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In the

Supreme Court of the United States

NATIONAL GEOGRAPHIC SOCIETY,

PETITIONER,

V.

CALIFORNIA BOARD OF EQUALIZATION,

RESPONDENT.

No. 75-1868

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IN THE SUPREME COURT OF THE UNITED STATES

NATIONAL GEOGRAPHIC SOCIETY, Petitioner,	:	
v.	:	No. 75-1868
CALIFORNIA BOARD OF EQUALIZATION, Respondent	:	

Washington, D. C.

Wednesday, February 23, 1977

The above-entitled matter came on for argument at 1:43 o'clock, p.m.

BEFORE:

WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
JOHN P. STEVENS, Associate Justice

APPEARANCES:

ARTHUR B. HANSON, ESQ., Hanson, O'Brien, Birney and Butler, 888 Seventeenth Street, N. W., Washington, D. C., 20006, for the Petitioner.

PHILIP M. PLANT, ESQ., Deputy Attorney General, State of California, 6000 State Building, San Francisco, California, 94102, for the Respondent.

C O N T E N T S

P R O C E E D I N G S

MR. JUSTICE BRENNAN: We will hear next Number 75-1868, National Geographic Society versus Board of Equalization.

Mr. Hanson.

ORAL ARGUMENT OF ARTHUR B. HANSON, ESQ.,

ON BEHALF OF THE PETITIONER

MR. HANSON: Mr. Justice Brennan, distinguished Associate Justices, and may it please the Court:

National Geographic Society appears before the Court today to ask that this Court reverse the decision of the Supereme Court of California, handed down April 1, 1976.

That decision represents the farthest reach in asserted use tax collection liability by any state supreme court since this Court struck down the decision of the Supreme Court of Illinois in National Bellas Hess v. Department of Revenue in 1967.

The test for asserted use tax collection liability set forth in the Supreme Court of California opinion is that the slightest presence within such taxing state, without regard to the nature of such presence, is enough for liability to attach.

This proffered test, juridically created in California, has no genesis in the jurisprudence relating to this subject, nor has any state legislature nor the Federal

Congress ever attempted to assert legislatively such a clear-cut violation of the Commerce Clause of the Constitution, as set forth in Article 1, Section 8, Clause 3, of the Constitution of the United States.

Likewise, the California decision is an egregious violation of the Due Process Clause of the Federal Constitution, as set forth in the Fourteenth Amendment to the Constitution.

This Court has specifically addressed the subject in this field in Wisconsin v. J. C. Penney Co., referred to at pages 3, 4 and 8 of the Society's reply brief, in saying "A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection it has afforded, the benefits which it has conferred by the fact of being an orderly, civilized society."

In all cases decided by this Court upholding the sales-related taxing authority of the states, there has been meaningful in-state exploitation of that state's resident customers. Such in-state customer exploitation is clearly a benefit which satisfies the Due Process requirements of the Constitution.

The California Court of Appeals, First District, also stated the relationship requirement succinctly in 1969, in the case of Montgomery Ward and Company v. State Board of

Equalization, referred to at pages 16 and 22 of the Society's jurisdictional statement, page 22 of the Society's brief, and page 3 of the Society's reply brief, where the California Appeals Court said, "The protection afforded and the benefits conferred must have some relationship to the transaction which the state seeks to burden."

It is interesting to note that the Supreme Court of California refused to hear this case in 1969 and this Court denied certiorari in this very case in 1970.

This same question was raised in the instant case and most properly answered by the California Court of Appeals, First District, where in 1975 it stated in pertinent part: "What did the State of California give in relation to the out-of-state sales that the state can ask a return by way of requiring the Society to collect the use taxes?"

The answer is that the state provided no protections or benefits which were related to the out-of-state sales. All parts of the transactions were conducted through the Federal mail with the state playing no part and providing no benefits or protections.

QUESTIONS: The magazines that came through the mails to the customers carried advertising, I suppose, some of which was sold in California.

MR. HANSON: No, no advertising was sold in California, Mr. Justice White. All advertising that is

solicited --

QUESTION: I'll put it solicited in California.

MR. HANSON: Some may have been.

QUESTION: Well, they had two offices for that, didn't they?

MR. HANSON: That is correct.

QUESTION: They just didn't keep them there for nothing.

MR. HANSON: No, of course not. They solicited advertising. The record is clear on that.

QUESTION: Do you have any idea of what the total volume of advertising was from California?

MR. HANSON: It is not in the record, but it is, in a total volume in a given year in the period of this case, which ran about $16 million, California supplied about $1 million.

QUESTION: If you took the magazine's return from its advertising and compared it with its magazine sales, the take from California might be rather substantial.

MR. HANSON: Not at all. There were over 800,000 members of the Society in California, and at $8½ the arithmetic isn't very difficult to figure out.

QUESTION: What did you say the volume of advertising was?

MR. HANSON: About $1 million is the most --

QUESTION: About eight to one?

MR.HANSON: No, no. It is much more than that. Eight hundred thousand times eight gives you a figure of about -- I am not very good on arithmetic today, Mr. Justice White -- eight hundred thousand times six would be --

QUESTION: Six million, four hundred thousand.

MR. HANSON: Six million, four hundred thousand, right.

QUESTION: More than six to one.

MR. HANSON: It's more than six to one, but I would like to point out another thing while we are on that subject.

