APPENDIX

TABLE OF CONTENTS

APPENDIX A

IN THE SUPREME COURT OF NORTH CAROLINA

2022-NCSC-133

No. 407A21

Filed 16 December 2022

QUAD GRAPHICS, INC.

v.

N.C. DEPARTMENT OF REVENUE

Appeal pursuant to N.C.G.S. § 7A-27(a)(2) from the order and opinion entered on 23 June 2021 by Judge Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases, in Superior Court, Wake County, granting summary judgment in favor of petitioner after the case was designated a mandatory complex business case by the Chief Justice pursuant to N.C.G.S. § 7A-45.4(b). Heard in the Supreme Court on 30 August 2022.

Akerman, LLP, by Michael J. Bowen, pro hac vice; and Douglas W. Hanna for petitioner-appellee.

Joshua H. Stein, Attorney General, by Ryan Y. Park, Solicitor General, and Ashley Hodges Morgan, Special Deputy Attorney General, for respondent-appellant.

Poyner Spruill LLP, by Caroline P. Mackie; and Caroline S. Van Zile, Principal Deputy Solicitor General for the District of Columbia, for Steve Marshall, Attorney General for the State of Alabama, Treg R. Taylor, Attorney General for the State of Alaska, Philip J. Weiser, Attorney General for the State of Colorado, Karl A. Racine, Attorney

General for the District of Columbia, William Tong, Attorney General for the State of Connecticut, Lawrence G. Wasden, Attorney General for the State of Idaho, Kwame Raoul, Attorney General for the State of Illinois, Theodore E. Rokita, Attorney General for the State of Indiana, Thomas J. Miller, Attorney General for the State of Iowa, Brian E. Frosh, Attorney General for the State of Maryland, Maura Healey, Attorney General for the Commonwealth of Massachusetts, Keith Ellison, Attorney General for the State of Minnesota, Aaron D. Ford, Attorney General for the State of Nevada, Andrew J. Bruck, Acting Attorney General for the State of New Jersey, Hector Balderas, Attorney General for the State of New Mexico, Letitia James, Attorney General for the State of New York, Wayne Stenehjem, Attorney General for the State of North Dakota, Josh Shapiro, Attorney General for the Commonwealth of Pennsylvania, Peter F. Neronha, Attorney General for the State of Rhode Island, Thomas J. Donovan Jr., Attorney General for the State of Vermont, and Robert W. Ferguson, Attorney General for the State of Washington, amici curiae.

Q Byrd Law, by Quintin D. Byrd; and Richard Cram, pro hac vice, for Multistate Tax Commission, amicus curiae.

William W. Nelson for North Carolina Chamber Legal Institute, amicus curiae.

MORGAN, Justice.

¶ 1 Respondent appeals from the Business Court's decision, in which the tribunal had concluded that the sales of printed materials produced by Wisconsin-

based petitioner out of state and shipped to its customers and their designees located within North Carolina lacked a sufficient nexus to North Carolina for the imposition of state sales tax under the Commerce Clause of the Constitution of the United States in light of the Supreme Court of the United States' decision in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944). The question we are tasked with answering on appeal is whether *Dilworth* remains controlling precedent in this case or if subsequent Supreme Court decisions supersede *Dilworth*'s holding and provide an alternative method for determining the constitutionality of North Carolina's sales tax regime. Because *Complete Auto Transit Inc. v. Brady*, 430 U.S. 274 (1977), provides the relevant modern test for the imposition of a state tax on interstate commerce and because *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018), applies this test to a tax regime materially identical to that of North Carolina without regard for *Dilworth*'s holding, we hold in favor of respondent and reverse the Business Court's decision below.

I. Factual and Procedural Background

¶ 2 The facts of this case are neither particularly complicated nor in dispute. Petitioner is an S-Corporation headquartered in Sussex, Wisconsin. Petitioner is engaged in the production and sale of printed materials, including books, magazines, catalogs, and other items, for distribution across the United States. Between 2009 and 2011, petitioner processed approximately $20 million worth of orders for delivery to customers or third-party recipients located in North Carolina. Petitioner's materials are printed at commercial printing facilities throughout the United States, but no such facility was located in North Carolina during the time period at issue. After producing the purchased materials at a facility

located out of state, petitioner would deliver customers' orders to the United States Postal Service or another common carrier located outside of North Carolina for delivery to in-state customers or their third-party representatives. According to its sales contracts, possession, legal title, and risk of loss for any ordered materials passed from petitioner to its customers when those materials were delivered to carriers outside of North Carolina. Petitioner employs sales representatives throughout the United States. Beginning in September 2009, petitioner employed a sales representative in North Carolina who solicited sales to customers both inside and outside of the state.

¶ 3 Respondent North Carolina Department of Revenue is an agency of the State of North Carolina which administers the state's tax collection system. In 2011, respondent conducted an audit related to petitioner's collection of sales and use tax within North Carolina for the period between 1 January 2007 and 31 December 2011. On 12 November 2015, respondent issued a Notice of Proposed Sales and Use Tax Assessment finding petitioner liable for uncollected and unremitted sales tax for sales to North Carolina customers between 1 January 2007 and 31 December 2011. Petitioner appealed respondent's Notice of Assessment through respondent's departmental review process. Upon review, respondent found that petitioner was a retailer engaged in business in North Carolina as it maintained a resident employee to solicit sales and service customer accounts within the state. Respondent also found that petitioner had failed to establish that its customers took possession of purchased materials outside of North Carolina and, as such, concluded that the sales were properly sourced to the state under North Carolina's sourcing statute N.C.G.S. § 105-164.4B, since the materials were received by

petitioner's customers or their designees within the state.[1] However, respondent found that the Department had been unable to establish that petitioner had sufficient business activity in North Carolina to create the nexus for the imposition of sales and use tax prior to September 2009 based on petitioner's lack of physical presence in the state until that time. On 30 November 2018, after removing sales predating September 2009 as well as other exempt transactions and adjusting the assessment accordingly, respondent issued a Notice of Final Determination upholding the imposition of uncollected and unremitted sales tax in the amount of $3,238,022.52 from sales made between 1 September 2009 and 31 December 2011.

¶ 4 On 28 January 2019, petitioner appealed respondent's Notice of Final Determination and filed a petition with the Office of Administrative Hearings (OAH) advancing the following arguments: (I) that the disputed transactions were not subject to North Carolina retail sales or use tax because all relevant aspects of the transactions took place outside of the state, (II) that the assessment of North Carolina sales and use tax on these transactions violated the Due Process Clause and Commerce Clause of the Constitution of the United

[1] Section 105-164.4B of the North Carolina General Statutes provides sourcing principles for the imposition of sales tax on sellers of goods delivered to in-state purchasers or their designees. In relevant part, the statute provides that "[w]hen a purchaser receives a product at a location specified by the purchaser . . . , the sale is sourced to the location where the purchaser receives the product[,]" N.C.G.S. § 105-164.4B(a)(2) (2009), and that "[d]irect mail . . . is sourced to the location where the property is delivered" when "the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered[,]" N.C.G.S. § 105-164.4B(d)(2) (2009). This is known as "destination-based" sourcing, which defines the site of a sale of tangible property based on the item's destination and has been adopted by a majority of the states.

States, and (III) that the specific transactions included in respondent's assessment should have been excluded or were otherwise exempt from North Carolina sales and use tax. Petitioner removed Claim III from its petition but pursued Claims I and II before the OAH. On 24 June 2020, after petitioner and respondent filed cross-motions for summary judgment, Administrative Law Judge Melissa Owens Lassiter entered a Final Decision granting respondent's motion for summary judgment and dismissing petitioner's case with prejudice.

¶ 5 The OAH's Final Decision held that petitioner was a "retailer" as defined by N.C.G.S. § 105-164.3(35)(a) and was therefore obligated to collect and remit sales tax pursuant to N.C.G.S. §§ 105-164.8 and 105-164.4B. Furthermore, although the OAH acknowledged that it "has not been given jurisdiction to determine the constitutionality of legislative enactments[,]" quoting *In re Redmond*, 369 N.C. 490, 493 (2017), it opined that petitioner had sufficient nexus with North Carolina for respondent to impose sales tax on the sales in question. Finally, the Final Decision announced that the sales at issue were properly sourced to North Carolina as set forth in the state's sourcing statute. *See* N.C.G.S. § 105-164.4B(a)(2), (d)(2) (2009).

¶ 6 On 24 July 2020, petitioner petitioned for judicial review of the OAH's Final Decision to the Business Court pursuant to N.C.G.S. § 105-241.16, designating the case as a mandatory complex business case pursuant to N.C.G.S. § 7A-45.4. The matter was assigned to the Honorable Louis A. Bledsoe III, Chief Business Court Judge on the same day. On 20 August 2020, petitioner filed an Amended Petition for Judicial Review. On 24 September 2020, the parties stipulated to the official record of the proceedings at the OAH. On 2 October 2020, the Business Court issued an Order and Opinion on various motions filed by the parties, including

a denial of respondent's motion to dismiss petitioner's amended petition for judicial review. Between 26 October 2020 and 10 December 2020, the parties filed their briefs, responses, and replies with the Business Court. On 6 January 2021, the case was reassigned to the Honorable Gregory P. McGuire, Special Superior Court Judge for Complex Business Cases. The parties appeared for a hearing on 2 February 2021. On 27 May 2021, the Business Court issued a Notice to Provide Supplemental Briefing; in response, the parties filed supplemental briefs on 11 June 2021.

¶ 7 On appeal before the Business Court, petitioner argued that (1) the OAH erred in holding that petitioner was a "retailer" under the provisions of N.C.G.S. § 105-164.3(35)(a) that was required to pay sales tax to North Carolina on the sales at issue under the provisions of the Act, and (2) respondent's assessment of sales tax on the sales at issue was unconstitutional under the Due Process Clause and Commerce Clause of the Constitution of the United States. On 23 June 2021, the Business Court held in favor of petitioner, reversing the OAH's Final Decision and granting summary judgment in favor of petitioner. The Business Court first considered petitioner's argument that it was misclassified as a "retailer" under N.C.G.S. § 105-164.3(35) because the transfer of title and possession to the printed materials took place outside of North Carolina and a person must make sales "in this State" to be classified as a retailer under the statute. *See* N.C.G.S. § 105-164.3(35) (2009). The Business Court rejected this argument, concluding that the OAH had correctly held that petitioner was a "retailer" within the meaning of N.C.G.S. § 105-164.3(35). This issue has not been briefed to this Court and is not the subject of our review.

¶ 8 The Business Court next considered petitioner's contention that North Carolina's imposition of

sales tax on the sales at issue—where title and possession of the printed materials arguably transferred to purchasers and third-party recipients located in North Carolina before the materials entered the state—was unconstitutional under the Commerce Clause of the Constitution of the United States in light of the Supreme Court's decision in *Dilworth*. The Business Court discredited respondent's assertion that the decisions of the Supreme Court of the United States in *Complete Auto* and *Wayfair* overruled *Dilworth* formalism, and therefore concluded that *Dilworth* remains controlling precedent in this case. The Business Court accordingly granted summary judgment to petitioner on the basis that North Carolina did not have a sufficient nexus with the sales at issue under the Commerce Clause to impose sales tax on them, reversing the OAH's Final Decision. On 1 July 2021, the matter was reassigned to the Honorable Mark A. Davis, Special Superior Court Judge for Complex Business Cases. On 22 July 2021, respondent filed a notice of appeal directly to this Court pursuant to N.C.G.S. § 7A-27(a)(2). On the same day, respondent filed a motion to stay execution of the Business Court's 23 June 2021 Order and Opinion with the Superior Court pending the outcome of this appeal. The trial court granted this motion on 5 October 2021.

II. Analysis

¶ 9 Appeals arising from orders granting summary judgment are decided under a de novo standard of review. *Dallaire v. Bank of Am., N.A.*, 367 N.C. 363, 367 (2014). Under this standard, the Court considers the matter anew and freely substitutes its judgment for that of the lower court or administrative agency. *Midrex Techs. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257 (2016); *N.C. Dep't of Env't & Nat. Res. v. Carroll*, 358 N.C. 649, 660 (2004). Since the Business Court granted summary

judgment to petitioner, we shall consider the questions of law underlying the decision anew and freely substitute our own judgment for the conclusion of the Business Court. The sole question before this Court is whether the holding of the Supreme Court of the United States in *Dilworth* controls the outcome of the case at bar. Based on the high court's subsequent decisions in *Complete Auto* and *Wayfair*, we hold that *Dilworth* does not govern the present case. We further conclude that North Carolina's imposition of sales tax on the purchases at issue in this case does not violate either the Commerce Clause or the Due Process Clause of the Constitution of the United States under the relevant modern test provided by *Complete Auto*.

A. *Dilworth*'s status in modern Commerce Clause jurisprudence

¶ 10 On 15 May 1944, the Supreme Court of the United States issued its opinions in both *Dilworth* and *Dilworth*'s companion case *General Trading Co. v. State Tax Comm'n*, 322 U.S. 335 (1944). In *Dilworth*, the Supreme Court determined that the state of Arkansas had no authority under the Commerce Clause of the Constitution of the United States to impose a tax on the sale of machinery or mill supplies purchased from Tennessee corporations which did not have any offices, branches, or other places of business located within Arkansas, where title passed upon delivery to a common carrier within Tennessee before the goods were ultimately brought into Arkansas for delivery to Arkansas customers. *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 330 (1944). Since these sales were, in the high court's view, "consummated in Tennessee for the delivery of goods in Arkansas[,]" Arkansas could not tax them without "project[ing] its powers beyond its boundaries and . . . tax[ing] an interstate transaction." *Id.* at 328, 330. As

such, the Supreme Court determined that Arkansas was prohibited from doing so under the then-prevailing interpretation of the Commerce Clause as categorically barring states from taxing interstate commerce, which was seen as residing within the exclusive province of Congress. *Id.* at 330.

¶ 11 Meanwhile, in *General Trading*, the Supreme Court of the United States upheld the imposition of an Iowa use tax levied against property brought into Iowa from the state of Minnesota for customers located within Iowa's boundaries even though the Minnesota company whose goods were subject to the tax and which was required to collect and then to remit the tax back to Iowa maintained no offices or other places of business within the state. *General Trading*, 322 U.S. at 336. According to the Supreme Court in its opinion in *General Trading*, Iowa's imposition of a *use* tax did not tax the "privilege of doing interstate business," but rather the privilege of enjoying one's property within the state, regardless of its origin. *Id.* at 338. Requiring the Minnesota seller to collect the tax was, in the Supreme Court's view, simply a "familiar and sanctioned device" to implement a use tax against the ultimate consumer, an Iowa resident. *Id.* The high court thus justified Iowa's imposition of the tax on the grounds that:

> Of course, no State can tax the privilege of doing interstate business. That is within the protection of the Commerce Clause and subject to the power of Congress. On the other hand, the mere fact that property is used for interstate commerce or has come into an owner's possession as a result of interstate commerce does not diminish the protection which he may draw from a State to the upkeep of which he may be asked to bear his fair share.

Id. (citation omitted). As Justice Douglas noted in his dissent in *Dilworth*, however, the Supreme Court's categorical rejection of the imposition of state sales tax and its simultaneous countenance of a complementary use tax on the same transactions had no practical effect on the ability of states to tax the receipt of goods from out of state. *Dilworth*, 322 U.S. at 333–34 (Douglas, J., dissenting) ("But a use tax and a sales tax applied at the very end of an interstate transaction have precisely the same economic incidence. Their effect on interstate commerce is identical . . . there should be no difference in result under the Commerce Clause where, as here, the practical impact on the interstate transaction is the same.").

¶ 12 The *Dilworth* majority addressed this apparent contradiction by acknowledging that, although a "sale[s] tax and a use tax in many instances may bring about the same result[,]" the two forms of tax "are different in conception, are assessments upon different transactions, and . . . may have to justify themselves on different constitutional grounds." *Id.* at 330. In particular, the high court's majority emphasized that a "sales tax is a tax on the freedom to purchase" whereas a "use tax is a tax on the enjoyment of that which was purchased." *Id.* A use tax, according to the Supreme Court, was imposed only after the sale "had spent its interstate character" and therefore did not amount to a taxation of interstate commerce itself. *Id.* at 331. The Supreme Court thus reasoned that only the imposition of interstate sales tax by the states was prohibited by the Commerce Clause:

> In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold, involves an assumption of power by a State which the

> Commerce Clause was meant to end. The very purpose of the Commerce Clause was to create an area of free trade among the several States.

Id. at 330. This "free trade" philosophy laid the groundwork for the subsequent decisions of the Supreme Court of the United States in cases such as *Freeman v. Hewit*, 329 U.S. 249, 252 (1946) (holding that the Commerce Clause does not "merely forbid a State to single out interstate commerce for hostile action" but precludes it from "taking any action which may fairly be deemed to have the effect of impeding the free flow of trade between States"), and *Spector Motor Serv. v. O'Connor*, 340 U.S. 602, 603–10 (1951) (striking down a nondiscriminatory "privilege of doing business" franchise tax as imposed by Connecticut against a foreign corporation only engaged in interstate commerce on the basis that Congress has the exclusive power to tax the privilege of engaging in interstate commerce).

