STATE OF FLORIDA DEPARTMENT OF REVENUE
TALLAHASSEE, FLORIDA

DOR 2013-004 - FOF
FILED
Department of Revenue – Agency Clerk
Date Filed: March 25, 2013
By: April Warner

RHINEHART EQUIPMENT CO.,

Petitioner,

vs.

DEPARTMENT OF REVENUE,

Respondent.
_____/

DOAH Case Number: 11-2567
Audit Number: 400019813

**FINAL ORDER**

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 assigned by the Division of Administrative Hearings considered this cause and submitted a Summary Recommended Order ("Order") to the Department. A copy of the Order, issued on August 27, 2012 by Administrative Law Judge W. David Watkins, is attached to this order and incorporated by reference as if fully set forth herein as Exhibit 1. The Petitioner filed exceptions to the Order which are attached to this order as Exhibit 2. The Respondent filed a response to Petitioner's exceptions which is attached to this order as Exhibit 3. The Department has jurisdiction in this cause.

RULINGS ON EXCEPTIONS

On October 19, 2012, Petitioner served its exceptions to the Order upon the Respondent, Florida Department of Revenue. 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 specific 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. Petitioner identifies three aspects of the Order to which exception is taken in the first paragraph of its exceptions. However, the numbered paragraphs seem to go beyond those three rulings, and numerous pages and paragraphs in the Order are cited in Petitioner's exceptions. For the most part, Petitioner has identified the legal basis it believes would support its exceptions. However, only the exception identified in paragraph 9 of Petitioner's exceptions includes a specific citation to the record. The exception set forth in paragraph 9 of Petitioner's exceptions cites to stipulated exhibit 1 at page 2 for its authority.

Upon thorough review of the record in this matter, Petitioner's exceptions are denied pursuant to subsection 120.57(1)(k), Florida Statutes. To the extent that Petitioner's exceptions seek to reverse findings of fact, including the exception set forth in paragraph 9 of Petitioner's exceptions, it cannot be said that the findings in the Order were not based upon competent substantial evidence or that the proceedings upon which the findings were based did not comply with essential requirements of law. To the extent that Petitioner's exceptions seek to reverse conclusions of law, it cannot be said that Petitioner's legal conclusions are as reasonable, or more reasonable, than the findings in the Order.

## 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 recommendations in the Administrative Law Judge's Order are hereby adopted. Petitioner shall determine whether any of the sales it made during the audit period (July 1, 2002 through June 30, 2005) would have qualified as exempt sales pursuant to subsection 212.08(3), Florida Statutes. Within 30 days of the date this Final Order is filed, Petitioner shall provide the Department with the certifications from purchasers required by subsection 212.08(3), Florida Statutes. Upon receipt of the required documentation, or upon the expiration of 30 days from the date this Final Order is filed, whichever is earlier, the Department will provide the Petitioner with the current balance owed for the audit period, including statutory interest, which shall continue 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 25th day of March, 2013.

STATE OF FLORIDA
DEPARTMENT OF REVENUE

Marshall Stranburg
Interim Executive Director

**CERTIFICATE OF FILING AND SERVICE**

I HEREBY CERTIFY that the foregoing FINAL ORDER has been filed in the official records of the Department of Revenue and that a true and correct copy of the Final Order has been furnished by United States mail, both regular first class and certified mail return receipt requested, to Petitioner C/O Ayman F. Rizkalla, K and L Gates, LLP, Suite 3900, 200 South Biscayne Blvd., Miami, Florida 33131 this 25th day of March, 2013.

April Warne
Agency Clerk

Copies furnished to:

W. David Watkins
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS



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| RHINEHART EQUIPMENT CO., | ) | |
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| Petitioner, | ) | |
| | ) | |
| vs. | ) | Case No. 11-2567 |
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| DEPARTMENT OF REVENUE, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

## SUMMARY RECOMMENDED ORDER

This came before the Administrative Law Judge W. David Watkins on Petitioner's Motion for Summary Recommended Order; Respondent's Motion for Summary Recommended Order; and the responses in opposition to the motions filed by the opposing party.

## APPEARANCES

For Petitioner: Ayman F. Rizkalla, Esquire
Richard L. Winston, Esquire
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Miami, Florida 33131

For Respondent: John Mika, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
Tallahassee, Florida 32399-1050

## STATEMENT OF THE ISSUES

The two issues for determination are: (1) whether Rhinehart Equipment Co. (Rhinehart) a foreign corporation domiciled in

Rome, Georgia, during the period July 1, 2002, through June 30, 2005, had "substantial nexus" with the state of Florida through its advertising, sale, and delivery into Florida of new and used heavy tractor equipment, sufficient to require it to collect and remit sales tax generated by these sales to the Florida tax authorities; and (2) Whether the applicable statute of limitations for assessing sale tax had expired when DOR issued its "final assessment" on September 11, 2009.

PRELIMINARY STATEMENT

This cause arose when the Respondent, the Department of Revenue, (Department), issued a "Notice of Final Assessment", dated September 11, 2009, advising Petitioner that it was being assessed $354,839.30 in Florida sales and use tax, with interest, for the period July 1, 2002, through June 30, 2005.

On September 30, 2009, Petitioner filed a letter of protest with Respondent, and requested reconsideration of the assessment. By letter dated March 9, 2011, Respondent advised Rhinehart that it had reconsidered the assessment and determined that the tax and interest had been correctly assessed. However, due to the passage of time, the amount of additional interest that had accrued brought the assessment to $380,967.89.

