subject to taxes imposed by this chapter. It shall be the duty of every person required to make a report and pay any tax under this chapter, every person receiving rentals or license fees, and owners of places of admission, to keep and preserve suitable records of the sales, leases, rentals, license fees, admissions, or purchases, as the case may be, taxable under this chapter; such other books of account as may be necessary to determine the amount of the tax due hereunder; and other information as may be required by the department. It shall be the duty of every such person so charged with such duty, moreover, to keep and preserve as long as required by s. 213.35 all invoices and

> other records of goods, wares, and merchandise; records of admissions, leases, license fees and rentals; and records of all other subjects of taxation under this chapter. All such books, invoices, and other records shall be open to examination at all reasonable hours to the department or any of its duly authorized agents.
>
> (b) For the purpose of this subsection, if a dealer does not have adequate records of his or her retail sales or purchases, the department may, upon the basis of a test or sampling of the dealer's available records or other information relating to the sales or purchases made by such dealer for a representative period, determine the proportion that taxable retail sales bear to total retail sales or the proportion that taxable purchases bear to total purchases. This subsection does not affect the duty of the dealer to collect, or the liability of any consumer to pay, any tax imposed by or pursuant to this chapter.

Appellant did not maintain the statutorily required sales invoices, sales journals or general ledgers. Vol. I, R. 160 (¶ 31). Nor did the Appellant retain for audit the books and records that would allow the Department to reconcile sales in the Appellant's electronic database to the deposits on its bank statement. Vol. I, R. 160 (¶ 30). The Department therefore determined that Appellant's books and records were inadequate for audit. Vol. I, R. 160 (¶ 31).

Based on the inadequacy of Appellant's available records, the Department could not determine where the consumers resided for 33 sampled prepaid calling arrangement sales, and considered them all to be Florida sales. Vol. II, R. 14. As a

result of the audit, the Department assessed sales tax on Appellant's prepaid calling arrangements sold to consumers who resided in Florida. *Id*.

In making the determination to rely on the 33 sampled transactions, the Department relied upon the "best information then available" of Appellant's sales tax liability. Vol. I, R. 160 (¶ 31). The auditor referenced section 212.12(5)(b), *Florida Statutes*, as authority for the Department's actions, rather than referencing section 212.12(6)(b), *Florida Statutes*. *Id*. Section 212.12(6)(b), *Florida Statutes*, quoted above, is the statute specifically addressing estimates necessitated by the inadequacy of taxpayer records. Section 212.12(5)(b), *Florida Statutes*, deals with other situations, such as taxpayers who refuse to permit inspection of their records. Section 212.12(5)(b), *Florida Statutes,* provides that assessments issuing under the authority of the statute will be considered "prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner, or lessor, as the case may be."

IV. Facts Concerning Proceedings Below.

A formal evidentiary hearing took place on January 10, 2013 in Miami, Florida. Vol. I, R. 154. At the formal hearing, owners Mauricio Gomez and Blanca Nino testified on behalf of the Appellant. Vol. I, R. 155. The Appellant offered no exhibits. The Department presented no witnesses, but offered 16

exhibits, each of which was admitted into evidence. Vol. I, R. 155.

In the Recommended Order, the Administrative Law Judge declared:

> 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. Dep't 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.

Vol. I, R. 163-64.

The Administrative Law Judge recommended that the Department sustain the tax assessment. Vol. I, R. 169. The Department accepted that recommendation by entering a Final Order. Vol. I, R. 150-171. This appeal timely followed.

STANDARD OF REVIEW

Appellant's reliance upon *Lloyd Enterprises, Inc. v. Department of Revenue,* 651 So. 2d 735, 739 (Fla. 5th DCA 1995) is entirely misplaced. That case stands for the proposition that ambiguities in tax statutes are construed in favor of the taxpayer. However, Appellant is *not* asking the Court to construe an allegedly ambiguous tax statute. Rather, Appellant is seeking to declare an unambiguous statute and implementing rules facially unconstitutional and unconstitutional as applied. When a statute is challenged as being "facially" unconstitutional, the standard of review is that "no set of circumstances exists under which the statute would be valid." *Fla. Dep't of Revenue v. City of Gainesville,* 918 So. 2d 250, 256 (Fla. 2005).

