

IN THE SUPREME COURT OF MISSOURI

GORE ENTERPRISE HOLDINGS, INC.)	
)	
Appellant,)	
)	
v.)	
)	No. 84226
DIRECTOR OF REVENUE,)	
STATE OF MISSOURI,)	
)	
Respondent.)	
)	

FROM THE ADMINISTRATIVE HEARING COMMISSION OF MISSOURI
THE HONORABLE SHARON M. BUSCH, COMMISSIONER

BRIEF AS *AMICUS CURIAE* OF COUNCIL ON STATE TAXATION
IN SUPPORT OF APPELLANT

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INTEREST OF THE AMICUS CURIAE

This brief is submitted, with the consent of both parties, by the Council On State Taxation (“COST”) as *amicus curiae* in support of the Appellant in the above-captioned matter. COST is submitting this brief because the Missouri Administrative Hearing Commission (“Commission”) Decision which holds that the State of Missouri has jurisdiction to tax the Appellant, Gore Enterprise Holdings, Inc. (“Holdings”), is unconstitutional, both threatening the flow of commerce among the states and impinging on due process rights. COST and its members respectfully request that this Court overturn the decision and hold that because the Appellant has no physical presence in Missouri, it is not subject to the State’s taxing jurisdiction.

COST is a non-profit trade association with the objective of preserving and promoting equitable and nondiscriminatory state and local taxation of multi-jurisdictional business entities. COST’s membership consists of over 500 multistate corporations involved in interstate and international commerce. COST was organized in 1969 as an advisory committee to the Council of State Chambers of Commerce and was separately incorporated on January 1, 1992. COST members are directly affected by the Administrative Hearing Commission Decision because many members are involved in contractual relationships which, under universally accepted principles of law, would not establish nexus for state taxation. However, pursuant to the Commission’s Decision, these COST members might now be deemed to have nexus with Missouri for the purposes of state taxation. If this decision is allowed to stand, COST members’ well-

settled expectations regarding jurisdiction of state taxation will be drastically altered and the state of the law thrown into chaos.

The Missouri Department of Revenue (“Department”) has unconstitutionally reached beyond its borders to assert nexus with a non-domiciliary business enterprise that has no physical presence within the State. This assertion of nexus, under the facts presented, has never been allowed under Due Process standards, let alone under the more stringent standards of the Commerce Clause. This Court should not allow this violation of Appellant’s constitutional rights.

JURISDICTIONAL STATEMENT

This appeal involves whether the licensing of patents by a non-Missouri domiciliary business enterprise that has no physical presence in Missouri satisfies the nexus requirements of §§ 143.431.1 and 143.451.¹ Because resolution of the issues in this appeal requires this Court to construe Missouri’s revenue laws, jurisdiction is proper in this Court pursuant to Mo. Const. Art. V, Section 3.

STATEMENT OF FACTS

Amicus Curiae COST relies on the Statement of Facts as set forth in the Appellant’s Brief.

¹ All statutory citations are to the Revised Statutes of Missouri of 2000, as amended, unless otherwise noted.

POINTS RELIED ON

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT IMPOSITION OF MISSOURI INCOME TAX UPON APPELLANT IS NOT PERMITTED UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE APPELLANT DID NOT PURPOSEFULLY DIRECT ITS ACTIVITIES AT RESIDENTS OF MISSOURI.

Miller Bros. v. Maryland, 347 U.S. 340 (1954).

Quill Corp. v. North Dakota, 504 U.S. 298 (1992)

Asahi Metal Indus. Co., Ltd. v. Superior Court of California, Solano County,
480 U.S. 102 (1987)

Due Process Clause of the United States Constitution (Amendment XIV, § 1)

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE BECAUSE APPELLANT HAS NO PHYSICAL PRESENCE IN

MISSOURI, AND THEREFORE DOES NOT HAVE A SUFFICIENT NEXUS WITH THE STATE, CONSISTENT WITH THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, THAT WOULD PERMIT MISSOURI TO IMPOSE INCOME TAX UPON APPELLANT.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)

Quill Corp. v. North Dakota, 504 U.S. 298 (1992)

Geoffrey, Inc. v. South Carolina Tax Commission, 437 S.E.2d 13 (S.C.), *cert. denied*, 510 U.S. 992 (1993)

Scripto, Inc. v. Carson, 362 U.S. 207 (1960)

Commerce Clause of the United States Constitution (Article I, § 8, cl. 3)

III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE BECAUSE THE TAX DOES NOT FAIRLY RELATE TO SERVICES PROVIDED TO APPELLANT BY MISSOURI, CONSISTENT WITH THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION, THAT WOULD PERMIT MISSOURI TO IMPOSE INCOME TAX UPON APPELLANT.

Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977)

Commerce Clause of the United States Constitution (Article I, § 8, cl. 3)

IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT THE COMMISSION'S DECISION WOULD CREATE OVERBROAD JURISDICTION TO TAX AND UNNECESSARILY UPSET LONG-ESTABLISHED EXPECTATIONS AS TO TAXABILITY BASED ON THE CONSTITUTIONAL LIMITS OF THE DUE PROCESS AND COMMERCE CLAUSES.

ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE , UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT IMPOSITION OF MISSOURI INCOME TAX UPON APPELLANT IS NOT PERMITTED UNDER THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION BECAUSE THE APPELLANT DID NOT PURPOSEFULLY DIRECT ITS ACTIVITIES AT RESIDENTS OF MISSOURI.

A. The Due Process Clause Limitations

The Director of Revenue's attempt to subject Holdings to tax violates the Due Process Clause of the United States Constitution (Amendment XIV, Section 1). The Due Process Clause "requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954). In order for a state to meet the Due Process Clause requirements sufficient to permit the taxing of an out-of-state corporation, the corporation must have "purposefully directed" its activities at residents of the taxing state. *Quill Corp. v. North Dakota*, 504 U.S. 298, 308 (1992). "[I]f a foreign corporation purposefully avails itself of an economic market in the forum State, it may subject itself to the State's *in personam* jurisdiction even if it has no physical presence in the State." *Id.* at 307. The Due Process Clause also mandates that a state's jurisdiction to tax be "rationally related to 'values connected with the taxing State.'" *Id.* at 306 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

B. The Commission's Decision Eviscerates the Due Process Limitations

Established by the U.S. Supreme Court

The Commission's decision disregards the U.S. Supreme Court's limitations on taxation under Due Process Clause jurisprudence, the effect of which is to render those limitations meaningless. As noted above, *Quill* requires that a corporation have "purposefully directed" its activities at residents of the taxing state. Unlike the taxpayer in *Quill* -- an out-of-state direct mail marketer that regularly solicited sales from North

Dakota customers -- Holdings did not “purposefully direct” its activities at residents of Missouri.

Holdings owned and managed more than 300 patents, and licensed those patents to W.L. Gore, Inc. (“Gore”), an affiliated manufacturer of medical products, fabrics and industrial products, in exchange for a royalty fee. Gore, in turn, manufactured those products as permitted under the patents, for sale to Gore’s customers. Holdings itself had no customers in Missouri and cannot be said to have “purposefully directed” its activities to Missouri customers. Gore did have its own customers in Missouri, but the activity for which it paid a royalty to Holdings -- the manufacturing of industrial products -- took place entirely outside the State. Thus, Gore cannot be considered a “Missouri” customer inasmuch as it did not engage in any in-State activities relating to the patents licensed by Holdings.

According to the Commission, Holdings “purposefully availed itself of the benefits of Missouri’s economic market,” even though it was not physically present in the State, because it “earned [royalty] income from the sales of the patented products in Missouri.” In making this holding, the Commission has made two fundamental errors that should be addressed by this Court. First, it has misinterpreted the facts by stating that royalties were earned from sales made by Gore in Missouri. Holdings earned royalty income because it permitted Gore to manufacture products pursuant to Holdings’ patents, and not because Gore sold those products to its customers.

Second, and of greater Constitutional significance, the Commission appears to have based its conclusion on a “stream of commerce” analysis that is at odds with the

U.S. Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court of California, Solano County*, 480 U.S. 102 (1987). In *Asahi*, 480 U.S. at 111, Justice O'Connor held that the Due Process Clause requires "something more than that the defendant was aware of its product's entry into the forum State through the stream of commerce in order for the State to exert jurisdiction over the defendant." Rather, "[t]he 'substantial connection' . . . between the defendant and the forum State . . . must come about *by an action of the defendant purposefully directed toward the forum State.*" *Id.* at 112 (citation omitted).