On May 9, 2011, Rhinehart filed a Petition for Formal Hearing challenging the assessment, and on May 18, 2011, the Department referred the petition to the Division of

Administrative Hearings for the conduct of a formal hearing and rendition of a recommended order. On June 2, 2011, the undersigned issued a notice of hearing, setting this matter for final hearing via teleconference on August 1, 2011, at locations in Tallahassee and Miami. However, on June 29, 2011, the parties filed an agreed motion to continue the final hearing in order to complete discovery, and by order dated July 1, 2011, the matter was placed in abeyance. On November 21, 2011, the matter was again noticed for final hearing, and again continued at the request of the parties, ultimately being set for hearing on May 1, 2012.

At the joint request of the parties a status conference was held on April 12, 2012. During the conference both parties indicated their desire to waive the necessity of a final hearing and instead, requested that the undersigned render a determination based upon stipulated facts and dispositive motions to be filed by the parties. On April 16, 2012, the parties filed their Joint Proposed Briefing Schedule for the submittal of stipulated facts, dispositive motions, and responses to the motions.

On May 11, 2012, the parties filed a Joint Stipulation of Facts and provided the undersigned with 22 stipulated exhibits. Where relevant and material the joint stipulations have been incorporated in this Summary Recommended Order.

Consistent with the agreed briefing schedule, both parties filed motions for summary recommended order on May 21, 2011, and responses in opposition to the opposing motions on June 8, 2012. The respective motions and responses have been carefully considered in the preparation of this order.

All statutory references are to Florida Statutes (2005), and all rule references are to the current Florida Administrative Code, unless otherwise indicated.

## FINDINGS OF FACT

### The Parties

1. Rhinehart Equipment Co. ("Rhinehart") is a retail heavy equipment dealer located in Rome, Georgia, and does not own or maintain a showroom or office location in Florida or directly provide financing to any Florida resident for any of its sales. Rhinehart does not provide Florida customers with any after-sale services such as assembly, technical advice, or maintenance. Rhinehart does not have any employees residing in Florida.

2. Respondent is an agency of the State of Florida charged with the regulation, control, administration, and enforcement of the sales and use tax laws of the state of Florida embodied in Chapter 212, Florida Statutes, and as implemented by Florida Administrative Code Chapter 12A-1.

Background

3. In early March 2005, the Department received an anonymous tip pursuant to section 213.30, Florida Statutes. The caller alleged that Rhinehart was selling equipment to Florida residents without including sales and use tax in the sales price and was delivering the equipment to Florida customers using its own trucks. The tipster also alleged that Rhinehart was advertising in a commercial publication *Heavy Equipment Trader*, Florida Edition.

4. By letter dated March 31, 2005, Respondent contacted Rhinehart and advised that its business activities in the state might be such as to require Rhinehart to register as a "dealer" for purposes of assessing Florida sales and use tax, and that it could be required to file corporate income tax returns, potentially subjecting it to liability for other Florida taxes. Included with this letter was a questionnaire for Rhinehart to complete and return to the Department "to assist us in determining whether Nexus exists between your company and the State of Florida."

5. On May 2, 2005, Rhinehart, without the advice of counsel, responded to the Department's inquiry by returning the completed questionnaire, which was signed by its president, Mark Easterwood.

6. By letter addressed to Mr. Easterwood dated May 4, 2005, the Department advised that it had determined that Rhinehart had nexus with the state of Florida and that therefore Rhinehart was required to register as a dealer to collect and remit Florida sales and use tax. According to the letter, the Department's determination was "based on the fact that your company makes sales to Florida customers and uses the company's own truck to deliver goods to customers in the State of Florida."

7. By application effective July 1, 2005, Rhinehart registered to collect and/or report sales and use tax to the state of Florida,

8. In a letter dated June 8, 2005, the Department invited Rhinehart to self-disclose any tax liability that it may have incurred during the three-year period prior to its registration effective date, to wit, July 1, 2002, through June 30, 2005 (the audit period). Specifically, the letter stated:

At this time, we would like to extend an opportunity for you to self-disclose any tax liability that you may have incurred prior to your registration effective date (for the period July 1, 2002, through June 30, 2005). This Self-Disclosure Program affords you an opportunity to pay any applicable tax and interest due for the prior three-year period (or when Nexus was first established) without penalty assessments.

9. In response to the Department's June 8, 2005, letter, Rhinehart's legal counsel sent a letter dated August 8, 2005, requesting a meeting or conference call to discuss a "few legal issues" concerning the Department's determination regarding nexus.

10. Thereafter, Rhinehart began filing the required tax returns relating to its Florida sales, noting in writing by cover letter that the returns were being filed "under protest." Rhinehart began collecting and remitting sales and use tax starting in July 2005. However, Rhinehart declined to provide any information regarding sales made prior to July 1, 2005.

11. On September 30, 2005, Rhinehart's legal counsel sent the Department a detailed protest letter and advised that, in Rhinehart's view: (1) the Department had not established "substantial nexus" with Florida as interpreted under the Commerce Clause of the United States Constitution; and (2) Rhinehart was not required to register as a Florida dealer for sales and use tax purposes.

12. On May 23, 2008, the Department issued a "Notice of Intent to Make an Assessment," and on September 11, 2009, a "Notice of Final Assessment," for the audit period. The assessment totaled $354,839.30, which was comprised of $229,695.00 in taxes and $125,144.30 in interest. The assessment was calculated by Respondent using Rhinehart's sales

tax returns filed from July 2005 through March 2008. The Notice of Final Assessment advised Rhinehart that the final assessment would become binding agency action unless timely protested or contested through the informal protest process, or by filing a complaint in circuit court or petition for an administrative hearing.

13. Rhinehart unsuccessfully sought to resolve the matter through informal review and then ultimately filed its petition seeking an administrative hearing to challenge the Department's September 11, 2009, assessment.