¶ 13 Nearly thirty years later, the Supreme Court began to disassociate its approach in this legal arena from the strict formalism that had characterized *Dilworth* and the *Dilworth* progeny. In 1977, the high court chose to expressly overrule *Freeman* and *Spector*, utilizing its opinion in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) to disavow the "free trade" theory which was articulated in *Dilworth*. Complete Auto Transit, Inc. was a Michigan corporation contracted for the purpose of transporting motor vehicles manufactured by General Motors Corporation outside of the state of Mississippi from a railhead in Jackson, Mississippi to dealers throughout the state. *Id.* at 276. Complete Auto argued that Mississippi did not have authority to impose a sales tax upon its transportation services since the company was "but one part of an interstate movement" and therefore immune to state taxation under the precedent set by cases such as *Freeman* and *Spector*. *Id.* at 277–78.

In *Complete Auto*, the Supreme Court acknowledged that *Freeman* and *Spector* had "reflect[ed] an underlying philosophy that interstate commerce should enjoy a sort of 'free trade' immunity from state taxation[,]" but the high court opted to follow the path paved by more recent decisions considering "not the formal language of the tax statute, but rather its practical effect." *Id.* at 278–79. The Supreme Court criticized the *Spector* rule's "holding that a tax on the 'privilege' of engaging in an activity in the State may not be applied to an activity that is part of interstate commerce" as having "no relationship to economic realities[,]" and rejected its blanket prohibition against the imposition of a direct tax on interstate sales regardless of whether it was fairly apportioned or nondiscriminatory. *Id.*

¶ 14 The Supreme Court in *Complete Auto* "abandoned the abstract notion that interstate commerce 'itself' cannot be taxed by the States[,]" recognizing, in its place, that "interstate commerce may be required to pay its fair share of state taxes." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30–31 (1988). Alternatively, the high court elected to follow the line of cases sustaining taxes against Commerce Clause challenges where they "applied to an activity with a substantial nexus with the taxing State, [were] fairly apportioned, [did] not discriminate against interstate commerce, and [were] fairly related to the services provided by the State." *Complete Auto*, 430 U.S. at 279. This has become known as *Complete Auto*'s "four-part formulation" and provides the modern test for determining the constitutionality of a state tax imposed on interstate commerce regardless of its formal designation.

¶ 15 The *Complete Auto* test has since been applied to determine the constitutionality of various taxes levied against interstate commerce. *D.H. Holmes*, 486 U.S.at 30; *see, e.g., Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514

U.S. 175 (1995), *superseded by statute on other grounds*. These cases have made clear that *Complete Auto*'s declaration required the rejection of outdated precedent that "proscribed all taxation formally levied upon interstate commerce" or encouraged legal gamesmanship by drawing artificial boundaries around taxes that differed in form but not substance. *Id.* at 183 ("[W]e categorically abandoned . . . [such] formalism when [*Complete Auto* . . .] overruled *Spector* and *Freeman*."); *see also Dep't of Revenue. v. Ass'n of Wash. Stevedoring Cos.*, 435 U.S. 734, 745 (1978) ("Because the tax in the present case is indistinguishable from the taxes at issue in *Puget Sound* and in *Carter & Weekes* [prohibiting state taxation of the gross receipts of businesses involved in the unloading of interstate cargo vessels on the grounds that such taxes were prohibited by the Commerce Clause], the *Stevedoring Cases* control today's decision on the Commerce Clause issue *unless more recent precedent and a new analysis require rejection of their reasoning*. We conclude that *Complete Auto* . . . requires such rejection.") (emphasis added). *Cf. Quill Corp. v. North Dakota*, 504 U.S. 298, 310–11 (1992) ("*Complete Auto* rejected *Freeman* and *Spector*'s formal distinction between 'direct' and 'indirect' taxes on interstate commerce because that formalism allowed the validity of statutes to hinge on 'legal terminology,' 'draftsmanship and phraseology.' " (citation omitted)), *overruled on other grounds by South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018).

¶ 16 The *Dilworth/General Trading* dichotomy was exactly such a formalistic distinction that turned upon legal draftsmanship as opposed to differences in the practical effect of a use tax as compared to a sales tax. It would further appear that the Supreme Court of the United States has wholly abandoned the free trade theory which had provided for the distinction's unsteady

foundation. *See Complete Auto*, 430 U.S. at 278–79. In the instant case, however, petitioner and its amicus curiae caution that this Court is not authorized to engage in an "anticipatory overruling" of Supreme Court precedent interpreting federal law, regardless of how "moth-eaten" its underlying logic has become. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the U.S. Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [other courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions."). Nonetheless, there is no "magic words" requirement that must be used for the nation's premier legal forum to overrule its own precedent; indeed, it may implicitly overrule precedent by issuing a decision in direct contradiction with its prior holdings. *See Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344 (1954) ("Our decisions are not always clear as to the grounds on which a tax is supported, especially where more than one exists; nor are all of our pronouncements . . . consistent or reconcilable. A few have been specifically overruled, while others no longer fully represent the present state of the law."). Where two precedents are flatly irreconcilable, the latter in time controls.

B. *Wayfair*'s application of *Complete Auto* to North Dakota's sales tax regime

¶ 17 We are in the fortuitous position of not having to discern whether *Dilworth* was automatically retained within the Supreme Court's decision in *Complete Auto* or whether we were compelled to engage in an anticipatory overruling of a federal precedent whose underlying logic has been abandoned but whose direct holding has never been specifically readdressed. Instead, we can confidently look to the application by the Supreme Court of the

United States of the *Complete Auto* test to a materially identical tax regime in *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018) to guide our analysis. Since *Wayfair* is directly applicable to the case before us, its holding supersedes *Dilworth* to the extent that the two precedents are in conflict with one another and guide our own path forward.

¶ 18 *Wayfair* overruled a line of precedent which prohibited states from requiring sellers to collect and to remit state sales or use tax unless they maintained a physical presence within the state. *See Nat'l Bellas Hess, Inc. v. Dep't of Revenue*, 386 U. S. 753 (1967); *Quill* Corp. *v. North Dakota*, 504 U. S. 298 (1992). In 2016, the state of South Dakota enacted "An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency" and invited the Supreme Court to reconsider this precedent in light of the fact that the modern proliferation of remote e-commerce vendors like Wayfair was "seriously eroding the sales tax base" and "causing revenue losses and imminent harm . . . through the loss of critical funding for state and local services." *Wayfair*, 138 S. Ct. at 2088 (alteration in original) (quoting S.B. 106, 2016 Leg. Assembly, 91st Sess. § 8(1) (S.D. 2016) (S.B. 106)). The Act required sellers who delivered more than $100,000 worth of goods to South Dakota customers or made more than 200 individual transactions for the delivery of goods into the state to collect and remit sales tax "as if [they] had a physical presence in the State." *Id.* at 2089 (quoting S.B. 106, § 1).

¶ 19 Wayfair challenged the South Dakota law under the Supreme Court's precedent in *Quill*, which affirmed the rule articulated in *Bellas Hess* that a state may not require a seller without any physical presence within the state to collect and remit sales or use tax for the sale of goods for delivery into the state. *Quill*, 504 U.S.

298. *Bellas Hess*, which was decided prior to the Supreme Court's decision in *Complete Auto*, held that requiring sellers "whose only connection with customers in the State [was] by common carrier or . . . mail" to collect and remit state use tax both "violate[d] the Due Process Clause of the Fourteenth Amendment and create[d] an unconstitutional burden upon interstate commerce[,]" in violation of the Commerce Clause. *Bellas Hess*, 386 U.S. at 756, 758. In *Quill*, the high court overturned the due process holding in *Bellas Hess* on the grounds that its "due process jurisprudence ha[d] evolved substantially in the 25 years since *Bellas Hess*," abandoning "formalistic tests" concerning a defendant's presence within the forum state for a "more flexible inquiry into whether a defendant's contacts with the forum made it reasonable . . . to require it to defend the suit in that State." *Quill*, 504 U.S. at 307. The high court went on to say that:

> Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign." In "modern commercial life" it matters little that such solicitation is accomplished by a deluge of catalogs rather than a phalanx of drummers: The requirements of due process are met irrespective of a corporation's lack of physical presence in the taxing State. Thus, to the extent that our decisions have indicated that the Due Process Clause requires physical presence in a State for the imposition of duty to collect a use tax, we overrule those holdings as superseded by developments in the law of due process.

> In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill.

Id. at 308 (alterations in original) (citation omitted). The Supreme Court did not, however, overrule the holding in *Bellas Hess* that such an imposition was in violation of the Commerce Clause. The high court distinguished the physical presence requirement in *Bellas Hess* from those distinctions articulated in other cases that had been overturned by its decision in *Complete Auto* by explaining that:

> *Complete Auto*, it is true, renounced *Freeman* and its progeny as "formalistic." But not all formalism is alike. *Spector*'s formal distinction between taxes on the "privilege of doing business" and all other taxes served no purpose within our Commerce Clause jurisprudence, but stood "only as a trap for the unwary draftsman." In contrast, the bright-line rule of *Bellas Hess* furthers the ends of the dormant Commerce Clause. Undue burdens on interstate commerce may be avoided not only by a case-by-case evaluation of the actual burdens imposed by particular regulations or taxes, but also, in some situations, by the demarcation of a discrete realm of commercial activity that is free from interstate taxation. *Bellas Hess* followed the latter approach and created a safe harbor for vendors "whose only connection with customers

> in the [taxing] State is by common carrier or the United States mail." Under *Bellas Hess*, such vendors are free from state-imposed duties to collect sales and use taxes.

Id. at 314–15 (alteration in original) (citations omitted). Instead, the Court in *Quill* held that *Complete Auto* had incorporated *Bellas Hess*'s physical presence rule into the first prong of its four-part test. *Id.* at 311 ("*Bellas Hess* . . . stands for the proposition that a vendor whose only contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause.").

¶ 20 Citing these cases as binding precedent, Wayfair moved for, and was granted, summary judgment in its favor at the state trial court level on the grounds that it did not have substantial nexus with South Dakota due to the lack of physical presence within the state. The South Dakota Supreme Court affirmed the lower court's decision pursuant to *Quill* and South Dakota petitioned the Supreme Court of the United States for a writ of certiorari.

¶ 21 After South Dakota had petitioned for a writ of certiorari, but before the Supreme Court agreed to hear the case, contemporary tax commentators faulted the state for drafting its Act to "attack the physical presence rule only in the context of sales taxes[,]" thereby raising the specter not only of *Bellas Hess* and *Quill*, but of *Dilworth* and its progeny. Hayes R. Holderness & Matthew C. Boch, *Did South Dakota Neglect Transactional Nexus in Its Bill to Kill Quill?*, Bloomberg BNA (Dec. 6, 2017) [hereinafter Holderness & Boch, *Did South Dakota Neglect Transactional Nexus*]. Specifically, despite a dearth of cases explicitly acknowledging such a distinction, academics had begun to identify that *Complete Auto*'s "substantial nexus" requirement could be broken down into two, separate

inquiries: first, so-called "personal" or "entity nexus" which requires each taxed *entity* to have a substantial connection to the taxing state (and, under the precedent set by *Bellas Hess* and *Quill*, to maintain a physical presence within the state), and second, so-called "transactional nexus," which requires each taxed *transaction* to have a substantial connection to the taxing state. *See* Jeffrey A. Friedman & Kendall L. Houghton, *The Other Nexus: Transactional Nexus and the Commerce Clause*, 4 St. & Local Tax Law., 19, 22–33 (1999). According to some legal scholars, *Dilworth* had been incorporated in part into *Complete Auto* through the concept of transactional nexus, and therefore states remained prohibited from imposing sales tax on transactions for goods delivered into the state by common carrier where title and possession transferred outside of the taxing state for lack of sufficient nexus even where a complementary use tax would be upheld. *See id.*; Breen M. Schiller & Daniel L. Stanley, *Nexus News: The Reemergence of Transactional Nexus*, J. St. Taxation 9, 11–12 (Winter 2021).

¶ 22 These commentators theorized that South Dakota's "oversight" in drafting its Act to require remote sellers shipping their goods into the state to collect sales tax but not use tax might impact the *Wayfair* case in one of four ways: (1) the Court might deny certiorari on the grounds that the Act addressed only sales tax; (2) the Court might grant certiorari and revisit not only *Quill*, but also *Dilworth*; (3) the Court might grant certiorari and note that South Dakota would have to extend its statute to cover use tax before it could require such tax to be collected pursuant to *Dilworth*; or (4) the Court might grant certiorari and overrule *Quill* without addressing *Dilworth* or its progeny, thereby "implicitly suggesting that the transactional nexus distinction between sales and use taxes is of little or no importance." Holderness &

Boch, *Did South Dakota Neglect Transactional Nexus*. Indeed, the Court, without ever addressing *Dilworth*, overruled *Quill* and held that there was sufficient nexus between Wayfair and South Dakota for the imposition of sales tax.

¶ 23 The Supreme Court accepted South Dakota's invitation to reconsider the physical presence requirement established in *Bellas Hess* and held to have been incorporated into the *Complete Auto* test in *Quill*. The high court decided to overrule both *Bellas Hess* and *Quill* on the grounds that the "physical presence rule . . . [was] unsound and incorrect." *Wayfair*, 138 S. Ct. at 2099. The Supreme Court held that the physical presence rule was "not a necessary interpretation of *Complete Auto*'s nexus requirement" but, rather, was closely related to the minimum contacts required under the Due Process Clause of the Fourteenth Amendment. *Id.* at 2085. However, as *Quill* itself had ceded, "a business need not have a physical presence in a State to satisfy the demands of due process." *Id.* at 2093.

¶ 24 Further, the *Wayfair* Court explicitly repudiated the formalistic Commerce Clause jurisprudence of eras past as incompatible with modern legal precedents and economic realities. *Id.* at 2094. The high court pointed out the recognition that *Complete Auto* and its progeny had "eschewed formalism for a sensitive, case-by-case analysis of purposes and effects." *Id.* (quoting *West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 201 (1994)). The Supreme Court instead held that:

> So long as a state law avoids "any effect forbidden by the Commerce Clause," courts should not rely on anachronistic formalisms to invalidate it. The basic principles of the Court's Commerce Clause jurisprudence are grounded in functional, marketplace dynamics; and States

> can and should consider those realities in enacting and enforcing their tax laws.

Id. at 2094–95 (citation omitted). Even though the *Wayfair* Court clearly understood that South Dakota's statute at issue involved the imposition of sales tax and not use tax, nonetheless the highest tribunal did not draw any legal distinction between the two. *See Wayfair*, 138 S. Ct. at 2089 ("[T]he Act requires out-of-state sellers to collect and remit *sales tax* 'as if the seller had a physical presence in the state.' " (emphasis added) (quoting S.B. 106, § 1)). The Court did not discuss *Dilworth* or "transactional nexus" as a concept separate and apart from "substantial nexus" at all. Conversely, the Supreme Court held that, "[i]n the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Id.* at 2099. There, the high court held that the nexus between Wayfair and South Dakota was "clearly sufficient based on both the economic and virtual contacts respondents have with the State." *Id.* The Supreme Court went on to conclude that "the substantial nexus requirement of *Complete Auto* [was] satisfied in [that] case[,]" *id.* at 2099, and remanded for further proceedings not inconsistent with its decision, *id.* at 2100.

¶ 25 The significance of the *Wayfair* decision was not lost on either the states or on interstate businesses in their capacity as the states' impending taxpayers. In its wake, South Dakota and Wayfair entered into a settlement agreement by which Wayfair would collect state sales tax beginning on 1 January 2019, and many states began using South Dakota's law as a model as they adopted statutes requiring the collection of sales tax by remote sellers. *See* Richard D. Pomp, Wayfair: *Its Implications and Missed Opportunities*, 58 J. L. & Pol'y 1, 9–10 n.55 (2019); Jennifer Karpchuk, *States Could Use*

Wayfair Laws To Fix Depleted Budgets, Law360 (July 15, 2020) [hereinafter Karpchuk, *States Could Use Wayfair Laws*]. This revenue had become particularly vital as online retail transactions proliferated while states continued to contend with a public health crisis. *See* Karpchuk, *States Could Use Wayfair Laws*; *see also Wayfair*, 138 S. Ct. at 2097 ("Though *Quill* was wrong on its own terms when it was decided in 1992, since then the Internet revolution has made its earlier error all the more egregious and harmful."). In order to remain under the auspices of the *Wayfair* decision, many such states intentionally adopted those aspects of South Dakota's law that were mentioned most favorably by the Court. *See, e.g.*, Jay Hancock, *The Wayfair Sales Tax Case: Companies Without a Physical Presence Required to Collect Sales Tax*, LBMC (Mar. 1, 2022) (detailing which states adopted "economic nexus" thresholds of $100,000 or more for the imposition of sales tax on remote sellers after *Wayfair*).