QUESTION: It is not insignificant, the advertising return from California.

MR. HANSON: We didn't say it was insignificant. It is not significant in the --

QUESTION: You had two offices in the State of California to solicit advertising.

MR. HANSON: The state also furnished something else. They furnished a statute which specifically exempted the magazine and its related offices to an exempt position within the state from any tax burden.

QUESTION: Well, apparently, it doesn't.

MR. HANSON: Sir?

QUESTION: Apparently, it doesn't.

MR. HANSON: No, it now asserts that it doesn't but --

QUESTION: That's the way it has been construed, isn't it?

MR. HANSON: The Supreme Court of California has construed it that way.

QUESTION: Actually what the law is then?

MR. HANSON: In California, until this Court --

QUESTION: We are bound by it, too.

MR. HANSON: No, you are not, sir.

QUESTION: Well, we are bound by what the California law discovers.

MR. HANSON: I would say not if the California law, as stated by the Supreme Court of California, is clearly contrary to the Constitution of the United States.

QUESTION: That's a different question.

MR. HANSON: That's why we are here.

QUESTION: I know, but you said that California furnished the law which exempted this. The California Supreme Court said it didn't.

QUESTION: That was its interpretation of that law.

We respectfully disagree with them and that, again, is one of the reasons we are here.

Now, the complete opinion of the Court of Appeals that I referred to --

QUESTION: You really don't ask us to differ with the California Supreme Court on construing its own statute, do you?

MR. HANSON: I don't think that that statute is going to be determinative of what's decided in this case.

The complete opinion of that court is set forth as Appendix B to the Society's jurisdictional statement, beginning at page 17(a): "As admitted by the State Board of Equalization on page 10 of its brief, the only benefits afforded the Society by the State of California relate to the Society's advertising solicitation activities."

QUESTION: Mr. Hanson, does the record tell us whether these sales are made on credit or does the customer send a check in when he places the order?

MR. HANSON: You mean the advertising sales?

QUESTION: No, I am talking about the sales -- the taxes imposed on globes and maps and things like that.

MR. HANSON: On that subject, Mr. Justice Stevens, the record states very clearly that they are either cash with order or they are on credit.

QUESTION: So there can be credit sales and, presumably, it would be possible for collection activities thereafter to take place within the state of California?

MR. HANSON: That subject was covered very thoroughly in National Bellas Hess, and it was not determinative

there, as we know.

Clearly, if California chose to impose a tax on services, the Due Process test set forth in Wisconsin v. J. C. Penney, referred to earlier, would be satisfied.

The State of California, however, has chosen not to impose a tax on such activities. And its election to not so tax those activities does not entitle the state constitutionally to tax as a more convenient alternative other totally unrelated out-of-state activities of the Society for which the State of California has clearly given nothing for which it can ask return.

The questions and positions of the parties in this case have been thoroughly briefed by both parties. The National Geographic Society will not reargue those papers. Rather, having stated the two constitutional questions at the outset, the Society will endeavor to outline the basic fallacy of the State Board's case and point out the effect that an affirmation of the California decision would have throughout this country.

As has been ably pointed out in the amicus curiae brief of the Direct Mail Marketing Association, Inc., urging reversal of the California court's decision, beginning on page 3: "Some forty-five states and the District of Columbia require out-of-state sellers to collect use taxes on sales made to residents of the state."

As has also been pointed out, there has been no uniformity in the state statutes on this subject, and the Federal Congress has not yet enacted a uniform sales and use tax act, although extensive hearings have been held.

Both the state and we have referred to those hearings in parts of our briefs and in parts of our reply brief.

Thus, the only protection for the Society and others similarly affected, is to rely on the Federal Constitution and this, the highest Court of our land.

The exact language of the test California would have this Court adopt is as follows: "Where an out-of-state seller conducts a substantial mail order business with residents of a state, imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state, independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so."

To us, this proposed test is little short of ludicrous. Does this mean that if the Society sends a writer and a photographer to California, that the state can impose use tax collection liability, based on their presence in the

state?

Suppose a writer is a resident of California and submits a story to the Society which is accepted for publication. Does that make the Society liable?

The answer should be, resoundingly, no. Yet, the state might well argue to the contrary were this proposed test be permitted to stand.

We used an example in our reply brief of the Society owning a parking lot in California; not operating it, merely owning it. Under the state's view of this case, that would immediately attach us to use tax liability, although there is absolutely no connection between that and the sales that are discussed in this case.

This Court must face the real test of use tax collection liability. This is the first case before this Court where a state court has asserted that a non-sales related presence in state, that is, one that has no connection with, or relationship to, any sales whatsoever will justify imposition of use tax collection liability on interstate sales.

Neither the state, nor anyone else, can point to a single case where such liability has attached, absent some direct retail sales-related activity in state.

QUESTION: Mr. Hanson, you haven't yet mentioned or conceded or covered the fact in this case that there were,

in fact, retail sales related activities in the state during part of the taxable period.

MR. HANSON: During a period of about nine months --

QUESTION: Yes.

MR. HANSON: -- which the California Court of Appeals regarded as de minimis.

QUESTION: Maybe so.

MR. HANSON: And the California Supreme Court said that it wasn't necessary to even consider that.

