I. THE TAX ON SALES OR USE OF SERVICES DOES NOT VIOLATE THE COMMERCE CLAUSE OR THE DUE PROCESS CLAUSE

It is beyond dispute that a fairly apportioned nondiscriminatory tax on an out-of-state business engaged exclusively in interstate commerce is permissible. Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450 (1959). It is "not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business. 'Even interstate business must pay its way,' . . ., and the bare fact that one is carrying on interstate commerce does not relieve him from many forms of state taxation which add to the cost of his business." Western Live Stock v. Bureau of Revenue, 303 U.S. 250, 254 (1938). For example, if instruments of commerce are used both within and without the state, a tax fairly apportioned to that use within the state will be sustained.

In Complete Auto Transit, Inc. v. Brady, the Supreme Court enunciated the modern test of constitutionality under the commerce clause, an analysis grounded in economic reality rather than formalistic distinctions. 430 U.S. 274 (1977). A tax on interstate commerce is valid if the four prongs of Complete Auto Transit are satisfied: The tax must be applied to an activity with a substantial nexus with the taxing state; the tax must be fairly apportioned;
the tax must not discriminate against interstate commerce; and the tax must be fairly related to the services provided by the state.

430 U.S. at 279.

The due process clause requires a closely related analysis -- there must be "some minimum connection" between the taxing state and the activities taxed and the tax base "attributed to the State for tax purposes must be rationally related to 'values connected with the taxing State.'" Moorman Manufacturing Co. v. Bair, 437 U.S. 267, 273 (1978).

The goal of the courts has been to "establish a consistent and rational 'method of inquiry' focusing on the 'practical effect of a challenged tax.'" Commonwealth Edison Co. v. Montana, 453 U.S. 609, 615 (1981). The same practical analysis should apply in evaluating commerce clause and due process challenges to a sales and use tax, for there is no basis for distinguishing the economic effect of such taxes on interstate commerce.

A. The Activities Subject to the Sales and Use Tax Have a Substantial Nexus With Florida

For a state to impose a tax, the nexus between the state and the activity of the taxpayer must be "substantial." This requirement is derived from the broader essential mandate of the Due Process Clause, which prohibits taxation where there is insufficient nexus with a state regardless of whether interstate commerce is involved.
"Substantial nexus," however, is not a stringent test--rather, it merely requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." Miller Brothers Co. v. Maryland, 347 U.S. 340, 344-45 (1954). It is worth noting that no court has ever held that a state sales or use tax on its face violated the Due Process Clause.

The challenge before the Court is highly fact-specific, focusing solely on those situations where an out-of-state resident has used a service in the State of Florida although a sale transaction occurred elsewhere. In the specific context of advertising, this argument relies on the premise that the circulation and distribution of advertising within a state is not "consumption" within the meaning of Fla. Stat. § 212.0595(3). If it is consumption and thus taxable as a use, then the opponents must demonstrate that either the geographical situs of the sale or the out-of-state residency of the consumer (who nevertheless consumes in Florida) is a bar to Florida's jurisdiction to tax.

It is a truism that the taxing power of the state is limited by the extent of its jurisdiction; there must be "some jurisdictional fact or event to serve as a conductor." Miller Brothers Co., 347 U.S. at 343. Clearly, with respect to the sales tax on services, there can be no challenge on the basis of nexus, for by definition the sale transaction will have occurred within state boundaries. Similarly, the
opponents appear to concede that the "use" or "enjoyment of benefit" or "consumption" of a service in the State of Florida has sufficient nexus with the state whenever the taxpayer is a state resident.

