REDACTED DECISION – DK#'s 12-432 U, 12-433 CU, 12-434 C, 12-435 NFN

BY: A.M. "FENWAY" POLLACK, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON OCTOBER 24, 2014
ISSUED ON JANUARY 30, 2015

SYNOPSIS

TAXATION
SUPERVISION
GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2 (West 2010).

TAXATION
WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT
COLLECTION OF TAX

"The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. §11-10-11(a) (West 2010).

TAXATION
CONSUMERS SALES AND SERVICE TAX
AMOUNT OF TAX; ALLOCATION OF TAX AND TRANSFERS

"For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter." W. Va. Code Ann. § 11-15-3(a) (West 2015).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

A state tax on interstate commerce will not be sustained unless it: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State." *Tax Com'r of State v. MBNA Am. Bank, N.A.*, 220 W. Va. 163, 167, 640 S.E.2d 226, 230 (2006).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

"[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199 (1987).

WEST VIRGINIA SUPREME COURT OF APPEALS
CASE LAW

The activities performed in West Virginia on behalf of the Petitioner before us are more than just "associated" with its ability to establish and maintain a market here. These activities create and maintain in totality the Petitioner's market here. *See e.g. Travelscape, LLC v. S. Carolina Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011); *Vill. of Rosemont, Ill. v. Priceline.com Inc.*, No. 09 C 4438, 2011 WL 4913262, (N.D. Ill. Oct. 14, 2011) and *Travelocity.com LP v. Wyoming Dep't of Revenue*, 2014 WY 43, 329 P.3d 131 (2014).

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

OFFICE OF TAX APPEALS
CONCLUSION OF LAW

The Petitioner in this matter has not carried its burden of proving that the October 9, 2012, sales tax assessment and combined sales and service tax assessment issued against it were erroneous, unlawful, void or otherwise invalid.

FINAL DECISION

On October 9, 2012, the Auditing Division of the West Virginia State Tax Department (the Tax Commissioner or Respondent) issued four estimated Audit Notices of Assessment against the Petitioner. These assessments were issued pursuant to the authority of the State Tax Commissioner, granted to him by the provisions of Chapter 11, Article 10 *et seq*, of the West Virginia Code. The first assessment was for use tax for the period January 1, 2007, through June 30, 2008, for tax in the amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____, for a total assessed tax liability of $_____. The second assessment was for combined sales and service and use tax for the period July 1, 2008, through September 30, 2012, for tax in the amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____, for a total assessed tax liability of $_____. The third assessment was for sales tax for the period January 1, 2007, through June 30, 2008, for tax in the amount of $_____,

interest in the amount of $_____, and additions to tax in the amount of $_____, for a total assessed liability of $_____. The fourth assessment was for corporate net income and business franchise taxes for the period January 1, 2007, through December 31, 2011, for tax in the amount of $_____, interest in the amount of $_____, and additions to tax in the amount of $_____, for a total assessed liability of $_____.

Thereafter, on November 13, 2012, the Petitioner timely filed with this Tribunal, the West Virginia Office of Tax Appeals, four petitions for reassessment. *See* W. Va. Code Ann. §§ 11-10A-8(1); 11-10A-9 (West 2010).

Subsequently, notice of a hearing on the petitions was sent to the Petitioner, and a hearing was held in accordance with the provisions of West Virginia Code Section 11-10A-10, after which the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.[1]

FINDINGS OF FACT

1. The Petitioner is an out of state corporation with its principal place of business in an out of state city.

2. The Petitioner's business is exterior facilities maintenance management. Specifically, the Petitioner provides snow and ice removal, landscaping services, parking lot maintenance, window washing and minor building repairs to four national corporations. During the periods of the assessments these services were provided in twenty (20) states, including West Virginia.

[1] This matter lingered on the docket of this Tribunal for a variety of reasons. First, the Petitioner replaced its initial attorney. Then, the evidentiary hearing which began on December 4, 2013, was continued at the Petitioner's request. The Petitioner then filed additional motions to continue the continuation of the evidentiary hearing. As a result the evidentiary hearing was not concluded until June 30, 2014.