The Department acknowledges that Appellant may, for the first time on appeal, raise facial and as applied constitutional challenges. *Southern Alliance for Clean Energy v. Graham*, 113 So. 3d 742, 748 (Fla. 2013)(recognizing that administrative agencies lack the power to consider or determine constitutional

issues); *Fla. Hosp. v. Agency for Health Care Admin.*, 823 So. 2d 844, 849 (Fla. 1st DCA 2002). When the appellate court reviews the constitutionality of a statute on first impression, however, it is a question of law subject to de novo review. *Southern Alliance*, 113 So. 2d at 748. Moreover, the challenged statutes are accorded a presumption of constitutionality, and the appellate court is to construe that statute in a way that would uphold a constitutional outcome, if possible. *Id*.

As to findings of fact, the standard of review is whether the trier of fact had available competent substantial evidence to support its findings. § 120.68(10), Fla. Stat.; *see also Legal Envtl. Assistance Found., Inc., v. Clark*, 668 So. 2d 982, 987 (Fla. 1996); *Fla. Cities Water Co. v. Fla. Pub. Serv. Comm'n*, 778 So. 2d 310, 312 (Fla. 1st DCA 2000).

SUMMARY OF ARGUMENT

Florida and at least thirty other states have imposed a tax on the sale of flowers, where, as here, the seller of the flowers is located in the taxing state, regardless of where the buyer of the flowers resides or where the flowers are delivered. This sourcing method is constitutionally permissible because the United States Supreme Court has declared 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.

American Business has not cited any authorities prohibiting a state from taxing a sale conducted by one of its own residents, wholly within its own boundaries. While states may lawfully impose destination-based sourcing, location of transaction sourcing is also lawful. States have wide latitude to create their own unique taxing systems, as long as they do not violate the constitution, and there is no one uniform taxing system which has been federally imposed. The income tax cases cited by American Business are all distinguishable. Income taxes are apportioned by formula, whereas sales taxes are allocated to a single location.

In addition, American Business has failed to present a constitutional argument concerning calling cards. The Final Order below unambiguously held that American Business had failed to comply with Florida's statutory record-keeping requirements. Appellant did not even maintain basic records such as sales invoices, sales journals, or general ledgers. Vol. I, R. 160 (¶ 31). For this reason, it failed to factually prove which of the taxed sales, if any, were destined to out-of-state customers.

It is not enough for a taxpayer to qualitatively show that an *unspecified and undeterminable percentage* of its sales involved shipments out of state. Where, as here, the uncontroverted evidence established that the Appellant lacked sufficient records to verify that that any of the 33 sampled transactions involved out-of-state destinations, the auditor was not authorized to pick a random percentage out of a

hat as representing out-of-state transactions.

It was due to the Appellant's flagrant failure to comply with Florida's record-keeping laws, and for this reason alone, that the auditor estimated that none of the sales at issue were out-of-state, based on the 33 sample points. Appellant has no one to blame but itself for failing to maintain and produce adequate records sufficient to identify the location of the purchasers. The auditor was authorized and required under these circumstances to use the best information available, and that information failed to show that any of the 33 sample points were out-of-state transactions.

Appellant argues that the statute provision on which the auditor relied (in estimating that none of the calling card sales were extraterritorial) requires proof of "wrongdoing" that was never presented. As a matter of law, failure to maintain the records required by law has been declared by the Legislature to be a criminal act. That is certainly a form of "wrongdoing." But, more importantly, there is a different statutory provision that specifically authorizes estimates based on inadequacy of records, rather than on proof of taxpayer wrongdoing. The alternative statutory authorization provision applies here because the Administrative Law Judge found that Appellant had failed to maintain invoices, sales journals, and general ledgers and declared the Appellant's records "inadequate." Although the auditor and the Administrative Law Judge failed to

cite the most clearly pertinent statutory provision authorizing the auditor's estimate, the Department, as an Appellee, can now rely upon any law supporting the ruling below.

