IN THE
COURT OF APPEALS OF MARYLAND

No. 6

September Term, 2000

FURNITURELAND SOUTH, INC.
and ROYAL TRANSPORT, INC.

Appellants

v.

COMPTROLLER OF THE TREASURY
OF THE STATE OF MARYLAND

Appellee

Appeal from the Circuit Court for Anne Arundel County
(Ronald A. Silkworth, Judge)

BRIEF OF AMICUS CURIAE

INTEREST OF THE *AMICUS CURIAE*

The Multistate Tax Commission ("MTC") is the administrative agency created by the Multistate Tax Compact ("COMPACT"). *See,* RIA ALL STATES TAX GUIDE ¶ 701 et seq., p. 751 (1995). Twenty-one States have legislatively established full membership in the COMPACT. In addition, two States are sovereignty members and nineteen States are associate members.[1] The United States Supreme Court upheld the validity of the

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[1] **Compact Members:** Alabama, Alaska, Arkansas, California, Colorado, District of Columbia, Hawaii, Idaho, Kansas, Maine, Michigan, Minnesota, Missouri, Montana, New Mexico, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. **Sovereignty Members:** Florida and Wyoming. **Associate Members:** Arizona, Connecticut, Georgia, Illinois, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, New Hampshire, New Jersey, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Wisconsin, and West Virginia.

COMPACT in *United States Steel Corp.* v. *Multistate Tax Comm'n*, 434 U.S. 452 (1978).

The purposes of the COMPACT are facilitation of a proper determination of state and local tax liability of multistate taxpayers, promotion of uniformity, facilitation of taxpayer convenience and compliance, and avoidance of duplicative taxation. *Id.* at art. I.

In furtherance of the purposes of the COMPACT, the MTC seeks a correct and uniform understanding of the constitutional nexus standard for the imposition of the use tax. A correct nexus standard ensures that interstate commerce pays its fair share of state sales and use taxes. *See Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175, 184 (1995). A uniform nexus standard also facilitates taxpayer convenience and compliance, because taxpayers will more readily understand the constitutional limits of the Commerce Clause on state use taxes. This case represents a unique opportunity to develop a plain and definite understanding on when a State may impose a use tax collection obligation on a remote seller utilizing customized delivery and related services of a third party.

The nexus standard that the MTC proposes accurately reflects the policy of the Commerce Clause underpinning the limited nexus exception for contact by common carrier. In this regard, the MTC standard is consistent with well-established jurisprudence as to what constituted a common carrier at the time the nexus exception was established in 1967.

The MTC submits that certainty based upon established jurisprudential moorings will promote the free flow of goods in our national economy consistent with the purposes of the Commerce Clause.

To be specific, the MTC seeks this Court's recognition that a remote seller utilizing a third party carrier on a customized basis to deliver its product and to perform other related services has left the safe harbor established by *National Bellas Hess, Inc.* v. *Dept. of Revenue*, 386 U.S. 753 (1967), and reaffirmed in *Quill Corp.* v. *North Dakota*, 504 U.S. 298 (1992). In the instance of custom services, the carrier does not provide its services in the capacity of a common carrier as that concept was understood in *Bellas Hess*. The failure to satisfy the common carrier exception to nexus that is found in the safe harbor rule arises, because the transport company is not providing these services to the remote seller as a member of the public on an indiscriminate basis. The contrary position taken here by Furnitureland and Royal Transport, that all "independent" or "private" delivery services are protected, would vastly expand the nexus exception of the safe harbor and unjustifiably injure in-state commerce (store front operations) that are the source of the local economy and employment.

STATEMENT OF THE CASE & OF THE FACTS

Your amicus adopts the statement of the case and the statement of the facts submitted by the Comptroller.

QUESTIONS PRESENTED

1. Whether the Court must address the constitutional issue legitimately raised by the facts of this case, ruling in favor of the Comptroller if its best understanding of applicable precedent supports that decision.

2. Whether market-enhancing activities (other than solicitation) of a representative, but not necessarily an agent, are sufficient under the Commerce Clause of the United States Constitution to impose a use tax collection obligation.