¶ 26 On 7 August 2018, the North Carolina Department of Revenue issued a directive requiring remote sellers making gross sales in excess of $100,000 or conducting 200 or more separate transactions to North Carolina customers to begin collecting state sales tax in accordance with *Wayfair*. N.C. Dep't Rev., SD-18-6 (Aug. 7, 2018). This rule was limited to prospective application, which brought about respondent's exclusion of those sales which were made by petitioner before the corporation first established a physical presence in North Carolina by hiring an in-state sales representative in September 2009. Prior to *Wayfair*, however, North Carolina's sales tax regime already paralleled South Dakota's in several key respects, given each state's membership in the Streamlined Sales and Use Tax Agreement (SSUTA). *See* An Act to Enable North Carolina to Enter the Streamlined Sales and Use Tax Agreement, S.L. 2001-

347, §§ 1.1–3.3, 2001 N.C. Sess. Laws 1041, 1041–60; S.D. Codified Laws § 10-45C-3 (2010). As member-states, North Carolina's and South Dakota's tax regimes are largely governed by the same definitions and sourcing principles. As such, many aspects of their respective tax laws are nearly identical, including, *inter alia*:

South Dakota	**North Carolina**
Sales tax is assessed against goods or services to be delivered into South Dakota for receipt by in-state customers. S.B. 106, § 1 (2016).	Sales are sourced to the state in which the product or service was received for the purposes of assessing sales tax. N.C.G.S. § 105-164.4B(a)(2) (2009).
South Dakota defines to "receive" as "(a) the taking possession of tangible personal property; (b) making first use of services; or (c) taking possession of or making first use of any product transferred electronically, whichever comes first" excluding possession by a shipping company on behalf of the purchaser. S.D. Admin. R. 64:06:01:62 (2015).	"Receipt" is defined as "taking possession of tangible personal property, making first use of services, or taking possession or making first use of digital goods, whichever comes first" but does not include possession by a shipping company on behalf of the purchaser. Sales and Use Tax Bulletin 4-1A.
Sales or use tax is due based on the locations to which the advertising and promotional direct mail is delivered. Other direct mail is sourced to the	Direct mail is sourced to the location where it is delivered if the purchaser provides the seller with information to show the jurisdictions to which the

address for the purchaser contained within the seller's records. S.D. Admin. R. 64:06:01:68 (2010).	direct mail is to be delivered. N.C.G.S. § 105-164.4B(d)(2) (2009).
A use tax is imposed for the in-state use, storage, or consumption of tangible goods at the same rate as would have been applied had the goods been purchased in South Dakota. S.D. Codified Laws § 10-46-2 (2010).	A complementary use tax applies when goods that are purchased out of state are brought into the state for their use, storage, or consumption. N.C.G.S. § 105-164.6(a)(1) (2009).
The imposition of state use tax is reduced by the amount of sales or use tax previously paid in another state for the same property. S.D. Codified Laws § 10-46-6.1 (2010).	North Carolina allows sellers to credit the amount of sales or use tax paid on an item in another state against the tax imposed under North Carolina law. N.C.G.S. § 105-164.6(c)(2) (2009).
Remote sellers are required to collect and remit sales tax as if they had a physical presence within the state if they make sales exceeding $100,000 or 200 or more separate transactions to South Dakota customers over the course of a year. S.D. Codified Laws § 10-64-2 (2016). This applies only prospectively following the passage of	Remote sellers are only obligated to collect state sales tax if they conduct significant in-state activity such as making at least 200 separate sales or $100,000 worth of sales to in-state customers over the course of a year. This applies only prospectively beginning 1 November 2018. N.C. Dep't Rev., SD-18-6 (Aug. 7, 2018).

the Act. S.B. 106, §§ 5, 3, 8(10) (2016).	
South Dakota can extract sellers' registration information from the central registration system. The state further allows sellers to register without a signature and permits agents to register on behalf of sellers. S.D. Codified Laws §§ 10-45C-3, 10-45C-5, 10-45-24 (2010).	North Carolina can extract a seller's information from the central registration system, allows sellers to register without a signature, and permits agents to register on behalf of sellers. N.C.G.S. §§ 105-164.29, 105-164.42E(4), 105-164.42I (2009).
South Dakota provides state-level administration of state and local sales and use taxes. Sellers are required to register, file returns, and remit funds at the state level. South Dakota requires sellers to file only one return each tax period for the state and all of its local jurisdictions. S.D. Codified Laws § 10- 45C-5 (2010).	North Carolina provides state-level administration of state and local sales and use taxes. Sellers are required to register with, file returns with, and remit funds to a state-level authority. The state requires sellers to file only one tax return each period for the state and all local jurisdictions. N.C.G.S. §§ 105-164.16, 105-469, 105-471, 105-483, 105-498, 105-507.2, 105-509.1, 105-510.1, 105-511.3 (2009).
South Dakota uses the definitions provided by the SSUTA to define the following terms, *inter alia*: "bundled transaction," "delivery	North Carolina uses the SSUTA definitions to define the following terms, *inter alia*: "bundled transaction," "delivery charges," "direct mail,"

charges," "direct mail," "lease or rental," "purchase price," "retail sale or sale at retail," "sales price," and "tangible personal property." S.D. Codified Laws §§ 10-45-1, 10-45-1.5, 10-45-1.9, 10-45-1.12, 10-45-1.13, 10-45-1.14, 10-45-1(4), 10-45-1(10), 10-45-94.1 (2010).	"lease or rental," "purchase price," "retail sale or sale at retail," "sales price," and "tangible personal property." N.C.G.S. §§ 105-164.3, 164.4D (2009).
South Dakota reviews sales tax software submitted for certification as Certified Automated Software (CAS) and provides liability relief to sellers for their reliance on such software. S.D. Codified Laws § 10-45C-7 (2010).	North Carolina reviews sales tax software submitted for certification as CAS and provides liability relief for reliance on such software. N.C.G.S. §§ 105-164.42H, 105-164.42I (2009).

C. Applying *Complete Auto*'s four-part formulation to North Carolina's tax

¶ 27 Because North Carolina's imposition of sales tax under the circumstances presented in this case does not differ from South Dakota's in any respect that is legally significant to this matter, and because both states have incorporated the SSUTA's uniform rules and definitions into their sales tax and use tax regimes, we follow the Supreme Court's precedent in *Wayfair* and apply the four-part test in *Complete Auto* to determine its constitutionality. Under the "now-accepted framework for state taxation" provided by *Complete Auto*, courts will

sustain a tax imposed on interstate commerce as long as it: "(1) applies to an activity with a substantial nexus with the taxing State, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services the State provides." *Wayfair*, 138 S. Ct. at 2091. We uphold North Carolina's tax against petitioner's Commerce Clause challenge because petitioner's activities have a substantial nexus with North Carolina and the imposition of sales tax on petitioner's sales to North Carolina customers is fairly apportioned, nondiscriminatory, and fairly related to the services provided by the state. We further hold that North Carolina's assessment of sales tax on the sales at issue does not offend petitioner's right to due process under the Due Process Clause of the Constitution of the United States.

1. Substantial Nexus

¶ 28 Despite petitioner's contention otherwise, the *Wayfair* Court addressed the first requirement of *Complete Auto*'s four-part test—substantial nexus—in its entirety by holding that, "[i]n the absence of *Quill* and *Bellas Hess*, the first prong of the *Complete Auto* test simply asks whether the tax applies to an activity with a substantial nexus with the taxing State." *Id.* at 2099. Specifically, the Supreme Court held that Wayfair's "economic and virtual contacts" provided a "clearly sufficient" nexus for the imposition of sales tax in light of the fact that South Dakota's act only applied to sellers delivering more than $100,000 worth of goods or services into the state or making 200 or more separate transactions for the delivery of goods or services into the state on an annual basis. *Id.* According to the high court, this "quantity of business could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." *Id.* Since a nexus

is established whenever a taxpayer "avails itself of the substantial privilege of carrying on business in that jurisdiction," *Polar Tankers, Inc. v. City of Valdez*, 557 U. S. 1, 11 (2009) (quotation marks omitted), the *Wayfair* Court held that the substantial nexus requirement of *Complete Auto* had been clearly satisfied. *Wayfair*, 138 S. Ct. at 2099.

¶ 29 Although the Supreme Court of the United States in *Wayfair* did not specifically disaggregate substantial nexus into its component parts of transactional and personal nexus, it did begin its discussion by dispensing with the subject properly considered as constituting the transactional nexus issue before proceeding to the physical presence requirement as an aspect of personal nexus. The high court stated:

> All agree that South Dakota has the authority to tax these transactions. S.B. 106 applies to sales of "tangible personal property, products transferred electronically, or services *for delivery into South Dakota*." § 1 (emphasis added). "It has long been settled" that the sale of goods or services "has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." [*Jefferson Lines*, 514 U.S. at 184]; *see also* 2 C. Trost & P. Hartman, Federal Limitations on State and Local Taxation 2d § 11:1, p. 471 (2003) ("Generally speaking, a sale is attributable to its destination").

Id. at 2092–93. By citing its decision in *Jefferson Lines*, South Dakota's sourcing statute, and a treatise on federal regulation of state and local taxation, the Supreme Court did not so much neglect transactional nexus as it summarily dismissed any notion that South Dakota might not have authority to tax the sales at issue on the grounds

of both general taxing principles and the state's specific destination-based sourcing statute.

¶ 30 The facts presented in the case at bar provide equal, if not greater, support for a finding of substantial nexus. Petitioner has clearly availed itself of the substantial privilege of carrying on its own business in North Carolina through both its economic and physical contacts with the state. Petitioner processed approximately $20 million worth of orders for delivery into the state between 2009 and 2011. This is well above the annual threshold of $100,000 cited favorably in *Wayfair*. Further, unlike the remote sellers implicated in *Wayfair*, petitioner has maintained a physical presence within North Carolina for the relevant time period by employing a sales representative to solicit sales both within and from outside of the state. Finally, as a member of the SSUTA, North Carolina employs the same destination-based sourcing principles as South Dakota, which attribute a sale to the state in which the goods or services were received for the purpose of assessing state sales tax. *Compare* S.B. 106 § 1, *with* N.C.G.S. § 105-164.4B(a)(2). We therefore hold that there is also substantial nexus here.[2]

---

[2] Although the Court only reached and ruled on the issue of nexus in *Wayfair*, we note that it also looked favorably to several features of South Dakota's statute in anticipating how the Act may be further evaluated on remand:

> The question remains whether some other principle in the Court's Commerce Clause doctrine might invalidate the Act. Because the *Quill* physical presence rule was an obvious barrier to the Act's validity, these issues have not yet been litigated or briefed, and so the Court need not resolve them here. That said, South Dakota's tax system includes several features that appear designed to prevent discrimination against or undue burdens upon interstate commerce. First, the Act applies a safe harbor to those who transact only limited business in South Dakota. Second, the

2. Fair Apportionment

¶ 31 The second requirement of the *Complete Auto* test serves "to ensure that each State taxes only its fair share of an interstate transaction" and to prevent "multiple taxation" of the same transaction by more than one state. *Jefferson Lines*, 514 U.S. at 184–85. The Supreme Court addressed the issue of malapportionment in *Jefferson Lines* in the context of the state of Oklahoma's imposition of a state sales tax on the sale of bus tickets sold within the state for travel into other states. *Id.* at 177–78. In *Jefferson Lines*, the Court began by stating that:

> For over a decade now, we have assessed any threat of malapportionment by asking whether the tax is "internally consistent" and, if so, whether it is "externally consistent" as well. Internal consistency is preserved when the imposition of a tax identical to the one in question by every other State would add no burden to interstate commerce that intrastate commerce would not also bear. This test asks nothing about the degree of economic reality reflected by the

---

> Act ensures that no obligation to remit the sales tax may be applied retroactively. S.B. 106, §5. Third, South Dakota is one of more than 20 States that have adopted the Streamlined Sales and Use Tax Agreement. This system standardizes taxes to reduce administrative and compliance costs: It requires a single, state level tax administration, uniform definitions of products and services, simplified tax rate structures, and other uniform rules. It also provides sellers access to sales tax administration software paid for by the State. Sellers who choose to use such software are immune from audit liability.

Wayfair, 138 S. Ct. at 2099–2100. Each of these features is reflected in North Carolina's own laws, as detailed in the table above.

> tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate. A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place interstate commerce at the mercy of those remaining States that might impose an identical tax . . . .
>
> External consistency, on the other hand, looks not to the logical consequences of cloning, but to the economic justification for the State's claim upon the value taxed, to discover whether a State's tax reaches beyond that portion of value that is fairly attributable to economic activity within the taxing State. Here, the threat of real multiple taxation (though not by literally identical statutes) may indicate a State's impermissible overreaching.

Id. at 185 (citations omitted).

¶ 32 The Supreme Court of the United States held in *Jefferson Lines* that Oklahoma's tax was both internally and externally consistent. *Id.* at 185–96. First, the high court determined that the tax was internally consistent because if every state were to impose an identical tax (i.e. a tax on ticket sales within the state for travel originating in that state), no sale would be subject to more than one such tax because each would be attributable to only one lone state. *Id.* at 185. And second, the Supreme Court concluded that the tax was externally consistent because "[a] sale of goods is most readily viewed as a discrete event facilitated by the laws and amenities of the place of sale," and thus the high court had

"consistently approved taxation of sales without any division of the tax base among different States" by permitting the state in which the sale is deemed to have taken place to tax the entire purchase price. *Id.* at 186. In *Jefferson Lines*, the Supreme Court declared that the sale of a bus ticket within Oklahoma for transit out of the state was properly deemed a local event because the taxable event was comprised of the "agreement, payment, and delivery of some of the services in the taxing State" and "no other State [could] claim to be the site of the same combination." *Id.* at 190. Further, "the combined events of payment for a ticket and its delivery for present commencement of a trip [were] commonly understood to suffice for a sale." *Id.* at 191. The high court therefore decided that Oklahoma could levy a sales tax upon the entire purchase price of the ticket even though the service it entailed included travel across other states. *Id.* at 186–96.

¶ 33 North Carolina's imposition of sales tax on the sales at issue in this case is likewise both internally and externally consistent. First, the tax is internally consistent because, as in *Jefferson Lines*, every state could impose an identical destination-based sales tax without any duplicative effect since each sale would only be attributable to a single state. Indeed, most states—including but not limited to, SSUTA member-states—have destination-based sourcing statutes that attribute sales to the state in which the goods or services are to be received and impose state sales taxes accordingly. And second, the tax is externally consistent because, as the Court recognized in *Wayfair*, a sale of goods is generally attributable to its destination. *Wayfair*, 138 S. Ct. at 2092–93. Unlike Arkansas in *Dilworth*, North Carolina has state law addressing where a sale is deemed to have taken place for the purpose of assessing state sales tax. North Carolina's sourcing statute traces the sale of goods to

their location of receipt and printed materials to the mailing address provided by purchasers, notwithstanding delivery to a common carrier f.o.b.[3] in another state. N.C.G.S. § 105-164.4B(a)(2), (d)(2)(b); N.C.G.S § 105-164.4E (2009). As in *Jefferson Lines*, "no other State [could] claim to be the site of the same" since each purchase of goods or materials is delivered to only one mailing address located within one destination state. North Carolina has joined a number of states which have adopted destination-based sourcing principles; beyond the twenty-three states which are members of the SSUTA, thirty-five of the fifty states in the nation, along with the District of Columbia, currently define the sale of goods according to their ultimate destination. Jennifer Faubion, Tax Burden Analysis and Review of Recent Significant Changes: Presentation to the Legislative Finance Committee (July 20, 2022), https://www.nmlegis.gov/handouts/ALFC%20072022%20Item%205%20Tax%20Burden%20Analysis%20and%20Review%20of%20Recent%20Significant%20Changes.pdf. This list of states includes Wisconsin—the state in which petitioner maintains its headquarters and from which petitioner ships many of its orders—whose sourcing rules are materially identical to North Carolina's sourcing rules as a fellow SSUTA member. Wis. Stat. § 77.522(1)(b), (1)(c) (2010). Consequently, none of these states will assess duplicate sales tax, since they all define a sale as occurring at the point of destination: one address located within one state. Finally, North Carolina and other states provide an additional safeguard against multiple taxation by providing a credit to sellers in the amount of any sales tax or use tax already paid on a particular purchase. N.C.G.S. § 105-164.6(c)(2) (2009).

---

[3] "F.o.b." is an abbreviation for "free on board."

¶ 34 For these reasons, we hold that North Carolina's assessment of sales tax on the sales at issue is as externally consistent as it is internally consistent.

3. Nondiscrimination

¶ 35 The requirement that a tax imposed on interstate commerce be nondiscriminatory serves to avoid the "multiplication of preferential trade areas destructive of the very purpose of the Commerce Clause," *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 356 (1951), by preventing states from "providing a direct commercial advantage to local business," *Nw. States Portland Cement Co. v. Minnesota*, 358 U.S. 450, 458 (1959); *see also Maryland v. Louisiana*, 451 U.S. 725, 754 (1981). A law is therefore discriminatory if it "tax[es] a transaction or incident more heavily when it crosses state lines than when it occurs entirely within the State." *Armco Inc. v. Hardesty*, 467 U.S. 638, 642 (1984). On the other hand, a tax structure that applies the same rate to in-state and out-of-state transactions and provides a credit for those taxes paid in another state is nondiscriminatory as a matter of law. *See D.H. Holmes*, 486 U.S. at 32 ("The Louisiana tax structure likewise does not discriminate against interstate commerce. The use tax is designed to compensate the State for revenue lost when residents purchase out of state goods for use within the State. It is equal to the sales tax applicable to the same tangible personal property purchased in-state . . . .").

