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Use Tax Collection Jurisdiction: Retail Stores on a State Border Held Hostage - Good's Furniture House, Inc. v. Iowa State Board of Tax Review

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USE TAX COLLECTION JURISDICTION: RETAIL STORES ON A STATE BORDER HELD HOSTAGE

Good's Furniture House, Inc. v. Iowa State Board of Tax Review, 382 N.W.2d 145 (Iowa 1986), *cert. denied*, 107 S. Ct. 76 (1986)

INTRODUCTION

An increasingly debated issue in the courts is the extent to which a state can impose use tax[1] collection responsibilities upon out-of-state sellers which sell to residents within the taxing jurisdiction. At the center of this controversy is a classic conflict inherent in our federal system—namely, the state's power to tax and raise revenues, balanced against the constraints placed upon this power by the commerce[2] and due process[3] clauses of the United States Constitution.

The Supreme Court, in a consistent line of cases,[4] has established the Constitutional parameters necessary for a state to require an out-of-state retailer to act as its use tax collection agent. According to the Court, State A cannot require a retailer located in State B to collect the State A use tax unless that retailer has a sufficient nexus, or connection, with State A.[5] The Supreme Court has found a sufficient nexus to exist only where the out-of-state retailer had some physical presence in the taxing state, as evidenced, for example, by retail outlets or sales solicitors in the taxing state.[6]

State tax administrators, not content with the Supreme Court's

1. Use taxes are generally levied against the purchaser for use, consumption or storage of tangible personal property within a taxing jurisdiction. For example, a typical use tax situation occurs when the Jones', residents of State A, go to a furniture store in nearby State B, to buy a couch, which will be delivered via the furniture store's own truck. In this situation, State A cannot require State B to collect its sales tax because the transaction did not occur in State A. A sales tax, as applied to an out-of-state transaction was held to be an unconstitutional burden on interstate commerce. McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330-31 (1944).

Instead, State A imposes a use tax on the Jones' use of the couch in State A. The imposition of a use tax in the Jones scenario *is* constitutional because a use tax is a levy on the enjoyment of an item, *after commerce is at an end*, and, therefore, does not contravene the commerce clause. *See* Henneford v. Silas Mason Co., 300 U.S. 577, 581-82 (1937). However, now State A is faced with the impractibility of collecting use taxes from a multitude of purchasers. State A, to remedy this problem, has imposed a seller collection system, and wants the State B furniture retailer to collect its tax. *See, e.g.*, the discussion in P. HARTMAN, FEDERAL LIMITATIONS ON STATE AND LOCAL TAXATION § 10:8, at 618-19 (1981).

2. U.S. CONST. art. I, § 8, cl. 3.

3. U.S. CONST. amend. XIV, § 1.

4. *See infra* Historical Background section for a complete discussion.

5. *See* National Bellas Hess, Inc. v. Illinois Dep't. of Revenue, 386 U.S. 753, 758 (1967).

6. *Id.*

physical presence standard, argue that their tax bases have been eroded and state coffers deprived of much needed revenues[7] by the states' inability to reach interstate mail order retailers and border store[8] sellers. Generally, these retailers have no contacts with the taxing jurisdiction other than solicitation of in-state residents by mail and other forms of advertising. The problem, administrators contend, promises to be even more acute in the very near future given the increasingly sophisticated methods of advertising. For example, cable television, toll-free "800" telephone numbers, and computerized shopping services have enabled businesses to solicit customers at greater distances and with fewer physical contacts[9] than ever before.[10] In response, states have attempted to expand use tax collection jurisdiction to extra-territorial retailers which do little more than advertise in the forum state by passing new nexus laws[11]—a seemingly unconstitutional expansion of state taxing power.[12]

7. A recently completed study by the Advisory Commission on Intergovernmental Relations (hereinafter "ACIR") estimates that the states are losing $1.4 to $1.5 billion annually by not being able to impose collection responsibilities on out-of-state retailers. ACIR, STATE AND LOCAL TAXATION OF OUT-OF-STATE MAIL ORDER SALES 11 (April 1986). The Supreme Court long ago judicially recognized the revenue needs of states. Justice Jackson noted that "[i]n the last twenty years, revenue needs have come to exceed the demands that legislatures feel it expedient to make upon accumulated wealth or property with fixed location within the state. The states therefore have turned to taxing activities connected with the movement of commerce." Miller Bros. Co. v. Maryland, 347 U.S. 340, 342-43 (1954). *See also* Wisconsin v. J.C. Penney Co., 311 U.S. 435, 442 (1940).

8. Border store sellers as used herein refers to retailers with a place of business located close to the boundary of a neighboring state. A border store seller located in State B typically sells to residents of State A tax-free because the seller is not registered to do business in State A (the taxing state).

9. The term "physical contacts" as used here should not be confused with minimum contacts in the Constitutional sense. Rather, physical contacts is used here in its literal sense, meaning that the retailer/solicitor has no presence, other than its advertising, in the taxing state.

10. *See, e.g.*, Corrigan, *Interstate Corporate Income Taxation—Recent Revolutions and a Modern Response*, 29 VAND. L. REV. 423, 424-25 (1976); Address by Matthew J. Coyle, Deputy Director Washington Department of Revenue, to the National Association of Tax Administrators (June 18, 1984).

11. For an overview of the new nexus laws, see Dlouhy, The Debate Over the Constitutionality of the New Nexus Laws: The Legal Issues and the Arguments 1-2 (unpublished outline).