3. The four corporations are: Corporation A, Corporation B, Corporation C, and Corporation D, all headquartered in separate states and cities outside West Virginia.

4. The Petitioner does not perform the services but rather contracts with "service providers" that it characterizes as independent contractors. These service providers do the work under the supervision of the Petitioner. This supervision is possible by the Petitioner's use of proprietary software. This software allows the Petitioner to monitor in real time the services being provided. The agreement between the Petitioner and the service providers also requires them to submit photographs of their completed work.

5. The Petitioner does not have any employees or property in West Virginia. The Petitioner does not advertise in West Virginia.

6. The Petitioner and the Respondent have resolved, to their mutual satisfaction, the corporate net income and business franchise tax assessment. Additionally, the Respondent orally withdrew the use tax assessment during the second day of the evidentiary hearing.

7. Regarding the remaining two assessments, the parties have agreed on actual (as opposed to estimated) amounts due, should the Respondent prevail. Those amounts are $_____ for the combined sales and service assessment and $_____ for the sales tax assessment.

DISCUSSSION

Neither party in this matter discusses, let alone disputes, the relevant West Virginia law regarding the taxability of providing services.

> *Vendor to collect*. -- For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to

> the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter

W. Va. Code Ann. § 11-15-3(a) (West 2015). Due to the fact that neither party argues about the applicability of Section 3(a), we do not feel the need to delve deeper into it. It is sufficient to say that the Petitioner clearly has statutory nexus, meaning that if it were located in West Virginia it acknowledges that it would be a vendor that is providing the type of services subject to the collection duty in Section 3(a). Therefore, the only question before this Tribunal (and the only question raised by the parties) involves the constitutionality of the Tax Commissioner's actions under the Dormant Commerce Clause. In plain English, the question becomes, is there sufficient nexus between the Petitioner and the State of West Virginia, under these facts, to require the Petitioner to collect West Virginia sales tax from the national corporations with which it does business.

The Tax Commissioner relies almost exclusively on the case of *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960).[2] In *Scripto*, the Taxpayer was a Georgia corporation that was shipping writing instruments into Florida. In similar fashion to the Taxpayer in this matter, it argued that because it had no employees or offices in Florida, imposition of a tax regarding these sales violated both its due process rights and burdened interstate commerce. The Court decided that the Taxpayer had sufficient nexus with Florida based upon Scripto's use of commissioned salesmen in that state.

> True, the 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida. . .

[2]The Tax Commissioner also relies on one case from the Kansas Supreme Court.

> .To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance. Moreover, we cannot see, from a constitutional standpoint, 'that it was important that the agent worked for several principals.' The test is simply the nature and extent of the activities of the appellant.

Id, at 211-12, 621-22 (internal citations omitted).

The Tax Commissioner argues that for nexus purposes there is no difference between the independent salesmen in *Scripto* and the independent contractors who perform the snow removal or window cleaning in this matter. In fact, the Tax Commissioner argues that nexus should be more readily apparent in this case because here, save for generating the business and signing the contracts, the independent contractors are performing **all** of the business activity being taxed.

The Petitioner relies on two U.S. Supreme Court cases, *Quill Corp. v. N. Dakota By & Through Heitkamp*, 504 U.S. 298 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) and *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 97 S. Ct. 1076, 51 L. Ed. 2d 326 (1977). However, before we can discuss *Quill* it is necessary to discuss its predecessor, *Nat'l Bellas Hess, Inc. v. Dep't of Revenue of State of Ill.*, 386 U.S. 753, 87 S. Ct. 1389, 18 L. Ed. 2d 505 (1967). In *Bellas-Hess*, like *Quill* and *Scripto* (and all the other cases we will be discussing) an out of state entity is claiming that the taxing state does not have the power to tax it, because of insufficient connections with the taxing state. In both *Bellas Hess*, and *Quill* the Court was dealing with mail order catalogue sellers whose only contact with the taxing state was the postal service for delivery of the catalogues and common carrier for delivery of the goods sold. In *Bellas Hess* the Court cited *Scripto*, and clearly referenced and distinguished the two different fact patterns.