¶ 36 Here, North Carolina imposes the same sales tax on all purchases made for delivery to North Carolina customers regardless of the origin of the goods or the location of the seller. Further, the state maintains a complementary tax structure that imposes sales tax and use tax at an equal rate and provides a credit against the assessment of use tax for sales tax paid to another state. N.C.G.S. § 105-164.6(a), (c)(2). As such, North Carolina

does not impose any greater burden on the purchase of goods from out of state than it does on transactions which are entirely intrastate. Therefore, the tax is nondiscriminatory as a matter of law.

4. Fair Relation

¶ 37 The fourth and final prong of the *Complete Auto* test requires that the assessment of tax be fairly related to services provided by the state to its taxpayers. However, the state does not need to provide a "detailed accounting" of the services provided to each taxpayer based on the taxpayer's in-state activities; instead, the state may simply demonstrate the provision of ordinary public services which are advantageous to the execution of the taxpayer's business within the state. In *D.H. Holmes*, for instance, the Supreme Court found that:

> *Complete Auto* requires that the tax be fairly related to benefits provided by the State, but that condition is also met here. Louisiana provides a number of services that facilitate Holmes' sale of merchandise within the State: It provides fire and police protection for Holmes' stores, runs mass transit and maintains public roads which benefit Holmes' customers, and supplies a number of other civic services from which Holmes profits. To be sure, many others in the State benefit from the same services; but that does not alter the fact that the use tax paid by Holmes, on catalogs designed to increase sales, is related to the advantages provided by the State which aid Holmes' business.

D. H. Holmes, 486 U.S. at 32. Similarly, in *Jefferson Lines*, the high court found that:

> The fair relation prong of *Complete Auto* requires no detailed accounting of the services provided to the taxpayer on account of the activity being taxed, nor, indeed, is a State limited to offsetting the public costs created by the taxed activity. If the event is taxable, the proceeds from the tax may ordinarily be used for purposes unrelated to the taxable event. Interstate commerce may thus be made to pay its fair share of state expenses and " 'contribute to the cost of providing all governmental services, including those services from which it arguably receives no direct 'benefit.' " The bus terminal may not catch fire during the sale, and no robbery there may be foiled while the buyer is getting his ticket, but police and fire protection, along with the usual and usually forgotten advantages conferred by the State's maintenance of a civilized society, are justifications enough for the imposition of a tax.

Jefferson Lines, 514 U.S. at 199–200 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 267 (1989)). As with Louisiana in *D.H. Holmes* and Oklahoma in *Jefferson Lines*, North Carolina requires interstate taxpayers like petitioner to pay their "fair share" of those ordinary public services that aid their in-state business activities, including police and fire protection, mass transit and public roads, and those other "forgotten advantages conferred by the State's maintenance of a civilized society." *See Jefferson Lines*, 514 U.S. at 200. For this reason, we hold that the assessment of sales tax upon the sales at issue in this case is fairly related to North Carolina's provision of public services to its taxpayers, including petitioner.

5. Due Process

¶ 38 Finally, we hold that petitioner has been afforded due process of law. The Due Process Clause "limits States to imposing only taxes that 'bea[r] fiscal relation to protection, opportunities and benefits given by the state.'" *N.C. Dep't of Revenue v. Kimberly Rice Kaestner 1992 Fam. Tr.*, 139 S. Ct. 2213, 2219 (2019) (alteration in original) (quoting *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940)). "The [U.S. Supreme] Court applies a two-step analysis to decide if a state tax abides by the Due Process Clause." *Id.* at 2220. First, there must be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill*, 504 U.S. at 306 (quoting *Miller Bros. Co. v. Maryland*, 347 U.S. 340, 344–45 (1954)). Second, "income attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'" *Id.* at 306 (quoting *Moorman Mfg. Co. v. Bair*, 437 U.S. 267, 273 (1978)).

¶ 39 Petitioner and its sales have a definite connection to North Carolina. As in *Quill* and *Wayfair*, petitioner in the present case is engaged in "continuous and widespread solicitation of business" within North Carolina, amounting to millions of dollars' worth of sales for delivery into the state. *See Quill*, 504 U.S. at 308. This level of activity suffices to give petitioner "fair warning" that its activities may be subject to the state's jurisdiction. *See id.* Further, this activity is rationally related to values connected with North Carolina since, as discussed above, the sales at issue can be properly traced to the state through the application of North Carolina's sourcing statute.

¶ 40 Additionally, the Supreme Court has held that the "*Complete Auto* test, while responsive to Commerce Clause dictates, encompasses as well . . . due process

requirement[s]." *Trinova Corp. v. Mich. Dep't of Treasury*, 498 U.S. 358, 373 (1991). As such, the high court acknowledged the possibility that "every tax that passes contemporary Commerce Clause analysis [may also be] valid under the Due Process Clause," even though the converse is not necessarily true. *Quill*, 504 U.S. at 313 n.7. Although we do not presume to conclusively decide that this will hold true in all circumstances, nonetheless the above analysis demonstrating the satisfaction of *Complete Auto*'s four factors provides significant additional support for our conclusion in the case at bar that North Carolina's assessment of the sales tax at issue comports with the Due Process Clause. We therefore hold that North Carolina's imposition of sales tax on the sales involved in this case does not offend the Due Process Clause of the Constitution of the United States.

III. Conclusion

¶ 41 Based upon the reasons discussed above, we hold that the formalism doctrine established in *Dilworth* has not survived the subsequent decisions of the Supreme Court of the United States in *Complete Auto* and *Wayfair* so as to render the sales tax regime of North Carolina violative of the Commerce Clause and the Due Process Clause of the Constitution of the United States. Further, North Carolina's imposition of sales tax on the transactions at issue in this case is constitutional under the relevant test provided by *Complete Auto*. Accordingly, we reverse the Business Court's order and opinion and hold in favor of respondent.

REVERSED.

Justice BERGER dissenting.

¶ 42 As the trial court correctly noted, resolution of this case is determined by response to one question: "is the holding in *Dilworth* the controlling law." In answering in the affirmative, the trial court invalidated assessment of the sales tax against Quad Graphics by the North Carolina Department of Revenue because the Supreme Court of the United States has not overruled *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327, 64 S. Ct. 1023, 88 L. Ed. 1304 (1944). The trial court's decision should be affirmed because this Court is not permitted to disregard the Supreme Court's interpretation of the Commerce Clause and the federal Constitution. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921– 22, 104 L. Ed. 2d 526 (1989) (holding that when United States Supreme Court precedent "has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, [a lower court] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions"). Therefore, I respectfully dissent.

¶ 43 The transaction at issue in the present case is strikingly similar to the one addressed in *Dilworth*. There, Arkansas sought to impose a sales tax upon Tennessee companies for the sale of machinery and mill supplies out of offices located in Memphis, Tennessee, which utilized a Tennessee salesman to solicit sales in Arkansas. *Dilworth*, 322 U.S. at 328, 64 S. Ct. at 1024. Orders for goods were required to be approved by the Memphis office and would come to Tennessee by mail or phone. *Id.* at 328, 64 S. Ct. at 1024. Further, title of the goods passed upon delivery to the carrier in Tennessee, and payment of the sales price was not made in Arkansas. *Id.* at 328, 64 S. Ct. at 1024–25. Simply, *Dilworth* involved "sales made by Tennessee vendors that are consummated in Tennessee for the delivery of goods in Arkansas." *Id.* at

328, 64 S. Ct. at 1025. The U.S. Supreme Court observed that it "would have to destroy both business and legal notions to deny that under these circumstances the sale—the transfer of ownership—was made in Tennessee." *Id.* at 330, 64 S. Ct. at 1025. Thus, the Supreme Court held that an Arkansas sales tax on transactions completed by Tennessee companies and consummated in Tennessee violated the Commerce Clause of the U.S. Constitution. *Id.* at 329–30, 64 S. Ct. at 1025.

¶ 44 Here, Quad Graphics, received orders and produced printed materials outside of the State of North Carolina. Once the printed materials were produced, they were delivered to the United States Postal Service or another common carrier—all outside of North Carolina. Then, the common carrier would deliver the materials to customers or direct mail recipients within North Carolina. In accordance with the contracts between the parties, title to the printed material and risk of loss passed when the materials were provided to the common carrier for shipping. As in in *Dilworth*, the sale—"transfer of ownership"—was completed outside of North Carolina such that petitioner was "through selling" before the materials reached the state. *See Dilworth*, 322 U.S. at 330, 64 S. Ct. at 1025. Quad Graphics later hired a North Carolina-based sales representative to solicit orders in North Carolina; however, all orders had to be approved and accepted through the company's Wisconsin headquarters.

¶ 45 In 2011, the North Carolina Department of Revenue attempted to assess a sales tax against Quad Graphics for transactions which occurred from 2007 through 2011, even though transfer of title and possession of the printed material to its customers occurred outside of North Carolina. Quad Graphics contends that under these circumstances, and pursuant to *Dilworth*, imposition of the sales tax is suspect under the Commerce

Clause of the federal Constitution because the sale did not occur in North Carolina.

¶ 46 Citing to *Dilworth*, the Supreme Court of the United States has stated that

> where a corporation chooses to stay at home in all respects except to send abroad advertising or drummers to solicit orders which are sent directly to the home office for acceptance, filling, and delivery back to the buyer, it is obvious that the State of the buyer has no local grip on the seller. Unless some local incident occurs sufficient to bring the transaction within its taxing power, the vendor is not taxable.

Norton Co. v. Dep't of Revenue of State of Ill., 340 U.S. 534, 537, 71 S. Ct. 377, 380, 95 L. Ed. 517 (1951).

¶ 47 To determine whether the tax at issue comports with the Commerce Clause, we must examine whether the tax is "applied to *an activity* with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State." Complete Auto Transit, Inc. v. Brady, 430 U.S 274, 279, 97 S. Ct. 1076, 1079, 51 L. Ed. 2d 326 (1977) (emphasis added). Thus, one focus of the first prong in *Complete Auto* test is the link between the transaction and the state, which some legal observers have termed a transactional nexus. *See* Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 Md. L. Rev. 1, 9 (2019).

¶ 48 Another focus of the first prong is what has come to be known as personal nexus as discussed in *Wayfair*. Personal nexus is the link between the taxpayer and the state. *Id.* The majority devotes much of its analysis to this issue. Notably, the Supreme Court in *Wayfair* only addressed personal nexus. The Court did not address the transactional nexus—leaving that aspect

of *Dilworth* undisturbed. *See South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 201 L. Ed. 2d 403 (2018) (discussing only the business's connection with the taxing state—personal nexus—rather than the transaction's connection to the taxing state—transactional nexus). The Court left open the possibility that the tax at issue in *Wayfair* could have been subject to other Commerce Clause challenges which were not reached in the opinion. *Id.* at 2099– 2100. Therefore, *Wayfair* speaks only to the personal nexus aspect of the substantial nexus test and does not apply to the issue in this case—an issue of transactional nexus.

¶ 49 It should be noted that just because the Department could not levy a *sales* tax on the transaction at issue, it does not follow that the State was without options. The Department could have applied a use tax without running afoul of the Commerce Clause. The Court in *Dilworth* addressed whether Arkansas could have levied a *use* tax rather than a *sales* tax and determined that such a tax was not chosen by Arkansas and was therefore not before the Court. *Dilworth*, 322 U.S. at 330, 64 S. Ct. at 1025. But the Court went on to note that there was a real difference in the transactions permitting levy of sales or use taxes:

> A sales tax and a use tax in many instances may bring about the same result. But they are different in conception, are assessments upon different transactions, and in the interlacings of the two legislative authorities within our federation 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. In view of the differences in the relation of the taxing state to them, a tax on an interstate sale like the one before us and unlike the tax on the enjoyment of the goods sold,

> involves an assumption of power by a State which the Commerce Clause was meant to end.

Id. at 330, 64 S. Ct. at 1025–26.

¶ 50 The Court further concluded that "[t]hough sales and use taxes may secure the same revenues and serve complementary purposes, they are . . . taxes on different transactions and for different opportunities afforded by a State." *Id.* at 331, 64 S. Ct. at 1026. A use tax would likely pose no constitutional issue if it had been chosen by the Department of Revenue. *See Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 337–38, 64 S. Ct. 1028, 1029, 88 L. Ed. 1309 (1944).

¶ 51 While the Department and the majority express concern that Quad Graphics may not be paying its fair share in state taxes, any loss of revenue here is a direct result of the Department's decision to levy a sales tax. While a taxpayer certainly has an obligation to pay taxes owed, it is not a charity, and the government is required to assess the appropriate tax. While some may deem this a "formalistic" requirement, such a requirement touches on fundamental fairness for taxpayers.

¶ 52 In this case, the Department of Revenue chose to levy a *sales* tax on a transaction which concluded outside of the state. Under *Dilworth* and the facts of this case, that violates the Commerce Clause. Had the Department chosen a *use* tax, the result here might be different. Contrary to the facts in *Wayfair*, it is the Department's choice of a tax, and not Quad Graphics's effort to avoid taxes, that brings this constitutional quandary before this Court.

¶ 53 Because *Dilworth* applies in this case and defines the location of a sale based upon "practical notions of what constitutes a sale," *Dilworth*, 322 U.S. at 329, 64 S. Ct. at 1025, and the transaction here occurred outside

of North Carolina, I would conclude that the tax violates the Commerce Clause as applied to Quad Graphics and affirm the Business Court's order.

APPENDIX B

STATE OF NORTH CAROLINA WAKE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 20 CVS 7449
QUAD GRAPHICS, INC., Petitioner, v. NORTH CAROLINA DEPARTMENT OF REVENUE, Respondent.	**ORDER AND OPINION ON FIRST AMENDED PETITION FOR JUDICIAL REVIEW**

THIS MATTER is before the Court on Quad Graphics, Inc.'s ("Petitioner") First Amended Petition for Judicial Review. ("Amended Petition for Judicial Review," ECF No. 9.) Pursuant to § 105-241.16 of the North Carolina General Statutes ("N.C.G.S."), Petitioner seeks review of the June 24, 2020 Final Decision of the North Carolina Office of Administrative Hearings ("OAH") ("Final Decision," Rec., at pp. 938–47).[1] On

[1] The Official Record on Judicial Review is filed in 10 parts on the electronic docket at ECF Nos. 27–36, each part consisting of 100 pages. For example, Official Record Part 1 (ECF No. 27) contains pages 1–100 of the Official Record on Judicial Review; Official Record Part 2 (ECF No. 28) contains pages 101–200; and so on. Hereinafter, ECF Nos. 27–36 are referred to as the "Rec.".

February 2, 2021, the Court held a hearing on the Amended Petition for Judicial Review.

THE COURT, having considered the Petition, the briefs and supplemental briefs filed in support of and in opposition to the Petition, the official record of proceedings in the OAH, the arguments of counsel at the hearing, the applicable law, and other appropriate matters of record, concludes that the Petition should be GRANTED and the Final Decision should be REVERSED.

Graebe Hanna & Sullivan, PLLC by Douglas W. Hanna and Akerman, LLP by Michael Bowen for Petitioner Quad Graphics, Inc.

The North Carolina Department of Justice by Terence Friedman and Matthew Sommer for Respondent North Carolina Department of Revenue.

McGuire, Judge.

I. FACTS AND PROCEDURAL BACKGROUND

1. The facts giving rise to this lawsuit are not in dispute. Petitioner is an S-Corporation headquartered in Sussex, Wisconsin. Petitioner is engaged in the business of the commercial printing of books, magazines, catalogs, and items for direct mail ("printed materials") to customers throughout the United States. (Rec., at pp. 192–93, 200.) Petitioner sold printed materials to customers in North Carolina and to customers who had printed materials delivered to third-party recipients with North Carolina addresses ("direct mail") during the period September 1, 2009 through December 31, 2011 (the "Sales at Issue"). (*Id.* at pp. 245, 551–56.) Petitioner's customers provided Petitioner with the addresses for the

direct mail recipients in North Carolina via mailing lists. (*Id.* at pp. 200–01, 244.)

2. It is undisputed that Petitioner received the orders for the Sales at Issue from a customer, produced the printed materials at facilities located outside of North Carolina, and then delivered the printed materials to the United States Postal Service ("USPS") or another common carrier at sites outside of North Carolina.[2] (*Id.* at p. 224.) The USPS or common carrier would, in turn, deliver the printed materials to either the customers or the third-party direct mail recipients inside North Carolina. (*Id.* at pp. 200–01, 244.) The contracts between Petitioner and its customers stated that title to the printed materials, and risk of loss, passed from Petitioner to the customers when the printed materials were deposited on the carrier's shipping dock.[3] (*Id.* at pp. 326, 335, 684–85.)

3. In August 2009 Petitioner hired a North Carolina resident, Edward Waters ("Waters"), as a sales representative. Waters "solicited orders for printed materials from North Carolina customers[.]" (*Id.* at pp. 245, 260, 555.) Waters did not have authority to accept or approve orders, as all orders were approved and accepted at Petitioner's headquarters in Wisconsin. (*Id.* at p. 244.) Prior to hiring Waters, Petitioner had no employees nor any other physical presence in North Carolina. (*Id.* at pp. 202, 224, 239.)

4. In or around 2011, Respondent North Carolina Department of Revenue (the "Department") notified

---

[2] Petitioner did not have a printing facility in North Carolina until 2013 when it purchased the assets of a company called Vertis. (Rec., at p. 224.)

[3] This type of contractual shipping arrangement is commonly referred to as Free On Board or Freight On Board Shipping Point ("FOB Shipping").