12. An increasing number of states are amending their use tax statutes to specifically provide that advertising constitutes a sufficient nexus for imposition of use tax collection responsibilities on out-of-state retailers. *See, e.g.*, CAL. REV. & TAX. CODE § 6015.5 (West 1987) (enacted in 1985) (amends the law by adding a section which defines any broadcaster, printer, publisher, etc. which carries advertising to consumers in California, including advertising in a California edition of a national publication, as an "agent of the person or entity placing the advertisement" and defines the person or entity placing the ad as a "retailer engaged in business" in California, and, thus, required to collect and remit sales tax); NEB. REV. STAT. § 77-2702(21)(d) (Supp. 1987) (enacted in 1987) (amends the definition of retailer engaged in business to include retailers that continuously, regularly, or systematically advertise from an in-state transmitter or distribution point); N.D. CENT. CODE §§ 57-39.2-01, 57-40.2-01 (Supp. 1987) (expands the definition of retailer to include every person who engages in regular or systematic solicitation of North Dakota consumers by various forms of advertising); OKLA. STAT. ANN. tit. 68, §§ 1354.2-1354.6 (West supp. 1987) (enacted in 1987) (provides that continuous, regular, or systematic solicitation in the Oklahoma consumer market by out-of-state vendors through advertisements is a sufficient nexus for imposition of collection

In *Good's Furniture House, Inc. v. Iowa State Board of Tax Review*,[13] the Iowa Supreme Court upheld the constitutionality of that State's imposition of use tax collection responsibilities upon an Illinois border retailer whose only contact with Iowa was incidental general advertising and occasional deliveries via company owned truck. Part I of this comment will review the historical background underlying the imposition of use tax collection responsibilities on out-of-state retailers. Part II will examine the facts of *Good's Furniture*, and describe the court's reasoning. Then, in Part III, this case comment will focus on the Iowa court's seemingly expansive interpretation of Supreme Court precedent and the substantial negative effect of its decision on the multitude of small, independent border store retailers, which, as a result of the Iowa court's opinion, will now be required to act as use tax collection agents.

I. HISTORICAL BACKGROUND

The use tax has mainly developed as a means of complementing the sales tax; it is used to reach those transactions occurring outside state boundaries, where a sales tax cannot constitutionally be imposed.[14] The imposition of a use tax thus protects sales tax revenues by putting local retailers on a competitive level with out-of-state retailers which are exempt from sales tax when selling to residents in the taxing state.[15] The legal incidence of a use tax is upon the in-state user or consumer.[16] It is impractical, however, for a taxing jurisdiction to identify and tax the multitude of purchasers that buy goods out-of-state, for use within the taxing state. To remedy this problem, state laws generally require out-of-state retailers to collect the use tax and remit the tax collected to the taxing state.[17] There can be no question today that a state has the power

liabilities); Substitute H.B. 231, 1987 Ohio Legis. Serv. 5-506, 5-618 (Baldwin) (effective Oct. 5, 1987) (amends OHIO REV. CODE ANN. § 5741.01 to provide that nexus exists when the seller "conducts a continuing pattern of advertising" in Ohio to solicit purchases of the seller's goods or services).

13. 382 N.W.2d 145 (Iowa 1986), *cert. denied*, 107 S. Ct. 76 (1986).

14. P. HARTMAN, *supra* note 1, at 578. In Henneford v. Silas Mason Co., 300 U.S. 577 (1937) the Supreme Court sustained the Washington use tax. The Court concluded that the use tax, unlike a sales tax on out-of-state purchases, did not exceed commerce clause limitations. The Court explained that the use tax was a tax on the privilege of use, *after commerce was at an end*. *Id.* at 581-82. Subsequently, the Supreme Court distinguished the sales tax from the use tax as follows:

> A sales tax and a use tax in many instances bring about the same result. But they are different in conception, are assessments upon different transactions, and . . . may have to justify themselves on different constitutional grounds. A sales tax is a tax on the freedom of purchase . . . [a] use tax is a tax on the enjoyment of that which was purchased.

McLeod v. J.E. Dilworth Co., 322 U.S. 327, 330 (1944).

15. National Geographic Soc'y. v. California Bd. of Equalization, 430 U.S. 551, 555 (1977).

16. P. HARTMAN, *supra* note 1, at 578.

17. *Id.* at 619.

to require an out-of-state seller to collect the state use tax, providing the constitutional tests described below are met.[18]

A state, in order to deputize an extra-territorial vendor as its collection agent, must meet both Constitutional due process and commerce clause limitations imposed on the exercise of state power. Due process requires that the out-of-state seller have minimum contacts[19] with the state seeking to compel collection of its use tax.[20] In *Wisconsin v. J.C. Penney Co.*,[21] the Supreme Court formulated the test that has been used to determine whether a state's imposition of tax collection responsibilities on an out-of-state seller passed due process muster. The Court specified that the "test is whether . . . the taxing power exerted by the state bears fiscal relation to protection, opportunities and benefits given by the state. The simple but controlling question is whether the state has given anything for which it can ask return."[22] The test with respect to commerce clause limitations on imposition of a use tax collection duty on extra-state sellers is similar. That clause prevents a state from imposing taxes that unduly burden interstate commerce. Thus, according to the Supreme Court in *Freeman v. Hewit*,[23] taxes falling on interstate commerce can only be justified when there is a relationship between the tax imposed and the cost of local government protection afforded the out-of-state seller. The primary focus, then, under either the due process or the commerce clause, is on determining whether the out-of-state seller has derived a sufficient benefit from the taxing jurisdiction to justify imposition of a duty to collect use tax.

Accordingly, when examining the constitutionality of imposing a use tax collection duty, the relevant legal inquiry is whether there is a sufficient nexus,[24] or connection, between the extra-territorial vendor and

18. *Id. See also National Geographic Soc'y.*, 430 U.S. at 551, 555; Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1939); Monamotor Oil Co. v. Johnson, 292 U.S. 86, 93 (1934).

19. Minimum contacts, as used here, should not be confused with the minimum contacts required for *in personam* jurisdiction.

20. Miller Bros. Co. v. Maryland, 347 U.S. 340, 344-45 (1954).

21. 311 U.S. 435, 444 (1940). Even though the *J.C. Penney* case involved imposition of a tax "for the privilege of declaring and receiving dividends" out of income derived from in-state property and business, the Supreme Court has applied the *J.C. Penney* test in use tax collection cases. *See, e.g.*, National Bellas Hess, Inc. v. Illinois Dep't. of Revenue, 386 U.S. 753, 756 (1967).

22. *J.C. Penney Co.*, 311 U.S. at 444.

23. 329 U.S. 249, 253 (1946). The *Freeman* commerce clause test was applied to the use tax collection jurisdiction issue in *National Bellas Hess*, 386 U.S. at 756.

24. When the taxing state seeks to compel an out-of-state vendor to collect its tax, it is imposing its administrative, or collection jurisdiction, as opposed to its taxing jurisdiction, where the state seeks to impose a tax directly. The Supreme Court has clearly distinguished collection jurisdiction from tax jurisdiction, and has held that a lower nexus standard is required in the former situation. *See, e.g., National Geographic Soc'y.*, 430 U.S. at 560, where the out-of-state retailer argued that a nexus was required between the seller and the taxing state *and* between the activity of the seller upon

the taxing state to deputize the vendor as a collection agent. As will be seen from the cases in Sections A and B, below, the Supreme Court has invoked the due process and the commerce clauses interchangeably[25] in making the nexus determination, and in delineating the constitutional boundaries, beyond which a state cannot extend its use tax collection jurisdiction.

