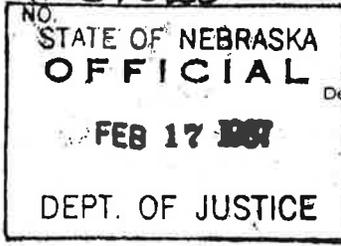


DEPARTMENT OF JUSTICE

STATE OF NEBRASKA

TELEPHONE 402/471-2682 • STATE CAPITOL • LINCOLN, NEBRASKA 68509

87020



ROBERT M. SPIRE
Attorney General
A. EUGENE CRUMP
Deputy Attorney General

DATE: February 17, 1987

SUBJECT: Constitutionality of LB 304 - Amendments to Definition of "Engaged in Business in this State" Within the Nebraska Sales and Use Tax Statutes

REQUESTED BY: Senator Dennis Baack
Nebraska State Legislature

WRITTEN BY: Robert M. Spire, Attorney General
L. Jay Bartel, Assistant Attorney General

You have requested our opinion concerning the constitutionality of LB 304. Generally, LB 304 proposes to amend the definition of "engaged in business in this state" contained in Neb.Rev.Stat. §77-2702(21) (Reissue 1986) by expanding the definition of this term within the sales and use tax statutes to reach transactions involving tangible personal property sold by mail order retailers, or retailers soliciting sales by certain advertising conducted in the state. Your specific question concerns whether the imposition of an obligation to collect and remit sales and use tax on out-of-state sellers under these circumstances violates the due process clause of the Fourteenth Amendment of the United States Constitution, and imposes an impermissible burden on interstate commerce under Article I, Section 8, Cl. 3 of the Constitution.

Sales and use taxes, while both constituting excise or privilege taxes, are nevertheless considered to be distinct forms of taxation. Generally, ". . . the sales tax is imposed on sales occurring within the state, while the use tax applies to goods purchased outside the state." 68 Am.Jur.2d Sales and Use Taxes, §173 (1973). The use tax is correlative of, and complementary to, the sales tax, and is designed to prevent loss of tax revenues through evasion of the sales tax. Miller Brothers Co. v. Maryland, 347 U.S. 340 (1953). Although the sales and use tax often bring about the same result and serve complementary purposes, they are different in conception, and different standards may apply with respect to the determination of their constitutionality. McLeod v. J. E. Dilworth Co., 322 U.S. 327 (1944).

L. Jay Bartel
Martel J. Bundy
Janie C. Castaneda
Dale A. Comer
Laura L. Freppel

Lynne R. Fritz
Yvonne E. Gates
Jill Gradwohl
Royce N. Harper
William L. Howland

Marilyn B. Hutchinson
Mel Kammerlohr
Sharon M. Lindgren
Charles E. Lowe
Steven J. Moeller

Harold I. Mosher
Fredrick F. Neid
Bernard L. Packett
Lisa D. Martin-Price
LeRoy W. Sievers

James H. Spears
Mark D. Starr
John R. Thompson
Susan M. Ugal
Linda L. Willard

February 17, 1987

With respect to the constitutionality of imposing a sales tax on property delivered from outside the state, the United States Supreme Court, in McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940), held a sales tax imposed under these conditions was constitutionally permissible where transfer of title and possession to the purchaser occurred within the taxing state. In a subsequent case, however, the Court held unconstitutional on commerce clause grounds the application of an Arkansas sales tax where transfer and title to the goods occurred outside the taxing state upon delivery to a common carrier. McLeod v. J. E. Dilworth Co., supra. Thus, in determining questions regarding the constitutionality of imposing sales tax liability, the Court has focused on the legal incidents of the sale, focusing upon the transfer of ownership and possession of the property in question within the taxing jurisdiction.