QUESTION: No. The California Supreme Court didn't find it necessary even to consider that in order to rule against you, but even if we disagree with you -- even though we fully agreed with you on the argument you are now making, that unless there is a sales-related activity within the state, then Bellas Hess controls this. Nonetheless, in this case, there was a sales-related activity.

MR. HANSON: Let me approach --

QUESTION: I trust you are going to get to that.

MR. HANSON: I am coming to it, but let me address it for a moment now.

There is a reason as to why the state board and we agreed to set up two periods for the courts to consider. We set up one period where there were sales activities, minor as they were, in the San Francisco and Los Angeles offices.

QUESTION: Of the very same kind of items that are sold here by mail order.

MR. HANSON: That is correct.

And, in turn, we set up the second period, beginning with the quarter that ended in September, where those activities had ceased. They actually ceased on May the 6th, and we paid the tax on the period where we had sales-related activities and did not ask for a refund. We asked for a refund of the tax assessed for the period in which the sales-related activities had ceased.

There was only a period from the 1st of August, 1963, to May 6, 1964, in which there were any sales-related activities in this. There were never any before and there have never been any since, but I'll cover that further as we go along.

In every case where liability has attached, there have been either retail sales outlets in state or sales persons soliciting orders in state, or, as in the case of Standard Steel Co. v. Washington Revenue Dept., referred to at page 21 of the Society's jurisdictional statement, page 28 of the Society's brief, and page 17 of the Society's reply brief, in a case which we think was rightly decided, an in-state resident employee, someone who is living in the state,who has something to do with the sales involved. In this case, he was an engineer. He consulted with the end user of his

Company's products and he also worked with his company's engineers, at least three days every six weeks on the very subject of the sales which involved the Boeing Aircraft Company. Guiding both the end user and his company's engineers on the needed technical requirements, he also acted as a trouble-shooter if something went wrong with their materials. He was --

QUESTION: I want to be sure about that.

You do concede the correctness, then of Press Steel?

MR. HANSON: We do, indeed. We do not think it applicable in this case.

The Society's advertising solicitors made no retail sales -- I might say, Mr. Justice Blackmun, we stated that in our reply brief, in the concluding part of it where we discuss the State of New York's amicus, which made much of Washington-Press Steel, and we stated there we felt it was rightly decided.

QUESTION: That case was vigorously argued here and I just want to be sure --

MR. HANSON: I know it was, sir, but we think, based on the factual statement that the record shows, it was rightly decided.

The Society's advertising solicitors made no retail sales of goods in California or anywhere else. The Society's advertising officers in California were restricted in authority

and function solely to the solicitation of national advertising copy for the exempt magazine, except for the brief period of August 1, 1963, to May 6, 1964.

As noted on page 7 and 8 of the Society's jurisdictional statement, and page 26 of the Society's brief, "The California Court of Appeals found the few sales in this period to be de minimis and the Supreme Court of California disregarded these sales for purposes of its decision."

I think it might be well to note just what the percentage involved in the period at that time was.

In the reply brief of the Appellant, if you look at page 11, you will find a discussion of the Miller Brothers' sales, which were rather interesting, where in Miller Brothers v. Maryland, there were $12,000 worth of sales, of which eight were delivered in Maryland by a Miller Brothers' truck. That was a five to four decision.

When we come to the Society's picture, the San Francisco office sold the sum of $679.20 worth of goods. The Los Angeles office was $2,161.85, while during that period from August 1, 1963, to May 6, '64, the Society sold, through interstate commerce, to California, $452,470 worth of goods. That's on the bottom of page 13 of the reply brief. That figure was .63% of the volume of mail order sales, the amount that was actually sold in two offices. One of those offices was on the 10th story of an 18-story building, and the

other was, at that time, on the second story of a two-story building, and is now on about the 15th or 20th floor of a 28-story building. They aren't designed for retail sales, and never have been.

The California Court of Appeals -- the Society took no mail orders in California. The Society had no door-to-door solicitors in California seeking mail orders to be filled outside California. The Society had no local advertising, by either written or electronic media, advertising its products in California. The Society made use of no local flyers or handbills for the solicitation of mail orders from California residents.

In this connection, the California Court of Appeal expressly stated the solicitation of advertisements to appear in the magazine had no effect upon whether California residents would purchase products of the Society which they saw advertised in the magazine or in mailed circulars.

QUESTION: Mr. Hanson, suppose throughout this period the magazine had been sold on newsstands or over the counter in the state, although there was no in-state activity with respect to the mail order sales.

MR. HANSON: I think, again, it would depend on how they got to the newsstands, as you, perhaps, know.

QUESTION: Let's assume that National Geographic sold them out of their own establishment.

MR. HANSON: Well, you mean that they would have newsstands that they maintained in California?

QUESTION: Yes.

MR. HANSON: I think it would be a completely different case.

QUESTION: I know it would be different, but how -- what would be the result?

MR. HANSON: I think that in all probability that a use tax would apply.

QUESTION: Even though there was no in-state activity with respect to the specific sales to be taxed?

MR. HANSON: No, but we would have had to at that point been licensed to do business in the state. They would be operating under the protection of the state on a substantial business. We are advertising the goods in the magazine. And at that point, I think that --

QUESTION: Even though there needn't be in-state activity with respect to the specific sales to be taxed, as long as there is some other retail activity.

MR. HANSON: Well, let's take a look at Nelson v. Sears Roebuck.

QUESTION: You accept that decision, I gather?