A. Sufficient Nexus to Impose Collection Jurisdiction

All of the use tax collection jurisdiction cases decided by the Supreme Court have turned upon whether there was a sufficient connection, or nexus, between the taxing jurisdiction and the out-of-state seller to justify imposition of collection responsibilities. One of the earliest rulings[26] addressing this issue was *Nelson v. Sears, Roebuck & Co.*[27] Sears, which had twelve retail stores in Iowa, argued that imposing use tax collection responsibilities with regard to its separately administered and distinct mail order business would contravene the due process and commerce clauses. Sears contended that the requisite nexus requirement for satisfying the two clauses was lacking because its local retail stores did not generate the mail order sales. Rather, the mail order sales were accepted and filled out-of-state.[28]

The Court, addressing both the due process and the commerce

which a tax was to be imposed, and the seller's activity within the taxing state. The Court disagreed, stating that "[h]owever fatal to a direct tax a 'showing that particular transactions are dissociated from the local business . . .' such dissociation does not bar the imposition of the use-tax-collection duty." *Id.* (citations omitted). *Compare* General Trading Co. v. State Tax Comm'n, 322 U.S. 335 (1944) with McLeod v. J.E. Dilworth Co., 322 U.S. 327 (1944). Both cases were decided the same day. In the former case, the Supreme Court upheld the imposition of use tax collection responsibilities on an out-of-state vendor; whereas in the latter case, the Court held that, in an identical fact situation, the taxing state could not impose a sales tax directly on the extra-state retailer.

25. A debate currently exists as to whether the use tax collection jurisdiction issue should be resolved by reference to either the due process or the commerce clause. That constitutional debate is not the focus of this comment. Rather, the focus of this comment is on the business ramifications of use tax collection jurisdiction, as it is being expanded by the states under the new nexus laws. Thus, it is taken as an accepted fact that a certain nexus is constitutionally required, regardless of whether the due process or the commerce clause is the basis for challenging a state's imposition of collection duties on an extraterritorial retailer. *See, e.g.*, Loar, *Use Tax Jurisdiction: Why Not a Unified Nexus Standard*, 1 Am. J. Tax Pol'y. 119 (1982); McCray, *Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-evaluation*, 17 Urb. Law. 529 (1985); McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. REV. 265.

26. The Supreme Court actually addressed the sales-use tax jurisdiction issue in one earlier case, Felt & Tarrant Mfg. Co. v. Gallagher, 306 U.S. 62 (1938). However, the line of cases beginning with Nelson v. Sears Roebuck & Co., 312 U.S. 359 (1941), establishes the current parameters for determining whether a state imposition of a duty to collect use tax contravenes constitutional limitations. Moreover, *Sears* was the first case addressing mail order selling schemes, a selling arrangement similar to the border store situation discussed herein.

27. 312 U.S. 359 (1941).

28. *Id.* at 365.

clause concerns,[29] applied a physical presence standard to uphold Iowa's assertion of use tax jurisdiction. The presence of Sears retail stores in Iowa provided a sufficient connection with the taxing state to justify the imposition of use tax collection responsibilities on Sears.[30] Justice Douglas, speaking for the majority, reasoned that Sears' mail order business was part of its aggregate business activity in Iowa. Thus, the taxing state was entitled to make the out-of-state retailer its collection agent "as a price of enjoying the full benefits flowing from the Iowa business."[31]

Subsequent cases have expanded state use tax jurisdiction over extra-territorial sellers, but have maintained the physical presence standard for nexus. For example, in *General Trading Co. v. State Tax Commission*,[32] solicitation of orders by General Trading's traveling salesmen within the taxing state was found to provide a sufficient nexus for imposition of collection duties.

Similarly, in *Scripto, Inc. v. Carson*,[33] the Court affirmed a Georgia retailer's duty to collect the Florida use tax. In that case, the retailer's only connection with Florida was the use of ten in-state jobbers who solicited orders from Florida customers. Scripto argued that these jobbers were independent contractors, not employees, and that Scripto therefore lacked the requisite connection with Florida to be deputized as a collection agent.[34] The Court found the distinction between "employee" and "independent contractor" to be without constitutional significance. Although the Court did not specifically mention the due process clause, its holding addressed due process concerns. Also, the Court dismissed the commerce clause as a basis for rejecting Florida's imposition of use tax collection responsibilities on the Georgia retailer. Of primary importance to the *Scripto* Court was the nature and extent of the Georgia retailer's activities in Florida.[35]

29. *Id.* at 364-65.

30. *Id.* at 364.

31. *Id. See also*, Nelson v. Montgomery Ward & Co., Inc., 312 U.S. 373 (1941) (companion case to *Sears*). The Court noted an additional factor present in this case, compelling the imposition of tax collection duties on the retailer. Namely, that Ward advertised locally, not only retail merchandise, but catalog merchandise as well. The Court interpreted the *local* advertisements as an indication that Ward had solicited mail order sales in Iowa. However, this case must be distinguished from that in *Good's Furniture*, where the advertisements did not originate locally, but rather out-of-state.

32. 322 U.S. 335 (1944).

33. 362 U.S. 207 (1960).

34. *Id.* at 209. Scripto thus attempted to distinguish its relational connection with the state from that in *General Trading*. Also, the *National Bellas Hess* Court described the *Scripto* decision as the "furthest constitutional reach to date of a State's power to deputize an out-of-state retailer as its collection agent for a use tax." *National Bellas Hess*, 386 U.S. at 757.

35. *Scripto*, 362 U.S. at 211-12.

In the most recent case to address the use tax jurisdiction issue, *National Geographic Society v. California Board of Equalization*,[36] the Supreme Court reaffirmed its holding in *Sears*. The National Geographic Society maintained two advertising offices in California which were unrelated to its out-of-state mail order business. Nonetheless, the Court, without specifying the due process or commerce clause as the basis for its decision, found that the National Geographic Society's continuous presence in California provided a sufficient nexus to justify imposition of a collection duty. Justice Brennan, in his majority opinion, rejected the Society's argument that in addition to a "physical" nexus between the seller and the taxing state, an "activity" nexus was also required between the activity the state sought to tax, and the seller's activity within the state.[37]

As the above cases illustrate, the Supreme Court has found a sufficient nexus to constitutionally validate a state's assertion of use tax jurisdiction only where the out-of-state seller had a physical presence, as manifested by property, salesmen, agents, or independent contractors, in the taxing state.

