

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

DIVISION OF TAXATION

ADMINISTRATIVE HEARING

FINAL DECISION AND ORDER

#2018-11

STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS
DEPARTMENT OF REVENUE
DIVISION OF TAXATION
ONE CAPITOL HILL
PROVIDENCE, RHODE ISLAND 02908

IN THE MATTER OF:

Case No. 13-T-0173
sales and use

Petitioner:

DECISION

I. INTRODUCTION

The above-entitled matter came before the undersigned as a result of a Notice of Hearing and Appointment of Hearing Officer ("Notice") dated October 11, 2013 and issued to the above captioned taxpayer ("Taxpayer" or "Online Company" or "Online") by the Division of Taxation ("Division") in response to the Taxpayer's request for hearing filed with the Division. The hearing was held on April 12, June 14, and June 15, 2016. The parties were represented by counsel. The parties timely submitted briefs by January 21, 2017.

II. JURISDICTION

The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-18-1 *et seq.*, R.I. Gen. Laws § 44-19-1 *et seq.*, R.I. Gen. Laws § 44-1-1 *et seq.*, the *Division of Taxation Administrative Hearing Procedures Regulation AHP 97-01*, and the *Division of Legal Services Regulation 1 Rules of Procedure for Administrative Hearings*.

III. ISSUE

The parties agreed the issue was whether the Division's Notice of Deficiency is constitutionally and statutorily valid. The Division asserts that there is a substantial nexus between the out-of-state Taxpayer and the State of Rhode Island which the Taxpayer disputes.

IV. MATERIAL FACTS AND TESTIMONY

The parties agreed to the following facts:¹

1. The Taxpayer is a Massachusetts corporation engaged in the sale of riding apparel, tack, horse care and other items via catalogue and the internet, with offices in Massachusetts.
2. The Taxpayer sells its products to customers nationwide, including customers in Rhode Island, via catalogue and internet.
3. _____ ("Retail Company" or "Retail") is a Massachusetts corporation incorporated in 2006 and having its principal place of business in Massachusetts.
4. Retail Company engages in the retail sale of riding apparel, tack, horse care products and other equestrian items and operates a retail facility in Rhode Island.
5. The Taxpayer and Retail Company are both subsidiaries of their parent company, _____ ("Parent Company" or "Parent") which is incorporated in Delaware with a principal place of business located in Massachusetts.
6. Online Company and Retail Company do not have any ownership interests in each other but are "sister corporations."
7. The Division is a state agency charged with the administration and enforcement of all state taxes including the sales and use tax.
8. The Division advised the Taxpayer it had been selected for audit and notified it by letter dated February 15, 2011.
9. As a result of the audit, the Division issued the Taxpayer a Notice of Deficiency Determination for unreported sales tax dated June 30, 2013 covering the period February 9, 2009 through June 30, 2011 ("Audit Period").
10. During the Audit Period, the Taxpayer was not registered with the Secretary of State to do business within Rhode Island. During the Audit Period, the Taxpayer did not hold a

¹ See parties' agreed to statement of facts and agreed to exhibits filed with the undersigned.

Rhode Island Sales Tax permit, nor did it charge, collect, or remit sales tax on its retail sales to its Rhode Island customers.

11. During the Audit Period, the Taxpayer did not hold or rent real property within Rhode Island and had no employees located within Rhode Island.

12. Retail's store location in Rhode Island opened on February 1, 2009.

13. Retail Company holds a Rhode Island permit to make sales at retail and collects and remits Rhode Island sales tax on taxable sales made through the Rhode Island store.

14. The commencement of the Audit Period coincided with the opening of Retail Company's sales location in Rhode Island.

15. During the Audit Period, Retail Company routinely filed sales tax returns and remitted sales tax to the Division.

16. Retail Company registered with the Rhode Island Secretary of State to do business within Rhode Island in January of 2011.

17. Customers at Retail Company's location may ask to purchase an out-of-stock item and have it shipped to Retail Company's store for later pick-up.

18. Retail Company has a separate return policy, which accepts returns of any product that Retail Company carries that was purchased from any source, whether Retail Company itself, or another vendor (without exclusion of Taxpayer).

19. The Notice of Deficiency assessed the Taxpayer for unreported sales tax. The Taxpayer made a timely written request for administrative review of the Notice of Deficiency.

20. The Taxpayer contests the Division's authority to tax it on nexus grounds (including the authority to charge statutory interest and penalties), but does not contest the amount of the Deficiency Notice.

It should be noted that the companies all share a "brand" name so that the Retail Company and Online Company and the Parent Company all contain the same brand name so that the names are akin to

² This audit refers to the Retail store located in Rhode Island. Retail Company also has stores located in other states. It will be clear from the decision when the reference is to the Rhode Island retail store or the generic Retail Company.

(“Auditor”), Senior Revenue Agent, testified on behalf of the Division. He testified that he audited the in-state Retail store and based on findings made during that audit, he felt that Online should be audited. He testified that his contact for his audit was (“Officer”), Retail’s treasurer, (“”), the Retail’s store manager, and (“”), the Massachusetts’ office manager.

The Auditor testified that the Retail store accepts returns, refunds, and/or exchanges from customers regardless of where they bought the item. He testified that the store offers a measuring service to customers for apparel and boots and he observed someone being measured for boots being told he or she could order by catalogue or Online. He testified that the catalogue does not say Online or Retail, but rather just the brand name. He testified that the catalogue references a fabric selector in that a customer can review sample fabrics at a store or call the catalogue and receive a swatch kit. See Exhibit 16 (catalogue). He testified that both Online and the store advertise a saddle testing service. *Id.* He testified that he understood from that a customer could select a saddle from Online or the catalogue, test it, and return it directly to Retail. See Division Exhibits 18 (print out of website from 2013, last page) and 38. He testified he obtained a catalogue by asking for a catalogue.

The Auditor testified that and told him that the store accepts deliveries for customers to pick up at the store. He testified that the company offers a credit card as a financing option and a customer can inquire about it at the store or apply via Online or the catalogue. He testified that he reviewed the website during the Audit Period (which ended on June 30, 2011) and printed from the website in 2013 (Division’s Exhibit 18) and it fairly and accurately represented the website from 2011. He testified that the company offered a credit card which was accepted by Retail and Online and was advertised Online and in the catalogue. He testified that

customers could purchase a gift card from Online or in the catalogue and use it at the store and vice-versa. He testified that gift cards were advertised in the catalogue and Online. See Division's Exhibits 18 p. 1 and 16 p. 4. He testified that if an item is not in stock, [redacted] said a customer or a salesperson can use the computer system to order the item from Online. He testified that he saw a truck at the store that said the brand name and listed different locations and website and had a Massachusetts' license plate and was not registered to Retail. See Division's Exhibit 17 (photograph of truck).³ He testified that [redacted] told him that the truck made deliveries to the store for customers to pick up and to customers' home addresses.

The Auditor testified that the Taxpayer provided records of deliveries of places shipped to but that they did not include the street address and it could not be determined where items were shipped (customers' addresses or the store). See Division's Exhibit 29 (his spreadsheet based on said records). He testified that he needed to know how items were shipped and to whom and whether it was to the store or not. He testified that he asked for the missing delivery information from Online but the Officer refused saying that it was privileged and confidential.

On cross-examination, the Auditor testified that for the "pony express line," someone logs into the computer to see if the product is in stock and can order it by telephone. When asked if the order is "[i]n the system that it accesses?," he replied, "[w]herever that may be, yes."⁴ He testified that he understood that it connected to Online which is how it was explained to him.⁵ He testified that he printed out and saw the website pages in 2013 during the audit review before the audit closed and not during the Audit Period and does not know if they were on the website during the

³ On cross-examination, the Auditor was asked if the truck was registered to the distribution company which has a very similar name to [redacted]. He testified that he was not sure which is was. A review of the registration indicates that the registration is for the distributor as it is located in Massachusetts. See Exhibit 17.

⁴ June 14, 2016 hearing transcript, p. 35.

⁵ June 14, 2016 hearing transcript, pp. 87-8.

Audit Period. He testified that a customer can return a product to the store that was purchased from any sellers since the store wanted to increase its database. He testified that he spoke about returns with [redacted] and did not see a written policy. He testified that he did not remember if he asked if a customer could obtain a catalogue at the store.

On redirect examination, the Auditor testified that audits are always a look-back period so it would not be unusual to look back at time during an audit period. He testified that the field audit report for Online was not prepared for two (2) years because he was unable to obtain records promptly. He testified that [redacted] explained that the computer system accessed Online and that there was more than one (1) catalogue in the retail store.

On re-cross examination, the Auditor was asked if he actually observed [redacted] use the computer to order inventory or whether he just was told how the computer ordering worked. He initially appeared to testify that he had seen [redacted] actually input an order on the pony express line but upon further questioning, he had observed the computer that [redacted] told him was the pony express line used to order products that the store did not have in stock. It was his understanding that the pony express line ordered from Online.⁶

⁶ When asked what [redacted] told him, he testified, "[t]his is the pony express line. You can go on-line to see if it's in stock." (p. 111 of June 14, 2016 transcript). Then he testified, "[y]ou know, what I did is I asked [redacted]; that's what I did, and she explained it to me." (112) and the Taxpayer's attorney replied, "[s]o you didn't see it?" and the Auditor replied, "[n]o I did see it. I saw the pony express line computer." (112). A few lines later, the testimony continues -

Attorney: [n]o, I'm asking you what you observed at Retail. Did you just observe a computer sitting on the desk?

Auditor: [t]here was a computer at the counter, not desk.

Attorney: Okay at the counter you observed a computer at the counter?

