REDACTED ("SANITIZED") DECS. 03-185 RN, 03-186 RFN, 04-074 RFN & 04-075 RN – BY R. MICHAEL REED – SUBMITTED FOR DECISION ON 04-27-04 – ISSUED ON 10-22-04

SYNOPSIS

1. **WEST VIRGINIA CORPORATE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- NONDOMICILIARY FINANCIAL INSTITUTIONS -- REBUTTABLE STATUTORY PRESUMPTION OF NEXUS --** Each financial organization having its commercial domicile in another state is entitled to rebut the statutory presumption -- that it was regularly engaging in business in this state by virtue of having at least the minimum number of West Virginia customers or at least the minimum amount of in-state gross receipts -- by showing, from the totality of the in-state contacts, that the out-of-state financial organization was, nonetheless, not, actually, "regularly engaging in business in this state[.]" W. Va. Code § 11-23-5a(d) [1996], for West Virginia business franchise tax purposes, and W. Va. Code § 11-24-7b(d) [1996], for West Virginia corporate net income tax purposes.

2. **WEST VIRGINIA CORPORTE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- COMMERCE CLAUSE'S "SUBSTANTIAL" NEXUS REQUIREMENT** -- Under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, a state may not subject an activity to a tax unless, among three other factors, the activity has a "substantial" nexus with the taxing state. S*ee, e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326, 331 (1977).

3. **WEST VIRGINIA CORPORATE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- PHYSICAL PRESENCE REQUIRED FOR COMMERCE CLAUSE'S "SUBSTANTIAL" NEXUS** -- A "substantial" nexus, for Commerce Clause purposes, requires a finding of a physical presence in the taxing state, not merely an economic exploitation of the market. S*ee, e.g.*, *Quill* Corp. *v. North Dakota*, 504 U.S. 298, 314, 112 S. Ct. 1904, 1914, 119 L. Ed. 2d 91, 108 (1992); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App.

1999) (insufficient nexus for franchise and excise taxes on credit card income of nondomiciliary financial institution), *appeal denied*, (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927, 121 S. Ct. 305, 148 L. Ed. 2d 245 (2000); *In re Intercard, Inc.*, 270 Kan. 346, 14 P.3d 1111 (2000).

4. **WEST VIRGINIA CORPORTE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- COMMERCE CLAUSE'S "SUBSTANTIAL" NEXUS REQUIRES MORE THAN "SLIGHTEST" PHYSICAL PRESENCE** -- The physical presence necessary for the Commerce Clause's "substantial nexus" requirement must be more than a "slightest presence[.]" *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 n. 8, 112 S. Ct.1904, 1914 n. 8, 119 L. Ed. 2d 91, 108 n. 8 (*citing Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556, 97 S. Ct. 1386, 1390, 51 L. Ed. 2d 631, 636-37 (1977)). Instead, the in-state physical presence must be "'**significantly** associated with the taxpayer's ability to establish and maintain a market in'" the taxing state. *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199, 215-16 (1987) (emphasis by bold print added) (internal citation omitted).

5. **WEST VIRGINIA CORPORATE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- BURDEN OF PROOF FOR PETITION FOR REFUND** -- In a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon a petitioner-taxpayer, to show that the petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

6. **WEST VIRGINIA CORPORATE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- "SLIGHTEST" PRESENCE FROM *DE MINIMIS* CREDIT CARD DEBT-COLLECTION ACTIVITIES IN STATE** -- For the tax years in question, the Petitioner-taxpayer's only physical presence in West Virginia was by the extremely isolated and sporadic use of the in-state lawyer's(s') services and courts of this state in the *de minimis* number of credit card debt-collection actions. This extremely limited type and frequency of physical presence in state -- compared with the total volume of the taxpayer's business with West Virginia customers -- constitutes a "slightest presence" and is **not** "significantly" associated with the taxpayer's ability to establish and maintain a market in this state, for the time period involved in this matter.