> In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, **solicitors**, or property within a State, and those who do no more than communicate with customers

> in the State by mail or common carrier as part of a general interstate business

Nat'l Bellas Hess, at 758, 1392 (emphasis added).

Twenty-five years later, in *Quill* the Court again overturned a state tax on a mail order seller. And, as in *Bellas Hess*, the *Quill* decision again discussed the "sharp distinction" between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier. *Quill* at 307, 1910. In between *Bellas Hess* and *Quill* the U.S. Supreme Court decided *Complete Auto Transit, Inc. v. Brady*. *Complete Auto* created the seminal four part test regarding taxation of interstate commerce. The test is: "A state tax on interstate commerce will not be sustained unless it: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State." *Tax Com'r of State v. MBNA Am. Bank, N.A.*, 220 W. Va. 163, 167, 640 S.E.2d 226, 230 (2006). The Petitioner believes that the *Quill* Court equated prong one of the *Complete Auto* test as being the equivalent of the physical presence test in *Bellas Hess*. The Petitioner slightly mischaracterizes what the *Quill* Court said. "*Bellas Hess* concerns the first of these tests and stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the "substantial nexus" required by the Commerce Clause" *Quill* at 311, 1912.

We don't feel the need to quibble over how the *Complete Auto* test jibes with *Quill* and *Bellas Hess*. Even if we agreed with the Petitioner's proposition that a substantial nexus requires a physical presence, there is still a critical flaw in the Petitioner's argument.[3] What the Petitioner fails to adequately address is how it does not have a physical presence in West Virginia. In its

[3] To be clear, we do not agree with such a broad characterization. We believe that both *Quill* and *Bellas Hess* confine themselves exclusively to mail order vendors.

reply brief the Petitioner states that the sales force that was soliciting sales for Scripto in Florida is "entirely different" than the independent contractors performing services on its behalf in West Virginia. The Petitioner fails to explain exactly how the Scripto sales force is different than the workers working for it in West Virginia. The Petitioner also fails to mention that since *Scripto* (and *Complete Auto)* the U.S. Supreme Court has issued two other decisions that address vendors without employees or property within the taxing state. Very shortly after it decided *Complete Auto* the Court issued its decision in *Nat'l Geographic Soc. v. California Bd. of Equalization*, 430 U.S. 551, 97 S. Ct. 1386, 51 L. Ed. 2d 631 (1977). In *Nat'l Geographic* the Court was again confronted with a mail order seller.[4] Unlike the Taxpayer in *Bellas Hess*, the Court found nexus, based upon the fact that National Geographic had two sales offices in California. National Geographic argued that these two offices merely supported the advertising staff of the magazine and had nothing to do with the mail order catalogue sales. The Court was unpersuaded, stating:

> Here the Society's two offices, without regard to the nature of their activities, had the advantage of the same municipal services fire and police protection, and the like as they would have had if their activities, as in Sears and Montgomery Ward, included assistance to the mail-order operations that generated the use taxes

Id, at 561, 1393.

Ten years later the Court again looked at nexus, this time for an out of state seller of pipes, fittings and other drainage products. Continuing the theme, this seller had no employees, or property in the state of Washington. What it did have was one sales executive located outside of Washington State and one independent contractor in Seattle, both of whom worked on calling on

[4] While everyone is obviously aware of the National Geographic magazine, published by the National Geographic Society, this case involved the Society's mail order business of items such as globes, maps and books.

customers and soliciting sales on behalf of the Taxpayer. As one might expect, the Court immediately looked to *Scripto* and *National Geographic.*

> Although the "salesmen" were not employees of Scripto, we determined that "such a fine distinction is without constitutional significance. This conclusion is consistent with our more recent cases. See *National Geographic Society v. California Equalization Board.* As the Washington Supreme Court determined, the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.

Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue, 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199 (1987).