MR. HANSON: We do accept it. We do not accept its application by the Supreme Court of California.

QUESTION: I understand.

MR. HANSON: In Nelson, also the records in this Court, which we went through very thoroughly, point out that Sears Roebuck maintain twelve stores in the state and that their volume of sales which appears, I think, about page 12 of our brief, showed that Sears Roebuck, in our reply brief, the volume of sales with the in-state stores was $5,040,000 and the sales by mail -- it's at the top of page 14 -- $5,080,000 in the sales in the stores and $5,900,000 in the mail order sales, and they were selling exactly the same goods in both.

And, in addition to that, the records show that a number of those sales were actually processed in the retail stores. So they were obviously involved in that, and in addition, in Nelson, they of course, were licensed by the state to do business in the state, the state had jurisdiction over them.

QUESTION: So you would reach the same result, I suppose, if geographic -- Well, let us assume in Nelson the local retail sales made by Sears Roebuck never was of the same goods that were on the mail order. I suppose you would get the same result.

MR. HANSON: I don't see how the result would really differ because of the involvement of the organization, or the company, in --

QUESTION: Would you call the local sale of

advertising retail, or not?

MR. HANSON: No, I would not. In the first place, it is not a sale. It is solicitation. I am sorry. I am not quibbling with you.

QUESTION: That's all right. I understand what you mean.

MR. HANSON: The advertising is all sent to Washington. It cannot go in the magazine until it's approved here. There is no contract made there. A man goes and tries to interest these people --

QUESTION: But it is a solicitation for a sale at retail.

MR. HANSON: It is the solicitation for the sale of services, and this is not the sale of retail goods.

There is a recent case that is not pertinent here today, but I think the Virginia Pharmacy case in which we finally got to what I hoped was my view of how advertising matters should be treated by the Court, was treated by it, as opposed to the way the Pittsburgh Press case was treated.

QUESTION: I suppose if the advertising transactions had been completed within California, that would have been subject to a California sales tax?

MR. HANSON: No, again, because it is a sale of services and California has not --

QUESTION: Well, is there an exemption --

MR. HANSON: There is. That's Section 6362 of the California Code, specifically --

QUESTION: They don't treat it like a laundry?

MR. HANSON: No. Not a bit. It is not a can of beans.

The Society made no use of local handbills or flyers and were it not for the existence of the two advertising offices, this case would be factually on all fours with National Bellas Hess. It would appear to lie between Miller Brothers and National Bellas Hess, but much closer to the latter.

The solicitations made by the society for the sale of its products or through its magazine and circulars in the interstate mails. In effect, the magazine was the Society's catalogue, and the difference between it and Bellas Hess is that Bellas Hess had a catalogue with about 5,000 items advertised in it and a typical mail order house.

In the two exhibits in the record here, the Society had a three-quarter page ad in one issue and a quarter page ad in another, and they do not advertise these goods in each one of the magazines that is put out.

In light of these facts, it is difficult to understand how the State of California reached the conclusion it did unless it believed that the need for revenue at the state level is assumed to be as all important as alluded to by the

State of New York as amicus curiae in support of the State of California.

The main point in that brief centers on the need of states for revenue and, in effect, asks that the California Supreme Court's test be accepted for that helps the state's revenue needs.

Certainly, no revenue measure can be set solely on need, disregarding constitutional principles.

The states have many ways to obtain revenues, without violating the Constitution of the United States.

The other major hurdle that this --

QUESTION: Mr. Hanson, just so I've got it completely clear. Are you relying entirely on the Commerce Clause or do you also rely on the Due Process Clause?

MR. HANSON: We rely on them together, and the reason for that is that every case involving this subject which this Court has addressed has combined the two together.

QUESTION: So you rely on them both.

MR. HANSON: Yes, sir.

The other major hurdle that the state must overcome to place use tax collection liability on any retailer is to show that the in-state activities of the retailer are related to the retail sales sought to be taxed.

Stated another way, California must show that the in-state activities are not dissociated from the operations

which generate the alleged use-tax collection liability.

It must be remembered that the California decision is grounded entirely on non-sales related activities. No clearer case for dissociation exists than here.

Starting with Connecticut General Life Insurance Company in 1928, cited by the amicus in support on pages 8 and 9 of its brief, Norton Company in 1951 and American Oil Company in 1965, this Court has consistently refused to assess tax liability where the in-state activities were held to be dissociated from the activities generating the asserted tax liability.

The basic flaw in the Supreme Court of California's opinion was pointed out on pages 27 and 28 of the Society's brief. The California court tried to justify its holding by misstating the language of National Bellas Hess. That case clearly stands for the proposition that there must be in-state contact with customers before there can be a use-tax collection liability for mail order sales, and that a totally non-sales related contact by the out of state seller with the state will not suffice.

QUESTION: You mean an in-state connection with the customers to whom the sales sought to be taxed are made?

MR. HANSON: Yes, Your Honor.

QUESTION: How about Nelson?

MR. HANSON: No problem with Nelson. There was an

in-state contact.

QUESTION: Well, not with the customers to whom the mail orders were made.

MR. HANSON: Well, there was, indeed, according to the record.

QUESTION: Not with the customers to whom the mail order sales were made.

MR. HANSON: There was an in-state contact, as justified in the court's view, and I think rightly so -- Local advertising was carried on by Sears Roebuck of the exact same product that was involved in the mail order sales. They were carried on both radio and written media advertising and, in addition, they processed many of these orders in the local retail stores in Iowa.