Where an issue can be adjudicated on record-keeping and evidentiary grounds, without reaching the constitutional "sourcing" argument, as is the case here, the decision should be affirmed without reaching a constitutional issue.

ARGUMENT

I. The DOR Had Subject Matter Jurisdiction to Tax All Sales by a Florida Domiciliary Florist (Regardless of Where the Flowers Were Destined) Where 100% of the Seller's Activities Took Place in Florida and Where Title to the Property Passed in Florida.

A. Due Process Permits Taxation of Activities by a Florida Corporation Located in Florida.

Where, as here, a sales tax is imposed on a seller that is incorporated and headquartered in Florida, and that conducts 100% of its sales activity in Florida, there can be no serious question that Florida has the "minimum connection" required under the Due Process Clause to permit taxation of the seller's activity.

In *Quill Corp. v. North Dakota,* 504 U.S. 298, 112 S.Ct. 1904 (1992), the question presented was whether the Due Process and Dormant Commerce Clauses permitted sales taxation of a non-resident vendor who purposefully availed itself of North Dakota's markets, but who lacked any "physical presence" in the taxing state. The Supreme Court held that, although invalid under the Commerce Clause,

the tax was not prohibited by the Due Process Clause. The Supreme Court explained that the Due Process Clause only "'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344-45, 74 S.Ct. 535, 539, 98 L.Ed. 744 (1954), and that the 'income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.' *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273, 98 S.Ct. 2340, 2344, 57 L.Ed.2d 197 (1978) (citation omitted)." *Quill,* 504 U.S. at 306.

Addressing the first of those two questions, the Court held that "Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes. . ." *Id.* at 308. Addressing the second of those two questions, the Court held that "the use tax is related to the benefits Quill receives from access to the State." *Id.* at 308. The vendor activities that were held to meet the Due Process "minimum connection" requirements solely consisted of the vendor doing business with North Dakota's residents, from an out-of-state location. The vendor lacked any physical presence in the taxing state.

In the case at bar, Florida's Legislature, consistent with the decision in *Quill*, has imposed a tax upon florists, such as Appellant, who do business from a physical presence within Florida. At all pertinent times, section 212.05(1)(l),

Florida Statutes, provided:

> (*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. (emphasis added)

The physical presence of a florist in the state provides a minimum connection for the Legislature to tax sales activities by the vendor. Although some of the flowers may have been delivered to a foreign destination, the actual sales "activity" on which the tax is imposed, took place in Florida. Florida has lawfully imposed a tax on the sales activities of florists, in Florida, not on the delivery activities of third parties abroad. Title to the flowers constructively passed as soon as the sale was accomplished by the Florida florist, in Florida.

At least thirty sister states have taken this same logical position by adopting special sourcing rules concerning florists. *See* ALA. ADMIN. CODE r. 810-6-1-.67 (a) (1998) [Alabama]; ARIZ. ADMIN. CODE § 15-5-172 (C) 1. (1993) [Arizona]; ARK. CODE ANN. § 26-52-52-507 (2009) [Arkansas]; CAL. Code REGS. Florists § 1571(b)(6) (2007) [California]; CONN. AGENCIES REGS. § 12-426-4 (2014) [Connecticut]; GA. COMP. R. & REGS. 560-12-2-.42 (3)(c) (1987) [Georgia]; IDAHO ADMIN. CODE r. 35.01.02.059 (1993) [Idaho]; 35 ILL. COMP. STAT. 120/1 (2008) [Illinois]; IND. CODE ANN. § 6-2.5-13-1(h) (2013) [Indiana]; KAN. ADMIN. REGS. § 92-19-13 (b)(1) (1998) [Kansas]; 103