B. Insufficient Nexus to Collect Use Tax

The Court has drawn the line in situations where an extra-territorial seller lacked a physical presence in the forum state. Two cases evidence the outermost limits to which a taxing state can stretch its use tax jurisdiction. The first case is *Miller Brothers Co. v. Maryland*.[38] Miller Brothers, a Delaware furniture retailer, sold merchandise directly to customers at its store in Delaware, which was located close to the Maryland border. The store did not accept any mail or telephone orders, nor did it make any solicitation of customers other than by Delaware newspaper and radio advertisements, and occasional direct mail advertising to former customers. Residents of nearby Maryland purchased merchandise at the store, which they either carried home or which was delivered to them by common carrier or by the store's own truck.[39]

Maryland sought to assert use tax jurisdiction over Miller Brothers on the basis that the physical presence nexus test was satisfied by (1) Miller Brothers' newspaper and radio advertisements which, although not directed at Maryland residents, were known to reach them; and (2) the fact that Miller Brothers made occasional deliveries into

36. 430 U.S. 551 (1977).
37. *Id.* at 560.
38. 347 U.S. 340 (1954).
39. *Id.* at 341.

Maryland via company-owned trucks.[40] The Court, relying on the due process clause,[41] held that neither element afforded the state a connection with the seller sufficient to create a collector's liability. Primary emphasis was placed on the fact that the incidental effects of general advertising evidenced "no invasion or exploitation of the consumer market."[42] The *Miller Brothers* Court, in an often cited passage, defined the use tax jurisdictional nexus test as follows: "[T]he course of decisions does reflect at least consistent adherence to one time honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax."[43] None of the requisite links or connections were satisfied by the Maryland taxing scheme as applied to Miller Brothers.

The second case limiting the reach of a state's long "use tax jurisdictional" arm was *National Bellas Hess, Inc. v. Illinois Department of Revenue*.[44] There, the state revenue agency met with defeat when it tried to require collection of its use tax by a Missouri-based catalog company—National Bellas Hess. The company's only connections with customers in the market state were solicitation by mail and subsequent deliveries to Illinois residents via mail or common carrier. The retailer had no property or sales outlets in Illinois nor representatives, solicitors, or agents in that state.[45]

The majority in *National Bellas Hess* stressed that in order to uphold the power of Illinois to impose use tax burdens, it would have to repudiate the sharp distinction[46] made in previous cases between retail sellers with a physical presence in the taxing forum, and those without any presence other than mere communication by mail or common carrier.[47] This the Court declined to do. Justice Stewart, in delivering the opinion of the Court, based his decision on the commerce clause, although due process concerns were addressed in an ancillary fashion. Of primary importance to the Court was the fear that serious restraints on interstate commerce would result from a decision upholding use tax jurisdiction. The Court specifically mentioned the burdensome conse-

40. *Id.* at 341-42.

41. *See* the Court's discussion *id.* at 344-45. Having determined that the Maryland tax contravened the due process clause, the Court did not address the commerce clause issue. *Id.* at 347.

42. *Id.* at 347.

43. *Id.* at 344-45.

44. 386 U.S. 753 (1967).

45. *Id.* at 754.

46. *Id.* at 758.

47. In a vigorous dissenting opinion, Justice Fortas asserted that the "physical presence" test for nexus was adequately established by National Bellas Hess' large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market. *Id.* at 761-62 (Fortas, J., dissenting).

quences of forcing out-of-state retailers to comply with a myriad of taxing jurisdictions, varying tax rates, differing allowable exemptions, and entangling administrative and record-keeping requirements.[48]

II. Facts of the Case and Reasoning of the Court

Good's Furniture House (hereinafter "Good's Furniture") was an Illinois retailer of furniture, carpeting and drapes, with its principal place of business at its retail store in Kewanee, Illinois.[49] The store was located approximately 55 miles east of the Iowa-Illinois border.[50] Iowa residents came to Good's Furniture and made purchases, some of which they carried away, and some of which were delivered via Good's Furniture truck.[51] No saleschecks or order blanks were completed in Iowa.[52]

Good's Furniture had no retail stores, warehouses or other business property in Iowa, nor did the retailer have any sales agents or representatives in Iowa.[53] The business' advertising consisted primarily of television spots aired on Illinois stations which, although not directed at Iowa residents, crossed that state's borders and were viewed by Iowans. Occasionally, Good's Furniture advertised on a television station in Davenport, Iowa.[54] It was determined that approximately ten percent of Good's Furniture's retail sales during the period April 1, 1977, through March 31, 1982, were to Iowa residents.[55]

The Iowa Department of Revenue found that Good's Furniture's activities in Iowa warranted assessment of a use tax against the furniture retailer, covering the five year period in question.[56] Good's Furniture paid the tax under protest and filed a claim for refund, which the Department denied.[57] Subsequently, the Iowa State Board of Tax Review upheld the denial of the refund claim and a state trial court affirmed. Good's Furniture then appealed to the Iowa Supreme Court.[58]

48. *Id.* at 759.

49. Good's Furniture House, Inc. v. Iowa State Bd. of Tax Review, 382 N.W.2d 145, 146 (Iowa 1986), *cert. denied*, 107 S. Ct. 76 (1986).

50. *Id.* at 146.

51. *Id.* at 146-47.

52. Appellant's Brief at 4, Good's Furniture v. Iowa State Bd. of Tax Review, 382 N.W.2d 145 (Iowa 1986), *cert. denied*, 107 S. Ct. 76 (1986).

53. Appellant's Brief at 5. Good's Furniture did make occasional deliveries into Iowa. Thus, the company, at various times had delivery trucks and representatives in that State. However, these contacts were not enough to satisfy the constitutional requirements. *See, e.g.*, Miller Bros. Co. v. Maryland, 347 U.S. 340, 347 (1954).

54. Appellant's Brief at 4.

55. Appellant's Brief at 5.

56. *Good's Furniture*, 382 N.W.2d at 147.