Auditor: Okay. The pony express line.

Attorney: But you observed a computer, and I want to make sure I understand this testimony, because you, yourself, have said that this is very important to your determination that there was nexus.

Auditor: It's a factor, it's a factor yes.

Attorney: So I want to know exactly what it is that you're saying about this, and earlier you said something different than what you're saying now. Now, you are telling us that you observed the computer and were told by [redacted] that it could be used to check the availability of inventory and order it; is that what you observed?

The Officer testified on behalf of Online. He testified that he holds an officer position with and is the treasurer of Online and Retail and is familiar with Online during the Audit Period. He testified that he is employed by ("Distributor") which is the fulfillment/wholesaler for Online and Retail and prior to the 2005 public offering, it owned all the companies, but the company structure was reorganized for the public offering. He testified that the Distributor is a sister company of Retail and Online and is owned by . See Taxpayer's Exhibit Five (5). He testified that Online is a catalogue and internet company and only delivers products via common carrier to Rhode Island and never collects Rhode Island sales tax.

The Officer testified that Retail Company owns and operates stores in several states and was formed in 2005. He testified that in 2009, a store was opened in Rhode Island and it does not

Auditor: You can use the computer to see if it's in stock; if they don't carry it.

Attorney: -- that you observed it; saw it with your own eyes, not just were told, not just were told by , but actually witnessed it, so I've got to know what it is that you observed.

Auditor: Okay. So repeat your question then, because you are all over the place right now. I --

Attorney: That's -- you just told us that you observed the computer --

Auditor: Yes.

Attorney: -- on the counter.

Auditor: On the counter, okay. What's your question?

Attorney: Did you observe the functionality of that computer with respect to a so-called pony express

line?

Auditor: told me, this is the pony express line, and this is what it does.

Attorney: And just to make sure, what she told you.

Auditor: Yes.

Attorney: Did she tell you that it could be used to look up the availability of inventory and to order it?

Auditor: Yes, you can order it. If it's out of stock, if it's not carried at the store, but someone has a catalogue, oh, let's look in or call. And if they have it, it could be delivered to the store or the customer's address. [Officer] refused to give me that information.

Auditor: The pony express line is [Online].

Attorney: That is your understanding?

Auditor: That is my understanding, not only from , but from [Officer] and

Attorney: -- what you have just told us is that he told you clearly that [Taxpayer] is the pony express line. If you're mistaken about that, is that a significant fact in this case?

Auditor: No. I'm not mistaken. It's one of my observations, and -- when we spoke, and that's what I understood it to be; that is what I wrote down I wrote it down. If I wrote it down and I made it part of my audit report, that's the facts.

Attorney: That was your understanding?

Auditor: That's my understanding.

offer any services for Online. He testified that the Distributor fills orders for Online and Retail from a Massachusetts warehouse. He testified that it ships on behalf of Online via common carrier. He testified that for inventory for the Retail store in Rhode Island, a truck owned by Distributor is used to delivery inventory to the stores. He testified that the Distributor's trucks never deliver to customers and have no relationship on behalf of Online. He testified that the companies were structured this way to insulate each company from liability and because the each company has a different function. He testified that each company has its own employecs and payroll.

The Officer testified as to Online's 2009 sales catalogue. See Taxpayer's Exhibit Six (6). He testified that the catalogue indicated that a customer can order by telephone, on the web, by mail, or fax and did not say a customer could have Online Company product delivered to a Retail Company store. He testified if a customer asked for a product to be delivered to a retail store, that request would not be honored. He testified the catalogue explains that returns should be mailed back to the Distributor's address in Massachusetts. He testified that saddles are to be returned as well to the Distributor, but for added extra payment. He testified that customers are not advised in the catalogue to return a saddle to a retail store. He testified that the 2010 and 2011 catalogues had the same information about orders and returns. See Taxpayer's Exhibits Seven (7) and Eight (8). He testified that Online uses the same pre-printed invoices for all orders in the United States. He testified that the invoice gives return instructions for a customer to return a product to the Distributor address and provides an address label. He testified that the invoice does not say a return can be made to a Retail store. See Taxpayer's Exhibit Nine (9) (sample invoice).

The Officer testified that Online started in 2005. He testified that using the "wayback machine," website, he printed out old website pages for Online. He testified that the December 7, 2009 Online website gave instructions for Online returns for customers to follow the instructions

on the back of the packing slip and send returns to the Distributor address. He testified that packing slip is the invoice (Taxpayer's Exhibit Nine (9)). He testified that no option was given for a return to be made to a Retail store. He testified that on July 28, 2011, the Online website gave two (2) options for returns which were to be mailed and no option was given to make a return to a Retail store. He testified that on February 2, 2009 and October 8, 2011, the Online Company website indicated the cost of shipping is based on the value of the item. He testified that the website did not give an option to ship a product to a Retail store. See Taxpayer's Exhibits 10, 11, 13, and 14. He testified that the Retail does not accept returns for Online and Online does not give that option. He testified that Online does not deliver to Retail for pick-up. He testified that Retail does not advertise for Online.

The Officer testified that he printed out a chart of Online's (would be) taxable sales when products were shipped in Rhode Island, and of these products, 67 were shipped during the Audit Period to the town ("Town") where the store is located. He testified that the Auditor requested street addresses for the shipping information, but Online only provided the city or town in Rhode Island because it was keeping customer information confidential.⁷ He testified that he felt that the town or city information provided enough information to the Division. He testified that of the 67 addresses in the Town during the Audit Period, all were shipped to individual homes or businesses, except one. He testified that a Connecticut customer gave the store address, but she was contacted and told not to do that again. See Division's Exhibit 29 (delivery chart).

The Officer testified that using the way-back machine, the pricing policy shows up for the first time on the website on February 10, 2012. He testified that the "brand name" credit card was

⁷ Tax audits are confidential, but the Taxpayer would not produce the street address information during the audit. Nonetheless, the Division apparently never requested this information during the hearing process via discovery which when produced could have been subject to a further confidentiality order.

issued during the Audit Period by a Missouri or a Pittsburgh bank. He testified the bank issues the credit card and has the relationship with the customers. He testified that contrary to the Online audit report (Division's Exhibit 36), he never said that Online shipped products purchased online or mail order to the Rhode Island store. He testified that if the store is out of a product, a customer can back order the item which will come either to the store or the customer's home, but it is not ordered via Online, but from the Distributor and tax is paid on it as a Rhode Island sale.

On cross-examination, the Officer testified that the credit card could be applied for via Online or at the store. He testified that there was a reward program during the Audit Period that allowed customers to earn points from purchases from either company that could be redeemed at either company. He testified that there are gift cards which could be purchased at Retail or via Online and could be used at either entity. He testified that there are often coupons in the catalogue, but not usually at Online, and they could be redeemed at the store. He testified that customers can order saddles for testing from Online or from the store. He testified that if the saddle is ordered via Online, the customer purchases it and then if it is returned the credit card charges are reversed. He testified that a store will take back any products, no matter where they come from, as long as the store carries it. He testified that a store will accept returns, even if not bought from the store, because the store wants customer satisfaction. He testified that Retail's return policy is in the employee manual and if a customer cannot show a receipt, store credit is given. He testified that if a customer returns an item to the store, the name is entered into the company database which is kept by Distributor as the Distributor provides marketing to both companies.

The Officer testified that each store has its own software and computer system. He testified that Online cannot see the Retail inventory, but Online can see the Distributor inventory. He testified that store looks up Distributor inventory to replenish stock. He testified that a

customer can view swatch kits ordered to his or her home or examine fabrics in the store, and order via Online. He testified that if an item is purchased via Online and returned to Retail there is no fee. He testified that a Retail store would resell the item and it would go on their books without an offset on Online's books. He testified that Online is aware that Retail takes returns, but no one had told Retail not to. He testified that the catalogue and Online lists the Retail stores' locations.

The Officer testified that he is familiar with the multi-channel marketing strategy and he was not sure if it is a branded name, but that the idea is to expand sales. He testified that Retail and Online are separate and distinct companies, but the Parent Company wants to provide options on how to purchase items. He testified that the catalogue drives customers to the store and that states always want to find revenue to tax, so the Company follows a structure to keep it separate so that there is no nexus.

The Officer testified that there is a common logo that appears on everything for Online and Retail. He testified that it appears on credit cards, advertising, gift cards, trucks, website, and catalogues. He testified that not everything that is available from the whole company would be available at the store. He testified that there was an unwritten policy that the store would match a catalogue price if the catalogue price is lower. He testified that Online is usually lower because of competition so that the catalogue would not match the store price as the store is usually a higher price. He testified that a customer can be measured at the store and can buy from Retail or Online. He testified that usually a customer testing the fabric in the store would test the product and not a fabric sample. He testified that if a customer buys a product from Online, it comes with a return form to return by mail. If the customer chooses to return it to the store, it is treated the same as if purchased at a competitor since the Online customer would not have a store receipt so the customer would receive store credit like any other competitor customer.

On redirect examination, the Officer testified that on the Online website, the credit card is linked to bank webpage to apply for the card. He testified if a customer filled out a paper application for a credit card in the store, the application would be sent to the bank. He testified that the rewards for the credit card was discounted shipping from Online. He testified a customer could purchase a gift card at the store and use it with Online, but there was no fee for using it at Online and instead Online would have to give away the product and not receive any cash for it. He testified that the shipping charges for Online are higher than 7% sales tax in Rhode Island. He testified that 85% of the products that the company sold are manufactured by third parties so a customer could go to the store and then order the same product on the internet from a different company like amazon.com. He testified that the Distributor Company owns the brand name trademark. On re-cross examination, he testified that there is a benefit at Retail for the credit card, but he cannot remember what it is except that the credit card program is about accruing points. On re-direct, he testified that the Distributor has the bank contract for the credit card.