Here, the fact that Gore made sales in Missouri of goods it manufactured under Holdings' patents does not mean that Holdings "purposefully directed" its activities toward Missouri's economic market. The Commission's decision renders the U.S. Supreme Court's "purposefully directed" limitation virtually meaningless, thereby obliterating the Constitutional protections that insure that there be a relationship between a state and an entity that it seeks to tax.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE , UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE BECAUSE APPELLANT HAS NO PHYSICAL PRESENCE IN MISSOURI, AND THEREFORE DOES NOT HAVE A SUFFICIENT NEXUS WITH THE STATE, CONSISTENT WITH THE COMMERCE CLAUSE OF THE UNITED STATES

**CONSTITUTION, THAT WOULD PERMIT MISSOURI TO IMPOSE
INCOME TAX UPON APPELLANT.**

**A. Under *Quill*, a State May Not Tax a Corporation Having No Physical
Presence in the State.**

The Director's attempt to subject Holdings to tax also violates the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3). The Commerce Clause requires, at a minimum, that a "substantial nexus" exist between a state and a foreign corporation before the state can impose its taxes on the corporation. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). It also requires that the tax be "fairly related to services provided by the state." *Complete Auto*, 430 U.S. at 279.

In *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), the United States Supreme Court firmly established that a state may not levy a tax upon a corporation with no physical presence in the state. In *Quill*, the Supreme Court held that the "substantial nexus" requirement of the Commerce Clause precluded a state from compelling a vendor having no physical presence in the state to collect use taxes on goods sold to in-state purchasers. In doing so, the Court reaffirmed the "bright line, physical presence requirement" of *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), for state jurisdiction to impose sales and use taxes. The Court explicitly rejected the holding of the North Dakota Supreme Court that, given "changes in the 'legal landscape' . . . the Commerce Clause no longer mandated the sort of physical-presence nexus suggested in *Bellas Hess*." *Quill*, 504 U.S. at 303-04. The Supreme Court also

held that “Quill’s licensing of software [for use within the state] does not meet the ‘substantial nexus’ requirement of the Commerce Clause.” *Id.* at 315 n.8.

The Commission acknowledges that Holdings is not itself physically present in Missouri.² Nevertheless, it holds that the “physical presence” requirement in *Quill* is limited to sales and use taxes, and should not apply to income taxes such as the Missouri income tax. Although *Quill* did address the constitutionality of a state’s attempt to impose a use tax collection obligation on a direct marketer having no physical presence in the state, the Court’s holding should apply equally to an income tax. There is no basis in law to have one nexus standard governing sales and use taxes and another for all other types of taxes. Further, the creation of a different Constitutional standard for each type of state tax would create havoc in Missouri and throughout the United States.

The Commission’s rationale for having a different nexus standard for sales taxes and income taxes is that “intangibles . . . may earn income in the taxing state, even if their owner has no physical presence in that state.” It cites to the U.S. Supreme Court decision in *Mobil Oil Corp. v. Commissioner of Taxes of Vermont*, 445 U.S. 425 (1980) for the proposition that physical presence is not required in an income tax case. However, *Mobil* dealt not with the Commerce Clause “substantial nexus” requirement -- Mobil was

² Although the Commission found that Holdings was not itself physically present in Missouri, its decision contains dicta stating that “we could easily rule that Gore’s business activity in Missouri may be attributed to Holdings and that physical presence is [therefore] established.” The issue of attributional nexus will be discussed *infra*.

physically present in Vermont -- but with a separate Commerce Clause limitation requiring that the tax be “fairly apportioned.”

The Commission cites to the U.S. Supreme Court decision in *International Harvester Co. v. Wisconsin Department of Taxation*, 322 U.S. 435 (1944) as support for its holding that, for Commerce Clause purposes, a corporation need not be physically present in a state in order to be subject to that state’s income tax. It should be noted that *International Harvester* involved exertion of the state’s taxing power over an entity that, unlike Holdings, was physically present in that state, rendering that case irrelevant to this analysis.³

Indeed, the U.S. Supreme Court has never held in any state tax case that the “substantial nexus” requirement of the Commerce Clause can be satisfied in the absence of a taxpayer’s physical presence in the state. Subjecting to tax a corporation that is not physically present in that state -- through the performance of services, or by having in-state employees or property -- would result in an unconstitutional expansion of the state’s taxing authority. Inasmuch as Holdings was not physically present in Missouri during the years in issue, the Director should be prohibited under the stringent Commerce Clause requirements from assessing Missouri income tax against Holdings on the royalty income it received from the licensing of patents.

