

REDACTED DECISION – DOCKET NUMBER 14-081 CU

**GEORGE V. PIPER, ADMINISTRATIVE LAW JUDGE - SUBMITTED FOR
DECISION on JANUARY 14, 2015
ISSUED ON OCTOBER 14, 2015**

BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

SYNOPSIS

TAXATION

SUPERVISION

GENERAL DUTIES AND POWERS OF TAX 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 § 11-1-2.

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 § 11-10-11(a).

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. *See* W. Va. Code § 11-15-3(a).

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

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 functioning of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida, *See Scripto, Inc. v. Carson*, 362 U.S. 207, 805 Ct. 619, 4 L.Ed.3d 660 (1960).

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 Department 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 are significantly associated with its ability to establish and maintain a market here. These activities create and maintain the Petitioner’s market for its sales. *See Tyler Pipe Indus., Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

TAXATION

WEST VIRGINIA OFFICE OF TAX APPEALS

HEARING PROCEDURES

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 § 11-10A-10(3); W. Va. Code R. §§ 121-1-63.1 and 69.2 (2003)*.

WEST VIRGINIA OFFICE OF TAX APPEALS

HEARING PROCEDURES

The Petitioner in this matter has not carried its burden of proving that the assessment issued against it was erroneous, unlawful, void or otherwise invalid.

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

In order to be subject to taxation by any state, a foreign corporation, or its activities, must have connections with the state that meet the requirements imposed by the Due Process Clause, U.S. CONST. amend. XIV and the Commerce Clause, U.S. CONST. art. I, section 8, cl. 3.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

The Supreme Court has determined that, in addition to granting express authority to regulate interstate commerce, the Commerce Clause also prevents state regulations that interfere

with interstate commerce by way of the doctrine otherwise known as the “dormant” Commerce Clause. See *Tax Comm’r of State v. MBNA America Bank, N.A.*, 640 S.E.2d 226, 229 (W. Va. 2006) (internal citations omitted).

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

With respect to Petitioner’s Due Process challenge, it is well established that a state’s jurisdiction to tax under the Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Quill Corp. v. North Dakota*, 504 U.S. 198, 206 (1992) (internal citations omitted).

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

Regarding the Commerce Clause, a state may tax a foreign entity provided that it satisfies the four-part test espoused by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Specifically, that test requires that “the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.” *Id.*

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

Quoting *Quill*, the West Virginia Supreme Court of Appeals recently distinguished Due Process challenges from Commerce Clause challenges in the area of state taxation:

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

Due Process concerns fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him. We have, therefore, identified “notice” or “fair warning” as the analytic touchstone of due process analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendants as by structural concerns about the effects of state regulation on the national economy.

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

The *Complete Auto* analysis reflects these concerns about the national economy. The second and third parts of that analysis, which require fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and the state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce. Thus, the “substantial nexus” requirement is not, like due process’ “minimum contacts” requirement, a proxy for notice, but rather a means for limiting burdens on interstate commerce. Accordingly, contrary to the State’s suggestion, a corporation may have the “minimum contacts” with a taxing State as required by the Due Process Clause, and yet lack the “substantial nexus” with that State as required by the Commerce Clause.”

UNITED STATES SUPREME COURT OF APPEALS

CASE LAW

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. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

As a result of the factual evidence presented, we find that Petitioner's purposeful utilization of manufacturing representatives who provide leads, sales information, installation and follow-up, coupled with the expertise of its independent contractor (sales representative) have established and maintained such a market in the State of West Virginia.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

Application of the sales tax against Petitioner cannot be said to be "administered or applied in a discriminatory manner [that] runs afoul of the equal protection clause of the Federal [or State] Constitution." *Summers v. West Virginia Consolidated Public Retirement Bd.*, 217 W. Va. 399, 404, 618 S.E.2d 408, 413 (2005).

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

In this case, the Petitioner has a physical presence in West Virginia through its website, through its use of its representatives such as independent contractor Mr. A and manufacturer A. In addition, Petitioner has generated enough sales and use tax during 2010 and 2011 to produce a resulting sales tax liability of nearly \$ _____. Petitioner's physical presence creates nexus sufficient to pass the constitutional muster of the Commerce Clause and easily satisfies the minimum contacts necessary to satisfy due process under the Federal and State constitutions.