KY. ADMIN. REGS. 27:050, Section 2 (2) (2009) [Kentucky]; MD CODE REGS. 03.06.01.18 (2014) [Maryland]; MICH. ADMIN. CODE r. 205.80, 30(2)(b) (2014) [Michigan]; MINN. STAT. ANN. § 297A.668, Subd. 9 (2013) [Minnesota]; 35-IV. MISS CODE R. § 8.01 (2011) [Mississippi]; MO. CODE REGS. 12, § 10-103.620 (2006) [Missouri]; 316 NEB. ADMIN. CODE § 1-052 (1993) [Nebraska]; NEV. ADMIN. CODE § 372.230 (2009) [Nevada]; N.M. STAT. ANN. § 7-9-3.5A(2)(e) (West 2007) [New Mexico]; N.Y. COMP. CODES R. & REGS. Sale, selling or purchase § 1101(b)(5) (1994) [New York]; N.C. GEN. STAT. ANN. § 105-164.4B(d)(3) (West 2013) [North Carolina]; OHIO ADMIN. CODE R. 5703-9-31 (2014) [Ohio]; OKLA. STAT. ANN. Tax levy--Rate--Sales subject to tax § 1354(A)19. (West 2013) [Oklahoma]; 61 PA CODE § 31.24 (1972) [Pennsylvania]; 60-1. R.I. CODE R. § SU 07-49 (West 2014) [Rhode Island]; S.C. CODE ANN. REGS. 117-309.1 (2002) [South Carolina]; S.D. ADMIN. R. 65:06:02:32 (1995) [South Dakota]; 34 TEX. ADMIN. CODE § 3.307(c) (1990) [Texas]; 23 VA. ADMIN. CODE § 10-210-610 (2013) [Virginia]; WASH. REV. CODE § 82.32.730(7)(d) (2008) [Washington].

Each of the states listed above also imposes the duty to collect sales tax on the in-state florist, whenever the in-state florist receives an order by telephone or telegraph or other electronic means and then arranges the delivery of the flowers through another florist, regardless of whether the flowers are delivered to a

customer outside of the taxing state. *See also,* Hellerstein, *State Taxation* ¶18.02, n.51 (citing Letter of Findings 04-20110615, Ind. Dep't of State Revenue, July 1, 2012, providing that fees a florist charges to customers for the remote delivery of flowers by a third party are subject to sales tax because the florist has constructive possession of the flowers at the time of the transaction and all consideration received is subject to tax).

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." *Okla. Tax Comm'n v. Jefferson Lines, Inc*., 514 U.S. 175, 184, 115 S.Ct. 1331, 1338 (1995). "A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Id.*, 514 U.S. at 186, 115 S.Ct. at 1339.

Appellant has failed to cite any federal constitutional law cases holding that a state cannot tax sales made *by its own residents*, in situations where the sales activity occurred *solely* in the taxing state. Instead, Appellant has cited various corporate income tax cases and other cases which are readily distinguishable: *Allied-Signal, Inc. v. Director, Div. of Taxation,* 504 U.S. 768, 112 S.Ct. 2251 (1992) (income tax case prohibiting formula apportionment of income that did not serve an operational purpose); *Asaarco Inc. v. Idaho State Tax Comm'n,* 458 U.S. 307, 102 S.Ct. 3103 (1982) (income tax case prohibiting formula apportionment of

dividend income from subsidiary that was not part of taxpayer's unitary business); *Boston Stock Exch. v. State Tax Comm'n,* 429 U.S. 318, 97 S.Ct. 599 (1977) (bank transfer tax invalidated because out-of-state sales were taxed more heavily than in-state sales); *Shaffer v. Heitner*, 433 U.S. 186, 97 S.Ct. 2569 (1977) (statutory presence of completely unrelated property was insufficient physical presence to permit shareholder's derivative action against nonresident corporation); *Miller Bros. Co. v. State of Md.*, 347 U.S. 340, 74 S.Ct. 535 (1954) (nonresident company not subject to sales tax jurisdiction where it lacked any physical presence in the taxing state and did not purposefully direct sales activity toward the taxing state, other than general advertising); *MeadWestvaco Corp. ex rel. Mead Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 128 S.Ct. 1498 (2008) (capital gain income was not apportionable unitary business income for purposes of income tax formula apportionment); *Treichler v. State of Wis.,* 338 U.S. 251 (1949) (invalidating an inheritance tax on out-of-state property under certain circumstances).