³ Although the Commission appears to have cited *International Harvester* for its Commerce Clause analysis, the case involved the Due Process Clause, not the Commerce Clause.

B. The *Geoffrey v. South Carolina* Decision Has Never Been Followed by the Highest Court in Any Other State.

The Commission cites with approval to the South Carolina Supreme Court decision in *Geoffrey, Inc. v. South Carolina Tax Commission*, 437 S.E.2d 13 (S.C.), *cert. denied*, 510 U.S. 992 (1993), as supporting its holding that *Quill* limited the “physical presence” requirement under the Commerce Clause to sales and use taxes. Without question, *Geoffrey* remains one of the most controversial state tax decisions ever rendered, and has been the subject of severe criticism by tax scholars and by other state courts and tax tribunals throughout the United States, both for its flawed analysis and for its ultimate holding. Many have questioned its failure to adequately distinguish between Due Process analysis and Commerce Clause analysis. As proof of its lack of acceptance as precedent, we note that in the 10 years that have elapsed since it was decided, the *Geoffrey* decision has never been adopted by the highest court of any other state. Needless to say, it is not binding on this Court and should not be given any deference.

Subsequent to the *Geoffrey* decision, a South Carolina Court of Common Pleas held that a physical presence is necessary for Commerce Clause purposes to establish a nexus sufficient to subject corporations to the Charleston business license tax. *City of Charleston v. Government Employees Insurance Co.*, No. 93–CP–10–2567 (S.C. Ct. Com. Pl. Sept. 15, 1997), and *City of Charleston v. United Services Automobile Ass’n*, No. 95–CP–10–1859 (S.C. Ct. Com. Pl. Sept. 15, 1997), *rev’d on other grounds*, 512 S.E.2d 504 (S.C. 1999). This decision suggests that even the South Carolina courts have questioned the validity of the Commerce Clause analysis in *Geoffrey*.

Moreover, in the 10 years since *Geoffrey* was decided, several state courts and state administrative law judges have explicitly recognized that the U.S. Supreme Court’s “physical presence” analysis in *Quill* should not be limited to sales and use taxes and have held that a corporation can only be subject to a state’s corporate income tax if it is physically present in that state. *Kevin Assocs., LLC v. Crawford*, No. 460-981 (La. 19th Jud. Dist. Ct. Aug. 20, 2001); *SYL, Inc. v. Comptroller*, No. 24-C-99-002389 AA (Cir. Ct. Baltimore City Mar. 17, 2000) (*appeal pending*); *Crown Cork & Seal (Del.) Inc. v. Comptroller*, No. 24-C-99-002388 AA (Cir. Ct. Baltimore City Mar. 17, 2000); *MCI Telecomms. Corp. v. Comptroller*, No. 24-C-99-002387 AA (Cir. Ct. Baltimore City Mar. 17, 2000); *Rylander v. Bandag Licensing Corp.*, 18 S.W.3d 296 (Tex. App. 2000); *Dial Bank*, Nos. INC. 95-289, F.95-308 (Ala. Dep’t of Revenue Aug. 10, 1998); *Cerro Copper Prods., Inc.*, No. F-94-444 (Ala. Dep’t of Revenue Dec. 11, 1995), *reh’g denied* (Ala. Dep’t of Revenue Jan. 29, 1996).

Recently, the U.S. Supreme Court denied certiorari review sought by the Tennessee Commissioner of Revenue in *J.C. Penney National Bank v. Johnson*, 19 S.W.3d 831 (Tenn App. Ct. 1999), *cert. denied*, 531 U.S. 927 (2000). The Tennessee Court of Appeals had held that the “physical presence” requirement under *Quill* was applicable to the Tennessee corporate franchise and excise tax.

C. The Commission’s Dicta that Holdings is Physically Present in Missouri Through its In-State Affiliate Should be Rejected.

There is no basis for the Commission’s dicta that Gore’s in-State business activities may be attributed to Holdings so as to establish the requisite “physical

presence.” The Commission believes it could have reached that conclusion, allegedly because “Gore and Holdings were a unitary business and were functionally integrated.” The existence of a unitary business between a taxpayer corporation and an out-of-State affiliate -- including the presence of functional integration between them -- does not by itself cause the out-of-State affiliate to be physically present wherever the taxpayer is present.