7. **WEST VIRGINIA CORPORATE NET INCOME TAX AND WEST VIRGINIA BUSINESS FRANCHISE TAX -- BURDEN OF PROOF CARRIED** -- The Petitioner-taxpayer in this matter has carried its burden of proving entitlement to the requested West Virginia corporate net income tax and business franchise tax refunds, due to the lack of "substantial" nexus between the activities of the Petitioner and this state during the relevant years, under precedents of the Supreme Court of the United States applying the "substantial nexus" part of that Court's interstate Commerce Clause analysis for determining the validity of state taxation of interstate commerce.

FINAL DECISION

PROCEDURAL BACKGROUND

On September, 2002, the Petitioner timely filed claims for refunds (amended tax returns setting forth the refund claims) of West Virginia business franchise tax and of West Virginia corporate net income tax, for the calendar and tax year 1998.

By letters received by the Petitioner in December, 2002, the Corporate and Franchise Tax Unit ("Unit") of the Internal Auditing Division of the West Virginia State Tax Commissioner's Office ("the Commissioner" or the "Respondent") denied each of these tax refund claims for the year 1998. The reason stated for the total denial of these refund claims was that the Petitioner, for this year, met the statutory test for, presumptively, "regularly engaging in business" in the State of West Virginia, by virtue of the Petitioner's West Virginia gross receipts for that year of $. *See* W. Va. Code §§ 11-23-5a(d) [1996] (West Virginia business franchise tax) and 11-24-7b(d) [1996] (West Virginia corporate net income tax).

Thereafter, by mail postmarked February, 2003, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for refund with respect to each of these two types of West Virginia state tax, for the year 1998. *See* W. Va. Code § 11-10A-8(2) [2002].

Similarly, on dates not specified in the record, the Petitioner timely filed claims (amended tax returns) for refunds of West Virginia business franchise tax and of West Virginia corporate net income tax, for the calendar and tax year 1999.

By letters received by the Petitioner in December, 2003, the Commissioner, by the Unit, denied each of these two tax refund claims for the year 1999, for the same reason stated in denying the refund claims for the year 1998, that is, by virtue of Petitioner's West Virginia gross receipts for the year 1999 of $. *See* W. Va. Code §§ 11-23-5a(d) [1996] (West Virginia business franchise tax) and 11-24-7b(d) [1996] (West Virginia corporate net income tax).

By mail, the Petitioner timely filed with this tribunal a petition for refund with respect to each of these two types of taxes, for the year 1999. *See* W. Va. Code § 11-10A-8(2) [2002].

Subsequently, notice of an evidentiary hearing on the petitions for refund was sent to the Petitioner in accordance with the provisions of W. Va. Code § 11-10A-10 [2002] and 121 C.S.R. 1, § 61.3.3 (Apr. 20, 2003). However, the parties thereafter agreed to submit the matter for decision by this tribunal on stipulated facts, memoranda of law, and oral argument. *See* 121 C.S.R. 1, § 53.1 (Apr. 20, 2003). This matter (including tax year 1999) was fully and finally submitted on April 27, 2004, for decision by this tribunal.

FINDINGS OF FACT

The material facts in this matter have been stipulated by the parties. These facts may be summarized and stated as follows.

1. The Petitioner was chartered as a national bank in the year 1991, outside of the State of West Virginia; such status applied during the two years in question here, that is, 1998 and 1999. Stipulation No. 1.

2. At all relevant times, that is, during the years 1998 and 1999, the Petitioner's principal place of business and commercial domicile was located outside of the State of West Virginia. Stipulation No. 2.

3. At all relevant times the Petitioner's principal business activity was issuing and servicing major credit cards for customers throughout the United States. Many of those credit cards were specially designated for various associations located throughout the United States that had engaged the Petitioner to provide credit cards for their members or affiliates. (The parties have not stipulated the number of West Virginia credit card customers during the relevant time period.) At all relevant times the Petitioner did not engage in any secured corporate or property financing. Stipulation No. 3.