2. Whether a remote seller utilizing on a customized basis the delivery and in-state related services of a transport company has left the safe harbor of protection against a use tax collection obligation, because the transport company does not provide its services as a "common carrier" within the meaning of the limited safe harbor established in *Bellas Hess.*[2]

SUMMARY OF ARGUMENT

This case presents an issue of first impression; whether a remote seller using the services of an ICC certificated transport company on a customized basis has left the safe harbor protecting against a use tax collection obligation established by the Supreme Court in *National Bellas*

[2] Maryland also argues that Royal Transport is required to collect use tax under the Maryland sales and use tax statute. This state-law issue is beyond the scope of the MTC's present institutional interest in seeking a clear recognition of the circumstances under which a motor transport company is a representative of the remote seller and can establish nexus for imposing a use tax collection obligation.

Hess and reaffirmed in *Quill*. This Court is necessarily required to interpret relevant Supreme Court Commerce Clause jurisprudence in order to decide the issue. This Court is both competent and obligated to do so, notwithstanding the lack of Supreme Court precedent on all fours.

The Court's interpretation should be guided by the policies derived from the Supreme Court's Commerce Clause cases. The *Bellas Hess* rule is designed to fulfill the purposes of the Commerce Clause by assuring that the use tax collection obligation not become unduly burdensome. Determining whether a use tax collection obligation would be unreasonably burdensome is accomplished by an examination of the substantive relationship between the remote seller and the transport company, not on the formal label under which the transport company conducts its business. The correct analytical approach will result in determining that a remote seller using the services of an ICC certificated transport company on a customized basis has left the safe harbor from use tax collection.

Basing a finding of use tax collection nexus upon the relationship of a remote seller with the transport company fits comfortably under the well- established principle that nexus is established by third-party activities in the taxing state that are significantly associated with the remote seller's ability to establish and maintain a market in the taxing state. While this principle does not reach all third-party activities, clearly delivery, set-up, repair, backhauling and return or replacement of damaged merchandise are material to the remote seller's ability to establish and maintain a market. These third-party activities create nexus, under applicable Supreme Court precedent, whether conducted by an agent or independent contractor acting as the remote seller's representative in the taxing state.

This Court is further guided by the Supreme Court's intention to create a limited safe harbor from use tax collection for remote sellers whose only connection with the taxing state is delivery by common carrier or the U.S. mail. If this Court were to define the safe harbor to include a carrier holding an ICC common carrier certificate under the now largely symbolic federal regulatory system for interstate truckers, the safe harbor would expand far beyond the narrow safe harbor intended by the Supreme Court. Such an erroneous ruling would rest upon formalities and not economic substance. The Supreme Court has long noted it will not make Commerce Clause determinations affecting the sovereignty of the States based upon formal contractual labels. In the past, the Court has rejected reliance on formal contractual labels, because this approach would permit widespread tax manipulation that has nothing to do with the purposes of the Constitution.

While the constitutional questions presented in this case, as applied to the specific facts of the case, are national ones of first impression, the governing principles enunciated by the Supreme Court are clear. Your *amicus* submits that these principles strongly support a determination by this Court that use tax collection nexus has been established in this case. In these circumstances, this Court may appropriately affirm the decision of the Circuit Court.

ARGUMENT

I. THE COURT MUST FAIRLY AND COMPLETELY ADDRESS THE CONSTITUTIONAL ISSUES PROPERLY RAISED IN THIS CASE WITH DUE REGARD TO PRINCIPLES OF FEDERALISM.

We are perplexed by the suggestion, Royal Transport Br. 28*ff* that it is without the power of the Court to resolve the constitutional issue of determining the contours of the *Bellas Hess* safe harbor. No one can seriously question the competence and duty of the Court to decide constitutional issues. *Arkansas* v. *Kansas & T. Coal Co.*, 183 U.S. 185, 190-91 (1901); cf. *Alden* v. *Maine*, 119 S. Ct. 2240, 2266 (1999) (good faith state application of Constitution implements supremacy clause). Of course in applying the Constitution, the state court must adhere to precedent of the Supreme Court to the extent they exist. *Chesapeake & O. Ry. Co.* v. *Martin*, 283 U.S. 209, 221 (1931).

Abdicating the responsibility to resolve constitutional issues properly raised would leave the litigants at the mercy of the default rule the court would adopt to avoid deciding the constitutional issue. In this case, abdication might mean, as appellants would undoubtedly prefer, a ruling in favor of a remote seller in the absence of Supreme Court precedent *on all fours*. This kind of decision making would of course ensure that the Comptroller would never succeed in state court with respect to reasonable interpretations of constitutional limitations on state taxing power in the absence of a precise and controlling precedent. But application of this kind of default rule is unwarranted and unsupportable by the jurisprudence of the Supreme Court.