14. Based on sales records and other information provided by Rhinehart, on March 9, 2011, the Department revised its September 11, 2009, assessment. The revised assessment totaled $380,967.89, which included the past due sales and use tax liability, and interest accrued through that date.

Rhinehart's Florida Activities

15. Rhinehart produced records of its sales to Florida customers during the audit period. Those records reflected sales to 116 different Florida customers as follows: one sale in the second-half of 2002; 12 sales in 2003; 84 sales in 2004; and 19 sales thorough June 2005. The total value of the merchandise sold to Florida residents was $2,928,981.00.

16. The majority of Rhinehart's sales during the audit period were "sight unseen" by the customer, and were negotiated by telephone.

17. Numerous hurricanes made landfall in Florida during the 2004 and 2005 hurricane season. Since 2005, Rhinehart's sales to Florida customers have substantially dropped, with no sales occurring in some quarters.

18. During the audit period Rhinehart accepted a number of trade-ins toward the purchase of new equipment. The records showed trade-in transactions as follows: none (0) in 2002; five (5) in 2003; eleven (11) in 2004; and none in 2005.

19. Concurrent with the delivery of the new equipment purchased from Rhinehart, used equipment taken in trade was transported by Rhinehart employees using Rhinehart transport equipment back to Rhinehart's location in Georgia. In these instances, the trade-in equipment remained with the Florida customer following negotiation of the sale and prior to Rhinehart physically taking possession of it.

20. During the audit period the equipment accepted as trade-ins had a total value of $168,915.00. The valuation of trade-in equipment was done based on a customer's representations (i.e. sight unseen, with no Rhinehart employee personally inspected the equipment) and pursuant to industry guidelines.

21. Rhinehart's drivers would deliver the purchased equipment, load any trade-in equipment, and return to Georgia, if possible, on the same day. To the extent that the Department of Transportation regulations mandated that they cease driving in a given day, the drivers would rest in the back of their trucks for the required amount of time, sometimes overnight, and then complete their journey back to Georgia.

22. Rhinehart's dealership is located approximately 300 miles north of the Florida state line. Sales invoices reflect that Rhinehart's customers were located throughout the state of Florida, as far south as Miami on the east coast and Naples on the west coast.

23. During the audit period, Rhinehart placed advertisements with with the Trader Publishing Company, located in Clearwater, Florida. The Trader Publishing Company is the publisher of the *Heavy Equipment Trader* magazine which is distributed in Georgia, Alabama, Florida, and Tennessee. Trader Publishing Company publishes a "Florida Edition" of the magazine which is directed to potential heavy equipment customers located in Florida.

24. Stipulated Exhibit 19 consists of advertising invoices for advertisements placed by Rhinehart in the Florida Edition of *Heavy Equipment Trader* magazine during the audit period. These invoices establish that Rhinehart regularly and systematically

purchased advertising for its products which was targeted toward potential customers located in Florida.

CONCLUSIONS OF LAW

25. The Division of Administrative Hearings has jurisdiction of the subject matter of and the parties to this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2012).

Is the Assessment Time-Barred?

26. As a threshold issue it must first be determined whether the Department has the authority to pursue the assessment at issue, or whether the applicable statutory limitations period had run, thereby precluding any assessment. Petitioner asserts that the assessment at issue is time-barred. Specifically, Petitioner argues that the Department was obliged to issue the assessment, or take affirmative steps to toll the limitations period, within three years of Rhinehart's September 30, 2005, protest letter to the Department.

27. Section 95.091(3)(a), Florida Statutes, provides:

> (3)(a) With the exception of taxes levied under chapter 198 and tax adjustments made pursuant to ss. 220.23 and 624.50921, the Department of Revenue may determine and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011 which it has authority to administer and the Department of Business and Professional Regulation may determine and assess the amount of any tax, penalty, or interest due under any tax enumerated in s. 72.011 which it has authority to administer:

1.a. For taxes due before July 1, 1999, within 5 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later; and for taxes due on or after July 1, 1999, within 3 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

b. Effective July 1, 2002, notwithstanding sub-subparagraph a., within 3 years after the date the tax is due, any return with respect to the tax is due, or such return is filed, whichever occurs later;

2. For taxes due before July 1, 1999, within 6 years after the date the taxpayer either makes a substantial underpayment of tax, or files a substantially incorrect return;

3. At any time while the right to a refund or credit of the tax is available to the taxpayer;

4. For taxes due before July 1, 1999, at any time after the taxpayer has filed a grossly false return;

5. At any time after the taxpayer has failed to make any required payment of the tax, has failed to file a required return, or has filed a fraudulent return, except that for taxes due on or after July 1, 1999, the limitation prescribed in subparagraph 1. applies if the taxpayer has disclosed in writing the tax liability to the department before the department has contacted the taxpayer; or

6. In any case in which there has been a refund of tax erroneously made for any reason:

a. For refunds made before July 1, 1999, within 5 years after making such refund; and

> b. For refunds made on or after July 1, 1999, within 3 years after making such refund, or at any time after making such refund if it appears that any part of the refund was induced by fraud or the misrepresentation of a material fact. (Emphasis added).

28. As can be seen by the above, the Department may pursue an assessment "at any time. . . " after a taxpayer has failed to make any required payment of the tax, unless the taxpayer has disclosed in writing the liability before being contacted by the Department, in which case a three-year limitations period applies.

29. As pointed out by Rhinehart in its motion, on September 30, 2005, Rhinehart filed with the Department its protest (1) asserting that there was an insufficient nexus between Rhinehart and the state of Florida; and (2) providing sufficient information (including Rhinehart's tax ID number, address, and name of counsel) for the Department to pursue an investigation or audit.