Petitioner of its intent to conduct an audit related to Petitioner's business activities within North Carolina. (*Id.* at p. 480.) On November 12, 2015, the Department issued a Notice of Sales and Use Tax Assessment to Petitioner for uncollected and unremitted sales tax arising from sales of printed materials to North Carolina customers for the period January 1, 2007 to December 31, 2011 (the "Initial Assessment"). (*Id.* at p. 635.) Petitioner appealed the Initial Assessment by filing a request for Departmental Review. (*Id.* at p. 43.)

5. During the Departmental Review, the Department received additional information from Petitioner and concluded that certain sales should be excluded from the Initial Assessment. (*Id.*) Specifically, the Department removed those sales shipped to North Carolina customers for which Petitioner provided sufficient documentation demonstrating that the transactions were sales for resale by those customers. (*Id.*) The Department also removed those sales that occurred before Petitioner hired Waters in August 2009.[4] (*Id.*) The Department adjusted the Proposed Assessment to reflect these changes, and on November 30, 2018 issued a Notice of Final Determination. ("NOFD," Rec., at pp. 686–93; upholding the assessment of sales tax on the Sales at Issue.)

6. Petitioner appealed the NOFD by filing a Petition for Contested Tax Case with the OAH. (*Id.* at pp. 5–12.) Petitioner and the Department both moved for summary judgment, and on June 24, 2020, the OAH issued its Final Decision granting summary judgment in favor of the Department, denying Petitioner's motion for summary judgment, and upholding the assessment of

[4] The Department determined that, prior to Petitioner's hiring of its resident sales representative in North Carolina, Petitioner did not have a sufficient sales tax nexus with North Carolina. (Rec., at p. 641.)

sales tax on the Sales at Issue. (*Id.* at pp. 938–947.) The OAH concluded that the Petitioner was a "retailer" as defined under N.C.G.S. § 105-164.3(35)(a) (2010)[5] (*Id.* at p. 942), and that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. §§ 105-164.4B(a)(2) and (d)(2)(b) (2010). (*Id.* at pp. 944–45.) In addition, while acknowledging that she was "barred" from ruling on Petitioner's constitutional challenges to the NOFD, the administrative law judge ("ALJ") nevertheless opined that the physical presence of Petitioner's sales representative in North Carolina created a sufficient constitutional nexus with the State to support the State's imposition of sales tax on the Sales at Issue.[6] (*Id.* at pp. 942–44.)

7. On July 24, 2020, Petitioner timely filed its Petition for Judicial Review of the Final Decision pursuant to N.C.G.S. §§ 105-241.16 and 7A-45(b)–(f). (ECF No. 3.) On the same day, the case was designated as a mandatory complex business case, and assigned to the Honorable Louis A. Bledsoe, III, Chief Business Court Judge. (ECF Nos. 1–2.) On August 20, 2020, Petitioner filed the Amended Petition for Judicial Review. (ECF No. 9.)

8. On September 24, 2020, the parties filed the stipulated official record of the proceedings in the Office of Administrative Hearings. (Stipulation Regarding

---

[5] For purposes of this Order and Opinion, the Court refers to the provisions of the North Carolina Sales and Use Tax Act (the "Act") in effect during the period September 1, 2009 through December 31, 2011. The Court's use of the present tense in discussing these statutes is not intended to mean that the discussion applies to the current version of the statute to the extent the statute has been amended effective after December 31, 2011.

[6] It is well established that in North Carolina, constitutional questions must be resolved by the courts and not by the State's administrative agencies. *In re Redmond*, 369 N.C. 490, 493 (2017).

Contents of Record, ECF No. 26; Official Record, ECF Nos. 27–36.)

9. On October 2, 2020, the Court issued an Order and Opinion on various motions filed by Petitioner and the Department which, among other things, denied the Department's motion to dismiss the Amended Petition for Judicial Review. (Ord. and Op. on Respd.'s Mot. to Dism. Petition, Respd.'s Mot. to Stay, and Petitioner's Mot. for Ext. Time to Serve Resp. with Pet. For Jud. Rev., ECF No. 41.)[7]

10. On October 26, 2020, Petitioner filed its Brief in Support of Petition for Judicial Review. ("Brief in Support," ECF No. 42.) On November 30, 2020, the Department filed its Response in Opposition to Petitioner's Petition for Judicial Review on the Merits. ("Response Brief," ECF No. 43.) On December 10, 2020, Petitioner filed its Reply Brief. ("Reply Brief," ECF No. 45.)

11. On January 6, 2021, this matter was reassigned to the undersigned. (Reassignment Ord., ECF No. 46.) The parties came before the Court for a hearing on the Amended Petition for Judicial Review on February 2, 2021.

12. On May 27, 2021, the Court issued a Notice to Provide Supplemental Briefing. (ECF No. 49.) On June 11, 2021, Petitioner and the Department filed supplemental briefs. (Respondent's Suppl. Br., ECF No. 50; Petitioner's Suppl. Br., ECF No. 51.)

13. The matter is now ripe for review.

---

[7] The Court also granted Petitioner's Motion for Extension of Time to Serve Respondent with Petition for Judicial Review (ECF No. 20) and denied the Department's Motion to Stay (ECF No. 13). (ECF No. 41, at ¶ 22.)

II. LEGAL STANDARD

14. Petitioner appeals the Final Decision granting summary judgment in favor of the Department. "A party aggrieved by the final decision in a contested case commenced at the Office of Administrative Hearings may seek judicial review of the decision in accordance with Article 4 of Chapter 150B of the General Statutes." N.C.G.S. § 105-241.16. Under Chapter 150B, the task before this Court is to "determine whether the petitioner is entitled to the relief sought in the petition based on [a] review of the final decision and the official record." N.C.G.S. § 150B-5l(c).

15. "In reviewing a final decision allowing . . . summary judgment, the court may enter any order allowed by . . . Rule 56" of the North Carolina Rules of Civil Procedure. N.C.G.S. § 150B-51(d). "Appeals arising from summary judgment orders are decided using a *de novo* standard of review." *Midrex Techs., Inc. v. N.C. Dep't of Revenue*, 369 N.C. 250, 257 (2016) (citation omitted). "Under the *de novo* standard of review, the [Court] 'consider[s] the matter anew[] and freely substitut[es] its own judgment for' [that of the lower court]." *Id.* at 257 (alterations in original) (citation omitted).

16. Under North Carolina law, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § lA-1, Rule 56(c). A genuine issue is "one that can be maintained by substantial evidence." *Dobson v. Harris*, 352 N.C. 77, 83 (2000). A material fact is one that "would constitute or would irrevocably establish any material element of a claim or defense." *Abner Corp. v. City*

Roofing & Sheetmetal Co., 73 N.C. App. 470, 472 (1985). Summary judgment is appropriate if "the facts are not disputed and only a question of law remains." *Wal-Mart Stores East v. Hinton*, 197 N.C. App. 30, 37 (2009) (citation omitted).

17. Further, with respect to the standards applicable to this Court's consideration of constitutional challenges, our appellate courts have held that "[a] law is presumed constitutional until the contrary is shown and the burden is on the party claiming that the law is unconstitutional to show why it is unconstitutional as applied to him." *Perry v. Perry*, 80 N.C. App. 169, 176 (1986).

III. ANALYSIS

18. In this appeal, Petitioner raises two arguments. First, Petitioner contends that the OAH erroneously held that Petitioner was a "Retailer" under the provisions of N.C.G.S. § 105-164.3(35)(a) (2010) that was required to pay *sales* taxes to North Carolina on the Sales at Issue under the Act. (*Id.* at pp. 6–12.) Petitioner argues that "this set of facts forms the basis for *use* tax liability for the customers of Petitioner" but "not a retail *sales* tax assessment."[8] (*Id.*, at p. 2 (emphasis in original).)

19. Second, Petitioner argues that the Department's assessment of sales taxes on the Sales at Issue is unconstitutional under the Due Process Clause

[8] The North Carolina Sales and Use Tax Act "imposes a use tax on items purchased outside the state and thus not subject to [sales] tax, which are brought into the state for 'storage use and consumption' here." *In re Assessment of Additional North Carolina & Orange County Use Taxes*, 312 N.C. 211, 215 (1984), *appeal dismissed*, 472 U.S. 1001, 105 S. Ct. 2693, 86 L. Ed. 2d (1985); *see also* N.C.G.S. § 105-164.6 (2010). The Department is not seeking to assess a use tax on the Sales at Issue.

and the Commerce Clause of the United States Constitution. (*Id.* at pp. 12–22.) Both of Petitioner's arguments are grounded in its position that although the printed materials were sold to customers for use or consumption in North Carolina, it is undisputed that title and possession of the printed materials took place outside the State. Petitioner contends that since title and possession passed outside of North Carolina, the "sales" occurred outside of North Carolina.

20. The Court will first analyze Petitioner's claim that the OAH misapplied the provisions of the Act in deciding that Petitioner is a "retailer" subject to North Carolina's sales tax, and second, the Court will analyze whether the imposition of sales tax on the Sales at Issue comports with the requirements of the United States Constitution.

A. OAH's conclusion that Petitioner was a "Retailer" under N.C.G.S. § 105-164.3(35) (2010)

21. Determination of Petitioner's statutory argument will require the Court to interpret the relevant and overlapping provisions of the Act regarding the sales and use taxes that were in effect during the relevant time period. The Supreme Court of North Carolina summarized the basic principles used by our courts when interpreting the language in a statute as follows:

> [q]uestions of statutory interpretation are ultimately questions of law for the courts . . . . The principal goal of statutory construction is to accomplish the legislative intent. The best indicia of that intent are the language of the statute, the spirit of the act and what the act seeks to accomplish. The process of construing a statutory provision must begin with an examination of the relevant statutory language.

> It is well settled that where the language of a statute is clear and unambiguous, there is no room for judicial construction and the courts must construe the statute using its plain meaning. In other words, if the statutory language is clear and unambiguous, the court eschews statutory construction in favor of giving the words their plain and definite meaning.

Wilkie v. City of Boiling Spring Lakes, 370 N.C. 540, 547 (2018) (cleaned up); *see also N.C. Dep't of Corr. v. N.C. Med. Bd.*, 363 N.C. 189, 201 (2009) ("When the language of a statute is clear and without ambiguity, it is the duty of this Court to give effect to the plain meaning of the statute, and judicial construction of legislative intent is not required. However, when the language of a statute is ambiguous, this Court will determine the purpose of the statute and the intent of the legislature in its enactment.").

22. "Usually, words of a statute will be given their natural, approved, and recognized meaning." *Wilkie*, 370 N.C. at 550. "Courts should give effect to the words actually used in a statute and should neither delete words used nor insert words not used in the relevant statutory language during the statutory construction process." *Midrex Techs.*, 369 N.C. at 258 (cleaned up). The court should "give every word of the statute effect, presuming that the legislature carefully chose each word used." *N.C. Dep't of Corr.*, 363 N.C. at 201.

23. Finally, special rules of construction apply where the statute at issue is one concerning taxation. Accordingly, "[t]ax statutes are to be strictly construed against the State and in favor of the taxpayer." *Wal-Mart Stores East, Inc.*, 197 N.C. App. at 42 (internal citations omitted). "If a taxing statute is susceptible to two constructions, any uncertainty in the statute or legislative

intent should be resolved in favor of the taxpayer." *Lenox, Inc. v. Tolson*, 353 N.C. 659, 664 (2001).

24. There are several statutory provisions relevant to the determination of Petitioner's first argument. The Act imposes a privilege tax on the net taxable sales or gross receipts of "tangible personal property" by a "retailer." N.C.G.S. § 105-164.4 (2010).[9] Under the Act, a "retailer" is defined, in pertinent part, as follows:

> A person engaged in the business of any of the following:
>
> a. Making sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use, or consumption in this State.

N.C.G.S. § 105-164.3(35)(a) (2010).

25. The Act further defines various terms within the definition of "retailer." A "person" is defined as "[a]n individual, . . . a limited liability company, a corporation, . . . or another group acting as a unit." *Id.* at § 105-164.3(26) (referring to N.C.G.S. § 105-228.90 (2010)). A "sale" is defined as "[t]he transfer for consideration of title or possession of tangible personal property or digital property or the performance for consideration of a service." *Id.* at § 105-164.3(36) (2010). A "sale at retail" or "retail sale" is "[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent." *Id.* at § 105-164.3(34) (2010). "Tangible personal property" is defined as "personal property that may be seen, weighed,

---

[9] The Act also clarifies that a "Complimentary use tax" at the same rate that applies to the *sale* of a product under § 105-164.4 is imposed where property is purchased *outside* the State for "storage, use, or consumption in this State." N.C.G.S. § 105-164.6 (2010). "A product is subject to [a complimentary use tax] only if it is subject to tax under [§] 105-164.4." *Id.*

measured, felt, or touched or is in any other manner perceptible to the senses" *Id.* at § 105-164.3(46) (2010), which includes "direct mail," defined as "printed material delivered or distributed by the [USPS] or other delivery service to a mass audience or to addresses on a mailing list by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients." *Id.* at § 105-164.3(7c) (2010). A retailer is "engaged in business" in North Carolina if it "permanently or temporarily" maintains "any representative, agent, sales representative, or solicitor operating in this State in the selling or delivering" of tangible personal property. *Id.* at § 105-164.3(9)(a) (2010).

26. Here, it is undisputed that Petitioner is a "person" (Rec., at pp. 192, 248); that the Sales at Issue involve "tangible personal property" or "direct mail" (*Id.* at p. 553); that the Sales at Issue were "sales" as defined in N.C.G.S. § 105-164.3(36) (*Id.* at p. 276); that Petitioner "engaged in business" in North Carolina by having a resident sales representative in North Carolina selling its products; and that the printed materials were stored, used, and consumed in this State (ECF No. 42, at p. 11).

27. Nevertheless, Petitioner argues that the OAH improperly held that Petitioner was a "retailer" under § 105-164.3(35)(a) (2010) because Petitioner did not make the Sales at Issue in North Carolina. Petitioner first argues that the Act defines a "sale" as "the transfer for consideration of title or possession of tangible personal property." (ECF No. 42, at p. 8.) Petitioner contends that it is undisputed that under the terms of its agreements with its customers, title and possession of the printed materials occurred when Petitioner delivered the printed materials to the USPS or other common carrier outside of

North Carolina for delivery to customers and third- party recipients in North Carolina.[10] (*Id.* at p. 10.)

28. Petitioner next argues that in order to be a "retailer" under § 105-164.3(35) a person must make sales "in this State," and because the transfer of title and possession to the printed materials took place outside of North Carolina, Petitioner cannot be a "retailer" under § 105-164.3(35). (ECF No. 42, at p. 9; ECF No. 45, at p. 3.) In other words, under Petitioner's interpretation, in order to be classified as a "retailer" under § 105-164.3(35), it must be making sales in which transfer of title or possession of the tangible personal property occurs in North Carolina.

29. In response, the Department contends that "it is without question that Petitioner is a 'retailer'" under § 105-164.3(35). (ECF No. 43, at p. 13.) Specifically, the Department argues that Petitioner attempts to impermissibly "expand[ ] the definition of 'sale' to require that transfer of title and possession occur in the state before [North Carolina] can impose sales tax on the transaction," which is "inconsistent with the General Assembly's intent that [North Carolina] be a destination-based sales tax state[.]" (*Id.* at p. 15.) In support of this argument, the Department cites to § 105-164.4B, which "expressly provides the principles for determining 'where to source *the sale* of a product.'" (*Id.* (emphasis in original)

---

[10] The undisputed facts show that Petitioner delivered its printed materials to USPS or other common carrier "F.O.B." at the point of shipment. North Carolina has held that such terms mean that title to the shipped goods transfers at the place of shipment. *Duke Power Co. v. Clayton*, 274 N.C. 505, 516–517 (1968); *Petrus Machinery, Inc. v. Radiator Specialty Co.*, 257 N.C. 85, 86 (1962) ("Where the contract of sale provides for a sale f.o.b. the point of shipment, the title is generally held to pass, in the absence of a contrary intention between the parties, at the time of the delivery of the goods for shipment at the point designated.").

(citing to N.C.G.S. § 105-164.4B(a) (2010)).) The Department also cites to § 106-164.8, which imposes, *inter alia*, obligations on a retailer to collect sales and use tax in certain circumstances where sales are contracted or accepted outside North Carolina with the intent that they be brought into North Carolina for storage, use, or consumption in this State. (*Id.* at p. 16 (citing N.C.G.S. § 105-164.8(a)(2), (4), (6) (2010).)

30. The Court has closely considered the arguments raised by both parties and concludes that Petitioner's contention that the term "in this State", as used in § 105-164.3(35), requires that transfer of title or possession must take place within North Carolina in order for a person to be considered a "retailer" is untenable. First, and most significantly, the Act imposes both a *sales* and a *use* tax on retailers. In other words, a retailer, as defined by N.C.G.S § 105-164.3(35), includes persons making sales of tangible personal property that is used, consumed, or stored in North Carolina whether or not the sale occurs inside North Carolina.