The income tax cases cited by Appellant are readily distinguishable because income is generally apportioned by formula, rather than by trying to allocate individual transactions to a single state with taxing jurisdiction. The distinction between income taxation and sales taxation is of a constitutional dimension. In *Jefferson Lines*, the Supreme Court explained this as follows:

> The very term "apportionment" tends to conjure up allocation by percentages, and where taxation of income

> from interstate business is in issue, apportionment disputes have often centered around specific formulas for slicing a taxable pie among several States in which the taxpayer's activities contributed to taxable value. . . . In reviewing sales taxes for fair share, however, we have had to set a different course. A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale, and the transaction itself does not readily reveal the extent to which completed or anticipated interstate activity affects the value on which a buyer is taxed. We have therefore consistently approved taxation of sales without any division of the tax base among different States, and have instead held such taxes properly measurable by the gross charge for the purchase, regardless of any activity outside the taxing jurisdiction that might have preceded the sale or might occur in the future.

Id. 514 U.S. at 186, 115 S.Ct. at 1339 (citations omitted).

As the Supreme Court explained, sales taxation is universally accomplished by allocation on an all-or-nothing basis, rather than by formula apportionment. *Compare* § 220.15, Fla. Stat. (apportioning adjusted federal income based on the percentage of property, payroll and sales in Florida, as compared to the property, payroll and sales everywhere) *with* § 212.02(15)(a), Fla. Stat. (declaring that a "sale" means "any transfer of title or possession, or both…").

American Oil Co. v. Neill, 380 U.S. 451, 85 S.Ct. 1130 (1965), cited by Appellant, is also distinguishable. In that case, a nonresident Delaware Corporation, licensed as an Idaho dealer in motor fuels, sold and transferred gasoline outside the State for importation into the State by an agency of the Federal

Government. The State of Idaho sought to tax the transaction on the theory that the dealer constructively received the gasoline in Idaho, upon its importation. The Court held that a nondomiciliary corporation electing to do business in the taxing state can "exempt itself by a clear showing that there are no in-state activities connected with out-of-state sales." *Id*. 380 U.S. at 458, 85 S.Ct. at 1135.

Here, Appellant is not just a nonresident company doing business in Florida, but it is a Florida corporation wholly located in Florida. Even more significantly, it entirely failed to make the required "clear showing that there are no in-state activities connected with out-of-state sales." Appellant placed into evidence no exhibits whatsoever, and the competent substantial evidence supported the trial court's findings that the sales transactions at issue were wholly accomplished by the Appellant, at its Florida headquarters.

Further, Appellant's reliance upon the distinguishable decision in *Dell Catalog Sales L.P. v. Taxation and Revenue Department of New Mexico,* 145 N.M. 419 (2008) is misplaced. That case holds, rather unremarkably, that a state may lawfully impose a sales tax on a nonresident vendor when it ships tangible personal property into the taxing state, provided that the taxing state has "nexus" with the vendor. It does not hold that all states *must* choose to tax all transactions in this manner. While *Dell* cites Hellerstein for the "destination principle," the actual

Hellerstein article recognizes that the sale is not always based on destination of the actual goods, but may often be based on the place where title was transferred.

The full text of the Hellerstein article observes that "inquiry into the appropriate place of taxation in cross-border transactions typically concerns where the legal or physical transfer of the property occurs rather than where the economic consumption of the property actually occurs." Hellerstein, *State Taxation* ¶ 18.02[2][a]. Thus, regardless of where the property that is purchased is ultimately transported or used, "the state in which an over-the-counter sale of the property takes place will virtually always subject the transaction to sales tax." *Id.*

Professor Hellerstein likewise notes that other states beside Florida have treated florists' sales as taxable based on the location where the sale occurs, rather than the location where the goods were destined. *See id.* at ¶18.02, n. 51 (observing that New York and Indiana impose tax on florists based on the location of the florist). Nowhere in Professor Hellerstein's article does he opine that taxation based on the location of the florist is unconstitutional. Nor would he likely do so, given the decision of the United States Supreme Court in *Jefferson Lines*.