WEST VIRGINIA SUPREME COURT OF APPEALS

CASE LAW

The West Virginia Supreme Court of Appeals recently made clear that the United States Supreme Court's decision in *Quill* requires the physical presence of an entity in analyzing alleged Commerce Clause violations involving sales and use taxes. *See Tax Comm'r v. MBNA America Bank*, 220 W. Va. 163, 640 S.E.2d 226 (2006), *cert. denied*, 551 U.S. 1141, 127 S.Ct. 2997, 168 L.Ed.2d 719 (2007).

FINAL DECISION

On January 6, 2014, the Auditing Division of the West Virginia State Tax Department (hereinafter, the Tax Commissioner or Respondent) issued an Audit Notice of Assessment against the Petitioner. The assessment was 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 assessment was for combined sales and use tax for the period January 1, 2010, through June 30, 2013, inclusive, for tax in the amount of \$_____ and interest in the amount of \$_____, for a total assessed tax liability of \$_____.

Thereafter, on March 4, 2014, the Petitioner timely filed (hand delivered) with this Tribunal, the West Virginia Office of Tax appeals, its petition for reassessment. *See* W. Va. Code §§ 11-10A-8(1); 11-10A-9.

FINDINGS OF FACT

1. The Petitioner is an out of state corporation with its principal place of business in that state. It has a warehouse, equipment and some inventory at that site.

2. The Petitioner's business is primarily the sale of garage equipment. Specifically, the Petitioner sells alignment machines, tire changers, wheel balancers and various kinds of lifts. During the audit period, the Petitioner operated in fourteen (14) states, including West Virginia, although it had no physical locations in any of those fourteen (14) states.

3. Petitioner conducts business by using representatives from Manufacturer A (hereinafter Company A), a manufacturer, who travels into West Virginia making field calls to show and demonstrate products sold by the Petitioner.

4. Petitioner estimates that Company A products account for seventy (70) percent of Petitioner's business. The remaining thirty (30) percent of Petitioner's business comes from other manufacturers that Petitioner utilizes.

5. When Petitioner sells an item, it is shipped to the customer by common carrier. Company A's representatives then install that product, provide training, conduct follow-ups and other services associated with the selling of the product, all using its own service team.

6. Petitioner utilizes an independent contractor, named Mr. A, who has functioned as its sales representative since 2004. Mr. A has a West Virginia phone number but has an out of state address. In conjunction with his job duties, Mr. A knocks on doors in West Virginia based upon leads provided by Company A, as well as contacts that he has made from his ex-tire sales days, when he operated in West Virginia as Company B.

7. Mr. A is also an independent representative for other companies but not for companies whose products compete with products sold by the Petitioner. Further, Mr. A only receives a commission from the Petitioner if a sale is made.

8. Petitioner also makes sales into West Virginia via phone calls, with people calling the Petitioner for sales leads. Petitioner advertises using its website, Web-A. An order cannot be placed using the website; however, it directs a potential customer to make contact with the local representative, Mr. A.

9. Beginning January 1, 2012, Petitioner started collecting and remitting sales tax in every state in which it conducted business including the State of West Virginia. It did so because of concerns of its manufacturers regarding the matter of nexus, as well as the employment of its independent contractor.

DISCUSSION

Our starting point to determine whether Petitioner is subject to the combined sales and use tax is West Virginia Code Section 11-15-3(a), which states as follows:

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 § 11-15-3(a).

With respect to any matter before this Tribunal, the burden of proof resides with the Petitioner to show that the assessment of tax against it is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e); W. Va. Code St. R. § 121-1-63.

In order to be subject to taxation by any state, a foreign corporation, or its activities, must have connections with the state that meet the requirements imposed by the Due Process Clause, U.S. CONST. amend. XIV and the Commerce Clause, U.S. CONST. art. I, section 8, cl. 3.

The Supreme Court has determined that, in addition to granting express authority to regulate interstate commerce, the Commerce Clause also prevents state regulations that interfere with interstate commerce by way of the doctrine otherwise known as the “dormant” Commerce Clause. *See Tax Comm’r of State v. MBNA America Bank, N.A.*, 640 S.E.2d 226, 229 (W. Va. 2006) (internal citations omitted).

With respect to Petitioner’s Due Process challenge, it is well established that a state’s jurisdiction to tax under the Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Quill Corp. v. North Dakota*, 504 U.S. 198, 206 (1992) (internal citations omitted). To elaborate, the extent of contacts be a foreign entity with a state that is necessary to satisfy the Due Process Clause is comparable to that needed to support a state court’s jurisdiction over a defendant in a civil matter, and is met if the entity purposefully directs its activity into a jurisdiction. *See Quill*, 504 U.S. 198 (1992).