31. In addition, a plain reading of the sentence at issue makes clear that the term "for storage, use, or consumption *in this State*" applies to the language in the phrase in which it is situated and does not limit the terms "[m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail" in the first phrase in the sentence. *See* N.C.G.S. § 105-164.3(35) (emphasis added). "Ordinary rules of grammar apply when ascertaining the meaning of a statute[.]" *Winkler v. N.C. State Bd. of Plumbing*, 261 N.C. App. 106, 111 (2018). The "last antecedent rule" is one such example. *See HCA Crossroads Residential Ctrs. v. N.C. Dep't of Human Resources, etc.*, 327 N.C. 573, 578 (1990); *Wilkie,* 370 N.C. at 546–49; *Novant Health, Inc. v. Aetna U.S. Healthcare of the Carolinas, Inc.*, 2001 NCBC LEXIS 1, at *12 (N.C. Super. Ct. Mar. 8, 2001); *R.R. Friction Prods. Corp. v.*

N.C. Dep't of Revenue, 2019 NCBC LEXIS 13, at *28 (N.C. Super. Ct. Feb. 21, 2019), *aff'd per curiam*, 374 N.C. 208 (2020).

32. Under the last antecedent rule, "relative and qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding and, unless the context indicates a contrary intent, are not to be construed as extending to or including others more remote." *HCA Crossroads Residential Ctrs.*, 327 N.C. at 578. Here, applying the term "in this State" to its last antecedent in the sentence, the statute expands the scope of the definition of "retailer" to include persons making sales of tangible personal property outside of North Carolina where that property will be used, consumed, or stored within North Carolina. It does not limit "retailer" only to persons making sales within North Carolina.

33. In addition, the definition of "retailer" must be read in conjunction with the other provisions of the Act. *See Huntington Props., LLC v. Currituck Cty.*, 153 N.C. App. 218, 224 (2002) ("Portions of the same statute dealing with the same subject matter are to be considered and interpreted as a whole, and in such case it is the accepted principle of statutory construction that every part of the law shall be given effect if this can be done by any fair and reasonable intendment." (cleaned up). Section 105-164.6, titled "Complimentary use tax," expressly provides the authority for North Carolina to collect a use tax from retailers on tangible personal property sold outside of North Carolina for use, consumption, or storage in North Carolina. Section 105-164.6 provides, in pertinent part, as follows:

> (a) Tax. – An excise tax at the applicable rate set in [N.C.]G.S. [§] 105-164.4 is imposed on the products listed below. The applicable rate is the rate and maximum tax, if any, that would apply

> to the sale of a product. A product is subject to tax under this section only if it is subject to tax under [N.C.]G.S. [§] 105-164.4.
>
> (1) Tangible personal property or digital property purchased inside *or outside* this State for storage, use, or consumption in this State.

N.C.G.S. § 105-164.6 (2010) (emphasis added). The logical construction of these two separate sections of the Act leads to the conclusion that the definition of "retailer" does not include the requirement that a retailer's "sales" occur solely "in this State."

34. Section 105-164.8 also lends support to the Court's construction of the definition of "retailer." That section provides, in pertinent part, as follows:

> A retailer is required to collect the tax imposed by this Article notwithstanding any of the following:
>
> . . .
>
> (2) That the purchaser's order or the contract of sale is made or closed by acceptance or approval outside this State, or before any tangible personal property or digital property that is part of the order or contract enters this State.
>
> . . .
>
> (4) That the property is mailed to the purchaser in this State or a point outside this State or delivered to a carrier outside this state f.o.b. or otherwise and directed to the purchaser in this State regardless of whether the cost of transportation is paid by the retailer or by the purchaser.
>
> . . .

> (6) Any combination in whole or in part of any two or more of the foregoing statements of fact, if it is intended that the property purchased be brought into this State for storage, use, or consumption in this State.

N.C.G.S. §§ 105-164.8(a)(2), (4), (6) (2010).

35. These provisions directly address a retailer's obligation to collect taxes under the precise circumstances present here, where a seller transfers title or possession of the products to North Carolina purchasers at a location outside of North Carolina on F.O.B. terms. Again, these requirements are not consistent with Petitioner's construction of N.C.G.S. § 105-164.3(35) (2010).

36. Therefore, the Court concludes that the OAH correctly found Petitioner to be a "retailer" within the meaning of N.C.G.S. § 105-164.3(35) (2010).

B. Constitutional Arguments

37. Petitioner next argues that North Carolina's assessment of *sales* tax on the Sales at Issue—where it is undisputed that title and possession transferred to North Carolina purchasers and third-party recipients *outside* of the State—is unconstitutional under the Commerce Clause in light of the United States Supreme Court's holding in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944) (precluding sales tax liability on Commerce Clause grounds where out-of-state goods were delivered by common carrier into the state and title and possession to the goods transferred to purchaser outside of the taxing state) (further analyzed infra). (ECF No. 42, at pp. 12–22; ECF No. 45, at pp. 4–12.)[11] The Department, of course,

[11] Petitioner also brought a Due Process Clause challenge; however, the Court need only address Petitioner's Commerce Clause argument to reach its decision.

argues that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. § 105-164.4B (2010), and that "it is readily apparent that N.C.'s sales tax statutes meet the constitutional requirements under . . . the Commerce Clause[.]" (ECF No. 43, at pp. 20–24.)

38. Preliminarily, the Court will address whether the Commerce Clause issue poses either a facial or an as-applied challenge to North Carolina's sales and use tax statutes. The Supreme Court of North Carolina has held:

> [a]n as-applied challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable. A facial challenge maintains that no constitutional applications of the statute exist, prohibiting its enforcement in any context. The constitutional standards used to decide either challenge are the same.

State v. Packingham, 368 N.C. 380, 383 (2015). Although Petitioner does not expressly label its constitutional challenges as either as-applied or facial, it does state that

> *[i]n this case*, the Department assessed sales tax to the Petitioner based on the fact that the property was used – or enjoyed – by Petitioner's customers in North Carolina. The assessment in this case violates the Commerce Clause because it imposes a sales tax on transactions – the passage of title and possession – occurring wholly outside North Carolina.

(ECF No. 9, at p. 2 (emphasis added).) Accordingly, the Court interprets Petitioner's constitutional argument as an "as-applied" challenge and will assess whether the Department's application of North Carolina's then-applicable sales and use tax statutes to the Sales at Issue was constitutional under the Commerce Clause.

39. To reach its decision, the Court need only answer one question: is the holding in *Dilworth* the controlling law. At the request of the Court, the parties submitted supplemental briefing on this issue. (ECF Nos. 50 and 51.) Before directly addressing this question, the Court will first provide necessary background.

i. The Department's sourcing of the Sales at Issue to North Carolina

40. Here, the Department in the NOFD and the OAH in the Final Decision found that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. § 105-164.4B (2010) and, therefore, concluded that the State properly assessed a sales tax on Petitioner for the Sales at Issue. (Rec., at pp. 17, 944–45.) This sourcing statute provides, in relevant part, as follows:

> (a) General Principles – The following principles apply in determining where to source the sale of a product.
>
> . . .
>
> (2) Delivery to a specified address – When a purchaser receives a product at a location specified by the purchaser . . . , the sale is sourced to the location where the purchaser receives the product.

N.C.G.S. § 105-164.4B(a)(2) (2010). The sourcing principles also provide that "direct mail . . . is sourced to the location where the property is delivered" where "the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered." N.C.G.S. § 105-164.4B(d)(2) (2010).

41. Under the language in §§ 105-164.4B(a)(2) and (d)(2), the Sales at Issue are sourced to the location where the purchaser "receives" the printed materials, or the

address where the printed materials are "delivered." Petitioner contends that the printed materials are "receive[d]" or "delivered" at the location where title and possession transfers, which in the case of the Sales at issue, was a location outside North Carolina. (ECF No. 45, at pp. 3–4.) The Department contends that the printed materials are "received" or "delivered" at their ultimate destination, which in the case of the Sales at Issue, was North Carolina. (ECF No. 43, at p. 20.) While framed as statutory arguments, the parties' arguments regarding N.C.G.S. § 105-164.4B have constitutional implications. If Petitioner's Commerce Clause argument prevails, the Department's reading of the statute would lead to an unconstitutional application against Petitioner for the imposition of sales tax on the Sales at Issue.

42. While neither "receives" nor "delivered" is defined in the Act, our Supreme Court has stated:

> [t]he cardinal principal of statutory construction is to save and not to destroy. We have repeatedly held that as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act. Even to avoid a serious doubt the rule is the same.

In re Dairy Farms, 289 N.C. 456, 465 (1976) (citation and internal quotation marks omitted) (emphasis added); *see also State v. T.D.R.*, 347 N.C. 489, 498 ("Where one of two reasonable constructions of a statute will raise a serious constitutional question, it is well settled that our courts should adopt the construction that avoids the constitutional question."); *Appeal of Arcadia Dairy Farms, Inc.*, 289 N.C. 456, 465–66 (applying the same principle to an as-applied challenge to the North Carolina constitution). Thus, the Court inevitably must determine whether the Department's interpretation of N.C.G.S. §

105-164.4B (2010) to source the Sales at Issue to North Carolina comports with the Commerce Clause.

ii. Commerce Clause

43. The Commerce Clause of Article Three of the United States Constitution authorizes Congress to "regulate Commerce with foreign Nations, and among the several States." U.S. CONST. art. I, § 8, cl. 3. Along with its affirmative application, the Commerce Clause also includes a "negative sweep" which "prohibits certain state actions that interfere with interstate commerce." *Quill Corp v. North Dakota*, 504 U.S. 298, 309 (1992). Under the so-called "dormant" Commerce Clause, in order for a state to impose a tax on an interstate transaction, the tax must (1) be "applied to an activity with a substantial nexus with the taxing state"; (2) be "fairly apportioned"; (3) "not discriminate against interstate commerce"; and (4) be "fairly related to the services provided by the state." *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977).

44. There are two considerations in determining whether a "substantial nexus" exists between a state and the tax it wishes to impose: a "personal nexus" (*i.e.*, a nexus between the state and the taxpayer) and a "transactional nexus" (*i.e.*, a nexus between the state and the activity being taxed). Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 7–18 (2019); *see also* R. Rosen & Marc D. Bernstein, *State Taxation of Corporations: The Evolving Danger of Attributional Nexus*, 41 TAX EXECUTIVE 533, 534 (1989) (referring to the concepts as "presence nexus" and "transactional nexus"); Walter Hellerstein, *Jurisdiction to Tax Income and Consumption in the New Economy: A Theoretical and Comparative Perspective*, 38 GA. L. REV. 1, 3 (2003) (referring to the concepts as "enforcement jurisdiction" and "substantive

jurisdiction"); *see also MeadWestvaco Corp. v. Ill. Dep't of Revenue*, 553 U.S. 16, 25 (2008) ("Where, as here, there is no dispute that the taxpayer has done some business in the taxing State, the inquiry shifts from *whether* the State may tax to *what* it may tax" (emphasis added)); *Allied-Signal, Inc. v. Dir., Div. of Taxation*, 504 U.S. 768, 778 (1992) ("[A]lthough our modern . . . jurisprudence rejects a rigid, formalistic definition of minimum connection, we have not abandoned the requirement that, in the case of a tax on an activity, there must be a connection to the activity itself, rather than a connection only to the actor the State seeks to tax."); *American Bus USA Corp. v. Dep't of Rev.*, 151 So. 3d. 67 (Fl. Ct. App. 2014) (finding that the taxpayer had a nexus with Florida, but holding that the taxing statute as applied to the taxpayer violated the nexus mandate of *Complete Auto*; that is, the "activity" must have a nexus with the taxing state).

45. Here, Petitioner concedes that it has a personal nexus with North Carolina. (ECF No. 45, at p. 6.) Nevertheless, Petitioner argues that this is "only half of the constitutional inquiry. The remaining dispositive question . . . is whether North Carolina has a constitutionally sufficient nexus ***with the disputed transactions***." (*Id.* (emphasis in original).) Specifically, Petitioner contends "the controlling transactional nexus cases" of *Dilworth* and *General Trading Co. v. State Tax Commission of Iowa*, 322 U.S. 335 (1944) render North Carolina's transactional nexus with the Sales at Issue insufficient to impose a sales tax on the Sales at Issue. (ECF No. 45, at p. 5; ECF No. 42, at pp. 18–22.) In response, the Department denies that there is a transactional nexus requirement under the Commerce Clause (ECF No. 43, at p. 22), and further argues in its supplemental brief that *Dilworth* is no longer good law (ECF No. 50, at p. 2). To assess these arguments, the

Court must analyze and determine the continuing vitality of *Dilworth* and its companion case, *General Trading*.

iii. Dilworth and General Trading

46. In *Dilworth*, the United States Supreme Court considered whether Arkansas could assess a *sales* tax on a Tennessee corporation for certain transactions between the company and residents of Arkansas. 322 U.S. at 327–28. The corporation had no physical presence in Arkansas and was not authorized to do business in Arkansas. *Id.* at 328. Orders from Arkansas residents were made "through solicitation in Arkansas by a traveling salesman domiciled in Tennessee, by mail or telephone." *Id.* The orders required acceptance by the corporation's office in Memphis, Tennessee. *Id.* The corporation's products were shipped by delivery to a carrier in Tennessee, and title passed to the purchaser "in Memphis" upon delivery of the products to the carrier. *Id.* The Supreme Court of Arkansas held that imposition of sales tax on these transactions by Arkansas was precluded by the Commerce Clause. *Id.* at 327. The United States Supreme Court affirmed, stating:

> we would have to destroy both business and legal notions to deny that under the circumstances of the sale – the transfer of ownership – was made in Tennessee. For Arkansas to impose a tax on such transaction would be to project its powers beyond its boundaries and to tax an interstate transaction.
>
> . . .
>
> 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. In view of the differences in the basis of these two taxes and the differences in the relation of the taxing state to them, a tax

> on an interstate sale like the one before us and unlike the tax on the enjoyment of goods sold, involves an assumption of power by a state which the Commerce Clause was meant to end.

Id. at 330.

47. Conversely, in *General Trading*, Iowa imposed a *use* tax on goods purchased from a Minnesota company by Iowa residents. 322 U.S. at 336. The Iowa statute at issue required "every retailer maintaining a place of business in Iowa to collect the use tax from the purchaser." *Id.* (cleaned up). The company had no physical presence in Iowa. *Id.* at 337. "The property on which the use tax was laid was sent to Iowa as a result of orders solicited by traveling salesmen sent into Iowa from [the company's] Minnesota headquarters. The orders were always subject to acceptance in Minnesota whence the goods were shipped into Iowa by common carriers or the post." *Id.* The Iowa Supreme Court held that the company "was a 'retailer maintaining a place of business in this state' within the meaning of the Iowa statute , . . . [and] that Iowa had not exceeded its powers in the imposition of this use tax on Iowa purchasers, and that collection could validly be made" from the company. *Id.* The United States Supreme Court agreed, and held that Iowa's use tax did not violate the Commerce Clause, concluding that

> [t]he tax is what it professes to be -- a non-discriminatory excise laid on all personal property consumed in Iowa. The property is enjoyed by an Iowa resident partly because the opportunity is given by Iowa to enjoy property no matter whence acquired. The exaction is made against the ultimate consumer -- the Iowa resident who is paying taxes to sustain his own state government. To make the distributor the

> tax collector for the State is a familiar and sanctioned device.

Id. at 338.

48. Thus, in *Dilworth* and in *General Trading* the states imposed different taxes (*i.e.*, sales versus use) and the Court reached different results, with the only significant difference being that in *Dilworth*, Arkansas did not have a sufficient transactional nexus with the sales where title to the products transferred outside of Arkansas, while in *General Trading*, Iowa clearly had a sufficient nexus to tax the in-state use of the products by Iowa residents.

49. Relying on these precedents, Petitioner summarizes its argument as follows:

> [t]he facts of this case are substantially indistinguishable from the pertinent facts in *Dilworth* and are in direct contrast to those in *General Trading Co.* and *Excel [Inc. v. Clayton*, 269 N.C. 127 (1967)].[12] In *Dilworth*, as in this case, though orders were solicited in the taxing state, all orders for tangible personal property were accepted and approved outside the taxing state, and legal title and possession of the tangible personal property passed to the purchasers outside the taxing state. In *Dilworth* and in this case, the tax assessed was a sales tax – not a use tax. There is simply no constitutionally significant distinction between

[12] In *Excel*, the Supreme Court of North Carolina addressed whether certain purported interstate transactions were subject to sales tax. 269 N.C. 127 (1967). Notably, the Court found that because the out-of-state purchasers arranged for pickup of the products "f.o.b. Lincolnton," North Carolina, the products "were delivered to [the purchasers] in North Carolina, the taxing jurisdiction." *Id.* at 134. Accordingly, the Court held that North Carolina's assessment of a sales tax on the transaction did not violate the Commerce Clause. (*Id.*)

> *Dilworth* and the facts of this case. *Dilworth* has not been overruled by the Court and remains the law of the land.