Three times the U.S. Supreme Court has been confronted with facts like those before this Tribunal and each time it has ruled for the taxing authority. To be clear, those facts are, an out of state seller with no employees, property or other direct presence in the taxing state, but with some person or persons operating on the seller's behalf, or helping the seller establish a market in the taxing state. When one looks at all the cases cited above, this matter could be decided on the basis of *National Geographic* alone. The sales at issue there were mail order sales, just like *Bellas Hess* and *Quill*. Nonetheless, the Court found nexus there based upon two offices; two offices in a state of approximately twenty million people[5] and that did not support the mail order business in any fashion. Even if one were to rely just on *Scripto* or *Tyler Pipe* the Petitioner's argument would still be unpersuasive. The bottom line is this, based upon the facts; a citizen of Florida could certainly buy a Scripto writing instrument without dealing with one of the company's salesmen. Someone in Washington could have no contact with a Tyler Pipe salesperson, and still purchase a pipe or fitting from that company. And everyone in California who bought maps, books or globes

[5] *See* http://geography.about.com/od/obtainpopulationdata/a/californiapopulation.htm.

from a National Geographic catalogue had no contact whatsoever with the Society's two advertising sales offices. Yet in all three cases the Supreme Court found sufficient nexus. Here, as the Tax Commissioner correctly points out, without the independent contractors operating on the Petitioner's behalf, nothing happens. The Petitioner can sell all the window washing services it wants, but without people in West Virginia to do the washing, it's out of business. If the U.S. Supreme Court found sufficient nexus for California to tax National Geographic's catalogue sales, when the Society's employees in that state did **nothing** to support those sales, how can there be insufficient nexus here, when without the independent contractors, the Petitioner before us is out of business?

While both parties discuss the fact that what is being taxed is a service, as opposed to the sale of tangible personal property, surprisingly, neither party directs us to any cases that analyze substantial nexus to tax out of state service providers. While there is no such decision from the U.S. Supreme Court, there are numerous such decisions from the lower courts. Of particular interest to this Tribunal are the cases involving internet travel companies. While the facts of those cases are different, conceptually they are identical to the case before us. We can see no legal difference for tax purposes between the Taxpayer who says "I can get you a hotel room in a West Virginia city" and one who says "I can have someone plow the snow in your parking lot in a West Virginia city." This conceptual similarity is critical because it distinguishes the few cases where a service is being provided from the cases involving sales of tangible personal property. There are a lot of the latter cases, but in many of those the substantial nexus questions hinges on how much the Taxpayer's representative helps them sell stuff. The implicit question in many of those cases is, could the Taxpayer sell as much stuff without the help? In the case before us, as in the internet

travel cases, that is not the question. Hotels.com is not going to build hotels and the Taxpayer before us is not going to plow snow.

Our research did not reveal any lower court decisions involving internet travel companies where substantial nexus was not found, although there may be such cases. Three cases where substantial nexus was found are *Travelscape, LLC v. S. Carolina Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011); *Vill. of Rosemont, Ill. v. Priceline.com Inc.*, No. 09 C 4438, 2011 WL 4913262, (N.D. Ill. Oct. 14, 2011) and *Travelocity.com LP v. Wyoming Dep't of Revenue*, 2014 WY 43, 329 P.3d 131 (2014). As one might expect, all three decisions cite *Tyler Pipe* and *Scripto.* The Supreme Court of South Carolina pointed to numerous factors that established substantial nexus between the state and Travelscape (an internet travel company). These factors included visits to South Carolina by Travelscape employees and the negotiation of contracts with South Carolina hotels. The Court also noted what we have discussed above, the obvious fact that without South Carolina hotels providing rooms, Travelscape's business in that state would not exist. *Travelscape*, at 106-107, 37. Both the *Vill. of Rosemont* and *Travelocity* decisions cited *Travelscape* and both went through a similar analysis. The Supreme Court of Wyoming even quoted one of the Taxpayer's witnesses as stating that "[a]n OTC cannot exist without the hotel because they [sic] have nothing to sell." *Travelocity* at 150.[6]

Based upon the foregoing, it is clear that virtually all courts that have examined the issue before us have, either explicitly or implicitly adhered to the "sharp distinction" discussed by the *Quill* Court. The reason the distinction is "sharp" is because the Taxpayers at issue either have someone operating in the taxing state on their behalf, or they don't. In the last fifty-five years the

[6] OTC is an acronym for "online travel company".