4. The Petitioner had no office, place of business, real property, or tangible personal property located in the State of West Virginia, and the Petitioner had no employees or any other representatives who were physically present in the State of West Virginia, during the two years involved in this matter, other than the very limited and sporadic non-courtroom legal services by the in-state office of the out-of-state law firm representing the Petitioner in the three credit card debt collection actions described below in Finding of Fact No. 10. Stipulation No. 13.

5. At all relevant times the Petitioner promoted its business operations by engaging in direct mail solicitation across the country, through the United States mail, including direct mail solicitation to residents of the State of West Virginia; the Petitioner's direct mail solicitation activities were not initiated in or from West Virginia. Stipulation No. 4.

6. At all relevant times the Petitioner also promoted its business operations by engaging in telephone solicitation across the country, via long distance telephone transmissions, including telephone transmissions to residents of the State of West Virginia; the Petitioner's telephone solicitation activities were not initiated in or from West Virginia. Stipulation No. 5.

7. At various times the Petitioner "out-sourced" certain of its national marketing activities; the businesses performing such services for the Petitioner were not located in West Virginia nor sent representatives into West Virginia to perform the marketing activities. Stipulation No. 6.

8. The Petitioner did not receive or process any accounts receivable in the State of West Virginia during the time period involved in this matter. Stipulation No. 7.

9. There were three credit card debt-collection actions which had been brought on the Petitioner's behalf and which were pending during the year 1998 in unspecified magistrate courts (basically, "small claim" courts) or circuit courts (basically, general jurisdiction trial courts) of the State of West Virginia (one of these actions had been filed during that year; the other two had been filed in preceding years). The amounts involved in these debt-collection actions were, respectively, $, $, and $, plus interest. One of these debt-collection actions was dismissed with prejudice during the year 1998, due to the Petitioner's failure to prosecute the action for more than a year, for lack of records. Another of these actions was dismissed with prejudice during the year 1999, due to the Petitioner's failure to prosecute the action for more than a year, in light of the debtor's death. The third debt-collection action was dismissed with prejudice during the year 2002, due to the Petitioner's failure to prosecute the action for more than a year, in light of the debtor's personal bankruptcy. Stipulation Nos. 8-11.

10. A law firm with its main office located outside the State of West Virginia represented the Petitioner in these three credit card debt-collection actions; management of this representation occurred in and from the main office of this law firm, but an unspecified number of attorney(s) with the law firm's West Virginia office (town or county not specified), "performed some [unspecified type, frequency, and total number of hours of] work on one or more of the three [credit card debt-collection] actions [pending] in [the year] 1998"; none of the law firm's attorneys however, made any court appearances in the State of West Virginia in any of these three credit card debt-collection actions during the year 1998 (and no such court appearances occurred, apparently, during the year 1999). Supplemental Stipulation Nos. 1-3.

11. The law firm representing the Petitioner in these three credit card debt-collection actions had been retained on a contingency-fee basis; the Petitioner did not pay any attorneys' fees to this law firm for services in these three debt-collection actions because the law firm did not collect any amounts in these actions. Supplemental Stipulation No. 4.

12. In addition to the aforementioned three credit card debt-collection actions brought by the Petitioner in the courts of the State of West Virginia, the Petitioner was a defendant/counter-claimant in a civil action brought by a debtor in an unspecified circuit court in the State of West Virginia during the year 1996 for alleged unfair claim practices by the Petitioner here; this action and, apparently, the Petitioner's counterclaim were dismissed with prejudice, for unspecified reasons, during the year 1998, after, apparently, no court appearances. The record appears to indicate that no attorney with an office located in the State of West Virginia, or elsewhere, made any court appearances in this particular litigation in the State of West Virginia during the years in question. Stipulation No. 12.

13. For the year 1998, the Petitioner had gross receipts of $ attributable to customers with West Virginia addresses, including interest income, service charges, fees, and other receipts from credit cards, and $ of gross income from all other sources attributable to West Virginia. Stipulation No. 17.

14. For the year 1998, the Petitioner had a total of $ of gross receipts attributable to all sources in all states, including West Virginia. Stipulation No. 18. Thus, the ratio of Petitioner's West Virginia gross receipts to its total gross receipts for the year 1998 was 19/100 of one percent.