("President") testified on behalf of the Taxpayer. He testified that he is Retail's president and was during the audit and has been in the retail business for 30 years. He testified that Retail has stores in 19 states and he wrote the store policies including the return policy and is in charge of hiring, firing, and training. He testified that he visits the various stores during the year and is familiar with how inventory is replenished. He testified that Retail has its own point of sales system for all retail stores. He testified that a computer is housed in each store location and at night, it gets up-loaded with the inventory of the Distributor and at night, the computer is downloaded to the Distributor with the orders taken during the day so that it is known what can be fulfilled or replenished in the store. He testified that each store has its own customer records in its computer that the stores do not share customer identification. He testified that the

computer system is not linked to Online's internal system. He testified that Retail gets its inventory from Distributor. He testified that back orders purchased in the store will have sales tax charged and then the customer can choose to have the item shipped to the store which would be by Distributor's truck or to home which would be delivered by common carrier. He testified that when it is back-ordered, sales tax is collected and the Distributor transfers the order to the store system.

The President testified that the "pony express line" is a process and not a computer system. He testified there is no computer called a pony express. He testified that if the customer wanted a product that the store did not carry and the item was then back-ordered, the computer only knows the inventory as of the previous business day since back-order orders are only downloaded at night. Therefore, he testified the store would not know if that product would be available in case someone else ordered it because the orders are only downloaded at night (at the end of each day). He testified that the pony express line basically means that the store calls the Distributor by telephone to ensure the product is available and is immediately taken off the shelf and put on the truck. He testified that item is delivered to the store and the customer is called to say the item is at the store and the sale is processed after delivery and sales tax paid. He testified that this is a little different from a back-order because the customer is not paying for the item up-front, but when it comes to the store. He testified that a back-order is entered in the point of sale system and then it is decided whether to ship it to store or to the customer's home. He testified that the pony express line is a way to avoid the down time between night and day downloading and expedite delivery. He testified that Online has no role in shipping items to a store or a home. He testified to the store's records includes information from customer receipts plus additional information.

The President testified that the Rhode Island store's sales floor is approximately 4,500 square feet. See Taxpayer's Exhibit 24. He testified that the Rhode Island store carries inventory

of about \$380,000 to \$420,000 in value and while the stores do not carry all items, the stores typically have twice as much as competitors. He testified that he never spoke to the Auditor during the audit. He testified that [redacted] had been hired part-time in 2009, became full time manager of the Rhode Island store in January 2011 and left in June, 2013. He testified that the Auditor's statements about what [redacted] said about the pony express were inaccurate. He testified that the return policy is that with a receipt from any Retail store, the customer would get back what was on receipt and the store would give credit for any competitor purchase. Taxpayer's Exhibit 21 (return policy). He testified that he wrote the return policy in effect during the audit. He testified that the policy includes money back for purchases from the Rhode Island store, but credit for purchases at other Retail stores (if no receipt) or competitors. He testified that when the store takes a product back, the store can resell it and also make a customer happy. He testified that product returned from any place will go back into the system and is recoded. He testified that if a customer returns a purchase from Online to the Retail store, the item would not be sent to Online but would be re-sold at the store. He testified that a customer can get measured at the store, but the store could not place an order with Online. He testified that the Online and Retail computer systems do not communicate. He testified that not all saddles are part of the test saddle, but they can still be returned anyway, but customers are encouraged to use the test saddle. He testified that catalogues are in the store for the staff for them to see what is available at the Distributor, but the policy is not to hand out the catalogue to the customer. He testified that the store receipts for Retail are the same in all stores and make no mention of the website. See Taxpayer's Exhibit 23 (sample receipt). He testified that sometimes the stores are mentioned in the catalogues. On cross-examination, the President testified that the website is not mentioned in the store.

V. DISCUSSION

A. **Legislative Intent**

The Rhode Island Supreme Court has consistently held that it effectuates legislative intent by examining a statute in its entirety and giving words their plain and ordinary meaning. *In re Falstaff Brewing Corp.*, 637 A.2d 1047 (R.I. 1994). If a statute is clear and unambiguous, "the Court must interpret the statute literally and must give the words of the statute their plain and ordinary meanings." *Oliveira v. Lombardi*, 794 A.2d 453, 457 (R.I. 2002) (citation omitted). The Supreme Court has also established that it will not interpret legislative enactments in a manner that renders them nugatory or that would produce an unreasonable result. See *Defenders of Animals v. Dept. of Environmental Management*, 553 A.2d 541 (R.I. 1989) (internal citation omitted). In cases where a statute may contain ambiguous language, the Supreme Court has consistently held that the legislative intent must be considered. *Providence Journal Co. v. Rodgers*, 711 A.2d 1131 (R.I. 1998).

B. **Relevant Statutes**

Pursuant to R.I. Gen. Laws § 44-18-18, Rhode Island imposes a sales tax of 7% on gross receipts of a retailer. R.I. Gen. Laws § 44-18-20 imposes the corresponding use tax. Pursuant to R.I. Gen. Laws § 44-18-19, the retailer is responsible for the collection of sales tax. R.I. Gen. Laws § 44-18-15 addresses the issue of the definition of "retailer" and R.I. Gen. Laws § 44-18-23 addresses the definition of "engaging in business."⁸

⁸ R.I. Gen. Laws § 44-18-23 provides in part as follows:

"Engaging in business" defined.

As used in §§ 44-18-21 and 44-18-22 the term "engaging in business in this state" means the selling or delivering in this state, or any activity in this state related to the selling or delivering in this state of tangible personal property or prewritten computer software delivered electronically or by load and leave for storage, use, or other consumption in this state; or services as defined in § 44-18-7.3 in this state. This term includes, but is not limited to, the following acts or methods of transacting business:

(1) Maintaining, occupying, or using in this state permanently or temporarily, directly or indirectly or through a subsidiary, representative, or agent by whatever name called and whether or not

C. Relevant Case Law

In cases involving the application of state tax statutes to out-of-state sellers, *Quill Corp v. North Dakota by and Through Heitkamp*, 504 U.S 298 (1992) found that a state may, consistent with the due process clause, have the authority to tax a particular taxpayer, but imposition of that tax may violate the Commerce Clause. The Court found that the due process clause requires minimal connection between a state and the taxable entity so that if a foreign corporation

qualified to do business in this state, any office, place of distribution, sales or sample room or place, warehouse or storage place, or other place of business;

(2) Having any subsidiary, representative, agent, salesperson, canvasser, or solicitor permanently or temporarily, and whether or not the subsidiary, representative, or agent is qualified to do business in this state, operate in this state for the purpose of selling, delivering, or the taking of orders for any tangible personal property, or prewritten computer software delivered electronically or by load and leave, or services as defined in § 44-18-7.3;

R.I. Gen. Laws § 44-18-15 provides in part as follows:

"Retailer" defined. - (a) "Retailer" includes:

(1) Every person engaged in the business of making sales at retail including prewritten computer software delivered electronically or by load and leave, sales of services as defined in § 44-18-7.3, and sales at auction of tangible personal property owned by the person or others.

(2) Every person making sales of tangible personal property including prewritten computer software delivered electronically or by load and leave, or sales of services as defined in § 44-18-7.3, through an independent contractor or other representative, if the retailer enters into an agreement with a resident of this state, under which the resident, for a commission or other consideration, directly or indirectly refers potential customers, whether by a link on an Internet website or otherwise, to the retailer, provided the cumulative gross receipts from sales by the retailer to customers in the state who are referred to the retailer by all residents with this type of an agreement with the retailer, is in excess of five thousand dollars (\$5,000) during the preceding four (4) quarterly periods ending on the last day of March, June, September and December. Such retailer shall be presumed to be soliciting business through such independent contractor or other representative, which presumption may be rebutted by proof that the resident with whom the retailer has an agreement did not engage in any solicitation in the state on behalf of the retailer that would satisfy the nexus requirement of the United States Constitution during such four (4) quarterly periods.

(3) Every person engaged in the business of making sales for storage, use, or other consumption of: (i) tangible personal property, (ii) sales at auction of tangible personal property owned by the person or others, prewritten computer software delivered electronically or by load and leave, and (iv) services as defined in § 44-18-7.3.

(b) When the tax administrator determines that it is necessary for the proper administration of chapters 18 and 19 of this title to regard any salespersons, representatives, truckers, peddlers, or canvassers as the agents of the dealers, distributors, supervisors, employers, or persons under whom they operate or from whom they obtain the tangible personal property sold by them, irrespective of whether they are making sales on their own behalf or on behalf of the dealers, distributors, supervisors, or employers, the tax administrator may so regard them and may regard the dealers, distributors, supervisors, or employers as retailers for purposes of chapters 18 and 19 of this title.

purposefully avails itself to the benefits 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. In terms of the Commerce Clause, Article 1 section 8 clause 3 of the Constitution expressly authorizes Congress to "regulate Commerce with Foreign Nations, and among the several States." The Court found that the Commerce Clause is more than an affirmative grant of power, but has a negative sweep well in that it prohibits certain state actions that interfere with interstate commerce. Thus, while due process concerns the fundamental fairness of a government action, the Commerce Clause and its nexus requirement are informed by structural concerns about the effects of state regulation on the national economy. The Court found that a corporation may have minimum contacts with the taxing state as required by the due process clause, and yet lack the substantial nexus with the state as required by the Commerce Clause. Thus, if there is not a substantial nexus between the out-of-state entity and the state, the out-of-state entity cannot be taxed.