Regarding the Commerce Clause, a state may tax a foreign entity provided that it satisfies the four-part test espoused by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Specifically, that test requires that “the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.” *Id.*

Quoting *Quill*, the West Virginia Supreme Court of Appeals recently distinguished Due Process challenges from Commerce Clause challenges in the area of state taxation:

Due Process concerns fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him. We have, therefore, identified “notice” or “fair warning” as the analytic touchstone of due process analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendants as by structural concerns about the effects of state regulation on the national economy.

The *Complete Auto* analysis reflects these concerns about the national economy. The second and third parts of that analysis, which require fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and the state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce. Thus, the “substantial nexus” requirement is not, like due process’ “minimum contacts” requirement, a proxy for notice, but rather a means for limiting burdens on interstate commerce. Accordingly, contrary to the State’s suggestion, a corporation may have the “minimum contacts” with a taxing State as required by the Due Process Clause, and yet lack the “substantial nexus” with that State as required by the Commerce Clause.”

Griffith v. Conagra Brands, Inc., 229 W. Va. 190, 196-197 (2012) (quoting *Quill*, 504 U.S. at 312, 313).

Importantly, the West Virginia Supreme Court of Appeals recently made clear that the United States Supreme Court's decision in *Quill* requires the physical presence of an entity in analyzing alleged Commerce Clause violations involving sales and use taxes. *See Tax Comm'r v. MBNA America Bank*, 220 W. Va. 163, 640 S.E.2d 226 (2006), *cert. denied*, 551 U.S. 1141, 127 S.Ct. 2997, 168 L.Ed.2d 719 (2007).

Here, Petitioner argues it has shown that there are no sufficient contacts with the State of West Virginia to require Petitioner to collect and remit sales tax during the audit period under either the "minimum contacts" standard required for the Due Process Clause of the United States Constitution or the "substantial nexus" standard as required by the Commerce Clause of the United States Constitution.

Additionally, the Petitioner argues that to impose this tax while at the same time exempting another out-of-state retailer who conducted sales operations in the State of West Virginia through a wholly owned subsidiary is discrimination against interstate commerce and violates the Equal Protection Clause of the United States Constitution and the West Virginia Constitution as applied to this Petitioner. For the reasons set forth below, this Tribunal disagrees with the Petitioner.

In *Scripto, Inc. v. Carson*, 362 U.S. 207, 80 S Ct. 619, 4 L.Ed.2d 660 (1960) that taxpayer was shipping writing instruments into the State of Florida. It too argued that it had no employees or offices there; only that of commissioned salesmen. However, the U.S. Supreme Court found sufficient nexus, to wit:

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 substantial flow of goods into Florida.... 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).

In the present matter, Respondent argued that during the tax years 2010 and 2011, save for two invoices, all of the invoices were the work of Petitioner's independent contractor, Mr. A¹. Respondent's argument was based upon the testimony of Petitioner's witness that each sales invoice designated the name or the initials of the sales representative who made that particular sale.

Mr. A's activities coupled with the purposeful activities of its manufacturer's representatives from whom Mr. A received his sales leads are more than enough to satisfy *Scripto*. In addition to sales leads, the manufacturer's representatives actively engaged in product demonstration pre-sale, installed the product immediately upon sale and provided assistance in the training and use of the products post-sale. All of the above illustrates the extent of Petitioner's sales activities that took place in the State of West Virginia.

This same finding of nexus was again supported by the U.S. Supreme Court three decades later where an out-of-state manufacturer also claimed insufficient nexus in that all products were manufactured in other states; no office or other property was located in the taxing state and no employees were living there. It too employed an independent contractor who solicited customers. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

¹ These two invoices, which were not attributed to Mr. A, were also referenced on page 48 of the transcript by the presiding Administrative Law Judge. Petitioner's counsel stated that Petitioner had no other West Virginia sales representatives other than Mr. A and that the two sales were probably the work of someone located out-of-state.

The *Tyler Pipe* Court cited *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960) and *National Geographic Society v. California Equalization Board*, 430 U.S. 551,556-558 (1997) for the proposition that “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. See *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

As a result of the factual evidence presented, we find that Petitioner’s purposeful utilization of manufacturing representatives who provide leads, sales information, installation and follow-up, coupled with the expertise of its independent contractor (sales representative) have established and maintained such a market in the State of West Virginia.