15. The record appears to indicate that the ratio of Petitioner's West Virginia gross receipts to its total gross receipts was within a similar range for the year 1999.

16. For the year 1998 (and, apparently, for the year 1999), the Petitioner had a property apportionment factor of zero and a payroll apportionment factor of zero for purposes of the West Virginia corporate net income tax and West Virginia business franchise tax. Stipulation of Fact No. 31.

DISCUSSION

Nexus

The only issue to be decided by this tribunal is whether the Petitioner-taxpayer has rebutted the presumption of statutory nexus in this matter. This tribunal holds in the affirmative, in light of the Federal Commerce Clause's definition, in effect, of what activity constitutes a "substantial nexus" with the taxing state, and thereby "regularly doing business" in that state.

W. Va. Code § 11-23-5a(d) [1996], for West Virginia business franchise tax purposes, and W. Va. Code § 11-24-7b(d) [1996], for West Virginia corporate net income tax purposes, provide, in relevant part:

> (d) *Engaging in business -- nexus presumptions and exclusions.* -- A financial organization that has its commercial domicile in another state is *presumed* to be regularly engaging in business in this state if during any year it obtains or solicits business with twenty or more persons within this state, or if the sum of the value of its gross receipts attributable to sources in this state equals or exceeds one hundred thousand dollars.

(italics added to the word "presumed" for emphasis) The parties in this matter agree -- and this tribunal concludes -- that the use of the word "presumed" necessarily implies that the Legislature intended that (and procedural due process would require that) each financial organization having its commercial domicile in another state is entitled to rebut the statutory presumption -- that it was regularly engaging in business in this state by virtue of having at least the minimum number of West Virginia customers or at least the minimum amount of in-state gross receipts -- by showing, from the totality of the in-state contacts, that the out-of-state financial organization was, nonetheless, not, actually, "regularly engaging in business in this state[.]"

The statutory definitions of "doing business" or "engaging in business" assist the analysis of whether a financial organization having its commercial domicile outside West Virginia, and rebuttably presumed to have sufficient nexus with this state under the statutory quantifiable factor(s), is, under *all* of the facts relevant to nexus, regularly engaging in business in this state (as a mixed question of fact and law). The business franchise tax statute generally defines the term "doing business" as meaning, in relevant part, "any activity of a corporation or partnership which enjoys the benefits and protection of the government and laws of this state[.]" W. Va. Code § 11-23-3(b)(8) [1991]. Likewise, the corporate net income tax statute defines the term "engaging in business" or "doing business" as meaning "any activity of a corporation which enjoys the benefits and protection of [the] government and laws in this state." W. Va. Code § 11-24-3a(7) [1991].

This type of general *quid pro quo* link between the in-state activity of an out-of-state business entity and the governmental services or protection provided by the taxing state is obviously derived from federal substantive Due Process Clause precedents involving state taxation of interstate commerce. For example, the usually eloquent and insightful Justice Frankfurter stated for a 5-4 majority of the Supreme Court of the United States in *Wisconsin v. J.C. Penney Co.*, that "[a] state is free to pursue its own fiscal policies, unembarrassed by [the Due Process Clause set forth in section 1 of the Fourteenth Amendment to] the [United States] Constitution, if by the practical operation of a tax the state has exerted its power *in relation to* opportunities which it has given, to *protection* which it has *afforded*, to *benefits* which it has *conferred by* the fact of being an orderly, civilized *society*." 311 U.S. 435, 444, 61 S. Ct. 246, 249-50, 85 L. Ed. 267, 270 (1940) (emphasis by italics added).

Similarly -- but not identically -- under the federal interstate Commerce Clause, U.S. Const. art. I, § 8, cl. 3 ("The Congress shall have Power . . . To regulate Commerce . . . among the several States"), a state tax on interstate commerce is valid if "the tax [1] is applied to an *activity* with a ***substantial*** *nexus* with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is *fairly related to the services provided by the State*." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326, 331 (1977) (emphasis by italics and bold print added).