U.S. Supreme Court has looked at this issue six times, and the only time it failed to find substantial nexus was when the Taxpayer's only contact with the taxing state was through mail or common carrier. Every time the Taxpayer had people in the taxing state, even when, as in the case with *National Geographic*, those people were not necessarily supporting the taxed activity, the Court found substantial nexus. In the case before us, the Petitioner's contacts with West Virginia are much greater than the Taxpayers in *Scripto, Tyler Pipe* and *National Geographic.* In those three cases there was at least the possibility of sales without help from the instate representatives. Here, the Petitioner is entirely dependent upon the instate representatives, without whom, no economic activity occurs.

Finally we would be remiss if we did not mention the West Virginia Supreme Court of Appeals. It has, twice in the last decade, examined substantial nexus for taxation purposes. Neither party before us relies on either *Griffith v. ConAgra Brands, Inc.*, 229 W. Va. 190, 728 S.E.2d 74 (2012) or *Tax Com'r of State v. MBNA Am. Bank, N.A.*, 220 W. Va. 163, 640 S.E.2d 226 (2006), presumably because both cases involve income taxes as opposed to sales taxes and because neither case answers the question before this Tribunal. Nonetheless, it is worth mentioning that both decisions reiterate the necessity of a physical presence before a sales tax may be assessed. However, neither decision analyzed or discussed *Scripto, Tyler Pipe* or *National Geographic,*[7] nor discussed whether a physical presence can be established by agents or representatives. Therefore, to the extent that the parties find these two cases to not be determinative, we are in agreement.

[7] The *MBNA* decision briefly mentions *National Geographic*, because the Taxpayer relied on it as standing for the proposition that there is a higher Commerce Clause standard for direct taxes as opposed to use taxes. However, the Court rejected this argument with little discussion.

CONCLUSIONS OF LAW

1. It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. §11-1-2 (West 2010).

2. "The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. §11-10-11(a) (West 2010).

3. "For the privilege of selling tangible personal property or custom software and for the privilege of furnishing certain selected services defined in sections two and eight of this article, the vendor shall collect from the purchaser the tax as provided under this article and article fifteen-b of this chapter, and shall pay the amount of tax to the tax commissioner in accordance with the provisions of this article or article fifteen-b of this chapter." W. Va. Code Ann. § 11-15-3(a) (West 2015).

4. A state tax on interstate commerce will not be sustained unless it: "(1) has a substantial nexus with the State; (2) is fairly apportioned; (3) does not discriminate; and (4) is fairly related to the services provided by the State." *Tax Com'r of State v. MBNA Am. Bank, N.A.*, 220 W. Va. 163, 167, 640 S.E.2d 226, 230 (2006).

5. "[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales." *Tyler Pipe Indus., Inc. v. Washington State Dep't of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199 (1987).

6. The activities performed in West Virginia on behalf of the Petitioner before us are more than just "associated" with its ability to establish and maintain a market here. These activities

create and maintain in totality the Petitioner's market here. *See e.g. Travelscape, LLC v. S. Carolina Dep't of Revenue*, 391 S.C. 89, 705 S.E.2d 28 (2011); *Vill. of Rosemont, Ill. v. Priceline.com Inc.*, No. 09 C 4438, 2011 WL 4913262, (N.D. Ill. Oct. 14, 2011) and *Travelocity.com LP v. Wyoming Dep't of Revenue*, 2014 WY 43, 329 P.3d 131 (2014).

7. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioner to show that any assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code Ann. § 11-10A-10(e) (West 2010); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003).

8. The Petitioner in this matter has not carried its burden of proving that the two October 9, 2012, assessments issued against it were erroneous, unlawful, void or otherwise invalid.

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessments issued against the Petitioner on October 9, 2012, in the modified amounts of $_____ for the combined sales and service assessment and $_____ for the sales tax assessment are hereby **AFFIRMED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
A. M. "Fenway" Pollack
Chief Administrative Law Judge

_____
Date Entered