30. Notwithstanding its written protests that nexus with the state of Florida did not exist, Rhinehart's September 30, 2005, letter came well after Rhinehart had been contacted by the Department with respect to potential tax liability. On March 31, 2005, the Department contacted Rhinehart to advise that the company "may have Nexus" with Florida, and requesting Rhinehart to complete and return the nexus investigation

questionnaire. Shortly thereafter, on May 4, 2005, the Department again wrote to Petitioner, this time to advise that it had determined that the company had nexus with Florida, and would therefore be liable for sales and use tax on products sold to Florida residents. Both of these "contacts" from the Department came well before Petitioner's September 30, 2005, letter.

31. Inasmuch as Rhinehart did not disclose in writing its tax liability before being contacted by the Department, the three-year limitation set forth in section 95.091(3)(a)1.a. does not apply, and the Department's assessment in this instance is not time-barred.

Is There a "Substantial Nexus" with Florida?

32. Section 212.21(2), provides that it is the specific legislative intent to tax every sale provided for in that chapter except such as shall be proven to be specifically exempted by provisions of chapter 212.

33. Section 212.02, provides as follows:

> Section 212.02 definitions.- The following terms and phrases when used in this chapter have the meanings ascribed to them in this section, except where the context clearly indicates a different meaning.
>
> * * *
>
> (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.

34. Pursuant to section 212.18, any person desiring to engage in or conduct business in Florida as a dealer, as defined in chapter 212, must obtain a certificate of registration from the Department, and the certificate issued by the Department grants dealers the privilege of conducting business in the state and imposes an obligation to collect and timely remit sales tax. See also Fla. Admin. Code R. 12A-1.060.

35. Florida Administrative Code Rule 12A-1.038 provides that transactions that result in shipment of tangible personal property into the state of Florida are subject to sales and use tax unless specifically exempt, and the selling dealer must establish the exempt status of a transaction at the time of sale with a supporting re-sale certificate or some documentation to support the exempt status of the transaction.

36. It has been determined that the taxability of a transaction made by an out-of-state vendor into Florida resulting in shipment of the goods which are the subject of the transaction into Florida, depends on the out-of-state vendor's "substantial nexus" with the state. Thus, the cases of Nat'l Bellas Hess, Inc. v. Illinois Dep't of Revenue, 386 U.S. 753 (1967) and Quill Corp. v. North Dakota, 504 U.S. 298 (1992)

(which re-affirmed the holding in the Nat'l Bellas Hess opinion) stand for the proposition that if an out-of-state vendor only has a connection with customers in the taxing state by common carrier or mail, used in delivering goods to customers in the state, then the state where the goods are delivered may not compel the out-of-state vendor to collect a sales or use tax. This is because a vendor whose only contacts with the taxing state are by mail or common carrier lacks the "substantial nexus" to the taxing state required by the cases interpreting the commerce clause of the United States Constitution. See Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), which sets out the test whereby a state-imposed tax could be sustained against a challenge under the commerce clause, which test included the requirement of a substantial nexus with the taxing state.

37. The principle running through these cases was affirmed and followed in Florida in more recent times in Florida Dep't of Revenue v. Share International, Inc., 667 So. 2d 226 (Fla. 1st DCA 1995). The court, speaking through Judge Barfield (concurred in by Judges Kahn and Shivers) followed this "substantial nexus" test, established through the above decisions. The factual situation in that case involved the presence of the appellee Share International, Inc., in Florida for three days a year at a seminar it conducted. The seminars

were conducted for chiropractors during the winter months in Florida. Share International, Inc., sold certain items in Florida during the seminars, registered with the Department and collected and remitted the sales tax on those items sold in Florida during the seminars. It did not, however, collect Florida sales taxes on sales or orders made by telephone or mail from residents in Florida, but delivered by mail or common carrier, or on orders received during the Florida seminars but later delivered by mail or common carrier. The court upheld the trial judge's finding that imposition and collection of the sales tax on this out-of-state vendor would be unconstitutional in terms of imposing a burden on interstate commerce in violation of the federal commerce clause. This was because the presence in the State for approximately three days per year of Share employees and products, under the circumstances presented in that case did not establish a substantial nexus with Florida which would permit the state of Florida to impose on Share the duty to collect and remit taxes on its mail order sales to Florida residents. The court, through Judge Barfield's opinion, after affirming the trial judge, certified the question to the Florida Supreme Court, as to whether, under the facts of that case, "substantial nexus," within the meaning set forth in the Quill Corporation, and Nat'l Bellas Hess decisions, existed which would permit Florida to require Share to collect sales and

use taxes on all goods sold to Florida residents. In due course, the Florida Supreme Court in Florida Dep't of Revenue v. Share International, Inc., 676 So. 2d 1362 (Fla. 1996), speaking through Justice Anstead, affirmed and adopted the holding of the First District Court of Appeal. The Department of Revenue later petitioned for writ of certiorari to the U. S. Supreme Court. The Supreme Court in Dep't of Revenue v. Share International, 519 U.S. 1056 (1997), denied certiorari.

38. With respect to the issue of nexus, the facts before the undersigned paint a significantly different picture than those presented in National Bellas Hess, Quill, and Share. Specifically, Rhinehart's physical presence in the state during the audit period was regular and substantial. Using its employees and transport equipment, Rhinehart consummated 116 sales and deliveries to Floridians located across the state. The value of its sales to Floridians during that period was $2,928,981.00. And unlike the situations in National Bella Hess, Quill, and Share, the goods sold by Rhinehart were not delivered by mail or common carrier, but rather by employees of Rhinehart, using Rhinehart transport vehicles.[1/]

39. It is also noteworthy that not infrequently equipment physically located in Florida was accepted by Rhinehart in trade. The significance of these transactions is that, after the sales contract had been negotiated and credit given for the

trade, the equipment remained in Florida until Rhinehart employees retrieved it--usually contemporaneously with the delivery of the new equipment.