57. *Id.*

58. *Id.*

Good's Furniture challenged the assessment of the use tax imposed pursuant to Iowa's use tax statute[59] as violative of its constitutional right to due process.[60] The retailer contended that it had insufficient contacts with Iowa to provide the requisite nexus for use tax collection jurisdiction. The Iowa Supreme Court disagreed and held that Good's Furniture had sufficient contacts with the state to allow imposition of the requirements of Iowa's use tax statute without violating constitutional limits.[61]

The Iowa Supreme Court, in addressing the due process concerns, first noted that Good's Furniture had relied primarily on the Supreme Court holding in *Miller Brothers*.[62] The court asserted that more recent decisions of the United States Supreme Court had eroded that holding.[63] To support this proposition the court cited *Scripto*,[64] *National Bellas Hess*,[65] and *National Geographic Society*.[66] In each case, the court noted that the *Miller Brothers* nexus test[67] was applied; with regard to *Scripto* and *National Geographic Society*, the minimum contacts were sufficient to justify imposition of use tax collection responsibility.[68]

The court concluded that Good's Furniture likewise had sufficient contacts with Iowa to justify imposition of use tax liability.[69] The court reasoned that the *Miller Brothers* nexus test, refined by later Supreme Court cases, was satisfied by the following facts: (1) Good's Furniture directly solicited a large volume of Iowa sales by intensive television ad-

59. Section 423 of the Iowa code provides in relevant part:

> § 423.9 Every retailer maintaining a place of business in this state and making sales of tangible personal property for use in this state . . . shall at the time of making such sales, whether within or without the state, collect the tax imposed by this chapter from the purchaser.
>
> § 423.1(5) "Retailer" . . . includes . . . any salesmen, representatives, truckers . . . as the agents of the dealers, distributors . . . under whom they operate or from whom they obtain tangible personal property sold by them . . . the director may so regard them and may regard the dealers, distributors . . . as retailers.

IOWA CODE ANN. §§ 423.1(5), 423.9 (West Supp. 1986).

60. Good's Furniture also contended that (1) it was not a retailer within the meaning of that term under the Iowa statute and (2) the department should be estopped from assessing use tax because department representatives earlier had informed it that the tax need not be collected. *Good's Furniture*, 382 N.W.2d at 147, 150.

61. *Id.* at 150.

62. *See Miller Bros.*, 347 U.S. at 340; *see also supra* notes 38-43 and accompanying text.

63. *Good's Furniture*, 382 N.W.2d at 149.

64. *Scripto*, 362 U.S. at 207. *See also supra* notes 33-35 and accompanying text.

65. *National Bellas Hess*, 386 U.S. at 753. *See also supra* notes 44-48 and accompanying text.

66. *National Geographic Soc'y.*, 430 U.S. at 551. *See also supra* notes 36-37 and accompanying text.

67. To satisfy due process there must be "some definite link, some minimum connection between a state and the person, property or transaction it seeks to tax." *Miller Bros.*, 347 U.S. at 344-45.

68. *Good's Furniture*, 382 N.W.2d at 149.

69. *Id.* at 150.

vertising, and (2) it regularly serviced its Iowa customers by delivering merchandise in employee-driven, company-owned trucks.[70] Significantly, the *Good's Furniture* court never distinguished the factual setting in *Miller Brothers.*

Finally, the court bolstered its holding by stating that "[o]ther state court decisions are in accord with our conclusion on this due process issue."[71] The court cited three rulings from other jurisdictions in support of this conclusion.[72]

III. ANALYSIS

A. The Physical Presence Standard

The Iowa Supreme Court is one of a growing number of state courts[73] that have exceeded the seemingly clear limitations upon use tax jurisdiction enunciated in a consistent[74] line of Supreme Court decisions. According to those decisions, in order for a state to impose tax collection duties upon an extra-territorial retailer, there must be a sufficient connection, or nexus, between the out-of-state seller and the taxing jurisdiction to pass constitutional challenge. In determining whether a sufficient nexus exists, the Court has adopted a physical presence test[75] whereby a state cannot extend its taxing arm to an out-of-state seller unless that seller has either retail outlets, solicitors or property within the taxing state.[76]

The limitation placed upon use tax collection jurisdiction by the physical presence test conforms with the doctrinal requirements underlying both the commerce clause and the due process clause of the Four-

70. *Id.*

71. *Id.*

72. The state cases cited by the court each held that a sufficient nexus existed to support imposition of use tax collection responsibilities upon out-of-state retailers, under facts similar to those in the instant case. *See* Cooey-Bentz Co. v. Lindley, 66 Ohio St. 2d 54, 419 N.E.2d 1087 (1981) (seller directed advertising at consumers in the market state, regularly serviced customers in that state, and could easily identify the destination of goods sold); *In re* Webber Furniture, 290 N.W.2d 865 (S.D. 1980) (seller made regular deliveries in its own truck into the taxing state); Rowe-Genereux, Inc. v. Vermont Dep't. of Taxes, 138 Vt. 130, 411 A.2d 1345 (1980) (seller made deliveries into Vermont in its own truck, did local advertising in Vermont, and performed some installation work in the taxing state).

73. *See* cases cited *supra* note 72.

74. The Supreme Court's decisions in this area have, at times, been characterized as inconsistent. This label can be attributed to Justice Jackson's statement in his opinion for the *Miller Bros.* Court that "[n]or are all of our pronouncements during the experimental period of this type of taxation consistent or reconcilable." 347 U.S. at 344. Nonetheless, the *Miller Bros.* decision and its progeny form a clear basis for establishing the constitutional limitations upon use tax jurisdiction.

75. The Supreme Court has never actually labeled its test. However, this is a convenient and accurate short-hand term for describing the nexus standard in use tax jurisdiction cases.

76. *National Bellas Hess*, 386 U.S. at 758.

teenth Amendment. For example, in *Freeman v. Hewit*, the Court stated that the commerce clause "created an area of trade free from interference by the States . . . State taxation falling on interstate commerce can only be justified as designed to make such commerce bear a fair share of the cost of local government whose protection it enjoys."[77] Thus, the *National Bellas Hess* Court, in reasoning that imposition of a use tax collection responsibility could only be justified on commerce clause grounds if the out-of-state seller had a physical presence in the taxing state,[78] concluded that anything short of a physical presence would impose an undue burden on the extra-state mail order house by forcing it to comply with a myriad of local and state taxing schemes.