QUESTION: Well, they taxed those, all right.

MR. HANSON: They taxed them both.

QUESTION: There wasn't any argument about those, but the mail order sales --

MR. HANSON: But the mail order sales contact was held to be the advertising and the fact that the same articles were being sold in the retail stores that were being sold by mail order and that the presence of Sears Roebuck in Iowa and the understanding of the citizenry of Iowa, that made that the final concluding item.

QUESTION: You give emphasis to the selling of the

same products. Suppose that factor were absent? What then?

MR. HANSON: I would say that under the Nelson v. Sears doctrine, with twelve stores in-state, and a national organization heavily flooding the state with other products, realistically you know it doesn't work that way.

Were it to work that way, as you posed it, Mr. Justice Blackmun, I think that there would be certainly a tax that could be -- a use-tax collection liability could be assessed.

QUESTION: So that that factor is not important, then?

QUESTION: No. That was really my same question: If your client were selling baseball bats or shoes inside California --

MR. HANSON: If we were in California -- Mr. Justice Stewart, if we were in California, with an active retail presence in California and a totally different sale coming in from out of state, I think we would be stuck with it. I don't think there would be any question.

QUESTION: That's what I understood you to say earlier.

So, as my Brother Blackmun suggests in his question, the same products is not dispositive at all.

MR. HANSON: Yes.

I have just, if I may --

QUESTION: What if the baseball bats that were being sold weren't actually sold in California, but there was active solicitation for the sales in California?

MR. HANSON: Then you've got Scripto. You've got Scripto there.

QUESTION: What would be the result?

MR. HANSON: I think the use tax would apply.

QUESTION: And then you could collect it from the solicitor.

MR. HANSON: No, not from the solicitor, from the vendor.

QUESTION: From the company.

MR. HANSON: Yes.

If I might --

QUESTION: So the baseball transactions don't need to be concluded in California?

MR. HANSON: No. That's right.

If I might, Mr. Justice Brennan, I have just two more paragraphs and we have had some extensive questioning.

I've stated the California court tried to justify its holding by misstating the language of National Bellas Hess.

It is clear that under the prior decision -- I pointed that out. If you read pages 27 and 28 of our brief, they very beautifully elided a sentence out of it, and we put the right sentence back in the way Mr. Justice Stewart

wrote that opinion.

It is clear that under the prior decisions of this Court no taxing nexus has been found to exist in the absence of meaningful, in-state sales related activity. Under the facts of this case, no such in-state sales related activity exists which would permit California to make the National Geographical Society a tax collector.

Accordingly, it is most respectfully urged that the decision of the Supreme Court of California be reversed and the decision of the California Court of Appeals be reinstated with whatever reinforcement this honorable Court deems appropriate.

Thank you very much.

MR. JUSTICE BRENNAN: Mr. Plant.

ORAL ARGUMENT OF PHILIP M. PLANT, ESQ.,

FOR THE RESPONDENT

MR. PLANT: Mr. Justice Brennan, and may it please the Court :

The Appellant has referred repeatedly to the opinion of the California State Supreme Court.

I respectfully submit that we are here before this Court on the facts of this case, and it should be viewed in that context.

On the facts of this case, the issue before this Court pertains to the constitutionality of a California statute

which imposes a use tax collection requirement on a foreign retailer having a place of business within the taxing jurisdiction.

This is not unusual. The 1965 Special Subcommittee on State Taxation of Interstate Commerce found that from seven to thirty-three of the thirty-six sales tax states then reporting to its survey had similar provisions.

Also following this 1965 report there were repeated attempts in introductions of bills into Congress to regulate the state taxation of commerce, among the several states, none of which passes, but all of which bills provided that the ownership or leasing of property within the taxing jurisdiction would support the imposition of a use tax collection requirement.

As Mr. Hanson has said, there are two constitutional challenges to the statute, Due Process and the Commerce Clause. Both of these provisions are based on principles of fairness.

The Interstate Commerce Clause is satisfied if the state tax in question does not constitute an undue burden upon the commerce among the several states.

The Due Process Clause is satisfied if the state has given something for which it can ask return, that is, if the benefits given and the opportunities conferred bear a fiscal relation to the exertion of the taxing power by the state.

We submit that the requirement of the presence of a business office within the taxing jurisdiction as a condition precedent to the requirement of a foreign retailer collecting a use tax satisfies both of these tests.

Firstly, it does not constitute an undue burden on interstate commerce. At the outset, it is appropriate to note that the purpose of the use tax is not to discriminate against the foreign retailer, but rather to place the foreign retailer under a tax, equal in amount, to that borne by the local retailer who is subject to the sales tax.

QUESTION: If these two offices were in Arizona, I take it you would concede that the California use tax does not apply?

MR. PLANT: That is correct, Your Honor, that would be National Bellas Hess.

QUESTION: Suppose the Society, from its office in Arizona, sent a salesman to solicit advertising into California?

MR. PLANT: In that situation, the relationship is such that under analogy to Scripto we might well assert a tax. We might say that the solicitation of the advertising supports the magazine, which in turn is the primary vehicle through which the Society advertised its offerings of maps, atlases, globes and books, moreover, it constituted the mailing list used by the Society in soliciting these mail

order sales to California residents. And, finally, the good will established by the prestige of the Society's name carried over to enhance its sales of these maps, atlases, globes and books.