Quill reaffirmed *National Bellas Hess, Inc. v. Department of Revenue of Ill.*, 386 U.S. 753 (1967) which found that whether or not a state may compel a vendor to collect a sales or use tax may turn on the presence in the taxing state of a small sales force, plant, or office. (Mail does not give an entity enough contacts). Thus, the Court will look for some type of physical presence in the state. This is consistent with *Scripto, Inc. v. Carson* 362 U.S. 207 (1960) which upheld a use tax when the out-of-state sellers' in-state solicitation was performed by independent contractors.

Tyler Pipe Industries, Inc. v. Washington State Dept. of Revenue, 483 U.S. 232, 250 (1987) found that "[a]s the Washington Supreme Court determined, 'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales.'" (citation omitted). In *Tyler Pipe*, the Court found that the activities of the company's in-state sales

representatives for an out-of-state company adequately supported the state's jurisdiction to impose sales tax on Tyler. The in-state sales representatives provided the company all of their information regarding the Washington market, including product performance, competing products, pricing, market conditions and trends, existing and upcoming construction products, customer financial liability and other critical information of a local nature concerning the state market.

Thus in order for Rhode Island to impose tax on Online, it must show that the in-state Retail store performed activities on behalf of Online that are significantly associated with Online's ability to establish and maintain a market in this state for sales.

While there are no Rhode Island cases addressing the issues in this case, other states have applied *Quill*, *Bellas Hess*, and *Tyler Pipe* to the issue of substantial nexus in the situation of an online or out-of-state seller with a sister corporation that has a physical store located in-state. Both Ohio and Connecticut were faced with the situation where Saks Fifth Avenue department store had two (2) sister corporations, one an in-state retail store and one a direct mail seller, owned by a parent Saks' corporation and both states tried to impose tax on the direct seller. In Ohio, the Court found that just because the online seller had a sister corporation with in-state presence that does not create substantial nexus between the online seller and the state. The Court found that the direct seller did not maintain a place of business in the state because it sold its merchandise by direct mail, and while the retail seller sold merchandise from its store in state, it did not sell any merchandise for the direct seller. The Court's analysis mostly turned on the store's return policy. The Court found the store accepted returns of products bought online based on the store's policy and not based on the online seller's policy and the store charged the returns to its inventory, not to the online company. The Court found that the returns were a minimal part of the returns that the store received. It found that the acceptance of returns was common within the retail industry and

the store accepted such merchandise to maintain customer satisfaction. See *SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St.3d 119 (1995).

In Connecticut, the Court reviewed the contacts between the in-state store and the direct mail seller. *SFA Folio Collections, Inc. v. Bammon*, 217 Conn. 220 (1991). The Court found that the direct company sent extra copies of its catalogue to the retail store to show the employees fashion trends and as reference guides. Additionally, the direct company's customers could use the store's tailoring services for a standard fee but those services were available to the public at large regardless of where an item was purchased. Also, customers could use their Saks' charge card when buying from the direct seller or the retail store. The direct company delivered purchases to buyers with the buyers paying for shipping and those customers were directed to call the New York office for assistance. The Court found that the catalogue sent to the store did not establish a nexus link because they were used for employee training and not for the purpose of having the store employees solicit sales for the direct company from Connecticut residents. The Court also rejected the state tax division's argument that because the direct company was part of a larger enterprise of an affiliated corporation that their separate corporate existences should be disregarded. Rather, the Court found that taxpayers may arrange their affairs to minimize their liabilities via tax avoidance rather than tax evasion.

In contrast to the Saks' cases, *Borders Online, LLC v. State Bd. of Equalization*, 129 Cal.App.4th 1179 (2005) found that there was a substantial nexus between the Borders' bookstore online out-of-state company and the state because of in-state activities of retail stores. In that case, the online's company stated on its website its return policy that the retail stores were authorized to accept online merchandise for return or exchange or store credit and credit card credit. The Court found that the stores were online's authorized agent for accepting returns of online merchandise

by in-state purchasers. This was based on 1) each store would accept returns and provide a refund, store credit, or exchange for online merchandise; 2) the stores encouraged their store employees to refer customers to online's website, and 3) receipts at the stores sometimes invited patrons to visit the online website and gave the website address. The Court found the online's return policy was integral to making sales because of its attractiveness, convenience, and trustworthiness especially in the context of e-commerce.

The Court stated that the question from *Tyler Pipe* is whether the activities of the retailer's in-state representatives are "significantly associated with [its] ability to establish and maintain a market in [the] state for sales." . . . [so that] the analysis turns on the totality of the activities undertaken to maintain a successful market." *Borders Online*, at 1197 (internal citation omitted). The Court found that online's return policy was part of its strategy to build a market in California, but that the store's efforts on online's behalf were not just returns, but also included the receipts with the website address, employees encouraged to refer customers online, similar logos, linking website, and some shared data. The Court differentiated itself from the Ohio Saks Fifth Avenue case since in that case, the mail order house did not formulate or initiate the return policy, but rather returns were accepted according to the store's own policy for its own benefit and for the convenience of its customers.

Borders Online also differentiated itself from *Bloomington's By Mail, Ltd. v. Commonwealth of Pennsylvania, Department of Revenue*, 130 Pa.Cmwlth. 190 (1989) which found no nexus between Bloomington's direct mail company and in-state Bloomington stores. In that case, the direct mail company sent catalogues to state residents. Said catalogues included a return form for customers to return merchandise to its Virginia location. However, twice in-state stores accepted returns from direct company's customers. In addition, both the store and the direct

mail company sold the same goods and had the same logo. The Bloomingdale's Court found that the two (2) direct return to the stores were a deviation from normal practice and that while the state tax division made much of the fact that the direct mail company and the store used the same advertising theme and motifs that such similarities absent more cannot constitute nexus. The *Borders Online* Court found that the Borders' store return policy was part of the strategy to increase its market as opposed to two (2) erroneous returns made to a store.

New Mexico Taxation and Revenue Dept. v. Barnesandnoble.com LLC, 303 P.3d 824 (N.M. 2013) concerned an online company with an in-state physical store sister corporation with both having the same parent company. Similarly to *Borders Online*, the Court found the in-state store engaged in activities in the state on behalf of bn.com (online company) that were significantly associated with bn.com's ability to establish and maintain a market for sales in the state thus creating a substantial nexus between bn.com and the state. The Court based its findings on 1) stores' promotion of bn.com through sales of gift cards redeemable at bn.com and bearing bn.com's name (provided advertising); 2) stores' policy of sharing customers' email addresses with bn.com; 3) stores' implicit endorsement of bn.com through the companies' shared loyalty program (store sold memberships which gave customer discounts at bn.com) and the stores' return policy;⁹ and 4) stores' use of Barnes & Noble's logos and trademarks which bn.com also used. The Court found that the in-state stores and bn.com presented a single face to the public so that the retail stores developed name recognition and loyalty for bn.com. The Court found that because of the stores' association with the online company, bn.com benefitted from brand loyalty and bn.com's parent company saw that benefit in its filing with the Securities and Exchange

⁹ Even though the stores would accept all returns, bn.com advertised its return policy online to its customers that they would be able to return most online purchases to Barnes & Noble stores for refund or in-store credit.

Commission which spoke of the Barnes & Noble trade name attracting customers so that by using Barnes & Noble's trademarks, bn.com benefitted from the goodwill associated with the stores.

The *Barnesandnoble.com* Court noted that *St. Tammany Parish Tax Collector v. Barnesandnoble.com*, 481 F.Supp.2d 575 (E.D.La. 2007) found no substantial nexus on very similar facts, but the Court stated it believed that *St. Tammany* used an unnecessarily high standard such as whether the store solicited orders on behalf of the online company rather than if the activities on behalf of bn.com were significantly associated with bn.com's ability to establish a market. The Court also noted that the Connecticut and Ohio Saks cases and the Bloomingdale's case found that the presence of affiliated brick-and-mortar stores in a state do not create a nexus that would allow a state to tax the catalogue or online sales. However, the Court felt its conclusion was the result of applying *Tyler Pipe* to the facts at issue. The Court found that despite the differences in Barnes and Noble and Borders' stores' formal return policy, bn.com like Borders Online received a benefit from the store's return policy. *Supra*.

St. Tammany Parish rejected the five (5) reasons offered by the state tax division in support of finding nexus.¹⁰ First, the membership program provided discounts to member customers online and in-store with the profits being distributed on a *pro rata* basis by the parent among the participating companies; however, the online company did not receive revenue from the store and vice-versa. Second, gift cards were available either online or at a store and were redeemable at the store and on the website. The store advertised that gift cards were redeemable online. The gift cards were administered by a market company and the participating retailer would only interact with the marketing company. The retailer would receive revenue upon sending the proceeds of

¹⁰ As *Barnesandnoble.com* discussed, *St. Tammany* found that the store had never taken or solicited orders for the internet company and did not provide facilities to place orders for the internet company. However, after that finding, *St. Tammany* discussed the five (5) reasons that were found in the *Saks* and *Bloomingdales* and *Borders* cases.

the card to the marketing company. The participants did not receive revenue made from sales of other participating retailers, but only received money from selling the gift cards. Third, if a store customer could not find a product, the store computer system would source the item through a computer system among various wholesalers including their own warehouses and third parties. The stores were not able to choose a particular source as the computer decided based on predetermined criteria and if the computer chose the online company as the provider, the online company would charge the store the wholesale price and a commission and the store would sell the item to the customer and collect tax. Fourth, the online website provided a store locator and list of events taking place at store locations, but the only evidence that the store promoted online was promotion of the gift and membership programs. The store employees would only provide information about the website only if asked. Fifth, the store accepted returns from the store or online or any other bookstore in order to keep customers satisfied. The online company advertised that its products could be returned to a store.