It is significant that the *National Bellas Hess* Court for the first time considered the burden of compliance costs as an integral part of the commerce clause analysis in use tax jurisdiction cases.[79] Since National Bellas Hess lacked a physical presence in Illinois, the costs imposed would have had no legitimate tie to the company's fair share of the cost of local government.[80]

Similarly, in determining whether due process clause concerns are met, the "simple but controlling question is whether the state has given

77. 329 U.S. 249, 252-53 (1946). *See also*, Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462 (1959); Central Greyhound Lines, Inc. v. Mealey, 334 U.S. 653, 663 (1948).

78. *National Bellas Hess*, 386 U.S. at 757-58. The majority, in adopting the physical presence test, refused to accept the test put forth by the dissenting justices; namely, whether the out-of-state retailer was engaged in exploiting the "local" market on a large-scale, systematic and continuous basis. *See id.* at 761-62 (Fortas, J., dissenting). In other words, the *National Bellas Hess* Court repudiated the business presence standard. *See* the discussion *infra* at Section B, *The Business Presence Standard*..

79. Justice Stewart, speaking for the *National Bellas Hess* majority, stated that "[I]f the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote." *Id.* at 759. It is interesting to note that at the time *National Bellas Hess* was decided, local sales taxes were imposed by approximately 2,300 localities. *Id.* at 759 n.12. Today, there is an estimated 6500 state and local taxing jurisdictions. ACIR, STATE AND LOCAL TAXATION OF OUT-OF-STATE MAIL ORDER SALES 11 (April 1986). Thus, it is reasonable to conclude that the compliance burdens now would be greatly magnified. Some may argue, on the contrary, that the technological progress in data processing equipment has lessened the cost of compliance. However, small independent border store retailers, the very target of state tax administrators, often do not have the sophisticated systems of larger corporations. In fact, the ACIR study confirms that compliance costs for small firms are much greater than for large retailers. *Id.* at 6, 48-49.

80. *National Bellas Hess*, 386 U.S. at 760. Further, a substantial compliance cost burden was being placed on the out-of-state seller that was not being borne by intrastate retailers. A burden posed on interstate commerce which intrastate commerce does not bear clearly contravenes the commerce clause. McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33, 48 (1940). The interstate-intrastate "equality of burdens" theme is not satisfied by a mere showing that local trade is taxed at the same rate as interstate trade. *Freeman*, 329 U.S. at 254. Thus, in *National Bellas Hess*, the burden on the mail order house to comply with the myriad of taxing schemes was clearly seen to be an excessive burden on interstate commerce.

anything for which it can ask in return."[81] Where an out-of-state retailer has a physical presence within the taxing jurisdiction, this requirement is easily met.[82] For example, the presence of the retailer within the taxing jurisdiction means that it is accorded the benefit of local public services, such as fire and police protection.

In sum, the physical presence test serves an important dual constitutional function. When an out-of-state retailer has a physical presence in the taxing jurisdiction, the benefits derived from that relationship satisfy due process requirements. Additionally, the standard—by factoring compliance costs into the commerce clause analysis—ensures that a state does not unduly burden interstate commerce. Where an extra-territorial seller has no physical presence in a taxing forum, the high costs of compliance, and the resulting burden on interstate commerce, will outweigh the state's need for imposing use tax jurisdiction.[83]

B. The Business Presence Standard

In effect, the *Good's Furniture* court ignored the physical presence standard and instead adopted a standard which I will refer to as the "business presence" test for determining whether an adequate basis existed for extension of use tax collection jurisdiction to an extra-territorial retailer.[84] The Iowa court erroneously viewed *Scripto* and *National Geographic Society* has having eroded the physical presence standard, rather than viewing the factual situations in those cases as simply failing to meet the test clearly evidenced from *Sears* and its progeny.[85]

The business presence standard impliedly requires merely that there be some evidence that an out-of-state retailer is doing business within a given state in order for the state to be able to impose collection responsibilities upon that retailer. For example, in the instant case the Iowa court found that the test was satisfied by two factors: (1) Good's Furniture's television advertisements, although not specifically directed at

81. Wisconsin v. J.C. Penney Co., 311 U.S. 435, 444 (1940).

82. *See, e.g., National Geographic Soc'y*, 430 U.S. at 561; Nelson v. Sears, Roebuck & Co., 312 U.S. 359, 364 (1941).

83. *See generally* Comment, *Use Taxes on Interstate Sales—Mail Order Firms Freed From Collecting Use Tax*, 29 OHIO ST. L.J. 520 (1968).

84. In a recent law review article it is posited that the concept of an economic or business presence nexus is more in tune with the realities of modern commercial operations than a physical presence nexus. McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. REV. 265, 286. Similarly, another commentator recommended that nexus in use tax cases be based on the amount of sales revenues received by a foreign vendor from sales in the forum state. Simet, *The Concept of "Nexus" and State Use and Unapportioned Gross Receipts Taxes*, 73 NW. U.L. REV. 112, 133 (1978).

85. For the court's discussion of *Scripto* and *National Geographic Soc'y.*, see *Good's Furniture*, 382 N.W.2d at 150.

Iowa customers, reached residents in that state,[86] and (2) Good's Furniture delivered merchandise to Iowa residents in its own trucks, with its own employees.[87] Mere business presence, however, expands use tax jurisdiction beyond any limits approved by the Supreme Court.

The absence of such approbation is understandable, since the business presence standard fails to meet the requirements imposed by the commerce and due process clauses. Since advertising is sufficient to sustain a business presence nexus, the out-of-state retailer need have no property or solicitors in the forum state. Therefore, the factual minima required to satisfy constitutional requirements become much more nebulous. For example, to satisfy the due process "benefit test,"[88] one commentator posited that out-of-state retailers receive a benefit through consumer protection and usury laws on mail order transactions. These laws, according to that commentary, create consumer confidence, which is critically important to interstate sales.[89] Any benefit accruing to an out-of-state retailer, and based on consumer confidence, would be impossible to measure. In contrast, it is relatively easy to measure benefits accruing to out-of-state retailers as a result of having property or solicitors in the taxing state.