As a general rule, the requirement that a corporation must be “physically present” in order to be taxed by a state refers to the in-state presence of the corporation itself, through its own employees or tangible property. In *Scripto, Inc. v. Carson*, 362 U.S. 207, 210-11 (1960), the U.S. Supreme Court found the presence in Florida of 10 part-time independent salesmen, who solicited customers on behalf of an out-of-state seller of pens, as subjecting the seller to tax. The Supreme Court rejected the taxpayer’s argument that it was not physically present in Florida because the salesmen were not considered its “employees.” In *Tyler Pipe Industries, Inc. v. Washington State Department of Revenue*, 483 U.S. 232, 250-51 (1987), the U.S. Supreme Court held that a corporation’s in-state independent sales representatives supported a finding of nexus, citing to *Scripto*.

Both the *Scripto* and *Tyler Pipe* decisions represent exceptions to the general rule that in order to be taxable a corporation must itself be “physically present” in a state. In those cases, “physical presence” was found to exist through the in-state activities of third-party salesmen. Tellingly, the U.S. Supreme Court has acknowledged that *Scripto*

represents “[t]he furthest extension” of a state’s power to tax an out-of-state corporation under the Due Process Clause. *Quill*, 504 U.S. at 306.⁴

Unlike the facts in *Scripto* and *Tyler Pipe*, Holdings did not engage Gore to conduct patent licensing activities in Missouri on its behalf. Holdings and Gore were engaged in separate and distinct activities. Thus, *Scripto* and *Tyler Pipe* are inapplicable and Holdings cannot be considered to be physically present in Missouri through Gore’s in-State activities.

III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE , UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND

⁴ In *Amway Corp. v. Director of Revenue*, 794 S.W. 2d 666 (Mo. 1990), the Missouri Supreme Court held that an out-of -state manufacturer and seller of household products had nexus with the State by reason of the in-State solicitation of distributorships using independent contractors. Finding that the sale of distributorships was part of the company’s unitary business, the Court held that it did not matter that those sales were made by independent contractors rather than by employees. The *Amway* decision is based on a *Scripto*-type analysis. As such, it is not applicable to this case because Gore did not engage in in-state activities that can be considered a part of Holding’s unitary business.

**SUBSTANTIAL EVIDENCE BECAUSE THE TAX DOES NOT FAIRLY
RELATE TO SERVICES PROVIDED TO APPELLANT BY THE
STATE, CONSISTENT WITH THE COMMERCE CLAUSE OF THE
UNITED STATES CONSTITUTION, THAT WOULD PERMIT
MISSOURI TO IMPOSE INCOME TAX UPON APPELLANT.**

In *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), in addition to establishing a “substantial nexus” requirement, the U.S. Supreme Court held that the Commerce Clause also requires that the tax imposed be “fairly related to services provided by the state” (commonly referred to as the “fourth prong” of the *Complete Auto* test). In *City of Charleston, supra*, the South Carolina Court of Common Pleas, unable to identify any services being provided to a corporation that was not physically present in the jurisdiction, held that application of a business license tax violated this fourth prong. The Commission does not address whether the tax imposed on Holdings is fairly related to services provided by the State.

There is no evidence that Holdings derived the benefits of *any* State services. The Commission found that Holdings has never had property, agents, offices, a mailing address, a phone number, a bank account, or payroll in Missouri. It has never brought suit, been sued in, or entered into a contract in Missouri. None of its outside professional advisors performed services in the State on behalf of Holdings. It is difficult to fathom

what services, if any, Missouri provided to Holdings in light of these facts.⁵ The Director has not identified any such services.

Accordingly, the Director's decision to subject Holdings to tax also violates the Commerce Clause because the tax does not fairly relate to any benefits provided by the State.

IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN UPHOLDING THE NOTICES OF DEFICIENCY BECAUSE, UNDER SECTIONS 621.189 AND 621.193, ITS DECISION IS NOT AUTHORIZED BY LAW OR SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE IN THAT THE COMMISSION'S DECISION WOULD CREATE OVERBROAD JURISDICTION TO TAX AND UNNECESSARILY UPSET LONG-ESTABLISHED EXPECTATIONS AS TO TAXABILITY BASED ON THE CONSTITUTIONAL LIMITS OF THE DUE PROCESS AND COMMERCE CLAUSES.

A. The Administrative Hearing Decision, if Upheld, Will Drastically Change Settled Long-Established Expectations as to Taxability.