In the first place, the Supreme Court has clearly established that interstate commerce is not immune from state tax. Interstate commerce must pay its fair share of taxes. E.g., *Oklahoma Tax Comm'n* v. *Jefferson Lines*, 514 U.S. 175, 184 (1995); *D.H. Holmes Co.* v. *McNamara,* 486 U.S. 24, 31 (1988). "[I]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of [the] state tax burden even though it increases the cost of doing business." *Commonwealth Edison Co.* v. *Montana,* 453 U.S. 609, 623 –624 (1981); *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938).

Additionally, the Supreme Court clearly operates from the premise that the burden to establish any exemption, including exemptions based upon constitutional principles, rests on the taxpayer. *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534, 537 (1951) (limited as to other matters in *National Geographic Society* v. *California Bd. Of Equalization*, 430 U.S. 551, 560 (1977)); see also, *General Motors Corp.* v. *Washington*, 377 U.S. 436, 441-42 (1964); *Container Corp. of America* v. *Franchise Tax Bd.*, 463 U.S. 159, 175-76 (1983).

The burden of proof bias that might be described as favoring state taxing power even in the face of a constitutional challenge is closely allied with the additional recognition of the Supreme Court that state taxing power is an essential element of state sovereignty. *National Private Truck Council, Inc.* v. *Oklahoma Tax Comm'n*, 515 U.S. 582, 586 (1995), quoting *Dows* v. *City of Chicago*, 11 Wall. 108, 110 (1871) ("It is upon taxation that the several States chiefly rely to obtain the means to carry on their respective governments, and it is of the utmost importance to all of them that the modes adopted to enforce the taxes levied should be interfered with as little as possible.") Without the power to tax, States are left with no resources to discharge their governmental responsibility in our federal union. See *Department of Revenue* v. *ACF Industries, Inc.*, 510 U.S. 332, 345 (1994) (considerations of federalism support view that tax system not proscribed). As *ACF Industries* further illustrates, considerations of federalism are so strong that they influence interpretation of a possible restriction based upon a congressional statute validly enacted under the Commerce Clause whose express intent is to regulate state taxing power. See also *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991).

In sum, we submit the Court must be guided by the strong presumption that the Supreme Court does not lightly undermine state taxing authority. As the Supreme Court has observed, "[t]he importance of the commerce clause to the Union is very great. But it is also important to prevent that clause being used to deprive the States of their lifeblood by a strained interpretation of facts." *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390, 395 (1930).

A strong constitutional value in favor of upholding the state taxing power even with respect to interstate commerce is not the only consideration that should influence the Court. The remainder of this brief addresses why the precedent of the Supreme Court that does exist strongly favors the State in this case.

II. SUBSTANTIAL NEXUS MAY BE ESTABLISHED THROUGH USE OF A REPRESENTATIVE, NOT NECESSARILY AN AGENT, THAT IS SIGNIFICANTLY ASSOCIATED WITH ENHANCING THE REMOTE SELLER'S MARKET.

The precise constitutional question before the Court is whether the first prong of *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 277-278 (1977), the substantial nexus prong, is satisfied by Furnitureland's provision of delivery and in-state services through its transport company, Royal Transport. If the remote seller has substantial nexus, the taxing State may require it to collect and remit its use tax for sales to instate customers. *Felt & Tarrant Mfg. Co.* v. *Gallagher,* 306 U.S. 62 (1939); *Nelson* v. *Sears, Roebuck & Co.,* 312 U.S. 359 (1941); *General Trading Co.* v. *State Tax Comm'n,* 322 U.S. 335 (1944).

Up until *Quill Corp.* v. *North Dakota,* 504 U.S. 298 (1992), the determination of nexus was made under an analysis that combined both the Due Process Clause and the Commerce Clause. J. Hellerstein, *The Quill Case: What the States Can Do to Undo the Effects of the Decision,* 4 STATE TAX NOTES 273 (NO.6 1993). *Quill* bifurcated the analysis of nexus into two distinct constitutional components, a separate Due Process

Clause component and a Commerce Clause component. *Quill*, 504 U.S. at 312-313.

The Due Process Clause is concerned with fairness to the taxpayer. *Quill*, 504 U.S. at 312. This concern is met, if the remote seller deliberately targets its economic activities to the taxing state, such that it would be fair to subject that seller to jurisdiction in the taxing state's courts. *Quill*, 504 U.S. 307, 312. Furnitureland concedes, as it must, that the degree of its targeted economic activity in Maryland exceeds the requirements of the Due Process clause.