QUESTION: That would be an extension of Scripto, however, which would only directly support the taxation of the advertising.

MR. PLANT: That's correct, Your Honor.

QUESTION: Is there any significance in the fact that you don't require them a license to do business in California?

MR. PLANT: Well, Your Honor --

QUESTION: Is there any?

MR. PLANT: We submit it does not. There are several cases, notable among them, Sears Roebuck and its companion case of Nelson v. Montgomery Ward, which make reference to retailers being registered to do business.

Now, on the other hand, this Court has decided in such cases as General Trading and Felt & Tarrant that there is sufficient nexus to support such a tax in the absence of registration to do business.

Our position with regard to that --

QUESTION: Mr. Deputy Attorney General, while I have you interrupted, I take it from what you said that the solicitation of retail sales and the accomplishment of those

sales for the nine months period that has been mentioned is of no importance to your case.

MR. PLANT: The --

QUESTION: The sales of articles --

MR. PLANT: There were solicitation of advertisements to be placed in the magazine.

QUESTION: I am drawing a distinction between solicitation for advertisements, on the one hand, and the sale of goods within California, on the other.

The California Supreme Court said the sales of goods for the nine months period were de minimis, as I understand it.

MR. PLANT: The Supreme Court held that it need not consider them because it found taxation independent of that ground.

QUESTION: What I am asking you is whether you consider those sales of goods relevant to your position?

MR. PLANT: I would consider them relevant in two particulars, Your Honor. In the first instance, we consider them relevant because we feel they are not de minimis. We feel that to the extent they overlap the first taxable quarter, they constitute approximately 2.3% of the taxes during that particular time when the over-the-counter sales overlapped with the mail order sales here disputed. That's 2.3% which we think more than

Furthermore, we notice that in the second quarter, after they discontinued over-the-counter sales their mail order sales dropped off from $45,000 to $38,000.

So we say there might be some significance to that and we take the position there should be.

Secondly, the fact that they made over-the-counter sales is very material to the question of whether or not they were registered to do business.

We submit, as one of our arguments, that they did, in fact, by stipulation, do business in California, and that they should not be rewarded for their failure to register by having a more restrictive liability in regard to use tax collection.

QUESTION: Even if you are correct on both those points and even if, further, the fact that intrastate retail sales were made of these same items during the period, even though a fairly small percentage of the total, should bring this case within Montgomery Ward and Sears Roebuck, that would still be true only for that taxable period during which the intrastate retail sales were made. It wouldn't continue forever, would it?

MR. PLANT: That would be correct, Your Honor.

But, as we will further develop our argument, we don't feel that the presence of a local retail operation is essential to the concept.

QUESTION: No, but if it is, it would give your state power to tax the, impose this use tax only for a specific taxable period, wouldn't it?

MR. PLANT: That's correct, Your Honor.

QUESTION: You can see that, that it doesn't damn these people forever.

MR. PLANT: To the extent that it is essential that they have a retail activity in the state, that is correct, Your Honor.

The Due Process Clause is satisfied if the state has given something for which it can ask return, if the benefits given and the opportunities conferred bear fiscal relation to the taxing power exerted by the jurisdiction.

Now, under the Commerce Clause, it does not constitute an undue burden. As I earlier noted, the purpose of the use tax is that of competitive parity.

Next, I think we should consider the holding of this Court in National Bellas Hess. In that Court, they found violation of Due Process and a violation of the Commerce Clause in a purely mail order situation, that is to say, where the foreign retailers only contacts with the taxing jurisdiction were through the use of the U.S. mails and common carriers.

Now, the Court in considering the Commerce Clause ground, made reference to the fact that if an interstate

mail order retailer had to file a separate return and a different rate under different administrative requirements in every state, political subdivision, local county and school district, that there would result an administrative entanglement which would constitute an undue burden on interstate commerce.

In the instant situation, we are only seeking to impose a use tax requirement on a foreign retailer maintaining a place of business within our state.

Now, the 1965 Special Subcommittee on State Taxation of Interstate Commerce specifically concluded that the vast majority of mail order retailers have business offices only in two or fewer states.

For this reason, there would not result the administrative entanglement productive of the undue burden condemned in National Bellas Hess.

Moreover, we should note that California has a centralized collection procedure whereby its local use taxes are collected by the state, so there is only one collector.

Turning to the Due Process Clause, as noted earlier, it asked no more than a fair return. We feel that conditioning the imposition of the use tax collection liability upon the maintenance of a place of business within California meets that test, because by maintaining places of business the foreign retailer necessarily substantially draws upon the

benefits conferred and the opportunities given by the state.

In this regard, it is interesting to compare the Standard Press Steel case. In the Standard Press Steel case, they found sufficient nexus to support the collection of a $33,000 tax liability on the basis of one engineering consultant who worked out of his home.

If that meets the Due Process text, with regard to the question of state opportunities and benefits conferred, then surely the maintenance of two employee staffed advertising offices in California would do likewise.

There are also benefits that do accrue to a foreign retailer purely by virtue of mail order sales.

Now, while it is true, that National Bellas Hess held that that alone is insufficient, it nevertheless is noteworthy that the Court, in General Trading Company, did observe that the foreign retailers doing a mail order business benefits by virtue of the fact that the state protection makes possible the California purchaser's use of the product, which is a sine qua non of the sale itself. Therefore, there is that benefit.