B. The Dormant Commerce Clause Likewise Permits the Taxation.

Under the four-part test applied by the Supreme Court, a tax will be sustained against a Commerce Clause challenge if the tax "[1] is applied to an

activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." *Quill Corp. v. North Dakota*, 504 U.S. 298, 311, 112 S.Ct. 1904, 1912 (1992) (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1079 (1977)) (emphasis added). Florida's tax passes each prong of the above-listed *Complete Auto* test.

i. Florida's Sales Tax is Applied to an Activity <u>That Has a Substantial Nexus with the State.</u>

Sales tax is an excise tax levied on the sale of items of tangible personal property. In the instant case, the sale of the tangible personal property took place entirely within Florida. Accordingly the taxable event, i.e., the sales transaction, has nexus with Florida.

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." *Oklahoma Tax Commission v. Jefferson Lines, Inc*., 514 U.S. 175, 184, 115 S.Ct. 1331, 1338 (1995). "A sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale." *Id.*, 514 U.S. at 186, 115 S.Ct. at 1339.

In *Jefferson Lines,* the Supreme Court held that when a bus ticket was sold in Oklahoma that the State of Oklahoma had plenary authority to impose a sales

tax upon 100% of the purchase price of the ticket, notwithstanding that the bus was destined out-of-state, or that much of the mileage driven was out-of-state. Since Appellant's sales had nexus with Florida, Florida's sales and use tax is consistent with the first of the *Complete Auto* tests, which is nexus.

ii. <u>Florida's Sales Tax is Fairly Apportioned.</u>

The tax has been fairly apportioned by allocation to the place where the incidence of the tax arose--Florida. As the Supreme Court explained in *Jefferson Lines, supra.,* whereas income taxes are apportioned by formula, sales taxes are apportioned by allocating the sale to a single taxing jurisdiction. Florida has done that, providing that a sale by a florist will be allocated based on the location of the florist.

To be fairly apportioned, a tax must pass both an "internal consistency" and an "external consistency" test. *Container Corp. of America v. Franchise Tax Bd.,* 463 U.S. 159, 169, 103 S.Ct. 2933, 2942 (1983). To be "internally consistent," the state tax must be of a kind that, "if applied by every jurisdiction, there would be no impermissible interference with free trade." *Armco Inc. v. Hardesty*, 467 U.S. 638, 644, 104 S.Ct. 2620, 2623 (1984). Florida's tax is internally consistent because Florida does not seek to "have its cake and eat it too." Just as Florida taxes the florist that is located in Florida, it declines to tax florists located outside of Florida merely because they arrange through a local florist for flowers to be delivered in

state. If each state were to enact a tax exactly like Florida's tax, the tax would only be imposed one time -- at the location of the florist who took the order and made the sale.

The tax is also externally consistent. External consistency means that the Court "will strike down the application of an apportionment formula if the taxpayer can prove "by 'clear and cogent evidence' that the income attributed to the State is in fact 'out of all appropriate proportions to the business transacted in that State.'" *Container Corp*., 467 U.S. at 170, 104 S.Ct. at 2942 (citation omitted). In the case at bar, the Appellant failed to introduce a single documentary exhibit and has therefore entirely failed to prove by "clear and cogent evidence" that Florida's tax is out of proportion to its Florida sales activity. Rather, the evidence showed that all of the sales were conducted by the Appellant entirely from a Florida location.

iii. Florida's Sales Tax Does Not Discriminate Against Interstate Commerce.