The Commerce Clause, on the other hand, prevents the States from imposing unreasonable burdens on interstate commerce. *Quill,* 504 U.S. 312, 313. The Commerce Clause nexus prong of the *Complete Auto* test is met, if the taxpayer meets the so-called physical presence test. This test provides a constitutional exemption from the use tax collection obligation if the taxpayer's contact with its customers in the taxing State is limited to contact by common carrier or the United States mail. *Id.*, 504 U.S. 314-15.

And a remote seller has the necessary "physical presence," if the activities that are conducted on its behalf in the taxing State, whether by an employee or agent, or by *independent contractor*, are significantly associated with that seller's ability to establish and maintain a market in the taxing state. *Scripto* v. *Carson,* 362 U.S. 207 (1960); *Standard*

Pressed Steel Co. v. *Dept. of Revenue*, 419 U.S. 560 (1975); *Tyler Pipe Industries* v. *Department of Revenue,* 483 U.S. 232, 248-251(1986). The immateriality of whether the activities that create nexus are provided by employees or agents, or by other third-party representatives, such as independent contractors, acting on behalf of the remote vendor, is explained by the observation, "To permit such formal "contractual shifts" to make a constitutional difference would open the gates to a stampede of tax avoidance." *Scripto,* 362 U.S. 211. Thus whether Royal acts as Furnitureland's agent is wholly immaterial to the constitutional issue presented.

While *Scripto* and *Tyler Pipe* both involved independent sales solicitors acting on behalf of a remote vendor, nothing in either opinion suggests, as Furnitureland further argues, Furnitureland Br. 26-27, that the representational nexus test should be confined to solicitation. Rather the limitation is governed by the principle of "significant association" described in the previous paragraph. This long-standing principle, *General Motors Corp.* v. *Washington*, 377 U.S. 436, 448 (1964) (quoting *Norton Co.* v. *Dept. of Revenue*, 340 U.S. 534, 538 (1951), "'Petitioner has not established that such services as were rendered . . . [through instate activity] were not decisive factors in establishing and holding this market.'"), is by its very phrasing more extensive than solicitation. *Tyler Pipe* clearly reflects this understanding by its affirmative notation of non-solicitation, but market-support, activities of the representatives in reaching its conclusion that the "significant association" test was met in that case. 483 U.S. at 250-51. *Standard Pressed Steel* is also consistent with this approach. *Standard Pressed Steel* found sufficient nexus based upon the presence of an employee who performed no solicitation services but missionary and consulting services.

Beyond these telling observations, the holding of *Quill* does not support narrowly interpreting the significant association principle as limited to solicitation. R. Pomp & M. McIntyre, *State Taxation of Mail-Order Sales of Computers After Quill: An Evaluation of MTC Bulletin 95-1,* State Tax Notes, July 15, 1996, pp. 180 – 181. While the Supreme Court has described *Scripto* as the "furthest extension" of the state power to compel use tax collection, *Quill*, 504 U.S. at 306, that description refers to the recognition that representatives engaged on a part-time basis, *Scripto*, 362 U.S. at 211, in market enhancement activities on behalf of the remote seller establish nexus. This description cannot be read as limiting the long-standing significant association principle to solicitation.

Contrary to Furnitureland's argument, Br. 21-22, the "significant association" principle would not support finding nexus on the basis of any in-state contractual relationship. For example, it would be irrelevant to establishing and maintaining the Maryland market whether Furnitureland retained the services of a Maryland attorney, accountant or architect in furtherance of its general business objectives. However, a relationship that secures the provision of delivery and in-state sale services is directly related to the establishment and maintenance of Furnitureland's market in Maryland. That kind of relationship and resulting activity establishes nexus under the previously described principles.

There is of course one important exception to basing nexus upon delivery services—the exception for delivery by common carrier. This exception known as the *Bellas Hess* safe harbor that was reaffirmed in *Quill* provides that delivery services do not establish nexus if these services are rendered by a third party in its capacity as a common carrier. It is the examination of what is meant by the term "common carrier" to which we now turn. In doing so we submit that the *Bellas Hess* exception for "common carrier [and] the United States mail" acts as a bright-line principle to determine when the remote seller has left the safe harbor by employing a carrier that provides custom transport services and not transport services in general on an indiscriminate basis to the public. In essence, a remote seller employing a carrier that acts as the seller's market-enhancing representative has secured a local presence that subjects it to the use tax collection obligation.