While the Court has had only limited occasion to address the constitutionality of imposing sales tax liability on transactions involving out-of-state sellers, the Court has addressed on several occasions the level of in-state activity necessary to justify the imposition of use tax collection obligations on an interstate business. The initial U.S. Supreme Court decision in this area was Miller Brothers Co. v. Maryland, 347 U.S. 340 (1953). Miller Brothers involved a Delaware retailer which made only direct sales to customers at its store in Delaware. Residents of the neighboring state of Maryland made purchases at Miller Brothers' store, and occasionally Miller Brothers would arrange for delivery into Maryland of items purchased, either by common carrier or in its own delivery truck. Miller Brothers had no resident agent or retail outlets in Maryland, and did not advertise in the Maryland media, although its advertisements in the Delaware media were received by Maryland residents. The State of Maryland sought to impose upon Miller Brothers the duty to collect and remit use tax from Maryland residents who purchased goods at their Delaware store. Id. at 341-42.

The Supreme Court held that Maryland could not constitutionally impose a use tax obligation on Miller Brothers under these factual circumstances. In reaching this conclusion, the Court stated that, for a state to satisfy the due process requirement necessary to justify imposing a collection obligation of this nature on an out-of-state seller, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Id. at 344-45.

The next use tax obligation case before the Supreme Court was Scripto, Inc. v. Carson, 362 U.S. 207 (1960). Scripto involved a Georgia merchandising corporation which solicited orders in Florida for its products through the use of ten resident "jobbers", who would forward the orders to Georgia for shipment of the goods. Scripto had no offices, property or employees in Florida. The Court applied the nexus test adopted in Miller Brothers, and held the requisite minimum contacts with

February 17, 1987

Florida were present to justify imposing the use tax obligation on Scripto, even though the jobbers were independent contractors. Id. at 209-212.

The next case in the series, National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967), involved an attempt by the State of Illinois to impose a use tax obligation on a Missouri based mail order house that had no property or sales representatives in the taxing state, and did not engage in local deliveries or local advertising. National's only contacts with Illinois occurred through the mailing of catalogues to Illinois residents, and the delivery of goods by common carrier. A majority of six justices held the imposition of a use tax collection obligation unconstitutional under these circumstances, stating that ". . . the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail." Id. at 758. In a dissenting opinion, however, three members of the Court objected to the majority opinion on the ground that the ". . . large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market" constituted adequate nexus to justify the requirement for collection of use taxes. Id. at 761-62 (Fortas, J., Black, J., and Douglas, J., dissenting).

The most recent Supreme Court decision in this area is National Geographic Society v. California Board of Equalization, 430 U.S. 551 (1977). In that case, California sought to require the Society to collect use taxes owed by its customers who purchased maps, books, atlases and globes through its interstate mail order business. The Society maintained two offices in California, but these offices performed no activities related to the society's interstate mail order business.

Finding that the burdens imposed on interstate commerce are less in requiring a seller to collect a use tax, as opposed to requiring payment of a sales tax, the Court held the nexus required between the taxing state and the person, property, or transaction sought to be taxed is lesser in the use tax situation than in the sales tax situation. Id. at 557-58. Compare McLeod v. J. E. Dilworth Co., supra, with Scripto, Inc. v. Carson, supra. Stating that the key inquiry in determining whether sufficient nexus exists to impose a use tax collection obligation is ". . . whether the out-of-state seller enjoys services of the taxing state", the Court held the Society's presence within the state and activities conducted therein, although unconnected to its mail order business, were sufficient to supply the requisite nexus to impose a use tax collection obligation under the circumstances. 430 U.S. at 558, 562.