In *Quill Corp. v. North Dakota*, 504 U.S. 298, 314-15 (1992), the U.S. Supreme Court noted the benefits of a "bright-line" rule which avoids "[u]ndue burdens on

⁵ It is assumed that Missouri provides substantial services to Gore, which is physically present in the state and which is subject to Missouri income tax.

interstate commerce . . . by the demarcation of a discrete realm of commercial activity that is free from interstate taxation.” Such a rule “firmly establishes the boundaries of legitimate state authority”; it “reduces litigation”; it “encourages settled expectations and, in doing so, fosters investment by businesses and individuals”; and, when long-standing precedent supports the rule, it serves the “‘interest in stability and orderly development of the law’ that undergirds the doctrine of *stare decisis*.” *Quill*, 504 U.S. at 315-17 (citation omitted).

The Commission holds, in effect, that Holdings is subject to Missouri tax because it has “economic presence” with the State, based on Holdings having “earned income” in Missouri. A “physical presence” standard for nexus based on the in-state presence of employees, tangible personal property or real property is a far superior standard than an “economic” presence standard based on the alleged generation of in-state income or use of intangible property. If taxable nexus is found to exist simply because an in-state entity’s own sales result in additional income to an out-of-state entity, there is no logical stopping point for state and local tax administrators and overreaching will certainly occur.

The logical consequence of the Commission’s decision will be to give Missouri virtually limitless jurisdiction to tax. If the decision were to become the law of the land, sports figures, celebrities, authors and designers, for example, could find themselves taxable in every jurisdiction in which merchandise bearing their name or likeness is sold, regardless of whether they have ever set foot in the jurisdiction, simply because they derive an “income stream” through royalties they receive from products sold by others

that bear their mark or likeness. The Commission has held that “the evidence establishes that the Director would treat royalty income in the same way regardless of whether patents were transferred to a related corporation.” Thus, the Director’s position, if upheld, would likely lead to the “parade of horrors” outlined above.

The Commission’s decision, if upheld, will inexorably result in the taxation of the same income by multiple jurisdictions and drastically change settled long-established expectations as to taxability. Although the decision holds that the licensing of intellectual property between *related* parties subjects an out-of-state licensor to taxation in Missouri, its reasoning would apply equally to licensing arrangements between *unrelated* parties. This would radically alter the landscape for taxation of transactions affecting intellectual property among the states.

B. If the Director of Revenue Believed That Appellant’s Transactions Resulted in Tax Avoidance, the Director Should Have Invoked Her Authority to Address Such Alleged Tax Avoidance, Instead of Subjecting Appellant to Tax.

If the Director of Revenue believed that Holdings is, as the Commission states, a “mere legal construct to shelter income from taxation in the state from whose revenue stream the income was derived,” then the Director instead should have invoked his authority to address such alleged tax avoidance either by (i) making pricing adjustments to properly reflect the Missouri income of Holdings’ in-State affiliates or

(ii) demonstrating that Holdings is a “sham” corporation or that the transactions engaged in by Holdings are “sham” transactions. Typically, the invoking of such authority by a tax administrator would not have constitutional implications. In upholding a finding of nexus in the absence of physical presence, however, the Commission has sanctioned an action of enormous constitutional significance, based on an apparent concern over perceived tax avoidance that it has ample tools to address.

CONCLUSION

The Commission’s Decision that a state may tax a corporation having no in-state physical presence is erroneous as a matter of law and would dramatically alter settled expectations regarding state taxation jurisdiction. Accordingly, COST urges that the decision be overturned as being in violation of the Commerce Clause, as well as the Due Process Clause, of the United States Constitution.

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CERTIFICATE OF CONSENT

I hereby certify that all the parties to this proceeding have consented to COST filing this *Amicus Curiae* Brief in this Court.

CERTIFICATE OF SERVICE

I hereby certify that one true and accurate copy on paper and one true and accurate copy on disk of the foregoing were mailed first class, postage prepaid, this 3rd day of May, 2002, to:

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06(b) and (c)

I hereby certify that the foregoing brief complies with the limitations contained in Supreme Court Special Rule 1(b). The foregoing brief contains 5,578 words.

The undersigned further certifies that the disk simultaneously filed with the briefs filed with this Court under Supreme Court Rule 84.05(a) has been scanned for viruses and is virus-free.

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