III. A "COMMON CARRIER" PROVIDES SERVICES TO THE PUBLIC INDISCRIMINATELY; A COMMON CARRIER DOES NOT ACT AS THE REPRESENTATIVE OF THE REMOTE SELLER.

In its most basic terms, the present constitutional question is whether Furnitureland's provision of delivery and in-state services that is effected through Royal Transport is within or without the safe harbor of *Bellas Hess*. The *Bellas Hess* safe harbor provides that a remote "seller whose only connection with customers in the State is by common carrier or the United States mail" lacks the requisite minimum contacts with the State to be subject to a use tax collection obligation. *Bellas Hess*, 386 U.S. at 758; *Quill*, 504 U.S. at 301, 311. In the factual context of this case, the question becomes whether Royal Transport's provision of delivery and in-state sales services is provided as a common carrier or otherwise. We do not believe, as suggested by Furnitureland, Br. 20, and Royal Transport, Br. 22, that the safe harbor concept of a common carrier includes all types of "independent" or "private" carriers. This concept of a common carrier would expand the safe harbor to allow a remote seller to achieve a local presence through a carrier representative within the taxing State without any obligation to contribute to the costs of maintaining the society from which it benefits.

At the outset we note that the Supreme Court did not define the term common carrier in *Bellas Hess*. There was no need to do so, since everyone agreed that the delivery was provided through common carrier and the U.S. mail. See *Bellas Hess* 386 U.S. at 754.[3] The same is true for Quill. 504 U.S. at 302.[4]

Comment [SL1]: Do we want to use the affidavits referred to in footnotes 4 & 5 without attaching them? If we need to attach them, I will not have access to them until August 1, the date the brief is due.

If one must attempt to define what the Supreme Court meant by the term "common carrier" in stating its safe harbor rule of *Bellas Hess* that was reaffirmed by *Quill*, reference should be made to the understandings of that concept that were contemporary with the *Bellas Hess* 1967 decision. At that time, the term common carrier was defined as follows.

> The salient characteristic of a common carrier is that 'He must be engaged in the business of carrying goods for others as a public employment, and must hold himself out as ready to engage in the transportation of goods generally … (and) … undertakes to carry for all persons indifferently … [T]hose who … do not hold themselves out as willing to serve the public indiscriminately, are not common carriers.'

United States v. *Stephen Brothers Line,* 384 F. 2d 118, 122–23 (5th Cir. 1967).

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[3] Bellas Hess was tried on affidavits, 386 U.S. at 762, that included the sworn statement to the effect that Bellas Hess "shipped by the cheapest available method of transportation, which in most cases [was] mail, but occasionally it could be railway express for a bulky item or for one which [was] too large for the receiving post office to handle,… [N]o goods are shipped by other than common carrier." *Affidavit of George Marks, Vice-President, National Bellas Hess, Inc., in Opposition to Motion for Summary Judgment,* Record, United States Supreme Court, Folio 186, pp. 68 – 74, paragraph 10.

[4] An affidavit similar to what was filed in *Bellas Hess* was filed in *Quill. Affidavit of Arnold Miller, Treasurer of Quill Corporation, in Support of Quill Corporation's Motion for Summary Judgment,* Record, United States Supreme Court, Joint Appendix 28–33, paragraph 7.

This contemporaneous definition of course is consistent with Supreme Court precedent. "(T)he statutory definitions … are essentially declaratory of the common law. In other words, the fact or not of a public holding out remains the final or ultimate test of common carriage." *ICC* v. *JT Transport,* 368 U.S. 81, 101 (1961) (Frankfurter, J., dissenting) (internal citations omitted). There is nothing to suggest that the Supreme Court intended to employ any other meaning in 1967, when it established the safe harbor, or in 1992, when it reaffirmed the earlier established safe harbor. These observations necessarily respond to a number of arguments that seek to avoid the consequence of these common sense conclusions.

Common Law and Federal Statutory Law in 1967. Arguing over whether the definition of a common carrier is derivative of the common law or statutory law is a fruitless exercise. The essence of the concept of a common carrier that is at issue here is the same under either the common law or federal statutory law as it existed in 1967. In order to act in the capacity of a common carrier the carrier must be providing its transport services and related services indiscriminately to the public. If the motor transport was individualized by a long-term relationship memoralized in a contract, the transport was not common carrier transport. In 1967, the Supreme Court was well aware that the statutory division of motor transport into common carriers and contract carriers maintained this distinction. *See U.S. v. Contract Steel Carriers,* 350 U.S.