In this instance, as with all such use taxes, the use tax is a necessary complement to the sales tax imposed. Its function is (a) to protect state revenues by taking away the incentive to travel out-of-state to make untaxed purchases, and (b) to protect local merchants from the competitive disadvantages imposed by out-of-state sellers which can offer lower prices because of lower or nonexistent tax burdens. Miller Brothers, 347 U.S. at 343; Hartman, Federal Limitations on State and Local Taxation § 10.6, at 612-13 (1981). The constitutionality of use taxes is well-settled. Henneford v. Silas Mason Co., 300 U.S. 577, 582-83 (1937). Overall, the use tax helps in-state sellers compete terms of relative equality with out-of-state sellers. Absent the use tax, purchases of advertising from a Florida advertising media provider would be subject to the sales tax while purchases of advertising from advertising media providers who happen to be non-residents would go untaxed. The function of the use tax is to prevent this discrimination against in-state media providers, thereby placing the two transactions in a position of relative equality; "[t]he common thread running through cases upholding compensatory taxes is the equality of treatment between local and interstate commerce." Maryland v. Louisiana, 451 U.S. 725, 759 (1981).
It should be borne in mind that the liability for a use tax is very different from the subsequent ability of the state to assert jurisdiction to collect the tax. The opponents confuse these arguments, resulting in an incorrect analysis of the statute's effect.

The Association also erroneously cites *Western Live Stock* for the proposition that the authority of the state to impose a use tax on services is somehow territorially limited to services performed within the state. Nothing in *Western Live Stock* supports this statement. In that case, the Statute imposed a sales tax on publishing services performed within the state; the case says nothing about the territorial limits of use taxes on services. Indeed, this suggestion is entirely contrary to longstanding general principles of use taxation. By definition, the sale itself has occurred out of state. The premise underlying use taxation is that there has been a use or consumption or enjoyment of benefits within the state of a purchase made outside the state -- the use itself is the taxable event or taxable moment. A sale and a use are different activities and thus a sales tax and a use tax operate upon different incidents.

*Henneford*, 300 U.S. at 583-84. Under the Florida statute, the use of a service means "the consumption or enjoyment of the benefit of services." § 212.02 (27).

Residency of the user is irrelevant to the determination of liability for a use or consumption within the
taxing jurisdiction. Residency is not part of the analysis of a use tax on services, just as it is not relevant to a use tax on goods. Use taxes apply equally to in-state and out-of-state users so long as the use occurs in the taxing state. See Halliburton Oil Well v. Reily, 373 U.S. 64, 70-71 (1963). Thus, the state can tax the use of a car or airplane within its borders, [cite]; the temporary storage of goods in transit from one state to another, Independent Warehouses, Inc. v. Scheele, 331 U.S. 70 (1947); Edelman v. Boeing Air Transport, Inc., 289 U.S. 249 (1933), the installation of equipment purchased out-of-state, Pacific Telephone & Telegraph Co. v. Gallagher, 306 U.S. 182 (1939); the storage of fuel as measured by consumption, United Airlines, Inc. v. Mahin, 410 U.S. 623 (1973); and the lease of equipment in a state by an out-of-state resident, Philco Corp. v. Department of Revenue, 239 N.E.2d 805 (Ill. 1968).

In all of these cases, the use or consumption is itself a "taxable moment" apart from the sale.

An example which is more closely related to Florida's tax on advertising is the use tax on tangible personal property as applied to advertising supplements or fliers distributed in a state. See, e.g., Fla. D.O.R. Rule 12-A-1.008 (4). A national advertiser has an advertising supplement published in another state, which is then sent directly to a newspaper in the taxing jurisdiction. The advertising supplement is distributed with the newspaper.
(A common issue in such cases -- whether the advertisement is part of the exempt newspaper -- is not relevant here since newspapers are not exempted.)