40. Perhaps most significantly, the facts establish that Rhinehart deliberately and systematically targeted Florida customers in its advertising. This was not an instance of customers who happened to live in Florida visiting the company's website, viewing the available equipment, and placing a telephonic order. Rather, Rhinehart directly and regularly advertised in a Florida publication specifically circulated to potential Florida customers. This was a deliberate (and successful) exploitation of the consumer market in Florida.

41. Petitioner argues it should not be subjected to Florida taxation based on the 1954 United States Supreme Court decision in those in Miller Brothers Co. v Maryland, 347 U.S. 340 (1954). However, not only are the facts in the present case different as compared to Miller Brothers, but so is the legal rationale underpinning the court's decision.

42. The facts in Miller Brothers were that the store's sales to Maryland customers were all made in Delaware where the store was located; there were no employees or agents of the store soliciting sales in Maryland; it was Miller Brother's policy never to accept telephone orders; most of the merchandise sold required personal inspection and selection at the store in

Delaware; although the store did not advertise directly in Maryland it occasionally did send circulars to Maryland customers; and finally, the store delivered merchandise in Maryland, sometimes using its own trucks, sometimes common carrier.

43. In contrast to the Miller Brothers scenario, Rhinehart's sales were all consumated in Florida. As noted earlier, section 212.02(15) defines "sale" to mean (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. Sale negotiations between Rhinehart and the Florida customer usually began over the telephone, and were mostly made sight unseen. Physical transfer of possession always took place in Florida, and in several instances equipment located in Florida was taken in trade.

44. The Department persuasively argues that the Illinois case of Brown's Furniture Inc. v. Wagner, 171 Ill. 2d 410, 665 N.E. 2d 795 (1996) provides guidance. The issue in Brown's Furniture was whether a Missouri furniture retailer, who physically sent its representatives to Illinois to make frequent and regular deliveries of furniture with its own trucks, satisfied the substantial nexus requirement. The state Supreme Court found it did. The court commented on the utility of the

Miller Brothers decision, stating "because Quill made clear that under contemporary due process doctrine a company is no longer required to be physically present within a state before use tax collection duties may be imposed, the continued authority of Miller Brothers is in considerable doubt." Id. at 804. To the extent Miller Brothers remained relevant precedence, the Illinois Supreme Court observed it to be factually different. The same differences exist in the present case.

45. The facts found herein compel the conclusion that Rhinehart's business activities establish substantial nexus with the state of Florida.

Florida's Mail Order Statute

46. Section 212.0596 governs the taxation of "mail order sales," and provides in pertinent part:

> **212.0596 Taxation of mail order sales.—**
>
> (1) For purposes of this chapter, a "mail order sale" is a sale of tangible personal property, ordered by mail or other means of communication, from a dealer who receives the order in another state of the United States, or in a commonwealth, territory, or other area under the jurisdiction of the United States, and transports the property or causes the property to be transported, whether or not by mail, from any jurisdiction of the United States, including this state, to a person in this state, including the person who ordered the property.
>
> (2) Every dealer as defined in s. 212.06(2)(c) who makes a mail order sale is

> subject to the power of this state to levy and collect the tax imposed by this chapter when:
>
> * * *
>
> (d) The property was delivered in this state in fulfillment of a sales contract that was entered into in this state, in accordance with applicable conflict of laws rules, when a person in this state accepted an offer by ordering the property;
>
> (e) The dealer, by purposefully or systematically exploiting the market provided by this state by any media-assisted, media-facilitated, or media-solicited means, including, but not limited to, direct mail advertising, unsolicited distribution of catalogs, computer-assisted shopping, television, radio, or other electronic media, or magazine or newspaper advertisements or other media, creates nexus with this state;
> (Emphasis added).

47. According to the above statute, Rhinehart's sales during the audit period meet the definition of "mail order sales," since the orders were telephonically received in Georgia and resulted in the transport of tangible personal property to customers located in Florida. Moreover, pursuant to section 212.0596(2)(d) and (e), those sales subject Rhinehart to Florida's taxing authority, since two of the statutory indicia of nexus (orders placed by Florida residents for delivery in Florida, and magazine advertising in Florida) have been met.

48. Section 212.0596 statutorily confirms that Rhinehart's business activities in Florida during the audit period create nexus with the state and subject Rhinehart's sales to Florida

taxation. Rhinehart has not challenged the constitutionality of this statute, nor does this tribunal possess the authority to render a determination as to the statute's constitutionality. Florida Marine Fisheries Comm'n v. Pringle, 736 So.2d 17 (Fla. 1st DCA 1999). Further, the undersigned is required to construe applicable statutes in a manner that effectuates their legislative intent and, whenever possible, preserves their constitutionality. See Myers v. Hawkins, 362 So.2d 926, 930 (Fla. 1978); State v. McDonald, 357 So.2d 405, 407 (Fla. 1978); Novo v. Scott, 438 So.2d 477, 478 (Fla. 3d DCA 1983) (a statute should be construed in a manner that effectuates legislative intent, and all doubts should be resolved in favor of its constitutionality).