In *Quill Corp. v. North Dakota*, 504 U.S. 298, 112 S. Ct. 1904, 119 L. Ed. 2d 91 (1992) (retailers' use tax collection duties), the Supreme Court of the United States held that, "while a State may, consistent with the ["minimum connection" requirements of the] Due Process Clause, have the authority to tax a particular taxpayer, imposition of the tax may nonetheless violate the ["substantial nexus" requirements of the] Commerce Clause." 504 U.S. at 305, 112 S. Ct. at 1909, 119 L. Ed. 2d at 101.

Therefore, here, as typically the case, this quasi-judicial tribunal must examine interstate Commerce Clause precedents, not merely Due Process Clause precedents, to determine if the in-state connections between an out-of-state business entity and a taxing state are constitutionally sufficient, **as applied** to all of the relevant facts, to uphold a state tax in the interstate commerce context.[1]

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[1] In cases involving state taxation of interstate commerce the actual "policy" maker (at least ultimately) under the Federal Commerce Clause is not the state legislature but the Federal Congress. However, the Supreme Court of the United States has traditionally held that **it** will (with increasing

The "nexus presumption" statutes in this matter, for purposes of raising the rebuttable presumption of nexus for corporate net income tax and business franchise tax purposes, employ an economic-exploitation-of-the-market standard for nexus, rather than a "physical presence" nexus standard. In *Quill*, addressing sales and use taxes, the Supreme Court of the United States, in a dictum that is, frankly, vague (at the least), when put in context, stated that "we have not, in our review of other types of taxes, [explicitly] articulated the same physical-presence requirement . . . established for sales and use taxes[.]" 504 U.S. at 314, 112 S. Ct. at 1914, 119 L. Ed. 2d at 108. On the other hand, the Court at virtually the same place in *Quill* stated that "**all** of these [non- sales and use tax] cases [decided by the High Court] involved taxpayers who had a **physical** presence in the taxing State[.]" *Id.* (emphasis by bold print added), explicitly referring, for example, to two business privilege/gross income tax cases, namely, *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987), and *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 95 S. Ct. 706, 42 L. Ed. 2d 719 (1975). In addition, the four-prong analysis of *Complete Auto Transit* explicitly applies to a state tax, without distinguishing between types of state taxes. Finally, the "form of [the state] tax is inconsequential to questions of nexus and state benefits[.]" *Hartley Marine Corp. v. Mierke*, 196 W. Va. 669, 678 n.13, 474 S.E. 2d 599, 608 n. 13 (1996), *cert. denied*, 519 U.S. 1108, 117 S. Ct. 942, 136 L. Ed. 2d 832 (1997).[2]

Thus, it is well settled by court precedents that under the Commerce Clause a state may not subject an activity to a tax unless the activity has a "substantial" nexus with the state, *see, e.g.*, *Complete Auto Transit*; and that "substantial" nexus requires a finding of a physical presence in the taxing state, not merely an economic exploitation of the market, *see, e.g.*, *Quill*, *Tyler Pipe*, and *Standard Pressed Steel*; *In re Intercard, Inc.*, 270

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reluctance) establish the "policy" in the absence of Congressional action in a particular interstate commerce area ("negative" or "dormant" Commerce Clause approach), as is the case here. Accordingly, while the precedents of this state's highest court involving state taxation of interstate commerce are, of course, persuasive and will, without plenary review by the Supreme Court of the United States, become, in effect, the law in this State, this tribunal is not actually bound by the precedents of the West Virginia Supreme Court of Appeals in this area of federal law. Instead, we will look primarily to any **existing** applicable precedents of the **Supreme Court of the United States**, as that **High Court requires of us and of all other tribunals** inferior to that High Court: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower tribunals] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237, 138 L. Ed. 2d 391, 423, 117 S. Ct. 1997, 2017 (1997). Similarly, where, as here, existing applicable precedents of the Supreme Court of the United States do exist, this quasi-judicial tribunal -- even though we, unlike general appellate courts, possess state tax expertise -- will **not** assume the role of a treatise author or law review commentator and decide what the policy **should** be in this area, as if we were Congress or the Supreme Court of the United States or as if we were writing on a blank slate.