St. Tammany relied on the Connecticut *Saks* case in finding that a close corporate relationship between companies with a common corporate name, same parent company, using same logos and selling the same products does not mean that the physical presence of one is imputed to another one. The Court found that the online company and the stores were separate entities wholly owned by the same parent who clearly shared a common name and brand identity but there was no overlap between the management and directors and on intermingling of assets and they did not hold themselves out as the same entity. The Court found that that the nature of the contacts were that the store was not acting as a marketing presence for the online company in the state since the store never took or solicited orders on behalf of online nor did the membership or gift card program produce revenue by virtue of the physical presence in-state. Furthermore, the

Court found that the in-store orders treated the online company the same as all other providers and the stores could not choose the source. Finally, the Court found that while the store's return policy was slightly more generous policy for online than other sellers, it was not comparable to sales or sales support activity, but rather was to generate customer good will.

D. Arguments

The Division argued that the United Supreme Court created a safe harbor in *National Bellas Hess* for the shipping and mailing of goods and that was not changed by *Quill*. The Division argued that there can be a nexus even without physical contact¹¹ if the business acts in the state through intermediaries and that the relevant inquiry is whether the activities of in-state representatives established and maintained the market on behalf of a non-resident vendor. The Division argued that the Retail store aided and reinforced the sales effort of the Taxpayer and that the Retail store exceeded the safe harbor of *Quill*. The Division argued that the aid included activities such as common ownership, use of common logos, intellectual property, accepting in store returns for products, providing instore refunds, various services offered (measuring, test the fabric, test the saddle), catalogues at the store, common advertising among the entities including a store locator function on the website, in store advertising, price matching policy between the two entities, accepting Online's coupons at retail, and the acceptance of common gift cards at either entity. The Division argued that the Online falls under the definition of retailer in R.I. Gen. Laws § 44-18-15 so that the Division has the authority to tax.

The Taxpayer argued that the Division is trying to make Online collect sales tax for Rhode Island based on the presence in the State of its sister company's store. The Taxpayer argued that Retail and Online are separate companies which sell products to Rhode Island customers through

¹¹ It was agreed that the Taxpayer did not own or rent real property in State and had no employees in State during the Audit Period. Rather the parties agreed that the issue was one of substantial nexus.

different sales channel. The Taxpayer argued that *Quill* and *Tyler Pipe* speak of physical presence or third party activity to establish and maintain a market and the store engaged in no such activities. The Taxpayer argued that there never has been a case where an out-of-state entity is subject to nexus merely by virtue of common ownership. The Taxpayer argued that nexus cannot be created by perception that the companies are related but must be created by in-state activities conducted on behalf of the out of state entity.

E. The Relevant Factors to Consider

If having sister online and retail companies with shared names and a parent company with the same shared name was enough to establish nexus, there would no need to perform a nexus analysis and no reasons for any of the cases cited above to make such determinations regarding businesses such as Barnes and Noble or Saks Fifth Avenue or Bloomingdales or Borders. As the cases cited above demonstrate, it is more than just a shared name and being a retail and online sister company that establishes nexus. The Division argued that there are many factors that taken in totality show that the Retail store in Rhode Island performs services in Rhode Island that allow Online to establish and maintain a market in Rhode Island. The Taxpayer disagreed. A key to this analysis is that in order to find nexus, the Retail store must have performed activities on behalf of Online that are significantly associated with Online's ability to establish and maintain a market in this state for sales.

Before turning to a case law analysis, the facts of the operations of the Retail store and Online need to be determined. Once those facts are established, the parties' arguments will be discussed in the context of the case law. Finally, the case law and those facts will be discussed in order to determine whether there is substantial nexus between Online and the Retail store.

1. The Facts Regarding the Operations of the Retail Store and Online

i. Pony Express Line

The evidence was that the pony express line was a telephone line to the Distributor. The Auditor testified that he understood that the telephone line was used to order products that the store did not have in stock. Initially, it appeared from testimony that the Auditor saw [redacted] make such an order, but then he testified that he saw the computer and saw the telephone line and understood by being told by [redacted] that it was to order products. He testified that he understood from [redacted] that the order would be placed to Online. The President and Officer both testified that the Retail store (and all Retail stores) do not communicate with Online, but with the Distributor to obtain products. The President testified that the pony express line is a way to get the product onto the truck that day rather than the next day when a back-order would be downloaded from the computer system.

The Auditor never saw [redacted] (or anyone) make an order from the store to Online for delivery to the store for a product that was not in-stock. Instead, he testified that [redacted] explained the system and said that the pony express line called Online. While the Auditor's field report for Retail and Online discussed that the Distributor fulfills orders for both Retail and Online, the Retail field report also indicated that the catalogue and internet businesses were separate companies and that the catalogue business was also known as the pony express line. See Division's Exhibits 13 (Retail report) and 36 (Online report). That confusion may have led to a misunderstanding of "who" the pony express line contacts.

While hearsay testimony is admissible in an administrative hearing, the testimony referring to the pony express line was that [redacted] explained it was used to order unavailable products. Obviously, this could be via Distributor or via Online. The Auditor understood [redacted] to say

the latter, but the evidence does not support this conclusion. Since Distributor fulfills both companies' orders, it would not be logical for the store to make orders via Online when the orders are filled by Distributor.

Perhaps the pony express line's "gimmicky" name and the fact it was just a different way to order out-of-stock products caused confusion on the part of the Auditor. However, there was no evidence (either direct or by inference) of the Retail store using the pony express line – either by its salespersons or customers - to fulfill orders from Online for the store's customers.

ii. Returns, Refunds, Exchanges

The Auditor testified that the store will accept returns from Online or any of retailer. The President testified that the store return policy is money back for purchases from any Retail store with a receipt and credit for any competitor purchase. The Officer testified that the store will take back any product no matter where purchased as long as the store carries it because the store wants customer satisfaction. The Officer testified that a customer who purchased from Online would receive store credit like any other purchase at a competitor as that customer would not have a Retail receipt. The Officer testified that each store has its own software and computer system. The President testified that the Online and Retail computer systems do not communicate. The President testified that if the store takes back an Online product, the store re-sells it and does not return it to Online. The catalogue explains that returns should be mailed to the Distributor. When a customer buys a product from Online, it comes with a form to return it by mail. Online uses the same pre-printed invoices for all orders in the United States and the invoices give return instructions for a customer to return products to the Distributor and includes an address label. The invoice does not say a product can be returned to a retail store. See Taxpayer's Exhibits Six (6), Seven (7), and Eight (8) (2009, 2010, 2011 catalogue), and Nine (9) (invoice sample).

The parties agreed that the store takes all returns if it carries the product and all testimony agreed with that fact. The evidence was that the store has this policy for customer relations. Online does not direct or advise either on the internet or in the catalogue that customers can return Online products to any Retail store.

iii. Advertising

There was no evidence that the store had any advertising for Online. There was evidence that the Online website and catalogue listed all store locations. However, there was no evidence that the website address was advertised anywhere in the store, e.g. signage or on receipts, etc. See Taxpayer's Exhibit 23 (sample store receipt; no mention of website).

iv. Credit Card

The evidence was that a credit card with the brand name was advertised on Online and in the catalogue. A customer can inquire about the credit card at the store. If a customer fills out a paper application for a credit card in the store, it is sent to the bank. The card can be applied for via Online or at the store and the reward program allowed points to be earned by purchases from either company that can be redeemed at either company. The Distributor has the bank contract for the credit card.

v. Gift Cards

The evidence was that customer could purchase a "brand name" gift card via Online or the catalogue or the store and use it at any entity to purchase a product. See Division's Exhibit 18.

vi. Database Sharing

The Officer and President testified to separate computer systems. The evidence was that the store obtained its inventory from Distributor (as does Online). The Officer testified that each store has its own software and computer system. The President testified that the Online and Retail

computer systems do not communicate and that each Retail store has its own customer records and do not share customer identifications. There was no evidence that the store shared data with Online.

vii. Common Logo

The evidence was that Retail, Online, and the Parent all used a common brand name logo.

viii. Common Owners

The parties agreed that Online and Retail were sister companies owned by Parent.

ix. Measuring Services

The Auditor testified that the store offered to measure customers for apparel and boots and if the store did not have the customer's size, the apparel or boots could be ordered by catalogue or Online. The Auditor testified that he observed in person a customer being measured for boots and being advised that could go online with the measurement and purchase it from catalogue or from Online. The Auditor testified that [redacted] told him that measuring was a routine service that the store offered customers to facilitate a purchase from Online. The Officer testified that a customer can be measured in the store and buy from anywhere. The President testified that a customer can get measured at the store, but the store could not place an order with Online. There was no evidence that the store offered or advertised this service as a service to allow a customer to buy from Online. Any customer being measured at the store can buy said item from another retail store or another online website.

x. Test the Fabric

The Auditor testified that a customer can review fabric samples at the store or call the catalogue and receive a swatch kit. The Officer testified that a customer can order swatch kits

from Online or can examine fabrics in the store, and then order from Online. The store is not advertising that one can test fabrics at the store in order to order via Online.

xi. Test the Saddle

The Officer testified that a customer can order test saddles from Online or at the store. He testified that if a customer orders a saddle to test from Online, the customer purchases it and the credit card charge is reversed if the saddle is returned. The Auditor testified that he understood from that a customer could select a saddle from Online or the catalogue, test it, and return it to the store. In terms of returning the saddle, Online's directions are the same as all returns for Online: return by mail. The evidence was that if a "test" saddle is bought from Online and returned to Online, the credit card charges are reversed but not shipping and handling. The catalogue does not give an option to return a saddle to a retail store, but states that saddles are to be returned to the Distributor for an added extra payment. However, if a customer of Online chooses to return a saddle to the store rather than follow Online's return direction, the store would treat that customer like any other non-Retail customer.