Significantly, the Court, faced with an opportunity to adopt a business presence standard on several occasions, has indicated a clear reluctance to expand its well-established physical presence nexus standard. In *Miller Brothers*, the Court characterized the difference between a business presence and a physical presence standard as representing a "wide gulf."[90] There, the Court refused to allow Maryland to impose tax collection liabilities upon an extra-state border retailer that had no contacts with the taxing state, other than the incidental effects of general advertising and occasional deliveries via company-owned truck.[91]

86. Good's Furniture's occasional advertising via a Davenport, Iowa television station was not dispositive of the nexus issue because the company's ads were not specifically geared towards Iowa customers. Rather, the Iowa station was used for economic reasons. As explained in Appellant's Brief at 4, Good's Furniture's location in Kewanee was bracketed between television markets in Peoria, Illinois and the Quad Cities area (Moline and Rock Island, Illinois and Davenport and Bettendorf, Iowa). One of three television stations in the Quad Cities area was located in Davenport. Good's Furniture purchased the most economical advertising in each of its markets and, based on price, sometimes advertised through the Davenport station. *Id.* This very situation highlights one of the many problems that results from using advertising as a basis for establishing a use tax jurisdiction nexus. *See* discussion, *infra*, at notes 82-86 and accompanying text.

87. *Good's Furniture*, 382 N.W.2d at 150.

88. *J.C. Penney*, 311 U.S. at 444.

89. McCray, *Overturning Bellas Hess: Due Process Considerations*, 1985 B.Y.U. L. REV. 265, 285.

90. *Miller Bros.*, 340 U.S. at 347.

91. *Id.*

Similarly, in *National Bellas Hess* the Court refused to "obliterate" the distinction between a business presence and a physical presence standard; a standard which, up until that time, had been generally recognized by state taxing authorities.[92] Finally, in *National Geographic Society*, Justice Stewart, writing for the majority, refused to accept California's "slightest presence" standard.[93]

Thus, based on *Miller Brothers*, where the extra-territorial seller's only contacts with the taxing state were the incidental effects of general advertising and occasional deliveries via company-owned truck—in brief, a business presence—precedent clearly dictated a decision in favor of the retailer-taxpayer in *Good's Furniture*. It is obvious that the factual setting in the Iowa case presented the state supreme court with a situation completely analogous to that presented in *Miller Brothers*. Any meaningful attempt to distinguish the two cases would not have enabled the Iowa court to reach a result opposite to that reached in *Miller Brothers*. A decision in favor of Good's Furniture is made even more compelling by the Supreme Court's steadfast refusal to depart from its physical presence standard for imposition of use tax collection liabilities on out-of-state sellers.

Furthermore, the business presence standard is unworkable because it imposes use tax collection duties on border store retailers, such as Good's Furniture, that engage in only incidental advertising in another taxing jurisdiction and, as a result, must respond to the needs of customers who choose to cross jurisdictional boundaries to make purchases.[94] There can be no doubt that in-state solicitation of sales through solicitors or independent contractors provides a sufficient nexus for imposition of tax collection duties.[95] While some courts and commentators argue, however, that a realistic approach to retail business practices compels the conclusion that systematic, continuous solicitation and exploitation of a

92. *National Bellas Hess*, 386 U.S. at 758.

93. *National Geographic Soc'y.*, 430 U.S. at 556. Based on its interpretation of relevant Supreme Court decisions, the California Supreme Court concluded that the *slightest presence* of a seller in California established the requisite nexus to support imposition of use tax collection responsibilities. National Geographic Soc'y. v. California Bd. of Equalization, 16 Cal. 3d 637, 644, 128 Cal. Rptr. 682, 686, 547 P.2d 458, 462 (1977).

94. In cases decided since *Miller Brothers*, the Court has repeatedly recognized that the border store situation is clearly distinguishable from the situations where use tax collection liability had been upheld. In *Scripto*, 362 U.S. at 212, the Court stated that "on the contrary, the goods on which Maryland sought to force Miller [in *Miller Brothers*] to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware . . . Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales." *See also, National Geographic Soc'y.*, 430 U.S. at 559.

95. *See, e.g., Scripto*, 362 U.S. at 207; General Trading Co. v. State Tax Comm'n, 332 U.S. 335 (1944).

market through advertising should be sufficient to satisfy constitutional nexus requirements,[96] this assertion loses its effect when the border store retailing situation is considered. In most cases, where a retail location is close to a taxing border its advertisements inevitably cross the boundary. Rhetorically speaking: How is it that an out-of-state retailer can control television advertisements that are beamed across another state's borders?

Indeed, the problem is more than a border store problem. The existence of satellite television stations and cable television, as well as national magazines and newspapers make a business presence, through advertising, an unworkable basis upon which to establish use tax collection jurisdictional nexus. Such a standard, as that established by the *Good's Furniture* court, means that any retailers advertising in nationwide media could be deputized as state tax collectors in any and all states. Compliance costs in such a situation would most assuredly contravene settled constitutional limitations upon use tax collection jurisdiction.[97] The Supreme Court, with good reason, has expressly excluded "incidental" advertising from the nexus equation.[98] Indeed, the Court has implied that *any* media advertising, whether it is incidental or direct, across state boundaries will be insufficient to pass a nexus test.[99]

C. *Effect of the Good's Furniture Decision*

The effect of the *Good's Furniture* decision, aggregated with similar recent decisions in other state courts[100] is that the physical presence nexus standard is steadily being eroded.[101] In its place, a standard is

96. *See, e.g., National Bellas Hess*, 386 U.S. at 761-62 (Fortas, J., dissenting). Advertising could, conceivably, satisfy a due process challenge by reasoning that the in-state solicitation yields the "benefit" of increased sales for the out-of-state retailer. However, the approach would still fail a commerce clause attack because without a physical presence, the compliance burden on the extra-territorial seller would outweigh the state's need to impose use tax jurisdiction.

97. See the discussion *supra* note 48 and accompanying text.

98. *National Bellas Hess*, 386 U.S. at 758.

99. Notably, the *National Bellas Hess* Court did not characterize the Miller Brothers advertising as "incidental," but rather, described the advertising in direct terms. The Court even mentioned that "substantial sales" had been made by Miller Brothers in Maryland, as a result of advertising. Nonetheless, the *National Bellas Hess* Court reaffirmed the *Miller Bros.* holding. *National Bellas Hess*, 386 U.S. at 758.

100. *See supra* note 61.