The advertisers in these cases have contended that because the contract or transaction is between the advertiser and the printer, both of which are out-of-state, and because they have no physical control over the advertisement, the state has no jurisdictional nexus to impose a use tax on the advertising. The majority of courts have rejected this due process challenge, responding that the advertiser had used or consumed the advertising as a means of promoting the sale of its products and had exercised control over the advertisement either directly or through its agent, the media provider. *K Mart v. Idaho State Tax Commission*, 727 P.2d 1147 (Idaho 1986); *Sears, Roebuck & Co. v. Woods*, 708 S.W.2d 374 (Tenn. 1986); *Wisconsin Department of Revenue v. J.C. Penney Co.*, 323 N.W.2d 168 (Wis. 1982); *K Mart Corp. v. South Dakota Department of Revenue*, 345 N.W.2d 55 (S.D. 1984). As the Tennessee Supreme Court held, "The power to allow property one owns to be used for one’s benefit, such as for profit-making purposes, is a taxable privilege of use." *Sears, Roebuck & Co.*, 708 S.W.2d at 381. The same rationale applies equally to the power to allow services one has purchased to be used for one’s profit-making benefit. Thus one advertiser enjoys the use or benefit of its advertising which circulates in Florida just as it enjoys the
benefit of property it brings into the state and leases, or machinery it brings into the state and uses.

Clearly, the state has a substantial nexus with the taxable incident, the "use" or "consumption or enjoyment of the benefit of services" within the state. The liability for the tax is established, and does not violate the Commerce Clause. The opponents of the use tax on advertising contend that, under the Due Process Clause, advertising alone is an insufficient nexus to impose a tax. This misstates the law. Both Miller Brothers v. Maryland and National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967) were collection cases;¹ in both cases, the court found that liability for the use tax on the part of the consumer was unquestionable. Miller Brothers, 347 U.S. at 347. The issue in both cases was whether the state had sufficient nexus with the sellers so as to permit the state to force the seller to act as the state's agent in collecting and remitting a tax for which a third party (the consumer) was actually liable. The "practical" effect was to impose a tax on the seller for a use when it had never enjoyed any use in the taxing state and had no independent nexus with the state. Miller Brothers, 347 U.S. at 344-45; "It would be a strange law that would make appellant more

vulnerable to liability for another's tax than to a tax on itself." Id. at 346.

Miller Brothers does suggest that, unless there is a use which would provide nexus for liability, "the incidental effects of general advertising," absent solicitation or "invasion or exploitation of the consumer market" in the taxing jurisdiction, is insufficient to constitute an independent nexus for state jurisdiction. Miller Brothers, 347 U.S. at 347. The opponent's reliance on this, however, ignores the fact that the statute in Miller Brothers taxed a use other than advertising, whereas the Florida tax makes the use, consumption, or enjoyment of the benefit of advertising, in itself, the taxable event or substantial nexus required by Due Process. Had the Miller Brothers statute taxed the use of advertising, then the seller would itself have been liable for the use -- there would be no need to attempt to identify an independent "minimum link."

Under National Geographic Society v. California Board of Equalization, 430 U.S. 551, 560 (1977), the Court flatly rejected the argument that "there must exist a nexus or relationship not only between the seller and the taxing state, but also between the activity of the seller sought to be taxed and the seller's activity within the state." The court repudiated the reasoning underlying Miller Brothers, holding that a lesser presence was sufficient to require a seller to collect a use tax than a sales tax. 430 U.S. at 557-58.
If the argument propounded by opponents is that an independent nexus apart from the use in Florida is needed to establish liability to tax under the Due Process Clause, then the cases they discuss do not support their conclusion. Alternatively, the opponents may be contending that, even conceding liability, due process requires an independent nexus to establish jurisdiction simply to collect the tax from the very person who owes it.