[2] In fact, the physical presence test -- not merely an economic exploitation test -- for the Commerce Clause's "substantial nexus" requirement, which was applied, for example, in the sales and use tax **collection**-duty case of *Quill,* should apply with even more force to **direct** taxes like the corporate net income tax and the business franchise tax; direct taxes against a taxpayer certainly are more **financially** onerous than mere collection duties. *See, e.g.,* Thomas E. McHugh & R. Michael Reed, *The Due Process Clause and the Commerce Clause: Two New and Easy Tests for Nexus in Tax Cases*, 90 W. Va. L. Rev. 31, 37 (1987) ("shameless plug" of obviously outstanding commentary co-authored by author of this Final Decision).

Kan. 346, 14 P.3d 1111 (2000) (collecting and analyzing United State Supreme Court and state cases, including a sound criticism of a couple of state cases relying on mere economic exploitation); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999) (insufficient nexus for franchise and excise taxes on credit card income of nondomiciliary financial institution), *appeal denied*, (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927, 121 S. Ct. 305, 148 L. Ed. 2d 245 (2000); *Dell Catalog Sales, L.P. v. Comm'r of Revenue Services*, 48 Conn. Supp. 170, 834 A.2d 812 (Super. Ct. 2003); *Lanco, Inc. v. Dir., Div. of Taxation*, 21 N.J. Tax 200, 2003 N.J. Tax LEXIS 18 (2003); *Avco Fin. Services Consumer Disc. Co. One, Inc. v. Dir., Div. of Taxation*, 100 N.J. 27, 42-50, 494 A.2d 788, 796-801 (1985) (Clifford, J., dissenting) (excellent analysis by dissent, including emphasis on infrequent and *de minimis* use of state court system to collect loans; pre-*Quill* majority opinion applied now-outdated "minimal connection" nexus test to many more in number and more permanent in-state contacts than occurring here). *See also, e.g.*, R. Todd Ervin, Comment, *State Taxation of Financial Institutions: Will Physical Presence or Economic Presence Win the Day?*, 19 Va. Tax Rev. 515, 541 (2000) ("there has been no clear [United States] Supreme Court precedent upholding a state tax challenged on Commerce Clause grounds absent some degree of physical presence by the putative taxpayer in the taxing state").

Moreover, the physical presence necessary for the Commerce Clause's "substantial nexus" requirement must be more than a "slightest presence[.]" *Quill*, 504 U.S. at 315 n. 8, 112 S. Ct. at 1914 n. 8, 119 L. Ed. 2d at 108 n. 8 (*citing Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556, 97 S. Ct. 1386, 1390, 51 L. Ed. 2d 631, 636-37 (1977). Instead, the in-state physical presence must be "'**significantly** associated with the taxpayer's ability to establish and maintain a market in'" the taxing state. *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199, 215-16 (1987) (emphasis by bold print added) (internal citation omitted). Stated another way, the in-state physical presence must have "made possible the realization and continuance of valuable contractual relations between" the taxpayer and the taxing state. *Standard Pressed Steel Co. v. Dep't of Revenue*, 419 U.S. 560, 562, 95 S. Ct. 706, 708, 42 L. Ed. 2d 719, 722 (1975). Thus, isolated and sporadic contacts are insufficient to constitute a "substantial" nexus. *See, e.g.*, *Dell Catalog Sales, L.P. v. Comm'r of Revenue*, 48 Conn. Supp. 170, 187, 834 A.2d 812, 822 (2003); *In re Intercard, Inc.*, 270 Kan. 346, 364, 14 P.3d 1111, 1122-23 (2000); *Avco Fin. Services Consumer Disc. Co. One, Inc. v. Dir., Div. of Taxation*, 100 N.J. 27, 45, 494 A.2d 788, 798 (1985) (Clifford, J., dissenting) (insufficient nexus that one-half of one percent of total outstanding loans to taxing-state customers were collected through use of taxing-state courts).