(ECF No. 42, at p. 22 (cleaned up).) The Court agrees with Petitioner that, under *Dilworth*, "a state sales tax survives scrutiny under the Commerce Clause only where the purchase of tangible personal property – *i.e.*, the transfer of ownership from the seller to buyer – takes place in the taxing state." (ECF No. 51, at p. 1) (hereinafter referred to as the "*Dilworth* formalism.") If the *Dilworth* formalism remains good law, then the sales tax imposed on the Sales at Issue in this case is unconstitutional.

iv. Arguments as to whether Dilworth *remains good law*

50. First, Petitioner argues that the United States Supreme Court has "consistently upheld" the *Dilworth* formalism. (ECF No. 51, at p. 1.) Specifically, Petitioner cites to *Oklahoma Tax Comm'n v. Jefferson Lines*, 514 U.S. 175, 186–87 (1995) (citing favorably to *Dilworth*, stating "we [have] held that a sales tax could not validly be imposed if the purchaser already had obtained title to the goods as they were shipped from outside the taxing State into the taxing State by common carrier"); *Itel Cont. Int'l Corp. v. Huddleston*, 507 U.S. 60, 69–75 (1993) (explaining that "Tennessee's sales tax is imposed upon the 'transfer of title or possession,'" and that this tax "on a discrete transaction occurring within the state" does not implicate Foreign Commerce Clause concerns[13]); *Wardair Canada, Inc. v. Fla. Dep't of Revenue*, 477 U.S. 1, 9 (1986) (recognizing there is "no threat of multiple

[13] The Foreign Commerce Clause requires satisfaction of the same *Complete Auto* factors assessed in dormant Commerce Clause analysis. *See Itel Containers*, 507 U.S. at 72.

international taxation . . . since the tax is imposed only upon the sale of fuel, a discrete transaction which occurs within one national jurisdiction only"); *American Oil Co. v. Neill*, 380 U.S. 451, 457–58 (1965) (citing favorably to *Dilworth*, stating that "this Court has struck down taxes directly imposed on or resulting from out-of-state sales which were held to be insufficiently related to activities within the taxing state, despite the fact that the vendor knew that the goods were destined for use in that State").

51. Second, Petitioner addresses the United States Supreme Court's most recent sales and use tax decision, *South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080 (2018). (ECF No. 51, at p. 3.) Specifically, Petitioner argues that "[t]he core holding in *Dilworth* . . . was not presented to – or discussed by – the *Wayfair* Court." (*Id.* at p. 4.)

52. On the other hand, the Department argues that the United States Supreme Court "implicitly" overruled *Dilworth* in its decision in *Complete Auto*. (ECF No. 50, at p. 2.) Specifically, the Department argues that:

> [i]n place of the semantic distinctions [between a sales tax and use tax expressed in *Dilworth*] the Court offered a four- part test for evaluating the constitutionality of a tax . . . . Thus, *Complete Auto* articulated a succinct standard by which to test the constitutionality of a tax while explicitly eschewing the *Spector*[14] rule and its rationale, which encapsulated the *Dilworth* understanding of the Commerce Clause. Nothing in the *Complete Auto* standard turned on semantic distinctions between *sales* taxes and *use* taxes.

---

[14] Referring to *Spector Motor Service, Inc. v. O'Connor*, 340 U.S. 602 (1951), where the Court made state taxation of interstate transactions *per se* unconstitutional. *See also*, *Freeman v. Hewitt*, 329 U.S. 249 (1946) (invalidating a state's gross receipt tax on interstate sales of securities under the same rationale).

> Relying on *Dilworth* as binding precedent would introduce an anachronism into modern state tax jurisprudence by reintroducing a formal interpretation of the Commerce Clause long abandoned by the Court.

(ECF No. 50, at p. 7.) Further, the Department argues that *Wayfair* did not expressly address *Dilworth* because "it was already effectively abandoned under *Complete Auto*." (*Id.* at pp. 10–11.)

a. Complete Auto

53. The Court is not persuaded that *Complete Auto* "implicitly" overruled *Dilworth* formalism. First, *Complete Auto* is neither a sales tax case, nor a nexus case. Its importance is that (1) it established an analytical framework for Commerce Clause cases, on which every case since has relied, *see* 430 U.S. at 279; and (2) it rejected the *Spector* rule that a state tax on the "privilege of doing business" is necessarily unconstitutional in the context of interstate commerce. *Id.* at 288–89.

54. Accordingly, the Court acknowledges that, to the extent *Dilworth* posits that taxation on interstate commerce is per se unconstitutional, *Complete Auto* and other cases have clearly overruled that aspect of its holding. However, the Supreme Court's rejection of the *Spector* rule in *Complete Auto* did not explicitly overrule *Dilworth's* holding that to meet the transactional nexus requirement under the Commerce Clause, a state *sales* tax must only be imposed on sales where the transfer of title or possession occurs within the taxing state. This position is consistent with conclusions reached by commentators. *See* Paul J. Hartman, *Federal Limitations on State and Local Taxation* § 11.4 (2d ed.) (Supp. Nov. 2020) (acknowledging that the Court in *Complete Auto* "abandoned the position that any tax

found by the Court to be imposed on interstate commerce is a per se violation of the commerce clause" but "[u]nless the Court changes its ideas about what constitutes a sufficient nexus for sales tax purposes of the taxed event to the taxing state, apparently the *Dilworth* holding will remain"); Richard D. Pomp, *Wayfair: It's Implications and Missed Opportunities*, 58 WASH. U. J. L. & POL'Y 1, 53 (2019) ("[T]here is, however, another aspect of *Dilworth*. The whole transaction, starting with solicitation in Arkansas and ending with the consumer having possession of the goods in Arkansas, constituted interstate commerce, which, under the jurisprudence of the day, could not be taxed. That part of the opinion was clearly overturned by subsequent cases. But still left open is the constitutional definition of where a sale takes place.").

b. Wayfair

55. With respect to *Wayfair*, the Court is similarly unpersuaded that its holding has any effect on the *Dilworth* formalism. In *Wayfair*, the United States Supreme Court considered "when an out-of-state seller can be required to collect and remit [a South Dakota sales] tax" and "reconsidere[d] the scope and validity of the physical presence rule mandated by" *National Bellas Hess v. Dep't of Rev.*, 386 U.S. 753 (1967) and *Quill*, 504 U.S. 298, under the Commerce Clause.[15] 138 S. Ct. at 2088.

---

[15] The physical presence rule originated in *Bellas Hess*, where the Court held that in order for a tax to pass muster under the Due Process Clause or the Commerce Clause, the taxpayer must have a physical presence in the taxing jurisdiction. 386 U.S. at 758–60 ("[T]he Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier or the United States mail."). Later, in *Quill*, the Court overruled *Bellas Hess* to the extent it "indicated that the Due Process Clause requires a physical presence for the imposition of duty to collect a use tax . . . as

56. South Dakota enacted a statute which "require[d] out-of-state sellers to collect and remit sales tax 'as if the seller had a physical presence in the state'" if the seller "on an annual basis, deliver[s] more than $100,000 of goods or services into the State or engage[s] in 200 or more separate transactions for the delivery of goods or services into the State." *Id.* at 2089 (quoting S.B. 106 at ¶¶ 3, 5, 8(10)). S.B. 106 expressly excluded the retroactive application of this new tax requirement for out-of-state sellers. *Id.*

57. South Dakota filed a declaratory judgment action against on-line retailers Wayfair, Inc., Overstock.com, Inc., and Newegg, Inc., none of which had any employees or real estate in South Dakota, "seeking a declaration that the requirements of [S.B. 106] are valid and applicable to respondents[.]" *Id.* The South Dakota Supreme Court affirmed a lower court's decision that S.B. 106 was unconstitutional due to respondents' lack of physical presence in South Dakota, reasoning that "*Quill* has not been overruled [and] remains the controlling precedent on the issue of Commerce Clause limitations on interstate collection of sales and use taxes." *Id.* (quoting 901 N.W.2d 754, 761 (S.D. 2017)).

58. On review, the United States Supreme Court first acknowledged that

> [u]nder this Court's decisions in *Bellas Hess* and *Quill*, South Dakota may not require a business to collect its sales tax if the business lacks a physical presence in the State. Without that physical presence, South Dakota must rely on its

---

superseded by developments in the law of due process." *Id.* at 308. However, with respect to the Commerce Clause, the *Quill* Court held that the physical presence "bright-line rule" remained good law. *Id.* at 312–319.

> residents to pay the use tax owed on their purchases from out of state sellers.

Id. at 2088. However, the Court ultimately vacated and remanded the decision of the South Dakota Supreme Court, overruling the *Bellas Hess* and *Quill* physical presence rule, and upholding the constitutionality of S.B. 106. *Id.* at 2098–2100. In the absence of the bright-line physical presence rule, the Court relied on the first prong of the *Complete Auto* test, which "simply asks whether the tax applies to an activity with a substantial nexus with the taxing state." *Id.* Further, the Court stated, "a substantial nexus is established when the taxpayer [or collector] 'avails itself of the subsequent privilege of carrying on business' 1n that jurisdiction." *Id.* at 2099 (citation omitted).

59. As applied to S.B. 106, the Court in *Wayfair* held that the statute's applicability thresholds require a "quantity of business [that] could not have occurred unless the seller availed itself of the substantial privilege of carrying on business in South Dakota." *Id.* at 2099. Accordingly, in the case of Wayfair, Inc., Overstock.com, Inc, and Newegg, Inc.—all entities for which S.B. 106 was applicable—the Court held that the Commerce Clause tax "nexus is clearly sufficient based on both the economic and virtual contacts respondents have with the State." *Id.*

60. Notably, as pointed out by Petitioner, the *Wayfair* Court did not have reason to consider any questions regarding whether there existed a transactional nexus between South Dakota and the sales being taxed because the parties "agree[d] that South Dakota has the authority to tax these transactions." *Id.* at 2092.[16] Accordingly, the Court concludes that *Wayfair* does not

---

[16] The Supreme Court's Opinion does not indicate whether title to the products sold by Wayfair to the South Dakota residents passed inside or outside of South Dakota.

overrule the *Dilworth* formalism. Again, this Court's conclusion is in line with conclusions reached by commentators. *See* Adam Themmesch, Darien Shanske, & David Gamage, *Wayfair: Sales Tax Formalism and Income Tax Nexus*, STATE TAX NOTES 975, 976 (Sept. 3, 2018) (stating that the *Wayfair* Court "certainly did not explicitly overrule" the "*Dilworth* formalism" and "uncertainty involving this issue leads us to conclude that the better course for states would be to continue to abide by *Dilworth* formalism and to enact economic nexus standards through their use tax systems"); Richard D. Pomp, *Wayfair: Its implications and Missed Opportunities*, 58 WASH. U. J.L. & POL'Y 1, 51–56 (2019) (opining that "[p]ost-*Wayfair* legislation should . . . clarif[y] that it is the use tax that remote vendors are being asked to collect and not the sales tax" as to avoid "a potential problem" created by the holdings in *Dilworth* and *General Trading*); Hayes R. Holderness, *Navigating 21st Century Tax Jurisdiction*, 79 MD. L. REV. 1, 13–24 (2019) (surveying the transactional nexus requirement since *Dilworth* and explaining that "the decision and the parties [in *Wayfair*] focused on the personal nexus issue" and "did little with respect to the transactional nexus doctrine").

c. State Courts and Dilworth

61. In further support of its arguments, Petitioner cites to a number of state court cases which have adhered to the Court's holding in *Dilworth*. *See Lamtec v. Dep't of Revenue*, 215 P.3d 968, 971 (Wash. Ct. App. 2009) (holding that *Dilworth* applies solely to transaction-based taxes (*i.e.*, sales taxes) and not gross receipts/activity-based taxes such as the Business & Occupation tax imposed on a New Jersey corporation); *TA Operating Corp. v. Fla. Dep't of Revenue*, 767 So. 2d. 1270, 1275 (Fla. Dist. Ct. App. 2000) (relying on *Dilworth* and holding fuel shipped

"F.O.B. Brunswick, Georgia" was not subject to Florida's fuel tax); *World Book, Inc. v. Mich. Dep't of Treasury*, 459 Mich. 403, 412, 590 N.W.2d 293 (1999) (relying on *Dilworth* and holding that where a Michigan taxpayer was "through selling" (*i.e.*, title and possession passed to buyers outside the State), the sales were subject to Michigan use tax, and not sales tax); *Bloomingdale Bros. v. Chu*, 513 N.E.2d 233, 234 (N.Y. 1987) ("[T]he ultimate destination of the goods is not necessarily the location of a particular sale [citing *Dilworth*]. Delivery may occur before the merchandise reaches its final destination. Delivery, in the sense that physical custody is transferred, may take place several times during the course of a transaction, but it is only that delivery which transfers control of the merchandise for consideration which marks a taxable event [(citations omitted)]."); *Sears, Roebuck and Co. v. Lindley*, 436 N.E.2d 1029, 1032 (Ohio 1982) (holding that *Dilworth* precluded the imposition of Ohio sales tax on newspaper inserts printed outside Ohio and mailed into Ohio, with title and possession passing outside Ohio).

62. In support of its contrary argument, the Department cites to state court cases which have treated *Dilworth* as obsolete. *See Arizona Dep't of Revenue v. Care Computer Sys., Inc.*, 4 P.3d 469, 471 (Ariz. Ct. App. 2000) (rejecting the argument that a "transaction privilege tax requires a higher level of nexus with the taxing state than does a use tax" reasoning that "[t]his argument is based on cases that were decided when state taxes on interstate commerce were *per se* unconstitutional," referring to *Dilworth*, *Freeman*, and *Spector*); *Greenscapes Home & Garden Prods. v. Testa*, 129 N.E.3d 1060, 1071 (Ohio Ct. App. 2019) (explaining that "[*Dilworth*] was decided at a time when . . . state taxes on interstate commerce were per se unconstitutional" and that "[i]n *Complete Auto*, the U.S.

Supreme Court overruled this line of cases and upheld a privilege on doing business tax on gross receipts from interstate commerce."); *Baker & Taylor, Inc. v. Kawafuchi*, 82 P.3d 804, 815 (Haw. 2004) (holding the same and declining to find *Dilworth* determinative).

63. Petitioner, on the other hand, argues that *Care Computer* and *Greenscapes* "are of limited relevance" to this case due to the fact that (a) they both involve gross-receipts-based taxes—not sales taxes (ECF No. 51, at pp. 9–12; citing to *Lamtec*, 215 P.3d at 971 and *Ford Motor Co. v. City of Seattle,* 156 P.3d 185, 190 (Wash. 2007) (holding *Dilworth* irrelevant where the tax involved is not a sales tax, but rather a business and occupation tax on the privilege of doing business in the taxing jurisdiction); and (b) both *Care Computer* and *Greenscapes* misinterpret *Complete Auto* as a rejection of the holding in *Dilworth*. (ECF No. 51, at p. 12.)

64. Both parties make compelling arguments regarding the impact of *Dilworth*, *Complete Auto*, and *Wayfair* on this case. The Court has thoroughly reviewed the parties' arguments, the relevant court decisions, and other persuasive authorities, and concludes that (a) *Complete Auto* did not overrule the *Dilworth* formalism; (b) *Wayfair* did not overrule the *Dilworth* formalism; and, therefore (c) the *Dilworth* formalism remains the law of the land. Absent contrary authority from the United States Supreme Court, the Court concludes that the principles set forth in *Dilworth* are controlling, and finds that North Carolina does not have a sufficient transactional nexus with the Sales at Issue under the Commerce Clause to impose *sales* tax on the Sales at Issue.

65. Therefore, the OAH's finding that the Sales at Issue were properly sourced to North Carolina under N.C.G.S. § 105-164.4B (2010) giving North Carolina authority to impose sales tax on those transactions is

unconstitutional as applied to Petitioner and should be REVERSED. The Sales at Issue lacked a sufficient transactional nexus to North Carolina under the Commerce Clause of the United States Constitution since it is undisputed that title to the Sales at Issue passed to the purchasers and third-party recipients outside of North Carolina.[17]

IV. CONCLUSION

THEREFORE, IT IS ORDERED that the Final Decision is REVERSED and summary judgment is hereby entered in favor of Petitioners.

SO ORDERED, this the 23rd day of June, 2021.

/s/ Gregory P. McGuire
Gregory P. McGuire
Special Superior Court Judge
for Complex Business Cases

[17] Again, the Court emphasizes that its conclusion on this "as applied" challenge—that the Department's sourcing of the Sales at Issue to North Carolina under N.C.G.S. § 105-164.4B (2010) is unconstitutional—is not intended to apply to any later enacted revised versions of the statute.

APPENDIX C

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE OFFICE OF ADMINISTRATIVE HEARINGS 19 REV 00334
Quad Graphics Inc Petitioner, v. NC Department of Revenue Respondent.	**FINAL DECISION**

Upon consideration of Respondent's Motion for Summary Judgment, accompanying brief and exhibits, Petitioner's Motion for Summary Judgment, Respondent's Response to Petitioner's Motion for Summary Judgment, Petitioner's Response to Respondent's Motion for Summary Judgment, all accompanying exhibits to such motions and responses, pursuant to N.C. Gen. Stat. § 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, and for good cause shown, the undersigned hereby **GRANTS** Summary Judgment for Respondent as follows:

APPEARANCES

For Petitioner: Douglas W. Hanna, Graebe Hanna & Sullivan, PLLC
Michael J. Bowen, Akerman, LLP
Attorneys for Petitioner

For Respondent: Matthew H. Sommer,
Terence D. Friedman
Assistant Attorneys General
North Carolina Department of Justice

ISSUE

Whether Petitioner's sales of printed materials from September 1, 2009 through December 31, 2011 were subject to North Carolina sales tax under N.C. Gen. Stat. § 105-164.1, *et. seq.*?