In either event, it is clear that the "minimum link" required by the Commerce and Due Process clauses has become less stringent under the modern Due Process standard as it has developed since Miller Brothers (decided over three decades ago). Under modern due process analysis, "doing business" in a state is no longer necessary or even relevant. See Scripto, Inc. v. Carson, 362 U.S. 207 (1960). Physical presence, through property or employees, is not necessary. McGee v. International Life Ins. Co., 355 U.S. 220 (1957). "[I]t is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another state, we have consistently rejected the notion that an absence of physical contacts can defeat personal jurisdiction there." Burger King v. Rudzewicz, 471
U.S. 462, 476 (1985). Solicitation conducted regularly and continuously in the market state is sufficient minimum contact for either taxation or judicial jurisdiction. *International Shoe Co. v. Washington*, 326 U.S. 310 (1945). (Indeed, solicitation by mail alone is sufficient for judicial jurisdiction, *McGee*, 355 U.S. at ___.) Through such solicitation, the nonresident purposefully directs its activities at state residents, thus availing itself of the privilege of conducting its business activities in the taxing jurisdiction, and invoking, if not actually utilizing, its benefits and protections. *Burger King*, 471 U.S. at 476; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984); *Kulko v. California Superior Court*, 436 U.S. 84, 96 (1978); *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Parties who "reach out . . . and create continual relationships and obligations with citizens of another state," such as through advertising, are subject to regulation for the consequences of their activities. *Calder v. Jones*, 465 U.S. 783 (1984). In Florida, for example, the courts have long agreed that the state has jurisdiction to regulate all advertising circulated in the state within constitutional limits. [Cite] The Due Process Clause permits an out-of-state publisher to be hauled into court in a state based simply upon circulation in that state, even when it is as little as 1% of the total circulation. *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) (1% of circulation in
state is sufficient); Calder v. Jones, 465 U.S. 783 (1984) (1% of circulation in state is sufficient). In Keeton, the court found that the regular monthly volume of circulation directed at persons in the state could not "be characterized as random, isolated, or fortuitous." 465 U.S. at 774.

Given that the court has merged its taxing jurisdiction and due process concerns into one test which examines the "protection, opportunities, and benefits" given by the state, compare Wisconsin v. J.C. Penney, 311 U.S. 435 (1940) with Hanson v. Denckla, 357 U.S. 235 (1958), it would appear that concerted solicitation through advertising in a publication can satisfy the minimum contact test.

The lower courts have repeatedly found that advertising in the taxing jurisdiction can be the basis for a finding of a "minimum link." In Rowe-Genereux, Inc. v. Vermont Department of Taxes, 411 A.2d 1345 (Vt. 1980), the court found that an out-of-state advertiser was not registered to do business and had no property or personnel in the state. Its only contacts were the use of both in-state media and out-of-state media which reached the in-state market. Its advertising costs for that state amounted to 15% of its total radio advertising budget and 21% of its total newspaper advertising budget. The seller also provided delivery service into the state. Finally, the seller had used the services of the state's courts and sheriff in a repossession action. These were held to establish "substan-
tial connection" with the taxing state; the fact that the seller had availed itself of the use of state roads, state media in its advertising, and the state judicial and law enforcement system in its business dealings indicated the state had given benefits for which it could ask a return.

In Ministers Life and Casualty Union v. Haase, 141 N.W.2d 287, appeal dismissed, 385 U.S. 205 (1966), a mail order insurance company challenged state taxation and regulation of its business. The company had no office, property, personnel, or sales in the state. The court found that through the company's national advertising in the media and direct mail solicitations, it "realistically entered the state looking for and obtaining business." 141 N.W.2d at 295. The court found that exploitation of a consumer market could occur regardless of whether a sale was consummated. "In any enlightened sense," the company was doing business in the state. Similarly, in People v. United National Life Insurance Co., 427 P.2d 199, appeal dismissed, 389 U.S. 330 (1907), the court found that "realistically viewed, the insurer through the instrumentality of the mail is for all practical purposes soliciting insurance here as manifestly as if it were to carry on such solicitation through representatives physically present within this state." 427 P.2d at 209.

In Goods' Furniture House, Inc. v. Iowa State Board of Tax Review, 382 N.W.2d 145 (Iowa 1986), cert. denied, 107
S.Ct. 76 (1986), the court found that the regular solicitation by an out-of-state seller through intensive television advertising, followed by delivery into the state, constituted sufficient nexus between the state and the seller to require collection of the use tax.

In In Re State Sales or Use Tax Liability of Webber Furniture, 290 N.W.2d 865 (S.D. 1979), the court found that "as long as appellant chooses to do business in this state," as evidenced by its regular deliveries into the state, there is a sufficient nexus to require use tax collection.