Exemption for Sale of Certain Farm Equipment

49. Florida law specifically exempts the sale of certain power farm equipment within the state when the purchaser provides the seller with a certification that the equipment qualifies for the exemption. Section 212.08(3) provides:

> (3) EXEMPTIONS; CERTAIN FARM EQUIPMENT.--There shall be no tax on the sale, rental, lease, use, consumption, or storage for use in this state of power farm equipment used exclusively on a farm or in a forest in the agricultural production of crops or products as produced by those agricultural industries included in s. 570.02(1), or for fire prevention and suppression work with respect to such crops or products. Harvesting may not be construed to include processing

> activities. This exemption is not forfeited by moving farm equipment between farms or forests. However, this exemption shall not be allowed unless the purchaser, renter, or lessee signs a certificate stating that the farm equipment is to be used exclusively on a farm or in a forest for agricultural production or for fire prevention and suppression, as required by this subsection. Possession by a seller, lessor, or other dealer of a written certification by the purchaser, renter, or lessee certifying the purchaser's, renter's, or lessee's entitlement to an exemption permitted by this subsection relieves the seller from the responsibility of collecting the tax on the nontaxable amounts, and the department shall look solely to the purchaser for recovery of such tax if it determines that the purchaser was not entitled to the exemption.

50. A review of the Rhinehart sales invoices during the audit period indicates the potential that some of the equipment purchased, such as tractors, mowers, augers, front-end loaders, tillers, etc.,[2/] may have been purchased for use exclusively on a farm for agricultural production[3/] purposes or for fire prevention and suppression relating to agricultural activities, and therefore qualify for exemption from taxation. It can reasonably be inferred that Rhinehart's customers who purchased qualifying equipment during the audit period would have provided the required certification for agricultural exemption had they been advised that sales tax would otherwise be included in the purchase price. Accordingly, in fairness to the Petitioner, who was not advised until nearly the end of the audit period of its

responsibility to collect and remit sales tax to Florida, a reasonable period of time (e.g. 90 days) should be given to Rhinehart to attempt to contact customers who purchased equipment during the audit period to ascertain whether the equipment would have qualified for the agricultural exemption, and if so, to obtain the necessary certifications from the purchasers. Any sales documented to qualify for the exemption should be removed from Petitioner's tax assessment, along with the accrued interest, in arriving at Rhinehart's final tax liability for the audit period.

RECOMMENDATION

Having considered the foregoing Findings of Fact, Conclusions of Law, the evidence of record, and the pleadings and arguments of the parties, it is, therefore,

RECOMMENDED that a final order be entered by the Department of Revenue:

1) Confirming that substantial nexus existed during the audit period and that Petitioner was therefore subject to the taxing authority of the state of Florida;

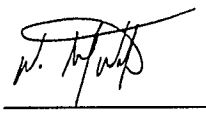
2) Confirming that the assessment at issue is not time-barred;

3) Allowing Petitioner a reasonable period of time to determine whether any of the sales it made during the audit period would have qualified as exempt sales pursuant to section

212.08(3) and if so, to obtain the required certifications from the purchasers; and

4) Imposing on Petitioner an assessment for the unpaid taxes, with accrued interest, for all sales during the audit period not qualifying for exemption.

DONE AND ENTERED this 27th day of August, 2012, in Tallahassee, Leon County, Florida.



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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of August, 2012.

ENDNOTES

1/ In Georgia, the Bellas Hess "safe harbor" insulating out-of-state vendors from taxation applies only when delivery of goods is made via common carrier or U.S. mail. Ga. Code Ann. §48-8-2(8)(L)

2/ See rule 12A-1.087(3)(a) for a non-exhaustive list of tax-exempt power farm equipment.

3/ "Agricultural production" means the production of plants and animals useful to humans, including the preparation, planting, cultivating, or harvesting of these products or any other practices necessary to accomplish production through the harvest

phase, and includes aquaculture, horticulture, floriculture, viticulture, forestry, dairy, livestock, poultry, bees, and any and all forms of farm products and farm production. § 212.02(32), Fla. Stat.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

RHINEHART EQUIPMENT CO.,

Petitioner,

v. DOAH Case No. 11-2567

DEPARTMENT OF REVENUE,

Respondent.
_____/

**PETITIONER'S EXCEPTIONS TO SUMMARY RECOMMENDED ORDER**

Pursuant to Florida Statute 120.57(1)(k), Petitioner Rhinehart Equipment Co. ("Rhinehart"), by and through its undersigned counsel, respectfully files its exceptions to the Court's August 27, 2012 Summary Recommended Order (the "Order"). Specifically, Rhinehart files the following exceptions: (1) the Order did not analyze whether substantial nexus existed for each of the four independent tax years comprising the audit period; (2) the Order improperly combined all transactions occurring over the course of the audit period to find the existence of substantial nexus despite Rhinehart's minimal presence in Florida; and (3) the Order improperly decided that the statute of limitations does not bar the assessment at issue. In support thereof, Rhinehart states:

1. On August 27, 2012, the Court issued its Order on the Parties' cross Motions for Summary Recommended Order, and which recommends in relevant part that Petitioner be assessed for all unpaid taxes for all sales during the audit period which consisted of the period from 2002 through June 2005. The Order improperly found that the combined transactions over the course of the audit period created substantial nexus warranting the imposition of sales tax on all of the transactions between 2002 and June 2005. *See* Order at pp. 14 – 21.

EXHIBIT 2

2. The United States Supreme Court has addressed a similar fact pattern to the one at issue in this case and accordingly, Rhinehart takes exception to the Court's distinction of *Miller Bros. v. Maryland*, 347 U.S. 340 (1954). Specifically, the Order found that the U.S. Supreme Court case was not applicable to the current situation. *See* Order at pp. 19 – 20, ¶¶ 41 – 45. The holding of *Miller Bros.* should have been applied to Rhinehart. In *Miller Bros.*, the petitioner (a Delaware company) used its own drivers and trucks to deliver its merchandise to Maryland residents and occasionally direct-mailed sales material to former customers including those in Maryland. *See Miller Bros.*, 347 U.S. at 341–42; 345–46. Despite the deliveries into Maryland, the Supreme Court held that the use of its own trucks and drivers was insufficient to meet the fundamental requirement of substantial nexus. *See id.* at 345–46. In addition, the Supreme Court reasoned that "due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Id. at 344–45 (emphasis added).