The Division offered Online website pages (printed after the close of the Audit Period) into evidence. Division's Exhibit 38 indicates that if a customer buys a saddle from Online, the price, shipping, and handling fee will be incurred on the customer's credit card and the purchase price will be refunded if the test saddle is returned. The page also indicates that test saddles are available at the website, catalogue, and retail stores. The Auditor testified that both Online and the catalogue advertise the saddle testing service. The Officer testified that the catalogue explains that returns should be mailed to the Distributor. There is no evidence that the store offered a test saddle on behalf of Online. A customer can choose to use a "test" saddle from either entity and a return is treated like any other return.

xii. Catalogues

The Auditor testified he requested a catalogue when he was in the store and was given a catalogue. He testified that he did not remember if he asked if catalogues were available to store customers. The President testified that catalogues are in the store for staff to see what is available at the Distributor, but the policy is not to hand them out to customers. The Auditor did not testify that he saw readily available catalogues at the store. There was no evidence as to their availability for store customers.

xiii. Common Advertising

The store, website, catalogue, and parent company all share a common brand name. The Auditor testified that the catalogue just contains the brand name. The Online website and catalogue list all store locations. There was no evidence that the Rhode Island store contained any advertising for Online or that directed customers to Online.

xiv. Deliveries

The Auditor testified that [redacted] and [redacted] both told him the store accepted deliveries on behalf of customers. He testified that the Taxpayer did not provide the addresses of where the Taxpayer shipped in Rhode Island. A review of the Auditor's testimony indicated that he was asked if an order from Online could be held at the store for pick-up. That question was objected to. The Auditor then testified that [redacted] told him that the store accepted products purchased for delivery and for a customer to pick up at the retail store. There was never any testimony from the Auditor that he personally knew someone ordered from Online and sent it to the store for pick-up. The testimony from the Auditor was what [redacted] and [redacted] told him about deliveries in general. He did not observe any pick-ups at the store. The parties agreed that store customers could have out-of-stock products delivered to the store.

The Officer testified that the Distributor has a truck that it uses to delivery inventory to the Rhode Island store. He testified that Distributor's truck never delivers to customers. He testified that if an Online customer asked for a delivery to the store, it would not be honored. The Officer testified that Online does not deliver to the Retail store for pick-up. He testified that the Taxpayer did not provide street addresses to the Division of Rhode Island shipments for Online, but his analysis showed of 67 deliveries to the Town only one was accidentally to the store and that Connecticut customer was told not to do it again.

The Officer testified that if the store is out of product, the product can be back-ordered and delivered to the store or customer's home, but that order is not made via Online and tax is paid on the sale. He testified the Distributor's truck would deliver to the store, but a common carrier would deliver to the customer. He testified that contrary to the field audit reports, he never said that Online shipped products purchased online or by catalogue to the store. The President testified as to the pony express line which allows a customer to ensure the product is available that day and the product will be delivered to the store and paid for when the customer picks it up.

Since the Auditor understood the pony express line to be ordering from Online then it would be understandable if he assumed that and included those deliveries as being to the store. However, the evidence from the Officer and President was that back-orders are delivered to the store or customer based on customer preference (and paid for at the store). The pony express line order is another way to make a back-order and the product is delivered to the store and picked up there and paid for at the store including tax.

The evidence was that deliveries for back-orders are delivered to the store or home and pony express orders are delivered to the store. There was no evidence that the store except once was used as a delivery location for an Online order. There was no evidence that Online directed

customers to use the Rhode Island store for delivery. The explanation for the Auditor's understanding of and information about deliveries is that the deliveries were for back order and pony express.

2. The Parties' Arguments vis a vis the Retail Store and Online's Operations

i. **Common Ownership**

The Division relied on the 2013 Barnes & Noble case that found the common ownership of the holding company of the online and bookstore companies along with certain factors as well as a shared brand name that was used to create more customers established nexus. As discussed above, there has to be more than a shared branded name or else Saks Fifth Avenue, Bloomingdales, Barnes & Noble, and many other sister retail and online companies would automatically have established nexus just by having a retail store with a shared name in-state. Indeed, the Court in the 2013 case found "that ownership of the corporations is not dispositive of the substantial nexus inquiry." *New Mexico Taxation and Revenue Department v. Barnesandnoble.com*, 303 P.3d 824, 828 (N.M. 2013). What is dispositive the Court found – pursuant to *Tyler Pipe* – was if the "in-state actor engages in activities on behalf of the taxpayer." *Id.* The in-state store advertised the Barnes and Noble' website by having the bn.com address on gift cards and in-store logos. The bookstore sold a shared loyalty program that gave customers a discount at bn.com. The stores' return policy allowed all returns, but it was advertised on the bn.com website that customers could return items to retail stores.

In the Barnes & Noble's case, the Court found that the in-state stores and bn.com presented a single face to the public so that the store developed name and recognition for bn.com. The Court found that because of the stores' association with the online company, bn.com benefitted from brand loyalty and the parent company even mentioned the brand name association by customers

with its filing with the Securities and Exchange Commission. However, there has to be factors that show a retail store's association with the online company to make such a finding. When the Court concluded that the in-state stores and bn.com presented one single face to the public, it based its finding on the fact that the retail stores developed brand name and loyalty for the website by selling gift cards that encouraged customers to shop at bn.com, bn.com advertised store locations and promoted its return policy, and the stores and website shared customer data. The Court found that none of bn.com's online competitors received those benefits.

Thus, in this 2013 case, there were other factors at play that are not at play in this case. In this matter, the Retail store never advertises or has any signs about Online. The website address is not included in store receipts. If a customer obtains a brand name credit card, they can earn points that can be redeemed. This is not a loyalty program purchased at the store usable for the website. Instead, a customer can apply at the store or online for a credit card from a bank. The gift cards only have the brand name and not the website address. The gift cards are interchangeable. Online has a store locator, but it does not advertise on its website that items purchased from Online can be returned at the store.

The Division argued that the Parent Company employed a multi-channel strategy for sales and distribution so that each entity serves to foster the growth of the Parent brand. The Division argued that pursuant to the Barnes & Noble case, the corporate structure leads to a physical presence for nexus purposes. However, the Barnes & Noble Court found certain services that the retail stores performed to help bn.com establish and maintain a market in the state. The Court did not find that corporate structure was dispositive. No one would dispute that any separate online and retail store with a parent company and shared names help develop brand loyalty. Otherwise, there would be no purpose for these corporate structures found in the Bloomingdales, Saks,

Borders, and Barnes & Noble cases. However, the inquiry is what services does a retail store perform for the online website to establish and maintain a market and again, it has to perform more than having a shared name; otherwise, there would be substantial nexus in all of those cases.

ii. Returns

The evidence and agreement was that the store accepted returns from any competitor including Online. The Division argued that the Retail store's return policy was similar to the Borders' case where the Court found that allowing easy returns to the in-state store of online purchases made online purchases more attractive. However, as discussed above in *Borders Online, LLC v. State Bd. of Equalization*, 129 Cal.App.4th 1179 (2005) that online's company stated on its website its return policy that the retail stores were authorized to accept online merchandise for return or exchange or store credit and credit card credit.

There is no dispute that the retail store accepted returns from anyone. Indeed the Auditor testified that was done by the store for customer satisfaction.¹² The Division argued that the Retail store's policy to accept returns from Online were motivated by Online's "continued efforts to establish and maintain a market in Rhode Island and increase the customer database for both Retail and [Online]."¹³ Online may want to establish a market in Rhode Island, but the store's policy of accepting all returns from any competitor without the evidence available in the Barnes & Noble and Borders cases where those websites directed returns to the in-state stores does not make the acceptance of such returns indicative of the store providing an activity on behalf of Online. Barnes & Noble accepted all returns, but the website specifically said online purchases could be returned

¹² The Division represented that "interestingly," the Officer testified that an Online customer did not have the option to return products to the store. That testimony [June 14, 2016 hearing, pages 146] actually referred to the website and whether the website gave Online customers the option to return products to the store. His testimony was that the website did not give that option to return products to the store. Obviously, if an Online customer chose to return a product to the store, the evidence was that the Online product - as well as any other product - would be accepted.

¹³ Division's brief, p. 18.

at the stores so that store offered a service on behalf of the website. When a retail store accepts all returns without direction from a website, that has been found that to be common in the retail industry in order to increase customer satisfaction. See *SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St.3d 119 (1995).

iii. Refunds

The Division argued that the store's liberal refund policy is akin to *Borders Online* and *Barnesandnoble.com*. However, the evidence is that the store accepted returns from all other stores including Online and would offer store credit for any purchases without a receipt that the store carried. Unlike in *Borders Online* and *BarnesandNoble.com*, the store was not named on the website as a location to return products or a location that would take returns and offer refunds. Just like its policy for returns, the Retail store accepted all returns and offered various credit to increase customer satisfaction. See *SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St.3d 119 (1995)

iv. Property of Out-of-State Seller in Rhode Island

The Division argued that Online had property within Rhode Island in the form of catalogues, joint advertising, and property purchased from Online and returned to the store. The evidence was that the Auditor requested a catalogue and saw catalogues. There was no evidence that they were freely available to customers. The President testified the catalogue were for staff to see what is available at the Distributor. The evidence regarding the catalogues is similar to the catalogues in *SFA Folio Collections, Inc. v. Bamon*, 217 Conn. 220 (1991). In that case, the direct mail Saks Fifth Avenue company sent catalogues to the retail stores as a resource for staff and were not being used to solicit sales. See also *SFA Folio Collection, Inc. v. Tracy*, 73 Ohio St.3d 119 (1995) (200 catalogues delivered by online business to retail store were minimal and did not constitute a nexus).