In Cooey-Bentz v. Lindley, 419 N.E.2d 1087 (Ohio 1981), an out-of-state seller was not qualified to do business in the state, and had no sales or employees in the state. It had placed ads in in-state newspapers and on in-state bill boards, as well as in out-of-state newspapers, radio, and television broadcasts that reached the state market. It also delivered in-state. Distinguishing Miller Brothers, the court observed that "[i]t is clear that solicitation of Ohio customers does occur here, and that sales to Ohio customers do result from this solicitation"; the seller "directed its advertising to reach citizens of this state in order to induce them to buy [out-of-state]." Moreover, it made deliveries, could easily identify the destination of goods (thus mitigating the burden of collection), and enjoyed the benefit of state services.
Similarly, in *South Dakota v. American Bankers Insurance Co.*, 374 N.W.2d 609 (S.D. 1985), the court found that the absence of physical contacts of an out-of-state insurer with the taxing state did not preclude taxation. The insurer's relationship with the state (collecting premiums and paying claims) was purposefully directed and was not "random, fortuitous, or isolated"; the insurer "realize[d] a steady source of economic gain." 374 N.W.2d at 613. Quoting *Burger King*, the court observed that the "Supreme Court has long recognized that the methods of transacting business in 'modern commercial life' has 'obviated the need for physical presence within a state in which business is conducted.'" 374 N.W.2d at 613.

In each of the above cases, the court examined a factual situation similar to that in *Miller Brothers*, applied the modern due process test, and concluded that the "minimum link" sufficient to create a nexus was established. The required nexus is economically based on the realities of modern commerce as it is regularly conducted by mail and telecommunications. Interstate consumer sales occur through computer and telephone systems; electronic banking and interstate credit card financing are the mode of payment. The economic nexus approach equalizes taxation of in-state and out-of-state sales and uses, serving the purpose of the use tax to eliminate the competitive disadvantage of in-state sellers and consumers. In light of the new
industries which have developed and the technological advances in modes of consummating business, the relationship between the state and the economic activity within it has come a long way since Miller Brothers or even Bellas Hess. See, e.g., Communications Satellite Corp. v. Franchise Tax Board, 469 U.S. 1209 (1985), 156 Cal. App. 3d, 726, 203 Cal. Rptr. 779 (1984).

Advertising constitutes a large scale, systematic, continuous solicitation and exploitation of the state consumer market. The advertiser uses widespread advertising in the state market to create and maintain potential customers with the expectation that it will result in sales and profits. See McCray, "Commerce Clause Sanctions Against Taxation on Mail Order Sales: A Re-Evaluation," 17 Urban Lawyer 529 (1985). The state, in turn, is largely responsible for the creation of the economy which the advertiser has targeted as a source of profit; it provides support, protection, and opportunities for development of the market. The state assures an orderly market through advertising, consumer protection, and usury regulations, all of which serve to enhance consumer confidence which is critically important to the advertiser. The advertiser anticipates that in consummating its expected sales, it will benefit from the state's financing and credit resources, as well as its banking and credit institutions, and will be wholly dependent on the state's enforcement processes and courts, for it
can sue the in-state buyer only in that state's court. *Spiegel v. FTC*, 540 F.2d 287 (7th Cir. 1976). To contend that advertising is, in itself, so innocuous and irrelevant that it cannot be considered to be "doing business" in an organized market casts credibility to the wind. The very price paid for advertising in a market reflects economic value to the user, a value which, when enjoyed in the State of Florida to earn profits, is a value the use of which can constitutionally be taxed.

Finally, to the extent that the reach of the use tax on services, including advertising, is overbroad, it need not invalidate the statute for the rules contained therein are presumptions and not rigid tests. The legislature addressed any potential threat to out-of-state consumers who can legitimately show that the state has no nexus over them. Under Fla. Stat. §212.0591(9)(a)3, the consumer can escape the tax by demonstrating that the benefit of the service was enjoyed in a state other than Florida.