409, 410, n. 1 (1956) (citing ICC Act definitions of "common" and "contract" carriers).

Specialized Common Carriers. No one suggests that the definition given above does not include specialized common carrier services. UPS that limits its carriage to "small" packages is an obvious example of this observation. But the offering of specialized transport services must be on an indiscriminate basis to the public in order for the transport services to be viewed as those of a common carrier.

Inapplicability of Policy of Free Enterprise That Drives Deregulation. Employing the current, amended federal regulatory concept of a common carrier to determine qualification under the *Bellas Hess* safe harbor makes no sense. What this unsupportable argument suggests is that the Supreme Court concluded that the certification as a common carrier, however the regulatory climate may have subsequently changed, an unknowable fact in 1967, was the critical element and not the relationship that the carrier had with the remote seller shipper. This approach inappropriately places the free enterprise policy prompting federal deregulation of motor transport as the determinant for concluding whether imposition of a use tax obligation on a remote seller is unreasonably burdensome under the Commerce Clause.[5]

We do not understand how the free enterprise policy of deregulation can control a determination of nexus under the Commerce Clause. The nexus standard seeks to vindicate the policy of the Commerce Clause by preventing a taxing State placing an unreasonable compliance burden on a remote seller. The two policies are not even close to being concurrent.

Bright-Line One, But Not Principal, Policy of Safe Harbor. We do not believe the principal policy effected by the bright-line, safe harbor rule is the preservation of the bright line; the bright line only was one of the policies and not even the most important. After all, a bright line that does not fulfill the needs of the Commerce Clause is not an acceptable method for determining the existence or nonexistence of nexus. In creating the *Bellas Hess* safe harbor, the Supreme Court was predominantly

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[5] As best your amicus can understand this analytical approach is based upon some concept that interstate transactions are generally protected from state tax and that the safe harbor was as much for the protection of the transport company as the remote seller. See Royal Transport Br. 23-25. We cannot agree with this rationale. Interstate transactions are not protected from fair share taxation. See *Goldberg* v. *Sweet*, 482 U.S. 252, 262 (1988) (tax similar to sales tax upheld as applied to "simultaneous activity in several States"). Additionally, the concept of when an interstate sale is consummated is not so simply stated as Royal Transport supposes. See P. Mines, *Conversing with Professor Hellerstein: Electronic Commerce and Nexus Propel Sales and Use Tax Reform*, 52 TAX L. REV. 581, 590-91, 599-600 n.106 (1997). In this case, for example, the determination of where the sale occurs may well be influenced by the fact that two thirds of the sale price is collected in Maryland, by Royal acting as Furnitureland's representative. (E. 11, 862). Further, the party exclusively protected by the safe harbor is the remote seller. And the principal inquiry in effecting this protection is when does the remote seller's connection to the taxing State reach a level where it is reasonable to require the seller to collect and remit the use tax.

motivated by the burden that would be imposed on a remote seller by requiring it to collect use tax in multiple states and political subdivisions. *Bellas Hess,* 386 U.S. at 759. As a safeguard against this burden the Court prohibited a State from imposing the use tax collection obligation on a remote seller whose only connection to the taxing state was delivery by common carrier or the U.S. mail. *Bellas Hess,* 386 U.S. at 756–58. Contact greater than this permitted level eliminates the Supreme Court's concern over unreasonable burdens on interstate commerce.

Another important policy effected by *Quill's* reaffirmation of *Bellas Hess* was the preservation of *stare decisis*. Maintaining the *Bellas Hess* safe harbor under the Commerce Clause avoided upsetting what it described as the settled expectations of the mail-order industry's reliance on the limited safe harbor the Court had established twenty-five years earlier. But if contact with a taxing State exceeds delivery by the U.S. mail and/or common carrier, there is no prior precedent upon which the remote seller can rely. We think we are amply supported in this conclusion.

Diann L. Smith, General Counsel for the Committee On State Taxation (COST), has publicly acknowledged that the personalized delivery services provided by Royal to Furnitureland's customers establish nexus.[6] As recognized by Ms. Smith, Furnitureland has no basis to rely on *Quill*'s "settled expectations" rationale. The Supreme Court has never indicated that a remote vendor whose delivery representative provides personalized delivery services and is present in the taxing state on more than an isolated basis could claim safe harbor protection merely because that representative possesses an ICC common carrier certificate. The common understanding of the term "common carrier" at the time *Bellas Hess* was decided does not support such a conclusion. There is no basis to assert that *Quill* expanded on the meaning of the term, both because the issue was never presented and because *stare decisis* principles counsel that the Court was preserving existing precedent rather than expanding it.