The tax does not discriminate against interstate commerce. Floridians, by virtue of Florida citizenship or domicile, receive no benefit that is not available to non-Floridians. Nonresident businesses are not taxed at a higher rate. Interstate transactions are not taxed less favorably than wholly intrastate transactions. Thus, Florida's sales tax on florists' sales passes this prong of the *Complete Auto* test.

iv. **Florida's Sales Tax is Fairly Related to Services Provided <u>by the State</u>.**

There are no reported cases where a tax that has complied with the other three prongs of *Complete Auto* has failed to pass the "fairly related" prong. The fair relation requirement for commerce clause analysis is closely connected with the nexus requirement. *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 625-26, 101 S.Ct. 2946, 2957-58 (1981). Satisfaction of the test contemplates the taxpayer's adequate presence in the state to derive benefits provided by the state. "The simple but controlling question is whether the state has given anything for which it can ask in return." *Commonwealth Edison*, 453 U.S. at 625, 101 S.Ct. at 2957 (citation omitted).

The benefits the Court recognizes include police and fire protection and the other advantages of civilized society. *Id.,* 453 U.S. at 628, 101 S.Ct. at 2959. It is inconceivable that Appellant receives no benefits from Florida. Appellant has failed to allege and prove by clear and cogent evidence that it receives no benefit of the state's police activities, fire safety activities, road system, and utilities infrastructure. Appellant receives value from the State.

II. The Court Should Not Reach a Constitutional Issue Concerning Appellant's Sale of Prepaid Calling Card Arrangements. The Administrative Law Judge Factually Determined That Appellant Failed to Provide Sufficient Records to Source Any of These Sales to a Location Outside the State of Florida. There was Competent Substantial Evidence to Support This Finding.

Appellant has failed to articulate what statute or rule would unconstitutionally prohibit Appellant from alleging and proving that an identifiable portion of its sales of long-distance calling arrangements were extra-territorial. Unlike the special statute concerning floral sales, Appellant would have been able to claim an export exemption for a portion of its calling arrangement sales had it maintained sufficient records, as required by law, and had it proven that an identifiable and quantifiable portion of the sales were extraterritorial.

As to the calling arrangements, this was a routine case involving bad record-keeping and failure of proof. Appellant began doing business in Florida in January 2001, but did not register with the Department as a sales tax dealer until February 19, 2004. Vol. I, R. 156 (¶ 4). Appellant never not charged its customers sales tax on the prepaid calling arrangements it sold during the audit period. *Id.*

Additionally, Appellant did not maintain the statutorily required sales invoices, sales journals or general ledgers. Vol. I, R. 160 (¶ 31). Nor did the Appellant retain for audit books and records that would allow the Department to reconcile sales in the Appellant's electronic database to the deposits on its bank

statement. Vol. I, R. 160 (¶ 30). Therefore, the Department determined that Appellant's books and records were inadequate for audit. Vol. I, R. 160 (¶ 31).

Based on the inadequacy of Appellant's available records, the Department could not determine where the consumers resided for 33 sampled prepaid calling arrangement sales, and considered them all to be Florida sales. Vol. II, R. 14. As a result of the audit, the Department assessed sales tax on its prepaid calling arrangements sold to consumers who resided in Florida. *Id*.

The Department relied upon the "best information then available" of Appellant's sales tax liability. Vol. I, R. 160 (¶ 31). The auditor referenced section 212.12(5)(b), *Florida Statutes*, as authority for the Department's actions, rather than referencing Section 212.12(6)(b), *Florida Statutes.* However, both statutes can be invoked as support for the Department's position.

Subsection (6)(b) of section 212.12, *Florida Statutes*, is the provision specifically authorizing estimates necessitated by the inadequacy of taxpayer records. Section 212.12(5)(b), *Florida Statutes*, deals with other situations, such as taxpayers who refuse to permit inspection of their records. Section 212.12(5)(b), *Florida Statutes*, provides that assessments issuing under the authority of these provisions will be considered "prima facie correct, and the burden to show the contrary shall rest upon the dealer, seller, owner, or lessor, as the case may be."