Further, there is a benefit that California facilities are available to the foreign retailer if, as here, there is a possible credit sale problem where they need to collect delinquent accounts.

So even in a mail order business, there are benefits,

albeit insufficient in and of themselves, we feel that it is one leg up toward supporting taxation.

The other thing that we would like to observe is that the Society did, indeed, exploit the California market in substantial manner with their mail order sales, and this is a factor to be considered.

The Court, in Miller Brothers v. Maryland, held that where there is no intentional, continuous, systematic exploitation of the market of the jurisdiction attempting to impose a tax, there is insufficient nexus. However, it is also recognized that where there is exploitation that is an important factor.

We feel that the Society, as a matter of stipulation, had $452,470.00 worth of mail order sales from the period August 1, 1963, to May 6, 1964.

There is pending, as reflected in the pleadings, a determination by the State of California for subsequent periods that covers a nine-year period and the board has been assessed for mail order sales exceeding $3,500,000.

QUESTION: How much of that came to either of these two offices?

MR. PLANT: As regards the assessment I just referred to, none.

As regards the amount over-the-counter from those offices --

QUESTION: Well, what you are saying is that but for the offices you wouldn't have any case.

MR. PLANT: Well, Your Honor --

QUESTION: Yes or no?

MR. PLANT: I am saying that the advertising soliciting activities support the tax. I am saying that we don't need those over-the-counter --

QUESTION: Could you advertise and solicit through the mail to get that tack?

MR. PLANT: As long as you don't maintain a place of business within the taxing jurisdiction.

QUESTION: Even though the business has nothing to do with the subscription.

MR. PLANT: Well, that's correct, Your Honor. We don't feel the need of a relational requirement.

QUESTION: Mr. Plant, you have referred to Miller Brothers. Do you think that the result below in this case is entirely compatible with the result in Miller Brothers?

MR. PLANT: Yes, I do, Your Honor. I think that Miller Brothers only stands for the proposition that where there is no intentional exploitation of the local market, that there cannot be nexus.

Miller Brothers and National Bellas Hess, together, can be read as conveying the message that nexus to support taxation is a mix of physical presence in a jurisdiction and

exploitation of the local market.

Bellas Hess says you have to have some physical presence and Miller Brothers says you have to have intentional exploitation.

QUESTION: Well, they sent their truck over into Maryland and serviced their product over there, didn't they?

MR. PLANT: That's true, but that was for deliveries that, according to the Court, were resultant from the residents of Maryland going across the border to the store in the other state and ordering material, and then they delivered it with their truck.

But, as the Court in Scripto v. Carson clarified Miller Brothers v. Maryland, they said that Miller Brothers did not go to Maryland, the Marylanders went to Miller Brothers, and that was emphasized.

QUESTION: I am not being critical, I am just wondering whether the decisions up here have been entirely consistent. That's really what I am saying, I guess.

QUESTION: Mr. Attorney General, if Geographic takes those two offices out right now, it's the end?

MR. PLANT: If they take their advertising soliciting offices right now, they are not liable for use tax collection liability, Your Honor.

QUESTION: Unless, I thought you said a while ago, they sent advertising solicitors into the state.

MR. PLANT: That's correct. That was in response to a hypothetical that they pulled them out and they put somebody else in. But if they pull out their advertising soliciting offices now, they have nothing.

Now, I would like to touch upon the reason we feel that qualification to do business should not influence the result in this.

First of all, as I mentioned, it is stipulated that the Society did do business and they shouldn't be heard to benefit because of the fact that they did not register as they should have done.

Secondly, as a matter of logic, the benefits accruing to the foreign retailer or the burdens, if any, imposed on interstate commerce will remain the same whether or not they went through the formality of registering to do business.

QUESTION: Whether or not a company needs to qualify to do business is a matter of local statutory law. It has nothing to do with the constitutional issue.

MR. PLANT: That's correct, Your Honor, but there are references, like in the Sears Roebuck case, to the fact that the foreign retailer there had -- was registered to do business.

I feel that the formal act of qualifying to do business should be irrelevant.

I'd like to make one further comment on that point, and that is, as a matter of policy, the 1965 Special Subcommittee noted that there is a severe compliance problem with foreign retailers not registering to do business in states at that time.

I think that if this Court were to increase a foreign retailer's susceptibility to taxation, by virtue of the fact that he voluntarily had registered to pay state taxes, that would only encourage evasion of the state requirement. So we feel it is inadvisable on that ground.

Now, addressing, briefly, the relation point, that is, the Appellant's position that the local activity must be related to the transaction tax.

QUESTION: Well, no, that the local activity must be retail sales activity, that's the extent of the submission, as I understood it.

MR. PLANT: If there is no requirement that the local activity bear a relationship to the transaction tax, then the question becomes: What possible difference could it make what the local activity is? It doesn't seem in terms --

QUESTION: Retail sales activity. Because that's the subject of this tax.

MR. PLANT: That's right, but we are taxing these mail order sales.

QUESTION: Take the hypothetical case that the

local activity was the writing of an article in California by a California author for National Geographic. That would be clearly local activity, he writing the article, a resident of California writing an article for submission and publication in National Geographic. That would clearly be local activity, and that under the phraseology of the Supreme Court of California's opinion, would be enough to constitutionally permit the state to impose use tax on these mail order sales.