Still a further policy recognized was the availability of a bright-line rule that would provide guidance to remote sellers. But the rule we suggest immediately below does not upset the bright line.

Correct Understanding of Common Carrier Does Not Undermine or Muddy Bright Line. The rule we propose does not undermine or muddy the bright-line, safe harbor rule of *Bellas Hess*. Any ambiguity over the

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[6] Remarks of Diann L. Smith, *18th National Institute on SALT Focuses on Nexus, M & A, Pass-Through Entities, and Other Issues,* 61 CCH State Tax Review, No. 5, pp. 12 – 13 (January 31, 2000). COST is a nonprofit trade association consisting of approximately 480 multistate corporations engaged in interstate and international business. According to COST, its objective is to preserve and promote equitable and nondiscriminatory state and local taxation of multijurisdictional business entities. *See,* Website, Committee on State Taxation, http://www.statetax.org/.

meaning of common carrier arises not because of any defect in the rule itself. The ambiguity occurs because remote sellers like Furnitureland are using the safe harbor as an aggressive tax planning device to avoid assisting States collect a legitimate tax for which the seller can be made whole by its customer. (E. 3). *Quill* as a reaffirmation of the holding of *Bellas Hess* does not support the conclusion that the Court intended to convert the narrow *Bellas Hess* safe harbor into a license for tax avoidance. Rather than announcing a rule that facilitates manipulation, the appropriate question for this Court is "whether the tax produces a forbidden effect." *Complete Auto Transit,* 430 U.S. at 288. Proper identification of the "forbidden effect" with which the Court was concerned in *Quill* demonstrates that it would be inappropriate to rely on the mere possession of an ICC common carrier certificate as controlling the determination of nexus. We therefore do not understand, as apparently argued by Furnitureland, Br. 20 (safe harbor should be available for remote seller that uses independent carrier), and Royal Transport, Br. 22 (safe harbor only lost when carriage is in vendor owned or leased trucks), that the safe harbor is available to the farthest reaches of how the seller utilizes an independent, third party, transport company.

Our understanding of the safe harbor is that if the carriage is performed for the remote seller as a member of the public on an indiscriminate basis it is within the safe harbor. This understanding of what constituted a common carrier in 1967 is a part of established jurisprudence and readily available to anyone that wants advice on the limits of the *Bellas Hess* safe harbor. The requisite need for indiscriminate delivery is why the reference to the United States mail is appropriate. The U.S. Postal Service offers the same type of service to everyone. We do not understand that the Comptroller or the Circuit Court really intends anything different. On the other hand, if the carrier essentially establishes a negotiated relationship with the seller shipper, the resulting relationship connotes a carrier that is doing something more than effecting a delivery as it does for the public in general. A negotiated relationship, especially one that provides for special services, connotes that the seller shipper is establishing a relationship that involves something more than indiscriminate carriage. That relationship properly is classified as establishing a relationship with the carrier that provides for in-state representation that is significantly associated with the establishment and maintenance of the market.

In this particular case, it is clear that the kind of service Furnitureland sought from Royal Transport was an in-state presence that would conclude its "Furnitureland *sale*." Furnitureland stressed the availability of Royal's delivery services and in fact controlled the actual delivery by scheduling and making all the delivery arrangements for Royal and the customer. It is not plausible in these circumstances to assert that the personalized delivery and post-delivery services provided to Furnitureland's Maryland customers by Royal are unimportant to a

Maryland customer's decision whether to purchase from Furnitureland. These services materially help create Furnitureland's market in Maryland. Stated in constitutional terms, these services are significantly associated with Furnitureland's ability to establish and maintain its furniture market in Maryland. Requisite nexus exists to support Maryland's requirement that Furnitureland collect the use tax.

We further do not find the practice of negotiating lower tariff rates, and presumably different delivery conditions, in the face of a high rate published tariff of the modern common carrier, Royal Transport Br. 21 and Furnitureland Br. 5, avoids the conclusion that the carrier is the remote seller's representative. What this modern practice establishes instead is what has already been conceded. Under current transportation law, there is little practical difference between a common carrier and a contract carrier. Furnitureland Br. 20. What this current practice also establishes is that once the terms of the contract for carriage are settled between the shipper and the carrier, the carrier has the option to publish a "tariff," knowing that the shipper will "agree" to the "contractual terms" by securing the published services. See Royal Transport Reply Br. 12, 13. But that mechanism cannot change the reality that what the carrier and shipper are doing is negotiating their own individualized contract.