The Division argued that an inference can be made that if a product was not available at the store, the store would use the catalogue to look up a product availability at the Distributor and use an Online number and not a store number to make the order. While there was no evidence that the catalogue was used by staff members to make orders, any order made by the store is for sale at the store. The Division further argued that the catalogues are analogous to *Scripto, Inc. v Carson* 362 U.S. 207 (1960). However, in that case, there were ten (10) in-state brokers who armed with catalogues and advertising materials of an out-of-state retailer made sales to local residents. There is no evidence in this matter of the catalogues being displayed in the store let alone being used by salespersons to make sales. Finally, if a customer purchased a product from Online, that product became the customer's which the customer could return to the store.

v. Cross Advertising

There was no evidence that the store advertised for Online. There was evidence that Online had a store locator which was present in *Barnesandnobles.com*. However, the Barnes & Noble case not only had a store locator, but information that the stores would accept returns from the website. Online's catalogue also lists the store locations. The Officer testified that the purpose of such advertising by Online on its website and catalogue is to encourage customers to visit the store. June 14, 2016 transcript, p. 156. In addition, the Division argued that the credit card and gift cards can be used interchangeably. If a customer bought a gift card in the store, it could be used at Online or vice versa. There is no sharing of any customer data. A customer could apply for a brand name credit card either at the store or Online or by mail or catalogue. The evidence was a bank handled the credit card.

Here, the Division relied on the companies' commingling of functions to argue that a customer does not know it is potentially dealing with three (3) entities. However, the issue is not

the corporate structure or what the customer thinks, but what has the store done for Online (it is that type of service that the Barnes & Noble case found that a customer would take the company as one company). If the store has not performed market activities for Online, then a customer's perception would not matter. *Bloomingdale's* rejected that nexus could be found solely on common advertising in both the retail store and online company. The Connecticut Saks case rejected that nexus can be found because there are affiliated companies since a company may arrange its corporate structure to avoid taxes. The Ohio Saks case also held that nexus cannot be imputed because a sister corporation has a physical presence in-state. Further, parent and subsidiary corporations are separate and distinct legal entities. *Bloomingdale's* also rejected an argument that the separate corporate entities – retail store and catalogue company - were mere legal formalities.

vi. Price Matching Policies between the Entities and Coupons

The Division argued that the Online website stated that a customer could bring his or her catalogue to a retail store and the store would match the catalogue sale price. The Division relied on print-outs from the website in 2013. The Taxpayer was notified of the audit on February 15, 2011 and the audit period covered February 9, 2009 to June 30, 2011. The Auditor testified that he reviewed the website during the audit and the 2013 print-outs reflected what he saw during the audit period. The Division did not print-out any of the Online website from the Audit Period.

The Taxpayer used the "wayback machine" to show the offer for Retail to match the catalogue price appeared online for the first time on February 12, 2012. The Division argued that the Auditor testified that he saw the statement on the website, but offered no documentary proof until the Division's 2013 print-out. The Division argued that the Taxpayer did not present any evidence regarding the website from February, 2009 to October, 2009. Of course, both parties

could have accessed the "wayback machine" if such records were not available to either party. The Auditor contacted the Retail store regarding its audit on October 22, 2010. See Division's Exhibit Four (4). He contacted Online regarding its audit on February 15, 2011. It could be that in October, 2010, he started reviewing the Taxpayer's website, but he was not reviewing it in 2009 so cannot testify to the website at that time.

There is no evidence that during the Audit Period, the Online website included the statement to bring the catalogue to a store to match the sales prices. The Officer testified that during the Audit Period there was an unstated policy that the store would match the catalogue price. However, that policy was not on the website during the Audit Period.

The testimony was that the store would match catalogue coupons. The 2012 "wayback machine" print-out indicated that coupons found in the catalogue could be redeemed by telephone, online, or at any retail stores. While there are no print-out from the Audit Period either from that period or by "wayback machine," the Taxpayer argued that accepting coupons (as well as matching catalogue prices) just helped the store obtain a sale rather than Online.

vii. Sharing Customer Data

Looking at *Barnesandnoble.com* and *Borders*, the Division argued that Online and Retail shared market data. However, if a customer returned an Online purchase at the store, the information goes into the store database. The evidence was that the store database was not shared. The fact that customer data is stored with Distributor (if the customer chooses to have back order mailed to home rather than to the store) does not show that the store and Online are sharing data. In the Barnes & Noble matter, the loyalty program was a program that a customer purchased at the store and it gave the customer discounted shipping from bn.com. There is no evidence here that the rewards programs by using the brand name credit card had to be purchased from the store.

Instead, the evidence was that application would be made by a customer to the bank. There was evidence that customers could accrue rewards by using the credit card, but there was no evidence how the program was administered or that data was shared by the store and Online.

viii. Services Performed in Rhode Island: Measuring, Testing Fabric, Test Saddle

The Division argued that the Officer confirmed that a customer would not be charged for the measuring service if the customer ordered from Online. However, the evidence is that the measuring service was free for all customers and not just for customers who ordered from the store or Online. See June 15, 2016 transcript, p. 83. The Division argued that Online's management knew that customers could use stores services and then order from Online. Of course, Online's management also knew that customers could use the store's services and order from an online competitor as well. The Auditor testified that he observed a customer being measured for boots being told he could buy boots at Online.

The catalogue indicated that customers could test the fabric at the Retail stores. The evidence was that any customer could test the fabric which essentially was just looking at the clothing items. The Division argued that since there is an internet connection at the store, a customer could test the fabric and then order from Online via the internet. There was no evidence that the store computer was allowed to be used by customers. Clearly a customer could order online from any internet company while in the store using a smart phone, but that would not be an activity by the store on behalf of Online.

In terms of test the saddle, the store advertised it as did the catalogue or website. There is no evidence that the store advertised it would accept a returned saddle ordered from Online. Unlike *Barnesandnoble.com* and *Borders Online*, there was nothing in the catalogue or website saying that a saddle could be returned to the store. Like any Online product ordered, the saddle came

with a return invoice and furthermore, the website indicated that the customer would be charged shipping and handling on the return of the saddle.

The Connecticut Saks case found that the online Saks' customers could use the Saks store's tailoring service, but that the service was open to any customer regardless of where the item was purchased. The measuring service and testing the fabric was available to any customer who then could order the product from the store or elsewhere. While a customer was apparently told, he or she could order from Online, that customer could also buy a product from anywhere. The store services were free and available to any customer who could purchase the product for anyone.

ix. Common Logo and Intellectual Property

The Division argued that that the shared logo improved the goodwill of Retail and Online. The Division relied on *Barnesandnoble.com* to argue that the customers see one entity as a multichannel marketing strategy is employed to accomplish that common goal. However, as discussed above, *Barnesandnoble.com* found that the corporate structure is not dispositive. The issue is what activities does the retail store perform for Online. In the Barnes & Noble matter, the customers saw one entity because of the stores' services. In addition, both Saks's cases and Bloomingdale's rejected that such a corporate structure – e.g. sister corporations and shared names – was enough to find substantial nexus.

x. Gift Cards

The Division argued that the gift cards with the common logo can be used at either the store or Online are available to be purchased from the store and used at Online. There was no evidence that the store was marketing the cards for use at Online, but rather the cards are available for purchase. The Division argued that purchase of the cards at the store increased goodwill for

Online. The cards are not being marketed by the store for Online. Rather like the credit card, they can be used at either entity.

xi. In-store Advertising

The Division argued that the Auditor observed advertising at the store that was identical to advertising in the catalogue and on the website. He observed advertising for test the saddle and fabric selection service. The same type of services were listed in the catalogue or Online. However, there was no advertising in the store directing customers to the website as there was in *Barnesandnoble.com*. *Bloomingdale's* rejected that nexus could be found on the basis of common advertising as in both the retail store and online company having the same advertising themes. The Division also argued that the store was advertising Online by having catalogues in the store. However, there was no evidence the catalogues were readily available to the public. *Supra*.

xii. Deliveries into the State Via Trucks Owned by Common Parent

The Division argued that Online was making deliveries to the store for customer pick-up. The evidence was that Distributor delivered back-orders to the store, but there were no deliveries from Online to the store for pick-up. The Auditor saw the Distributor truck that replenishes the store inventory. The Taxpayer was not cooperative with fully producing Online's delivery records, but the evidence was there were 67 deliveries to the Town and the testimony was that only one (1) delivery was made to the store by an Online customer which was in error like in *Bloomingdale's*.

xiii. Shared Inventory with Common Fulfillment Center

The Division argued that both Retail and Online share inventory so that if a customer went to the store with an Online catalogue and asked for a product that was then ordered from the Distributor, the customer would really be ordering from Online via the Distributor. The Division argued that the store would match the catalogue's lower price so that those services allow Online

to establish and maintain a market in Rhode Island. The store had a policy to match the catalogue price, but there was no evidence that this policy was on the website during the Audit Period. The store orders from the Distributor if a product is out-of-stock.

xiv. Pony Express Line

The evidence is that the pony express line was a way to expedite delivery to the store of out-of-stock items. It is not a method to order from Online. The Division argued that the store by looking at the Distributor's inventory is also looking at Online's inventory as Online uses Distributor's inventory. The Division questioned the President's testimony that a customer was unable to order from the store from Online. The Division raised the issue of using a smart phone. There was no evidence that customers used the pony express computer as that is for usage by staff to offer expedited delivery. If a customer uses a smart phone in the store to order from Online or another vendor, the customer's action is not a service being performed by Online. The Division argued that the pony express line permits a customer in the store to use a phone or internet connection to place an order from Online's inventory either online or via telephone because the customer knows he or she could purchase a catalogue item via the store. However, if the store orders an out of stock item for a customer whether by back order or pony express line, the store is using the Distributor to obtain a product and not Online.