MR. PLANT: Well, I think the language of the California State Supreme Court decision has to be read in context of the statute which it was applying. And the statute which it was applying, would not, I don't believe, allow taxation in an instance such as that.

The statute in question said that the tax could be imposed on a retailer doing business within the state, and went on to define doing business within the state to mean a retailer who established a sales office, warehouse, several other things, or any other place of business in the state.

And, so, therefore, what we are really looking at here is not how you could hypothetically expand ad infinitum the dicta of the California Supreme Court decision, but the validity of the California statute.

QUESTION: It is not the dicta, it is the test that it framed.

MR. PLANT: It is the test that it framed but

framed it whether or not the statute --

QUESTION: I don't have it and I --

Any presence, however, no matter how slight, or however slight, whatever it said.

MR. PLANT: That's correct, Your Honor, but my position is only that I respectfully submit that you have to look to the statute because I feel that if the state didn't have --

QUESTION: Well, look at the facts. The facts are that they solicited the sale of advertising regularly in the state.

MR. PLANT: Well, that's correct, Your Honor.

QUESTION: You don't need to say anything -- You don't need to go any farther than the tax you are trying to sustain here.

MR. PLANT: That's right, Your Honor. That's our position. We should just look to the facts of this case.

QUESTION: Your statement at the very outset of your argument -- You are not necessarily defending all the language of the Supreme Court of California. Did I misunderstand you?

MR. PLANT: No, you did not, Your Honor.

We just feel on the facts of this particular case that it is correctly decided.

With regard to the question of whether or not the

local activity need be related to the transaction tax, our position is, in essence, that physical presence within the taxing jurisdiction should be enough, and we can draw an analogy to the area of in personam jurisdiction over foreign corporations, whether or not they can be subjected to suit.

And we note that in Perkins v. Ben Gay Mining Company in 342 U.S., it was held that a foreign corporation, having administrative activities within a taxing jurisdiction, was held subject to suit for a cause of action arising outside the state, which cause of action bore no relationship, whatsoever, to the in-state activity.

Several commentators have recognized the similarity of the Due Process requirements in the area of taxation, on the one hand, and in the area of in personam jurisdiction, on the other hand.

QUESTION: Don't you have to find some nexus?

For example, if Survey Graphic set up a rest home and golf club for its employees in Palm Springs, you wouldn't put a sales tax on them, would you?

MR. PLANT: Well, under our statute, I don't think we would, but I would think --

QUESTION: It has to have some nexus, doesn't it?

MR. PLANT: I don't know that it constitutionally is required to relate to the transaction. I think if you can show that you are in the state and that you are deriving

benefits --

QUESTION: Why do you want to take on that big load? You don't need it.

MR. PLANT: Well, it's not a matter of taking on a big load, as much as it is trying to equalize the position of our local retailers, vis-a-vis our foreign retailers, and the ones most affected by this decision are the big ones.

When you limit the requirement to just having tax, use tax collection liabilities upon a foreign retailer with a business office in the state, you are looking only at the rather large foreign retailers who are the biggest competitive threat that the intent of the use tax was to neutralize.

We wish to argue that the dissociation test which, as set forth in American Oil Company v. Neill, should not be applied in this case, and that involved an excise tax, the incidence of which fell on the foreign retailer, whereas, in this case, the incidence of the tax is on the local user, and the foreign retailer is required to collect the tax.

Now, this Court has, in several cases, recognized this distinction, particularly in McLeod v. Dilworth and the Norton Company case. It is a logical distinction because, in one case, the foreign retailer bears the brunt of the tax and he is neither authorized nor required, as a matter of law, to pass that burden on to his purchaser.

In the instance of a use tax collection situation,

however, the foreign retailer is but a conduit and he is to pass the tax on to the local user.

QUESTION: He is ultimately liable, though, isn't he?

MR. PLANT: If he defaults in his performance, as such, he is ultimately liable, that's correct, Your Honor.

I have only two matters to touch upon, before closing.

Comments were made regarding the periodical exemption. The periodical exemption is set forth at page 3 of the Appendix to the Brief of Appellee, and it merely provides that the magazines or all the materials that go into make up the magazines, as a periodical, are exempt from sales and use tax. And it has always been our consistent position that where, by state legislative grace, we exempt a particular activity from sales and use tax, it does not mean that we blindfold ourselves to consider that as a factor in supporting the use tax collection liability that's appropriate on the mail order sales.

We noted that the Society conceded that if the magazine were sold from its own newsstands in California that the disputed tax on the mail order sales would be proper. We say, then, why not extend it to this situation where there are advertising soliciting offices? Both activities would equally draw upon the benefits conferred by the state. There would, in either event, be no greater burden on interstate

commerce.

It would then seem that the character of the local contact, if it need not be related to the transaction taxed, is fairly irrelevant, so long as it substantially draws upon the benefits that the state has conferred.

In summary, we feel that the requirement of a use tax collection liability on foreign retailers maintaining a place of business within the taxing jurisdiction, meets the requirements of the Due Process and Commerce Clause test.

MR. JUSTICE BRENNAN: Thank you, gentlemen.

The case is submitted.

(Whereupon, at 2:42 o'clock, p.m., the case in the above-entitled matter was submitted.)