We do not think that the Supreme Court would countenance reliance on so mechanistic a concept that if the carrier is certified as a common carrier under modern motor transport law, the carriage is necessarily within the *Bellas Hess* safe harbor. This kind of rule would elevate form over substance and would result in an invitation to widespread, manipulative tax avoidance. See *Scripto*, 362 U.S. at 211. These considerations validly influence the ruling in this case. The Supreme Court has long favored economic reality over formalisms that have no practical impact on the actors and invite manipulation that could adversely affect important constitutional doctrines, including the important governmental function of the States in our federal union. See *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 191 n.5 (1995); *Barclays Bank PLC v. Franchise Tax Bd.*, 512 U.S. 298, 303 (1994); *Goldberg* v. *Sweet*, 488 U.S. 252, 262 (1989); *Scripto,* 362 U.S. at 211; *International Harvester Co.* v. *Dept. of Treasury*, 322 U.S. 340, 346 (1944); *McGoldrick* v. *Berwind-White Co.*, 309 U.S. 33, 45 n.2; *Western Live Stock* v. *Bureau of Revenue*, 303 U.S. 250, 259-60 (1938); and *Superior Oil Co.* v. *Mississippi*, 280 U.S. 390 (1930).

We also think that providing the safe harbor based upon modern certification as a common carrier would unreasonably expand the safe harbor. Certificated common carriers could perform any representational service for the remote seller without any adverse effect on the immunity of the remote seller. This kind of understanding would ignore the balancing of the concerns expressed by the Supreme Court in the development of its nexus law and other constitutional law affecting "Our Federalism." See Argument I, above. A remote seller's responsibility to collect use tax should not become unlimited, while a State's jurisdiction to assert its sovereign tax authority should not be circumscribed by formal contractual arrangements that invite tax avoidance.

IV. THE MILLER BROS. CASE DOES NOT PREVENT HOLDING FURNITURELAND ACCOUNTABLE FOR THE USE TAX

Given the fact that *Miller Bros.* v. *Maryland,* 347 U.S. 340 (1954), involved this State we feel compelled to address its possible application to this matter. We find no basis to believe the restrictive nexus rule of *Miller Bros.* has any application in this case.

The degree of Royal Transport's in-state activities on behalf of Furnitureland distinguish this case from the isolated deliveries at issue in *Miller Bros.* Furthermore, unlike the limited indirect out-of-state marketing conducted by Miller Brothers, Furnitureland actively and directly exploits a national market, including Maryland, for its furniture. In addition, unlike *Miller Bros.,* this is not a case where Maryland seeks to impose the use tax on all sales, including over-the-counter sales, to Maryland residents, regardless of whether the seller knows where the goods are to be used. As the Supreme Court later observed, it was a fatal defect in *Miller Bros.* to impose use tax collection burden on the remote seller that would create a liability greater than that of the taxpayer whose bill was being paid. *Scripto,* 362 U.S. 207, 212; *National Geographic Society v. California Board of Equalization,* 430 U.S. 551, 559 (1977). Finally, because minimum physical presence in the taxing State is no longer required to support jurisdiction to tax under the Due Process Clause, the continuing validity of *Miller Bros.,* a pure due process case, is seriously in doubt. *Orvis Company, Inc.* v. *Tax Appeals Tribunal of New York,* 654 N.E.2d 954, 959 n. 2 (N.Y. 1995), *cert. denied,* 516 U.S. 989 (1995); *Brown's Furniture, Inc.* v. *Wagner,* 665 N.E. 2d 795, 803 (Ill. 1996), *cert. denied,* 519 U.S. 866 (1996).

CONCLUSION

This Court should affirm the decision of the Circuit Court for Anne Arundel County. Furnitureland does not come within the use tax safe harbor of limiting its contact to delivery by a common carrier or the U.S. mail. The Court should rule that Furnitureland's use of Royal Transport for its delivery and related services into Maryland does not meet the nexus safe harbor, because Royal Transport's services were individualized services not offered to the general public on an indiscriminate basis. The fact that current motor transport law allows individualized services to be published under a tariff of a common carrier does not avoid the conclusion that Royal Transport was the representative of Furnitureland and enhanced Furnitureland's market in Maryland. Under these circumstances, Furnitureland may be made to contribute a fair share of taxes to support the Maryland market from which it derives substantial benefit.

Respectfully submitted,

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