Petitioner recited *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 975 Ct. 1076, 51 L.Ed.2d 326 (1997) for the proposition that the imposition of the sales tax collection violates prongs one and three of the four part test. To the contrary, with regard to the first prong, the tax clearly applies to an activity with a substantial nexus to the taxing State given Petitioner’s extensive use of manufacturer representatives as well as a sales representative with established contacts. As to the third prong of the *Complete Auto* test, for the reasons set forth herein, this Tribunal finds that application of the tax to Petitioner does not discriminate against interstate or foreign commerce.²

Finally, Petitioner presents an as applied equal protection challenge under our Federal and State Constitutions. In *Summers v. West Virginia Consolidated Public Retirement Bd.*, 217 W.

² Petitioner did not argue that imposition of the tax in this case violated prongs two and four of *Complete Auto Transit, Inc.* concerning its fair apportionment. It was fairly related to the services provided by the taxing state.

Va. 399, 618 S.E.2d 408 (2005), the West Virginia Supreme Court of Appeals, discussing an equal protection challenge, reiterated that:

Where economic rights are concerned, we look to whether the classification is a rational one based on social, economic, historic or geographic factors, whether it bears a reasonable relationship to a proper governmental purpose, and whether all persons within the class are treated equally. Where such classification is rational and bears the requisite reasonable relationship, the statute does not violate Section 10 of Article III of the West Virginia Constitution, which is our equal protections clause.

Id. at 403-404, 412-413.

Here, Petitioner argues this tax cannot stand because Respondent had earlier consented in a certain Technical Assistance Advisory (TAA)³ that a certain corporation utilizing a wholly-owned subsidiary was not required to collect the tax. We find the situations presented by the TAA to be clearly distinguishable from the present matter. In this case, Petitioner is using its manufacturers' representatives and its own sales representative to make sales into the State of West Virginia in order to establish and maintain a market. To the contrary, the parent company involved in the TAA was to have structured its business operations in such a way as to have "de minimus or no contact with West Virginia customers of the taxpayer".

Therefore, nothing contained therein shows that the wholly owned subsidiary of the parent company had anything to do with establishing and maintaining a market in the State of West Virginia other than Petitioner's supposition that this is the case. Accordingly, application of the sales tax against Petitioner cannot be said to be "administered or applied in a discriminatory manner [that] runs afoul of the equal protection clause of the Federal [or State] Constitution."

³ Technical Assistance Advisories issued under W.Va. Code § 11-10-5r(b) have no precedential value except to the taxpayer requesting the advisory unless the Tax Commissioner specifically states that it has precedential value. If a Technical Assistance Advisory is declared to have precedential value, it may be cited by other taxpayers but is only considered relevant when the material facts and laws are essentially the same as in the advisory.

Summers v. West Virginia Consolidated Public Retirement Bd., 217 W. Va. 399, 404, 618 S.E.2d 408, 413 (2005).

In this case, the Petitioner has a physical presence in West Virginia through its website, through its use of its representatives such as independent contractor Mr. A and manufacturer Company A. In addition, Petitioner has generated enough sales during 2010 and 2011 to produce a resulting sales tax liability of nearly \$_____. Petitioner's physical presence creates nexus sufficient to pass the constitutional muster of the Commerce Clause and easily satisfies the minimum contacts necessary to satisfy due process under the Federal and State constitutions.

Accordingly, it is determined that the Petitioner has not met its burden of proof to show that the assessment is erroneous, unlawful, void or otherwise invalid.

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 § 11-1-2.

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 § 11-10-11(a).

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 § 11-15-3(a).

4. 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 functioning of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida, *See again Scripto, Inc. v. Carson*, 362 U.S. 207, 805 Ct. 619, 4 L.Ed.3d 660 (1960).

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 Department 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 are significantly associated with its ability to establish and maintain a market here. These activities create and maintain the Petitioner’s market for its sales. *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

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 § 11-10A-10(3); 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 assessment issued against it was erroneous, unlawful, void or otherwise invalid.

9. In order to be subject to taxation by any state, a foreign corporation, or its activities, must have connections with the state that meet the requirements imposed by the

Due Process Clause, U.S. CONST. amend. XIV and the Commerce Clause, U.S. CONST. art. I, section 8, cl. 3.

10. The Supreme Court has determined that, in addition to granting express authority to regulate interstate commerce, the Commerce Clause also prevents state regulations that interfere with interstate commerce by way of the doctrine otherwise known as the “dormant” Commerce Clause. *See Tax Comm’r of State v. MBNA America Bank, N.A.*, 640 S.E.2d 226, 229 (W. Va. 2006) (internal citations omitted).