Upon review of the series of Supreme Court decisions in this area, it is apparent that the determination of whether sufficient nexus exists to justify imposition on an out-of-state seller of

February 17, 1987

the obligation to act as the state's tax collection agent is a question answered primarily on a case-by-case basis. The Court has not pronounced a definitive standard by which to determine whether an out-of-state seller has engaged in the requisite level of local activity, but has instead chosen to consider each case on its particular facts. Nevertheless, one court has sought to find certain common threads running through the cases in this area, summarizing their holdings as follows:

First, it seems clear that the nexus requirement for sales taxes and use taxes is different, and that a lesser nature or extent of connections will pass constitutional muster in the latter case. Second, the "presence" of the out-of-state seller within the taxing state must be more than occasional deliveries by company truck as in Miller Brothers, but perhaps less than the degree of "presence" established by ten jobbers soliciting orders within the state in Scripto. Third, the requisite nexus can be found in the case of a mail order seller with retail outlets, solicitors or property within the taxing state as in National Geographic, but cannot be found where the out-of-state seller merely communicates with customers in the taxing state by mail or common carrier as in National Bellas Hess.

Rowe-Genereux, Inc. v. Vermont Department of Taxes, 138 Vt. 130, 137, 411 A.2d 1345, 1349 (1980).

In summary, the relevant inquiry in analyzing the constitutionality of the sales tax focuses on the significant aspects of the sale within the taxing jurisdiction, and the legal incidents respecting the transfer of ownership and possession. In the use tax area, the analysis centers on the local activities of the out-of-state seller, not necessarily related to the sale, but rather focusing on the physical presence of the seller in the taxing jurisdiction so as to make it reasonable to impose the collection duty.

Applying these principles to the proposed expansion of the definition of "engaged in business in this state" contained in LB 304, we believe certain aspects of the amendment pose serious constitutional difficulties under the standards enunciated by the Supreme Court. With respect to the proposal to expand the definition to reach the solicitation of retail sales through advertising broadcast from a transmitter in the state, or distributed from a location in the state, these facts alone would appear to be insufficient to justify either sales or use tax collection obligations on out-of-state sellers. The Supreme Court has never held that mere advertising alone is sufficient to satisfy the due process requirement based upon the connection between the state and the person or property or transaction it is seeking to tax. Similarly, as there is no controlling precedent

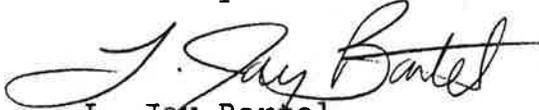
February 17, 1987

as to the sufficiency of the contacts pertaining to the proposed amendments to include within the definition "Being owned or controlled by the same interests which own or control any retailer engaged in business in the same or similar line of business in this state", or "Maintaining or having a franchisee or licensee operating under the retailer's trade name in this state. . .", these provisions may also be constitutionally suspect as to the adequacy of the nexus existing under such circumstances.

The final provision of LB 304 seeks to expand the definition of "engaged in business in this state" to cover the solicitation of orders from Nebraska residents by mail, if done on a "continuous, regular, seasonal, or systematic" basis, and ". . . if the retailer benefits from any banking, financing, debt collection, or marketing activities occurring in this state or benefits from the location in this state of authorized installation, servicing, or repair facilities." As to the imposition of sales tax liability under these circumstances, we believe this provision is not drawn with the specificity required to fall within the standards for constitutional purposes set forth by the Supreme Court in this area. As to the imposition of a use tax collection obligation under these circumstances, we believe this particular provision would survive constitutional attack, as it appears to require contact with the state beyond mere solicitation and mailing of orders into the state, as involved in National Bellas Hess, Inc., supra, by requiring that the seller also receive certain tangible benefits from the taxing jurisdiction in order to trigger the obligation to collect and remit use taxes from purchasers. It must be remembered, however, that the validity of the application of such a requirement depends primarily on the facts involved in a particular situation, and that the court decisions in this area do not provide a broad, definitive standard which would permit the application of a "bright-line" test as to the constitutionality of legislation of this nature.

Sincerely,

ROBERT M. SPIRE
Attorney General



L. Jay Bartel
Assistant Attorney General

LJB:jem

cc: Patrick J. O'Donnell
Clerk of the Legislature

3/10

APPROVED:



Attorney General