Here, for the tax years in question, the Petitioner-taxpayer's only physical presence in West Virginia was by the extremely isolated and sporadic use of the in-state lawyer's(s') services and courts of this state in the *de minimis* number of credit card debt-collection actions. This extremely limited type and frequency of physical presence in state -- compared with the total volume of the taxpayer's business with West Virginia customers -- constitutes a "slightest presence" and is **not** "significantly" associated with the taxpayer's ability to establish and maintain a market in this state, for the time period involved in this matter.

While application of these tests is, unfortunately, somewhat subjective in most cases (unlike the preliminarily "bright line" rule provided by the nexus presumption statutes here), this tribunal believes that the application is objectively clear (*de minimis)* in this matter. Each case must, of course, be decided on its own facts, and the frequency and type of in-state physical presence likely will vary for each time period, so that "substantial nexus" may (or may not) exist for some time periods subsequent to those involved here. This tribunal does believe that a sufficient level of debt-collection work by in-state lawyers, or a sufficient level of use of this state's courts, on behalf of a taxpayer would constitute a "substantial nexus," but the same are clearly lacking here.

Again, this tribunal is sensitive to the "policy" debate among the commentators about whether an economic-exploitation-of-the-market test should be applied under the Commerce Clause, in light of the way most modern business is done in this service-oriented, "high tech," national economy (instead of being primarily local-manufacturing-oriented); this tribunal is, however, sworn to follow existing relevant precedents of the Supreme Court of the United States, rather than anticipating a change in approach by that High Court or by Congress.[3]

CONCLUSIONS OF LAW

In light of the foregoing Discussion of the relevant substantive law, and in light of the relevant procedural law on the burden of proof in refund matters, it is **HELD** that:

1. Each financial organization having its commercial domicile in another state is entitled to rebut the statutory presumption -- that it was regularly engaging in business in this state by virtue of having at least the minimum number of West Virginia customers or at least the minimum amount of in-state gross receipts -- by showing, from the totality of the in-state contacts, that the out-of-state financial organization was, nonetheless, not,

[3] The Petitioner-taxpayer in this matter also asserts that the single-factor (based upon sales only) statutory apportionment for nondomiciliary financial institutions, W. Va. Code § 11-23-5a(a) & (c) & (**f**) [1996] (business franchise tax) and W. Va. Code § 11-24-7b(a) &(c) & (f)-(**g**) [1996] (West Virginia corporate net income tax), violates the Commerce Clause, on the ground that the most recent relevant precedents of the Supreme Court of the United States allegedly require, in essence, the more typical three-factor (property, payroll, and sales) apportionment (such as provided by the West Virginia corporate net income tax and business franchise tax statutes for virtually all other types of businesses).

This challenge is that the apportionment statutes for nondomiciliary financial institutions is unconstitutional **on the face thereof**, not just as applied to the facts of this matter and to this taxpayer. Being a part of the executive branch of state government, this quasi-judicial tribunal, under the Separation (or "Division") of Powers Clause of the State Constitution, W. Va. Const. art. V, § 1, lacks the authority to hold that a statute is facially unconstitutional. Instead, under this state constitutional provision, this tribunal must assume the facial constitutionality of the apportionment statutes in question. It would also be inappropriate for this tribunal to offer a merely advisory opinion predicting how the Supreme Court of the United States would "reconcile" earlier and more recent precedents on this issue and decide this issue now (which issue is very interesting to this tribunal with our state tax expertise; it may be much less interesting to virtually all of the general appellate courts, but they are constitutionally given that exclusive jurisdiction).

actually, "regularly engaging in business in this state[.]" W. Va. Code § 11-23-5a(d) [1996], for West Virginia business franchise tax purposes, and W. Va. Code § 11-24-7b(d) [1996], for West Virginia corporate net income tax purposes.

2. Under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, a state may not subject an activity to a tax unless, among three other factors, the activity has a "substantial" nexus with the taxing state. S*ee, e.g.*, *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326, 331 (1977).