3. Rhinehart's single transaction in 2002, or twelve transactions in 2003, or remaining transactions in 2004 and 2005 do not rise to the level of a slight physical presence, let alone a "regular and frequent basis" as contemplated in *Miller Bros.* or *Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410 (1996). *See* Order at p. 8, ¶15. It takes more than one, or twelve, or even 84 transactions to create substantial nexus and establish more than a slight presence in the taxing state. *Brown's Furniture,* 171 Ill. 2d 410. Rhinehart takes exception to the Court's reading of *Brown's Furniture* and its reliance on it in order to find substantial nexus as to the any of the individual tax years comprising the audit period including 2002, 2003 and 2004 through 2005. *See* Order pp. 20 -21, ¶¶ 44 – 45.

4. The Illinois Supreme Court analyzed the existence of a substantial nexus based on whether the activities at issue created more than a slight physical presence. *Brown's Furniture*, 171 Ill. 2d at 425. For example, Rhinehart's single trip into Florida during the 2002 tax year, or twelve trips during the 2003 tax year do not create the kind of substantial nexus contemplated in *Brown's Furniture*. There, more than 900 trips were made into Illinois in a ten-month period averaging between 15 and 18 trips *per month*. *Id.* These numbers created a "regular and frequent basis" that the Illinois Supreme Court found created substantial nexus, and which the Court here found to be a compelling guide for its Order.

5. Rhinehart takes exception to the Court's use of *Florida Dep't of Revenue v. Share Int'l., Inc.*, 667 So. 2d 226 (Fla. 1st DCA 1995), to find substantial nexus as to the remaining years of the audit period. *See* Order at pp. 16 – 17, ¶¶ 37 – 38. The Florida Supreme Court's rendering of the *Share Int'l* case line supports a lack of substantial nexus. The Florida Supreme Court held that an out-of-state vendor's personally delivery of its merchandise to some of its Florida customers was insufficient to create substantial nexus and thus, no imposition of a sales and use tax was warranted. *See Dep't of Revenue of the State of Florida v. Share Int'l, Inc.*, 676 So. 2d 1362, 1363 (Fla. 1996).

6. In *Share Int'l*, the seller not only personally delivered its products into the State of Florida, but also held seminars in Miami Beach to promote its products and mail order business and actually sold its products during the seminars. The Florida Supreme Court held that when assessing these activities in the aggregate, Share International's activities did not create nexus with the State despite the additional promotion through the seminars. *See Share Int'l*, 676 So. 2d at 1363. Rhinehart's employees did not undertake the type of additional commercial activities that Share International's employees engaged in while in Florida. As the Court noted in its

Order in paragraph twenty-one, Rhinehart's drivers simply drove the company's products from Georgia to the purchasers in Florida, then turned around and returned home to Georgia. *See* Order, p. 10, ¶21.

7. Unlike Share International, Rhinehart employees did not promote its products, nor solicit additional sales while in Florida. Rhinehart's activities in Florida are significantly less than that of Share International's activities, which the Florida Supreme Court held did not create the requisite nexus with the State for the imposition of a sales and use tax. *See id.* ("'[s]ubstantial nexus' exists only if the foreign corporation is present within the state conducting the activity to be taxed," *See Share Int'l, Inc. v. Dep't of Revenue*, Case No. 92-2918 (Fla. Cir. Ct. 2d 1993), *aff'd*, 667 So. 2d 226 (1st DCA 1995), *aff'd*, 676 So. 2d 1362 (Fla. 1996)).

8. Rhinehart takes exception to the Order comingling transactions over the course of different tax years to find the existence of substanial nexus. *See* Order at p. 18, ¶38. Well settled case law and jurisprudence states that the "tax year concept does not permit retroactive adjustments with the benefits of hindsight." *See Brent v. Comm'r of Internal Revenue*, 630 F.2d 356 (5th Cir. 1980); s*ee also Daoud v. Comm'r of Internal Revenue*, No. 12070-04, T.C. Memo 2010-282 (Dec. 22, 2010 U.S. Tax Ct.) (rejecting the IRS's attempt to impute fraud that was proven in a later year to an earlier year so the IRS could impose fraud penalties on all of the tax years at issue.)

9. Rhinehart takes exception to the Court's finding that Rhinehart "deliberately and systemically targeted Florida customers in its advertising." *See* Order at p. 19, ¶40. Rhinehart's interactions with its Florida customers are comparable to the mailings in *Miller Bros.* In *Miller Bros.*, the mailing of circulars to customers in Maryland as well as the delivery of merchandise to Maryland proved insufficient to establish Maryland's authority to tax the Delaware company.

*See id.* at 342, 345–346. Likewise, Rhinehart delivers its products directly to its customers and sends out occasional, infrequent mailings. In fact, contrary to the Court's statement in paragraph 24 on page 10, to which Rhinehart takes exception, Rhinehart's mailings do not directly target Florida customers only (whereas the advertisements in *Miller Bros.* did target Maryland customers specifically). The occasional mailings must be purchased by the readers and are not directly sent to any customers. A reader must pay $2.00 to purchase the publication. *See* Stipulated Ex. 1 at p. 2. As such, Rhinehart takes exception to the Court's finding that Rhinehart "deliberately and systemically" advertised in Florida. Order, p. 19, ¶ 40. Rhinehart's advertisements were not pervasive and were less accessible than the advertising scheme in *Miller Bros.* which the Supreme Court found insufficient to create nexus.