11. With respect to Petitioner’s Due Process challenge, it is well established that a state’s jurisdiction to tax under the Due Process Clause “requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.” *Quill Corp. v. North Dakota*, 504 U.S. 198, 206 (1992) (internal citations omitted).

12. Regarding the Commerce Clause, a state may tax a foreign entity provided that it satisfies the four-part test espoused by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). Specifically, that test requires that “the tax [1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State.” *Id.*

13. Quoting *Quill*, the West Virginia Supreme Court of Appeals recently distinguished Due Process challenges from Commerce Clause challenges in the area of state taxation:

14. Due Process concerns fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual’s connections with a State are substantial enough to legitimate the State’s exercise of power over him. We have, therefore, identified “notice” or “fair warning” as the analytic touchstone of due

process analysis. In contrast, the Commerce Clause and its nexus requirement are informed not so much by concerns about fairness for the individual defendants as by structural concerns about the effects of state regulation on the national economy.

15. The *Complete Auto* analysis reflects these concerns about the national economy. The second and third parts of that analysis, which require fair apportionment and nondiscrimination, prohibit taxes that pass an unfair share of the tax burden onto interstate commerce. The first and fourth prongs, which require a substantial nexus and a relationship between the tax and the state-provided services, limit the reach of state taxing authority so as to ensure that state taxation does not unduly burden interstate commerce. Thus, the “substantial nexus” requirement is not, like due process’ “minimum contacts” requirement, a proxy for notice, but rather a means for limiting burdens on interstate commerce. Accordingly, contrary to the State’s suggestion, a corporation may have the “minimum contacts” with a taxing State as required by the Due Process Clause, and yet lack the “substantial nexus” with that State as required by the Commerce Clause.”

16. 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. *See Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232 (1987).

17. As a result of the factual evidence presented, we find that Petitioner’s purposeful utilization of manufacturing representatives who provide leads, sales information, installation and follow-up, coupled with the expertise of its independent contractor (sales representative) have established and maintained such a market in the State of West Virginia.

18. Application of the sales tax against Petitioner cannot be said to be “administered or applied in a discriminatory manner [that] runs afoul of the equal protection clause of the Federal [or State] Constitution.” *Summers v. West Virginia Consolidated Public Retirement Bd.*, 217 W. Va. 399, 404, 618 S.E.2d 408, 413 (2005).

19. In this case, the Petitioner has a physical presence in West Virginia through its website, through its use of its representatives such as independent contractor Mr. A and manufacturer Company A. In addition, Petitioner has generated enough sales during 2010 and 2011 to produce a resulting sales tax liability of nearly \$_____. Petitioner’s physical presence creates nexus sufficient to pass the constitutional muster of the Commerce Clause and easily satisfies the minimum contacts necessary to satisfy due process under the Federal and State constitutions.

20. The West Virginia Supreme Court of Appeals recently made clear that the United States Supreme Court’s decision in *Quill* requires the physical presence of an entity in analyzing alleged Commerce Clause violations involving sales and use taxes. *See Tax Comm’r v. MBNA America Bank*, 220 W. Va. 163, 640 S.E.2d 226 (2006), *cert. denied*, 551 U.S. 1141, 127 S.Ct. 2997, 168 L.Ed.2d 719 (2007).

DISPOSITION

Based upon the above, it is the **FINAL DECISION** of the West Virginia Office of Tax Appeals that the assessment issued against the Petitioner for combined sales and use tax for the period January 1, 2010 through June 30, 2013 for tax in the amount of \$_____ and interest in the amount of \$_____ for a total assessed tax liability of \$_____, should be and is

hereby **AFFIRMED**.⁴ Pursuant to West Virginia Code Section 11-10-17(a) interest continues to accrue on the unpaid tax until the liability is fully paid.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
George V. Piper⁵
Administrative Law Judge

Date Entered

⁴ During the course of the hearing there was a reference to a tax amount of \$ ____ for tax year 2012. This amount was included in the assessment and therefore will not be treated separately in this decision. This small amount for tax year 2012 as well as the zero balance for 2013 resulted from the Petitioner's decision in 2012 to begin collecting and remitting the combined sales and use tax.

⁵ Chief Administrative Law Judge, A. M. "Fenway" Pollack, heard this matter. However, Judge Pollack is no longer with the West Virginia Office of Tax Appeals. Therefore, this decision was prepared and signed by Administrative Law Judge, George V. Piper. Chief Administrative Law Judge Heather G. Harlan was appointed subsequent to the evidentiary hearing on this matter and reviewed and approved this decision.