BRIEF OVERVIEW OF UNDISPUTED FACTS

While Findings of Fact are not appropriate in a grant of summary judgment, the undersigned provides a brief overview of the undisputed facts in this matter to provide context for the undersigned's analysis and ruling. *See, e.g.*, *Hyde Ins. Agency, Inc. v. Dixie Leasing Corp.*, 26 N.C. App. 138, 142 (1975). *See also* N.C. Gen. Stat. § 150B-34(e).

Petitioner was an S-Corporation and commercial printer engaged in the production and sale of printed books, magazines, catalogs, and other items ("printed materials"), which included delivery of printed materials to addresses in North Carolina. Upon receiving orders for and producing printed materials, Petitioner would deliver the printed materials to the United States Postal Service or some other common carrier at a site outside North Carolina for delivery to either customers in North Carolina or to some third-party recipients with North Carolina addresses. The addresses of third-party recipients were provided to Petitioner by its customers via mailing lists, which identified the recipients and their addresses. Customers paid for printed materials

regardless of whether printed materials were shipped to the customers in North Carolina or to third-party recipients in North Carolina.

While Petitioner's corporate headquarters was located in Wisconsin, Petitioner employed sales representatives throughout the United States. Beginning in September 2009, Petitioner employed a sales representative in North Carolina. Petitioner's sales representative in North Carolina specifically solicited the sale of tangible personal property to customers both inside and outside of North Carolina.

In 2011, Respondent conducted a sales and use tax audit related to Petitioner's business activities within North Carolina for the period January 1, 2007 through December 31, 2011. On November 12, 2015, Respondent issued a Notice of Proposed Sales and Use Tax Assessment finding Petitioner liable for uncollected and unremitted sales tax resulting from sales of print materials for the period September 1, 2009 through December 31, 2011. ("sales at issue"). Respondent determined that Petitioner had a sales tax nexus for the period at issue based upon the physical presence of its sales representative in North Carolina. The proposed Assessment included, among other things, the sales at issue in this case.

Petitioner appealed the Notice of Assessment through Respondent's Departmental review process. During that review, Respondent removed some sales and adjusted the proposed assessment to reflect those changes. On November 30, 2018, Respondent issued a Notice of Final Determination upholding the imposition of uncollected and unremitted sales tax resulting from Petitioner's sales of printed materials during the period at issue. Respondent found that Petitioner was a retailer engaged in business in North Carolina as it maintained a resident employee who solicited sales and serviced

customer accounts in this State. *See* N.C. Gen. Stat. §§ 105-164.4, 105-164.4B. Respondent also found that:

> Petitioner failed to establish with proper documentation that its customers took possession of the Print Media outside North Carolina or that it had been placed into storage outside of North Carolina. As such, the sourcing of Taxpayer's sales of Print Media delivered into North Carolina for storage, use or consumption is governed by the sourcing principles included in N.C. Gen. Stat. § 105-164.4B.

(Notice of Final Determination) In this Notice, Respondent concluded that because the print media was received by Petitioner's customers or their designee in North Carolina, the sales of such print media are sourced to this State under N.C. Gen. Stat. § 105-164.4B(a)(2) and (d)(2).

On January 29, 2020, Petitioner appealed the Notice of Final Determination and filed a petition to the Office of Administrative Hearings alleging Respondent deprived Petitioner of property, and ordered it to pay a fine or civil penalty AND exceeded its jurisdiction, acted erroneously and failed to act as required by law or rule in issuing the Notice of Final Determination as:

I. The disputed transactions are not subject to North Carolina retail sales or use tax because all relevant aspects of the disputed transactions took place outside North Carolina,

II. The Assessment of North Carolina Sales and Use Tax violates the Due Process and Commerce Clauses of the United States Constitution, and

III. The specific transactions included in the assessment should be excluded or are otherwise

exempt from the North Carolina Sales and Use Tax.

(Petition) It is undisputed that Petitioner is no longer pursing Claim III in its petition.

STANDARD OF REVIEW

"An Administrative Law Judge may [r]ule on all prehearing motions that are authorized by G.S. 1A-1, the [North Carolina] Rules of Civil Procedure." N.C. Gen. Stat. § 150B-33(b)(3a); *See* 26 NCAC 03 .0101(a) (specifically adopting the North Carolina Rules of Civil Procedure in contested cases at the Office of Administrative Hearings).

Summary judgment, under Rule 56(c) of the North Carolina Rules of Civil Procedure is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment "has the burden of establishing the lack of any triable issue of fact. His papers are carefully scrutinized and all inferences are resolved against him." *Kidd v. Early*, 289 N.C. 343, 352, 222 S.E.2d 392, 399 (1976). As both parties have moved for summary judgment in this matter, both parties acknowledge, and the undersigned determines, that there is no genuine issue as to any material fact in this contested case.

CONCLUSIONS OF LAW

1. This matter is subject to dismissal pursuant to N.C. Gen. Stat. §§ 1A-1, Rule 56 of the North Carolina Rules of Civil Procedure, 150B-33(b)(3a), and 26 NCAC 03.0101(a). This Tribunal has subject matter jurisdiction

over this matter and personal jurisdiction over the parties.

2. "A proposed assessment of the Secretary is presumed to be correct." N.C. Gen. Stat. § 105-241.9(a).

3. During the period at issue, North Carolina imposed a sales tax on the gross receipts from a retailer's sales at retail of tangible personal property if the retailer had a constitutional nexus with North Carolina and the sales were sourced to North Carolina. *See* N.C. Gen. Stat. §§ 105-164.3(9), 105-164.4(a), 105-164.4(a)(1), 105-164.4B, and 105-164.8. (The relevant portions of the Revenue statutes at issue in this contested case, including N.C. Gen. Stat. § 105-164.1, *et seq.*, are from 2010 and will, therefore, be used in this Final Decision unless specifically stated otherwise.)

I. The Sales at Issue Were Taxable in North Carolina

A. Petitioner was a retailer making sales at retail of tangible personal property

4. A "retailer" was "[a] person engaged in the business of . . . [m]aking sales at retail, offering to make sales at retail, or soliciting sales at retail of tangible personal property, digital property, or services for storage, use, or consumption in this State." N.C. Gen. Stat. § 105-164.3(35)(a).

5. A "person" was as "[a]n individual . . . limited liability company, a corporation . . . or another group acting as a unit" by reference to N.C. Gen. Stat. § 105-164.3(26) in N.C. Gen. Stat. § 105-228.90(5).

6. Under N.C. Gen. Stat. § 105-164.3(46), "tangible personal property" was defined as "personal property that may be seen, weighed measured, felt, or touched or is in any other manner perceptible to the senses." "Direct mail," a particular type of tangible personal property

relevant to the case at hand, was defined by N.C. Gen. Stat. § 105-164.3(7c) as:

> printed material delivered or distributed by the United States Postal Service or other delivery service to a mass audience or to addresses on a mailing list provided by the purchaser or at the direction of the purchaser when the cost of the items is not billed directly to the recipients.

7. A "sale" was [t]he transfer for consideration of title or possession of tangible personal property or digital property or the performance for consideration of a service." N.C. Gen. Stat. § 105-164.3(36). Additionally, a "sale at retail" or "retail sale" was "[t]he sale, lease, or rental for any purpose other than for resale, sublease, or subrent." N.C. Gen. Stat. § 105-164.3(34). There is no dispute that the printed materials in the sales at issue were tangible personal property and the printed materials shipped directly to the third-party recipients in North Carolina were "direct mail."

8. Any person maintaining "permanently or temporarily . . . any representative, agent, sales representative, or solicitor operating in this State in the selling or delivering" of tangible personal property was "engaged in business" in North Carolina. N.C. Gen. Stat. § 105-164.3(9)(a). It is undisputed that Petitioner employed a sales representative in North Carolina whose duties were the solicitation of sales to customers located both inside and outside of North Carolina during the period at issue. As a result, Petitioner was "engaged in business," as defined by N.C. Gen. Stat. § 105-164.3(9)(a), during the period at issue.

9. Applying the above statutory definitions to the undisputed facts in this case, the undersigned concludes that Petitioner's sales of printed materials were "sales," that the printed materials were "tangible personal property," that there was a "transfer of title for

consideration," that the printed materials were "stored, used, and consumed" in North Carolina, and that Petitioner was a "person" who was "engaged in business" in North Carolina during the period at issue. As a result, Respondent was a "retailer" as defined in N.C. Gen. Stat. § 105-164.3(35)(a) and was obligated to collect and remit tax on all of its sales sourced to North Carolina. N.C. Gen. Stat. §§ 105-164.8, 105-164.4B.

B. Petitioner had a sufficient constitutional nexus with North Carolina

10. Generally, there are two types of potential constitutional challenges to a statute, facial and as applied. In asserting a facial constitutional challenge, the proponent must "show that there are no circumstances under which the statute might be constitutional." *Beaufort County Bd. of Educ. v. Beaufort County Bd. of Com'rs*, 363 N.C. 500, 502, 681 S.E.2d 278, 280 (2009). In contrast, "[a]n as-applied constitutional challenge contests whether the statute can be constitutionally applied to a particular defendant, even if the statute is otherwise generally enforceable." *State v. Packingham*, 368 N.C. 380, 383, 777 S.E.2d 738, 743 (2015), *rev'd and remanded on other grounds*, 137 S. Ct. 1730 (2017).

11. "It is a well-settled rule that a statute's constitutionality shall be determined by the judiciary" and not an administrative tribunal or entity. *Matter of Redmond by & through Nichols*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (quoting *Meads v. N.C. Dep't of Agric.*, 349 N.C. 656, 670, 509 S.E.2d 165, 174 (1998)).

12. Similar to other administrative bodies, such as the Industrial Commission and the Utilities Commission, the Office of Administrative Hearings is an "administrative agency created by the legislature . . . [and] has not been given jurisdiction to determine the

constitutionality of legislative enactments" despite its power to conduct hearings, make decisions, and issue orders. *Matter of Redmond by & through Nichols*, 369 N.C. 490, 493, 797 S.E.2d 275, 277 (2017) (emphasis added). Similarly, the Office of Administrative Hearings is "not a court with general implied jurisdiction but primarily is an administrative agency of the state" that is "granted judicial power as is necessary to perform the duties required of it by the law which it administers." *Id.* (citing *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 137, 337 S.E.2d 477, 483 (1985) (discussing the limited jurisdiction of the Industrial Commission)).

13. Petitioner raises arguments alleging that Respondent's actions against Petitioner violates the Due Process Clause of the 14th Amendment and the Commerce Clause. While this Tribunal is barred from concluding and assessing the constitutionality of the relevant sales tax statutes in this matter, the undersigned may, however, analyze constitutional principles as applied to Petitioner in considering the propriety of Respondent's imposition of uncollected and unremitted sales tax resulting from the sales of printed materials during the period at issue.

14. In *South Dakota v. Wayfair*, 138 S. Ct. 2080, the United States Supreme Court explained that the substantial nexus requirement contained within the Commerce Clause is "closely related" to the due process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax[.]" *Wayfair*, 138 S. Ct. at 2093 (emphasis added) (internal quotation marks and citation omitted). This standard requires only that there be substantial nexus between the state and the person *or* the state and the property *or* the state and the transaction. Nothing in this standard suggests that only

the state in which the transfer of title or possession occurs may tax the transaction.

15. Rather, in *Wayfair*, the Supreme Court expressly noted that this substantial nexus requirement is met simply when a taxpayer "avails itself of the substantial privilege of carrying on business in that jurisdiction." *Id.* at 2099 (internal quotation marks and citations omitted). Therefore, as was the case in *Wayfair*, this standard is met even when there is only a sufficient connection between a state and the property subject to the transaction being taxed.

16. Here, there was a sufficient connection between both North Carolina and Petitioner, through its resident sales representative in North Carolina, and North Carolina and the printed materials' delivery into and use, storage, and consumption in North Carolina. In addition to shipping tangible personal property directly into this State, far in excess of the $100,000 threshold contemplated in *Wayfair*, Petitioner had a physical presence by way of its sales representative located in North Carolina.

17. Moreover, to the extent that any such nexus with the state is required between both the person and the transaction, the holding in *Wayfair* implies that such a requirement is met even when the destination of the tangible personal property that is the subject of the transaction is the sole connection between the state seeking to impose a tax and the transaction. In this case, it is undisputed that the printed materials in the sales at issue were delivered directly to North Carolina. Accordingly, North Carolina was well within it its rights under the Due Process Clause and the Commerce Clause to impose sales tax on these transactions in which the printed materials were shipped directly to North Carolina for storage, use, and consumption in this State.

18. Because Petitioner was a retailer with a constitutional nexus to North Carolina and the sales at issue were properly sourced to this State, Respondent correctly and constitutionally assessed Petitioner for unpaid sales tax on the sales at issue.

II. The Sales at Issue Were Properly Sourced to North Carolina

19. Sourcing is used to assign a location for where a transaction occurred, so that it may be taxed in the appropriate jurisdiction. North Carolina is a classic destination-based sales and use tax state as set forth in N.C. Gen. Stat. § 105-164.4B. In a destination-based sales and use tax state, a sale is sourced to, to deemed to have occurred in, the location where the product is delivered.

20. North Carolina had two relevant provisions under its sourcing statute that apply to the sales at issue. First, N.C. Gen. Stat. § 105-164.4B(a)(2) specifically stated that: "When a purchaser receives a product at a location specified by the purchaser and the location is not a business location of the seller, the sale is sourced to the location where the purchaser receives the product."

21. Second, N.C. Gen. Stat. § 105-164.4B(d)(2)(b) applied to direct mail and stated that direct mail was "sourced to the location where the property is delivered" when "the purchaser provides the seller with information to show the jurisdictions to which the direct mail is to be delivered."

22. The undisputed facts show that Petitioner shipped the sales at issue directly to customers located in North Carolina or directly to third-party recipients in North Carolina based on mailing lists provided by its customers. The shipments directly to customers, without contention, fall within N.C. Gen. Stat. § 105-164.4B(a)(2) as sourced to North Carolina because North Carolina was

the location where the customers received the printed materials.

23. Regarding shipments to third-party recipients, those shipments fall squarely within N.C. Gen. Stat. § 105-164.4B(d)(2)(b) because the customers provided Petitioner, via the mailing lists, the information showing the jurisdictions to which the printed materials were to be delivered. In the case of the sales at issue, those were all delivered to North Carolina.

24. Based upon the application of the above statues to the undisputed facts, Respondent properly sourced the sales at issue delivered directly to the customers in North Carolina to the "location where the purchaser receive[d] the product," which was North Carolina. N.C. Gen. Stat. § 105-164.4B(a)(2). Respondent also correctly sourced the portion of the sales at issue that were shipped directly to third-party recipients, *i.e.*, direct mail, "to the location where the property [was] delivered," which was also North Carolina, because "the purchaser provide[d] the seller with information to show the jurisdictions to which the direct mail is to be delivered," which were all in North Carolina. N.C. Gen. Stat. § 105-164.4B(d)(2)(b).

25. The sales at issue were therefore properly sourced to North Carolina, and Petitioner was required to remit tax on those transactions.

26. Applying the plain language of the applicable sales tax statutes set forth *supra*, Petitioner had a constitutional nexus with North Carolina and made taxable sales of tangible personal property to North Carolina but failed to collect and remit sales tax on these sales during the period at issue. Respondent did not deprive Petitioner of property when it issued its Notice of Final Determination, and did not exceed its jurisdiction, did not act erroneously and did not fail to act as required by law or rule in issuing the Notice of Final Determination.

27. As there was no genuine issue of material fact and because Respondent's proper application of the applicable sales tax statutes resulted in the sales at issue being taxable in North Carolina, Respondent is entitled to summary judgment as a matter of law.

FINAL DECISION

Since there is no genuine issue of material fact and Respondent is entitled to summary judgment as a matter of law, the undersigned hereby **GRANTS** Respondent's Motion for Summary Judgment, pursuant to Rule 56 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, and hereby **DISMISSES** this contested case with prejudice.

NOTICE OF APPEAL

This is a Final Decision issued under the authority of N.C. Gen. Stat. § 150B-34.

Under the Administrative Procedure Act of North Carolina, N.C. Gen. Stat. § 150B-1 *et. seq.*, and N.C. Gen Stat. § 105-241.16, any party aggrieved by the Final Decision may seek judicial review by filing a Petition for Judicial Review in the Superior Court of Wake County and in accordance with the procedures for a mandatory business case set forth in N.C. Gen. Stat. § 7A-45.4(b) through (f). **Before filing a petition for judicial review, a taxpayer must pay the amount stated in the Notice of Final Determination, plus applicable interest, which continues to accrue until the tax is paid.** N.C. Gen. Stat. § 105-241.21.

The party seeking review must file the petition within 30 days after being served with a written copy of the Final Decision. In conformity with 26 N.C. Admin. Code 3.0102, which incorporates the provisions of electronic service as defined in 26 N.C. Admin. Code

3.0501, **the Certificate of Service attached to this Final Decision shows the date of service on the parties.**

N.C. Gen. Stat. § 150B-46 describes the contents of the Petition for Judicial Review and requires service of the petition on all parties. Because the Office of Administrative Hearings is required to file the official record in the contested case under review, **the party seeking judicial review must send a copy of the Petition for Judicial Review to the Office of Administrative Hearings when the judicial review is initiated.**

This the 24th day of June, 2020.

/s/ Melissa Owens Lassiter
Melissa Owens Lassiter
Administrative Law Judge