B. The Sales and Use Tax on Services is Fairly Apportioned

The concern under the commerce clause is the risk of multiple burdens or excessive and duplicative taxation. The opponents contend that just such a multiple burden will be created. The cases cited by the opponents of this statute provide no support for their position. In *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250 (1938), the state of New Mexico sought to impose an unapportioned tax on the
entire gross receipts of an in-state publisher of a journal which circulated in interstate commerce. The court held that the state could impose a gross receipts tax on publications of newspapers and magazines as measured by the sale of advertising space to all advertisers, including those out of state. Id. at 259-60. The court held that "the vice characteristic of these [state taxes] which have been held invalid [under the commerce clause] is that they have placed on the commerce burdens of such a nature as to be capable, in point of substance, of being imposed . . . or added to . . . with equal right by every state which the commerce touches . . . so that without the protection of the commerce clause it would bear cumulative burdens not imposed on local commerce." Id. at 256. The court was concerned about the "multiplication of state taxes measured by the gross receipts from interstate transactions." Id. The court added that such taxation "has been sustained when fairly apportioned to the commerce carried on within the taxing state." Id. In Western Live Stock, the tax was imposed on the privilege of publishing, which is "peculiarly local and distinct from circulation," which was neither taxed nor used as the measure of the tax. Id. at 258, 260. All of the events constituting "publishing" occurred in New Mexico and nowhere else. Consequently, the "publishing" could not be subject to tax elsewhere, and no "cumulative tax burden" could arise. Clearly the forbidden tax under Western Live
Stock is not a tax on advertising measured by circulation but the danger of substantially the same tax being imposed on the same interstate transaction by one or more states. See also Lee Enterprises, Inc. v. Iowa State Tax Commission, 162 N.W.2d 730 (Iowa 1968).

Under Florida's taxing regime, no such risk of multiple taxation is present. To the extent that another state has assessed and the taxpayer lawfully has paid, a sales or use tax on services in another state, such purchaser will receive a full credit against the Florida tax for such payment. Fla. Stat. § 212.06(7), as amended by Ch. 87-6, § 12. This credit is provided even though such credits have never been held to be constitutionally required. See Henneford v. Silas Mason Co., 300 U.S. 577, 587 (1936); see also Williams v. Vermont, 472 U.S. 14 (1985). The cre-

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2 The opponents of the tax rely on Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) and Lee Enterprises, Inc. v. Iowa State Tax Commission, 162 N.W.2d 730 (Iowa 1968) for the proposition that states cannot tax gross receipts from advertising by claiming that circulation of advertising within the state is a taxable event. This misstates the holding of those cases, which concerned gross receipts taxes on publishers measured by total revenues. The issue at hand was not nexus, but the risk of multiple burdens. The court held that there was no prospect that other states could tax the same gross receipts, thus creating a multiple burden. The concern expressed in these cases is satisfied by the provision of a credit which insures that the same transaction is not taxed twice. To contend, as opponents would characterize the cases, that the payment of a gross receipts or, for example, an income tax, somehow immunizes a taxpayer from sales or use taxes, simply defies common sense. The Florida tax reaches only the use of advertising in Florida; this use cannot be taxed elsewhere. No multiple burden is created, especially given the credit provisions for sales or use taxes paid elsewhere.
dit results in equal treatment for both in-state and out-of-state transactions. As in *Henneford v. Silas Mason Co.*, "Equality is the theme that runs through all the sections of the statute. There shall be a tax upon the use, but subject to an offset if another use or sales tax has been paid for the same thing. . . . When the account is made up, the stranger from afar is subject to no greater burdens as a consequence of ownership than the dweller within the gates . . . the sum is the same when the reckoning is closed. Equality exists." 300 U.S. 577, 584 (1936). The risk of multiple tax burden is entirely eliminated.

In addition, although the sale of services to out-of-state residents (in contrast to sale of tangible goods) lawfully may be taxed, see *Evco v. Jones*, 409 U.S. 91 (1972), the Florida scheme provides an exemption, consistent with the purpose to tax only services whose benefits are enjoyed in Florida, for the sale of services purchased within the state for use outside the state. Fla. Stat. § 212.0592(1)(a).