10. Rhinehart also takes exception to the Court's reading of the Florida Mail Order Statute Section 212.0596. *See* Order at pp. 21 – 23, ¶¶ 46 – 48. Although Rhinehart's sales meet the definition a "mail order sale," there remains a complete lack of substantial nexus. Again, Rhinehart's advertisements were not systemic or regular and Rhinehart had too small a number of transactions to constitute a sufficient presence in any of the individual tax years.

11. Rhinehart takes exception to the Order's findings on the applicability of the statute of limitations. Order, pp. 11 – 14, ¶¶ 26 – 31. Rhinehart satisfied the "return" requirement in September 2005 by filing a seven (7) page protest letter containing various citations which explained the lack of substantial nexus between Rhinehart and the state of Florida. This submission contained all of the information that would constitute a proper tax return, including Rhinehart's Federal taxpayer ID number ("FEIN"), the applicable tax years at issue (2002 – 2005), the company's business address, contact phone numbers, and the fact that Rhinehart did not owe any taxes for the years 2002 – 2005. The Order did not consider

Rhinehart's arguments or the proper Florida statute that supports its arguments. Indeed, the Order failed to consider that as applied by the Court, Florida Statute 95.091(3)(a) would permit the Department of Revenue to wait fifty years, or even an infinite amount of time, to issue an assessment by simply mailing a questionnaire to a tax payer.

12. Rhinehart takes exception to the Order's recommendations on page twenty-five. Specifically, Rhinehart takes exception to numbers one; two; and four for the reasons stated above.

WHEREFORE, Rhinehart respectfully submits its exceptions to the Order entered August 27, 2012 as set forth above and requests that the Department of Revenue issue a final order finding no substantial nexus existed between Rhinehart and the State of Florida during any of the years comprising the relevant audit period.

Dated: October 19, 2012

Respectfully submitted,

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## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that a true and correct copy of the foregoing was furnished via facsimile, Federal Express, and e-mail this 19th day of October, 2012 to the following recipients:

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STATE OF FLORIDA
DEPARTMENT OF REVENUE

RHINEHART EQUIPMENT CO.,

Petitioner,

v.

DOAH Case No. 11-2567
DOR CASE NO.

DEPARTMENT OF REVENUE,

Respondent.
_____/

RESPONSE TO PETITIONER'S EXCEPTIONS TO RECOMMENDED ORDER

Respondent, Florida Department of Revenue, (DOR) by and through its undersigned counsel, in accordance with §120.57(1)(k), Fla. Stat., submits its responses to the exceptions filed by Petitioner.

The form and construction of Petitioner's filing is somewhat confusing. In its initial paragraph Petitioner specifically identifies three Exceptions, which DOR will address in the order they were identified. Further along, Petitioner identifies additional exceptions - for example, in paragraph 2, taking exception to the Court's distinction of *Miller Bros. v. Maryland, 347 U.S. 340 (1954)*, or paragraph 3, taking exception to the Court's reading of *Brown's Furniture,* or in paragraph 12 taking exception to the Order's recommendations, specifically numbers one; two; and four. The cases and recommendations are what they are and Respondent is at a loss as how to respond otherwise.

Exception No. 1

The [Recommended] Order did not analyze whether substantial nexus existed for each of the four independent tax years comprising the audit period.

Response

Petitioner does not cite to any statute, rule, or case authority for support of its proposition that each year (whether calendar or fiscal) must be independently examined for purposes of determining nexus regarding sales and use tax. The cases cited by Petitioner *Brent v. Comm'r of Internal Revenue, Daoud v. Comm'r of Internal Revenue* are federal income tax cases, for which discrete periods, either calendar or fiscal year, exist.

Section 212.05 (1)(a), Florida Statute states that 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, and for the exercise of such privilege, a tax is levied on each taxable transaction or incident.

Fla. Admin. Code R. 12A-1.060(1)(a) requires every person desiring to engage in or conduct business in the state to register with the Department of Revenue. The focus is on the intention of the actor, not an historical act. The historical record does demonstrate that Petitioner's year 2002 sale was not an isolated or single event - one hundred and fifteen more followed in the three year period under review.

Exception No.2

The Order improperly combined all transactions occurring over the course of the audit period to find the existence of substantial nexus despite Rhinehart's minimal presence in Florida.

Response

Petitioner is simply rephrasing its Exception No. 1. The determination of nexus requires "some" physical presence in the taxing state *National Bella Hess, Inc. v. Illinois Rev. Dept, 836 U.S. 753 (1967)* - not necessarily "substantial" but more than "slight" *National Geographic Society v. California Board of Equalization 430 U.S. 551 (1977)*. There is no limitation, by calendar year, fiscal year, or otherwise, on this determination. The facts clearly established Petitioner had more than a slight presence in Florida. One hundred and sixteen sale and deliveries over the period July 1, 2002 through June 30, 2005 valued at $2,928,981.00, support a finding of regular and frequent presence.

Exception No. 3

The Order improperly decided that the statute of limitations does not bar the assessment at issue.

Response

Petitioner repeats the argument it submitted with its Motion for Summary Recommended Order, which argument was rejected by the Administrative Law Judge. Petitioner did not make any required

payment of tax or file a required return during the period July 1, 2002 through June 30, 2005, nor did Petitioner disclose in writing the tax liability to DOR before DOR contacts the taxpayer, therefore Section 95.091(3)(a)5, Florida Statutes, controls. DOR has the authority to determine and assess the amount of tax due at any time.

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 U.S. mail to Ayman F. Rizkalla, Esq., and Richard L. Winston, Esq., K&L GATES LLP, Southeast Financial Center, 200 South Biscayne Blvd., Suite 3900, Miami, Florida 33131-2399 this 29th day of October, 2012.

JOHN MIKA
Assistant Attorney General