3. A "substantial" nexus, for Commerce Clause purposes, requires a finding of a physical presence in the taxing state, not merely an economic exploitation of the market. S*ee, e.g.*, *Quill* Corp. *v. North Dakota*, 504 U.S. 298, 314, 112 S. Ct. 1904, 1914, 119 L. Ed. 2d 91, 108 (1992); *Tyler Pipe Indus., Inc. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 107 S. Ct. 2810, 97 L. Ed. 2d 199 (1987); *J.C. Penney Nat'l Bank v. Johnson*, 19 S.W.3d 831 (Tenn. Ct. App. 1999) (insufficient nexus for franchise and excise taxes on credit card income of nondomiciliary financial institution), *appeal denied*, (Tenn. May 8, 2000), *cert. denied*, 531 U.S. 927, 121 S. Ct. 305, 148 L. Ed. 2d 245 (2000); *In re Intercard, Inc.*, 270 Kan. 346, 14 P.3d 1111 (2000).

4. The physical presence necessary for the Commerce Clause's "substantial nexus" requirement must be more than a "slightest presence[.]" *Quill Corp. v. North Dakota*, 504 U.S. 298, 315 n. 8, 112 S. Ct.1904, 1914 n. 8, 119 L. Ed. 2d 91, 108 n. 8 (*citing Nat'l Geographic Soc'y v. Cal. Bd. of Equalization*, 430 U.S. 551, 556, 97 S. Ct. 1386, 1390, 51 L. Ed. 2d 631, 636-37 (1977)). Instead, the in-state physical presence must be "'**significantly** associated with the taxpayer's ability to establish and maintain a market in'" the taxing state. *Tyler Pipe Indus. v. Wash. State Dep't of Revenue*, 483 U.S. 232, 250, 107 S. Ct. 2810, 2821, 97 L. Ed. 2d 199, 215-16 (1987) (emphasis by bold print added) (internal citation omitted).

5. Here, for the tax years in question, the taxpayer's only physical presence in West Virginia was by the extremely isolated and sporadic use of the in-state lawyer's(s') services and courts of this state in the *de minimis* number of credit card debt-collection actions. This extremely limited type and frequency of physical presence in state -- compared with the total volume of the taxpayer's business with West Virginia customers -- constitutes a "slightest presence" and is **not** "significantly" associated with the taxpayer's ability to establish and maintain a market in this state, for the time period involved in this matter.

6. A relevant procedural law is that, in a hearing before the West Virginia Office of Tax Appeals on a petition for refund, the burden of proof is upon a petitioner-taxpayer, to show that the petitioner-taxpayer is entitled to the refund. *See* W. Va. Code § 11-10A-10(e) [2002] and 121 C.S.R. 1, § 63.1 (Apr. 20, 2003).

7. The Petitioner-taxpayer in this matter has carried the burden of proof with respect to its contention that, as applied to the facts of this matter, W. Va. Code §§ 11-23-5a(d) [1996] (West Virginia business franchise tax) and 11-24-7b(d) [1996] (West

Virginia corporate net income tax) violate the "substantial nexus" component of the United States Supreme Court's analysis of the United States Constitution's interstate "Commerce Clause," U.S. Const. art. I, § 8, cl. 3.

8. Accordingly, the Petitioner-taxpayer in this matter has carried the burden of proving its entitlement to the requested West Virginia state tax refunds, due to the lack of "substantial nexus" as contemplated by the Supreme Court of the United States.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of business franchise tax, for the year 1998, is hereby **AUTHORIZED**, plus any statutory interest.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of West Virginia corporate net income tax, for the year 1998, is hereby **AUTHORIZED**, plus any statutory interest.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of business franchise tax, for the year 1999, is hereby **AUTHORIZED**, plus any statutory interest.

It is **ALSO** the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the Petitioner's petition for refund of West Virginia corporate net income tax, for the year 1999, is hereby **AUTHORIZED**, plus any statutory interest.

As set forth in W. Va. Code § 11-10A-18 [2002], the West Virginia State Tax Commissioner's Office is to see that the payment of these refunds, plus any statutory interest, is issued promptly.