The Division offered a hypothetical that a customer goes to the store with a catalogue in order to obtain out of stock items. However, it was determined that the website did not until 2012 inform customers to take their catalogues to stores to match lower prices. There is no evidence that the website directed customers to take their catalogues to the store to order items and that if the store did not carry it, the item could be ordered. Nor was there any evidence that the store was advertising to customers to use their catalogues to find products that the store could order for them.

xv. Credit Cards

The Division argued that the brand name credit card could be used interchangeably and points accrued. In the Barnes & Noble matter, the loyalty program was a program that a customer purchased at the store and it gave the customer a discount on shipping from bn.com. There is no evidence that the rewards programs by using the brand name credit card had to be purchased from the store. Instead, the evidence was that application would be made by a customer to the bank. There was evidence that customers could accrue rewards by using the credit card, but there was no evidence how the program was administered. Indeed, the bank could be administering the program by keeping track of the money spent on the credit card. The Division argued that the joint advertising allowed Online to establish and maintain a market in Rhode Island. Such an argument was rejected by the Connecticut Saks case.

xvi. Statements to Shareholders and Securities and Exchange Commission

The Division argued that the advertising materials were marketed nearly identically across both Retail and Online in order to provide a single unitary name for customers. The Division argued that this strategy is a deliberate multi-channel strategy to use a common name and joint programs and shared inventory. The Division argued that this has allowed Online to establish a market in Rhode Island. Clearly Bloomingdale, Saks, Barnes and Noble, and Borders are engaged in this type of marketing as most likely any retail store that also has an online component. As discussed above, the corporate structure is not dispositive in determining nexus.

F. Whether the Taxpayer Owes the Assessment

In reviewing the similar cases of retail stores with a sister online entity, they fall into two (2) categories: 1) *Borders* and *Barnesandnoble.com* found substantial nexus; and 2) *Saks*,

Bloomingtondale's, and *St. Tammany* did not. The Taxpayer has apparently tried to model its business on *St. Tammany*, a case that *Barnesandnoble.com* found had too high a standard.

The cases that found substantial nexus found activities by the store that helped the internet company. E.g. in-store advertising, advertising on the website that can return products to the store, receipts with the web address, and purchasing a loyalty program at the store. In contrast, the facts in this matter do not show those kind of activities. There is no in-store advertising for Online. There is nothing on the Online website that indicates products can be returned to the store. Online customers are giving a form to return purchases by mail. The store accepts returns and give refunds or credit for any product that it sells for customer satisfaction. It does not treat Online purchases differently nor does the website or store hold itself out to give special attention to Online returns. The store does not accept Online deliveries. A customer cannot purchase from Online at the store on the store computer. The store provides services (measuring and testing) for anyone. The customer can then use the measuring or testing to buy at the store or any other vendor. Catalogues are not given by the store to the public. There is no shared computer system between the store and Online. There is no shared customer data between the store and Online. The store does not use Online's inventory, but rather there is a separate entity that distributes products to both entities. There is a common brand name and parent company of the store and Online. It is those type of facts that led the *Saks* and *Bloomingtondale's* cases to find no substantial nexus.

The factors that led *Borders* and *Barnesandnoble.com* to find substantial nexus are not present. While *Barnesandnoble.com* spoke of the common identity and shared brand name, the case law requires more than that to establish nexus. There have to be some kind of services offered by the store that would significantly associate it with Online's ability to maintain a market there. *Borders* found 1) each store would accept returns and provide a refund, store credit, or exchange

for online merchandise; 2) the stores encouraged their store employees to refer customers to online's website, and 3) receipts at the stores sometimes invited patrons to visit the online website and gave the website address. Those factors were not present in this matter. *Barnesandnoble.com* found substantial nexus on the basis of the stores' promotion of bn.com through sales of gift cards bearing bn.com's name (provided advertising), stores' policy of sharing customers' email addresses with bn.com; stores' implicit endorsement of bn.com through the companies' shared loyalty program (store sold memberships), the stores' return policy, and stores' use of Barnes & Noble's logos and trademarks which bn.com also used. Those factors of in-store advertising for the internet company, directing returns to the store, and a loyalty program for purchase at the store are not present in this matter.

The Division argued that the Retail store's activities increased goodwill to Online. However, the return and refund policy were for the goodwill of the store. The measuring and testing services were for any customer. Such activities can increase goodwill to the store. They could increase goodwill to the brand name. But, the activities have to be more than something directed to a shared brand name or common ownership. The test requires activities by a store that are significantly associated with establishing and maintaining Online company's market.

In reviewing the cases, this matter appears to be the closest to the Connecticut Saks case with catalogues sent to the store staff and the store offering services to anyone and a Saks credit card that could be used at either the store or internet company. Indeed, this matter involves less contacts in some ways than *St. Tammany* where the computer could by a pre-set program source inventory from the internet company and the online company advertised that its products could be returned to the physical store. Both *Barnesandnoble.com* and *Borders Online* found that an online company representing and advertising that its purchases could be returned to a physical store was

a service that the store then provided for the internet company. That argument was rejected by *St. Tammany* that found that while the store treated the sister company's online returns slightly better than returns from other vendors, such treatment was not comparable to sales activity undertaken by in-state sales agent. *St. Tammany* cited to *In re Scholastic Book Clubs, Inc.*, 260 Kan. 528 (1996) which found nexus when an out-of-state vendor used Kansas teachers to sell books to students.

Here, Online does not advertise that returns can be made to the store. The store accepts all returns if it carries the product and does not give a benefit to an Online returns. The store does not accept deliveries from Online for customers. The credit card and gift card can be used interchangeably. There are no loyalty programs that are bought from the store for the internet company. The store does not advertise the Online website. The website address is not on any store receipts or advertising or signs. The store offers services like measuring and testing fabric that are available to anyone who then can purchase from anywhere. While the sister companies share a brand name, there are no services that the store performs that are significantly associated with Online's ability to establish and maintain a market in this state.

VI. FINDINGS OF FACT

1. On or about October 11, 2013, the Division issued a Notice in response to the Company Online's request for hearing filed with the Division.
2. A hearing in this matter was held on April 12, June 14, and June 15, 2016. The parties were represented by counsel who timely submitted briefs by January 21, 2017.
3. A sales and use tax field audit was conducted by the Division on the Company Online for the period of February 9, 2009 through June 30, 2011

4. The facts contained in Sections IV and V are reincorporated by reference herein.¹⁴

VII. CONCLUSIONS OF LAW

Based on the testimony and facts presented:

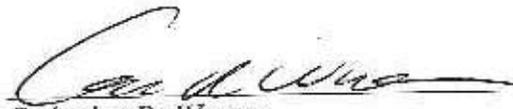
1. The Division has jurisdiction over this matter pursuant to R.I. Gen. Laws § 44-1-1 *et seq.*, R.I. Gen. Laws § 44-18-1 *et seq.*, and R.I. Gen. Laws § 44-19-1 *et seq.*
2. There is no substantial nexus between the Rhode Island Retail store and Online.

VIII. RECOMMENDATION

Based on the above analysis, the Hearing Officer recommends as follows:

The Taxpayer's appeal of the Notice of Deficiency issued by the Division to the Taxpayer is sustained.

Date: March 15, 2017

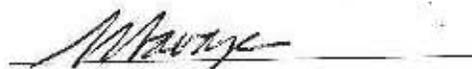

Catherine R. Warren
Hearing Officer

ORDER

I have read the Hearing Officer's Decision and Recommendation in this matter, and I hereby take the following action with regard to the Decision and Recommendation:

ADOPT
 REJECT
 MODIFY

Dated: 10/12/18


Necna S. Savage
Tax Administrator

¹⁴ The Taxpayer submitted in its briefs an extensive list of "proposed finding of facts." Its proposed finding of facts included proposed facts regarding the Retail store and Online, but also included characterizations of testimony. The undersigned has reviewed all the evidence and made determinations regarding how the store and Online operated as set forth above. Those are the finding of facts.

NOTICE OF APPELLATE RIGHTS

THIS DECISION CONSTITUTES A FINAL ORDER OF THE DIVISION. THIS ORDER MAY BE APPEALED TO THE SIXTH DIVISION DISTRICT COURT PURSUANT TO THE FOLLOWING WHICH STATES AS FOLLOWS:

R.I. Gen. Laws § 44-19-18 Appeals

Appeals from administrative orders or decisions made pursuant to any provisions of this chapter are to the sixth (6th) division district court pursuant to chapter 8 of title 8. The taxpayer's right to appeal under this chapter is expressly made conditional upon prepayment of all taxes, interest, and penalties, unless the taxpayer moves for and is granted an exemption from the prepayment requirement pursuant to § 8-8-26.

CERTIFICATION

I hereby certify that on the 12th day of October, 2018 a copy of the above Decision and Notice of Appellate Rights were sent by first class mail, postage prepaid to the Taxpayer's attorneys' addresses on file with the Division of Taxation and by hand delivery to Bernard Lemos, Esquire, Department of Revenue, One Capitol Hill, Providence, RI 02908.