Appellant simply failed to maintain or to introduce into evidence *any* records proving that any of the 33 sampled sales were extraterritorial. Had it established this, it would have received an exemption on a portion of the sales, by statute and rule. But where none of the sampled sales could be verified as extraterritorial transactions, the auditor could not wildly guess that a specific percentage of the transactions might be extraterritorial. The burden is on a taxpayer not merely to qualitatively establish that some of its sales are extraterritorial, but to quantitatively establish, with statutorily required documentation, the specific sales that were extraterritorial.

In this case, Appellant failed to do so, and its failure to comply with Florida's record keeping laws was gross and extreme. Appellant did not even maintain such basic records as sales invoices, sales journals or general ledgers. Vol. I, R. 160 (¶ 31). Appellant has no one to blame for its record-keeping failures but itself.

Appellant argues at pages 9 and 22 of its Initial Brief that section 212.12(5)(b), *Florida Statutes*, requires proof of "wrongdoing," citing *Lloyd Enterprises, Inc. v. Department of Revenue*, 651 So. 2d 735 (Fla. 5th DCA 1995). The *Lloyd Enterprises* decision is distinguishable for three reasons. First, Appellant's failure to maintain records required by law is a form of wrongdoing.

See §212.13(2), Fla. Stat.(declaring that it is a criminal offense for a taxpayer to fail to maintain required records).

Second, in *Lloyd,* the Department was criticized for examining the taxpayer's *adequate* records and then extrapolating the taxpayer's liability for past time periods, without making an effort to first examine the records of the former business owners, which pertained to the pertinent time period. In the case at bar, the Administrative Law Judge declared Appellant's records "inadequate" and there was neither a change of ownership nor an examination of records for the wrong time period, as was the case in *Lloyd Enterprises.*

Third and finally, *Lloyd Enterprises* only discusses section 212.12(5)(b), *Florida Statutes*. It does not address the separate statutory authorization for an estimate contained within section 212.12(6)(b), *Florida Statutes*. The latter statute authorizes an estimate to be made based on inadequacy of taxpayer records, and does not require proof of wrongdoing. While section 212.12(6)(b), *Florida Statutes*, was never cited by the auditor or the Administrative Law Judge, it nevertheless provides sufficient legal authority for the auditor's estimate. It declares that where the records are not available or are inadequate, that the auditor can and should make an estimate, based on a sample. *See, e.g., Dade Cnty. Sch. Bd. v. Radio Station WQBA*, 731 So. 2d 638, 644-645 (Fla. 1999) (holding that

even when based upon erroneous reasoning, a lower tribunal's decision will be upheld if supported by evidence or alternative theory).

The auditor did just that, but in this case, all 33 sample points were unable to be sourced anywhere but Florida. There is only one party to blame for this record-keeping failure: Appellant.

Having failed to maintain records or prove its case, Appellant should not be permitted to now conflate the calling card issue with the flower delivery issue. There are no statutes or rules adversely affecting Appellant on the calling card issue, other than the statutes and rules requiring taxpayers to keep records and the statute requiring the Appellant to prove its case. *See, e.g.*,§ 120.80(14), Fla. Stat. Having failed to identify a statute that taxes calling cards in an unconstitutional manner and having failed to present any reason why it should not have to keep records or prove its case, this argument should be summarily rejected, as it is entirely without merit.

CONCLUSION

Based on the foregoing, the Department of Revenue's Final Order sustaining its sales and use tax assessment against American Business should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by email on April 22, 2014 to: David B. Esau, Esquire, Dean A. Morande, Esquire, and Michael D. Sloan, Esquire, Carlton Fields, PA, CityPlace Tower, 525 Okeechobee Boulevard, Suite 1200, West Palm Beach, Florida 33401, desau@carltonfields.com, dmorande@carltonfields.com, msloan@carltonfields.com, kcasazza@carltonfields.com, shampton@carltonfields.com, wpbecf@cfdom.net.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the Department's Answer Brief complies with the font requirements of Florida Rules of Appellate Procedure 9.210(a)(2), in that this Brief uses Times New Roman 14-point font.

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