101. However, one state court recently refused to follow the trend in expanding state use tax jurisdiction. *See* L.L. Bean, Inc. v. Commonwealth Dep't. of Revenue, 516 A.2d 820 (1986). In that case, L.L. Bean, a mail order seller domiciled in Maine, delivered its merchandise via common carrier into Pennsylvania. L.L. Bean's catalogs were distributed through the mail and were advertised in magazines and newspapers that reached Pennsylvania residents. Additionally, the company maintained an "800" telephone number which out-of-state residents used to place orders. *Id.* at 882. The Department of Revenue determined that these activities constituted a sufficient nexus for imposition of use tax collection responsibilities. The Department argued that the trend in finding the requisite nexus had "moved from the initial requirement of physical property in the state to . . . the

emerging that is neither workable nor compatible with constitutional limitations. Understandably, states are taking independent action to protect erosion of state revenues.[102] These actions stem from an inability to reach mail order and border store retailers as a result of the physical presence test for nexus, and the perceived loss of revenues therefrom.[103] Expedience, from the states' perspective, cannot override constitutional concerns, however.[104]

The Supreme Court has demonstrated, in recent years, a reluctance to address the use tax collection jurisdiction issue further by indicating that jurisdictional questions are properly within the legislative domain of Congress.[105] Moreover, litigation would be a slow and costly process in which many possible criteria for nexus would have to be tested, perhaps one at a time, before establishing a clear definition of the standard.[106]

Where the collection of a tax is not compatible with constitutional protections, it cannot be made compatible through independent state actions.[107] Consequently, unless Congress acts to modify the nexus standards, balancing both the interest of the state tax administrators with the interests of the out-of-state retailers, the constitutional safeguards must prevail.[108]

consideration of the 'totality of business activities in a certain state.' " *Id.* at 825. The court declined to accept the business presence standard; it concluded that L.L. Bean's contacts with Pennsylvania were less substantial than those in *Miller Bros.* Thus, imposition of use tax collection duties on this out-of-state mail order company would contravene due process and commerce clause limitations. *Id.* at 825-26.

102. For example, states are forming compacts to reduce use tax advoidance on retail sales made by extra-territorial retailers in one state, but received by a customer in the market state. Illinois, Indiana, Michigan, Minnesota, and Wisconsin have entered into the Great Lakes Interstate Sales Compact (Wisconsin subsequently withdrew from the Compact, by Executive Order of the Governor, on August 31, 1987). Similarly, Pennsylvania, New York and Ohio have entered into such agreements. States are also attempting state legislative enactments to expand nexus requirements for use tax jurisdiction. *See supra* note 12.

103. *See supra* note 7 and accompanying text.

104. As the Supreme Court noted in *J.C. Penney Co.*, 311 U.S. at 444: "[T]he limits on the otherwise autonomous powers of the states are those in the Constitution."

105. *See, e.g.*, Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1977) and *National Bellas Hess*, 386 U.S. at 760 ("Under the Constitution this is a domain where Congress alone has the power of regulation and control.").

106. ACIR, STATE AND LOCAL TAXATION OF OUT-OF-STATE MAIL ORDER SALES 82 (April 1986).

107. Governor James Thompson made this very point when he vetoed the Illinois legislators' attempt to expand Illinois' use tax jurisdiction in S.B. 2037, Laws 1986. The Governor stated that "[A]lthough the goal of Senate Bill 2037 is laudable, this goal must be met through federal action to overturn . . . previous U.S. Supreme Court decisions. Attempts of a single state . . . to legislate an issue which can only be legislated by Congress will result in further constitutional challenges and litigation . . ." Governor James R. Thompson of Illinois, Veto Message, S.B. 2037, Laws 1986 (September 18, 1986).

108. Two bills were recently introduced in Congress that, if enacted, will relax the nexus standards for imposition of tax collection jurisdiction. One bill, the Equity in Interstate Competition Act of 1987, H.R. 1891, will permit a state to tax interstate sales if (1) the sale was destined for the taxing

CONCLUSION

The factual setting in *Good's Furniture* presented the Iowa Supreme Court with a situation completely analogous to that presented in *Miller Brothers*. Also, except for some local advertising and deliveries via company-owned truck, the situation in *Good's Furniture* was similar to that addressed by the Supreme Court in *National Bellas Hess*. Both of those cases should have dictated the outcome in the instant case.

Instead, to reach the opposite result, the *Good's Furniture* court adopted a business presence standard, predicated on advertising and delivery connections, both of which had been previously rejected by the Supreme Court as bases for imposing use tax collection responsibilities on out-of-state retailers. The Iowa Supreme Court exceeded the settled limitations upon use tax collection jurisdiction as enumerated in a consistent line of Supreme Court decisions. Under the physical presence standard established by the Court, which is still valid today, the presence of a retail store, property, or solicitors is needed to satisfy constitutional requirements.

Further, the *Good's Furniture* court gave tacit approval to a disconcerting trend which has developed in recent years. Namely, state attempts to expand use tax jurisdiction (and, correspondingly, revenues) by passing seemingly unconstitutional statutes relying on a business presence standard. Arguably, advertising technological innovations require a use tax jurisdictional standard less restrictive than the current physical presence standard. However, only Congress can exercise its broad powers to regulate commerce, and modify the use tax nexus standards.

CHRIS M. AMANTEA

state, (2) the seller engaged in regular or systematic soliciting of sales in such state, and (3) the seller had gross receipts from sales in the United States exceeding $12,500,000, or $500,000 in the taxing state in a one year period. H.R. 1891, 100th Cong., 1st Sess. § 2 (1987) (The provisions of this bill are essentially the same as those in H.R. 5021, 99th Cong., 2d Sess. § 2 (1986), which died in the House Judiciary Committee.).

Another bill introduced in the House of Representatives, the Interstate Sales Tax Collection Act of 1987, H.R. 1242, will allow any state to collect sales or use tax on tangible personal property shipped or delivered into the taxing state by a retailer engaged in business in the taxing state. A "retailer engaged in business" includes any retailer soliciting orders for tangible personal property by means of advertising in the taxing state. Also included are out-of-state vendors utilizing "substantial and recurring" mail solicitations in the taxing state, provided certain enumerated in-state benefits are realized by the vendor. To fall within the Act's provisions, a retailer's nationwide gross sales of tangible personal property must exceed $5,000,000 annually. H.R. 1242, 100th Cong., 1st Sess. § 2 (1987).

Both pieces of legislation implicitly recognize the burden of high compliance costs on small retailers by adopting a *de minimis* sales provision. Note that even under federal legislation, Good's Furniture would not have been subject to Iowa's use tax collection jurisdiction.

INDEX

TO

VOLUME 63