The risk of multiple tax burdens is mitigated further by the special apportionment provisions provided to business taxpayers for the use of services whose benefit is enjoyed in part in Florida, and in part in other states. Such apportionment is not traditionally provided for tangible personal property, which is taxed on an all or nothing basis mitigated only by the availability of credits. In the
case of a multistate business, where the service is not related to a situs or market in the state, then the service will be presumed to be enjoyed in Florida only to the extent the purchaser is doing business in Florida. Fla. Stat. § 212.0591(9)(b)4. The extent to which a purchaser is doing business in the state will be determined according to the comparable income tax apportionment formula. This formula has been upheld as a fair apportionment of state taxation on a business's activities in the state. [CITE].

A special advertising apportionment formula also was adopted at the request of the advertising industry because it felt that the "doing business" apportionment formula was not an equitable basis for taxing use of advertising. This formula measures the use or the enjoyment of the benefit of advertising services based on the proportion of the Florida market coverage to the total market coverage of the provider. F.S. § 212.0595(4)(a).3

Moreover, the challenger must demonstrate an actual risk of multiple taxation, not merely speculation or an abstract possibility. The opponents here can point to no actual predicate for their claim of potential duplicative taxation. The courts will not find duplicative tax burdens

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3 Am. 87-6 originally referred to the "proportion of the market coverage within Florida to the total United States market coverage." Fla. Stat. § 212.0595(4)(a). This was amended in the technical corrections bill to read "§ ____, thus mooting any challenges based on this language."
based on "speculative" grounds. Moorman Manufacturing, 437 U.S. at 276, 278. Rather, there must be clear and persuasive evidence to hold one state rather than another responsible for any "overlap" in taxation. Id. at 277; Corning Laboratories, Inc. v. Iowa State Department of Revenue, 270 N.W.2d 463 (Iowa 1978). Given that the legislature scrupulously avoided taxation of extra-state values under Florida's statute, any such overlap which one could invent could be attributed only to another state's taxing system.

Apportionment formulas are evaluated under an "internal consistency" test. See Container Corp. of America v. Franchise Tax Board, 463 U.S. 159, 168 (1983). The court examines the formula to determine whether the tax is such that "if applied by every jurisdiction," there would be no impermissible interference with free trade, that is, local and interstate business would be treated the same. If so, then the tax is internally consistent and fairly apportioned. Armco, Inc. v. Hardesty, 467 U.S. 638 (1984). In this instance, if all states were to impose the identical tax on the sale or use of services, there would be no impermissible burden or discrimination against out-of-state commerce. The all-or-nothing provisions are based strictly on situs or market in Florida. The apportionment provisions, if repeated nationwide, would always result in each state taxing only those values fairly related to the interstate business's activities in that state. The special apportion-
ment provision for advertising would only reach the share of advertising used in the taxing state.

The Association of National Advertiser, et al. contend that the apportionment formula is unfair to broadcast advertisers because it is based on an annual evaluation of the "market coverage" in Florida within the broadcaster's "signal reception area" in relation to its market coverage as a whole, Fla. Stat. § 212.0595(4)(a), while advertising is sold on the basis of actual audience reached. It is argued that this disparity provides an inaccurate measure of the value of the advertising to the advertiser. This argument, however, ignores the fact that the formula has two values -- the proportion of market coverage in Florida to total market coverage and the cost price of the advertising. The advertisers carefully determine the value of a particular advertising vehicle and its ability to target and reach the desired audience within the population; based on these investigations and surveys, the advertiser determines the value of that advertising vehicle, selects it on that basis, and compensates for its service accordingly. The disparate value to advertisers of advertising in different mediums, publications, markets, locales, or to different audiences will be reflected in the price charged and paid for the advertising.

The opponents of the sales tax on services have failed to demonstrate that the tax is not fairly propor-
tioned. On its face, the tax satisfies the fair apportionment prong of the relevant tests under the commerce clause and due process clauses.

C. The Florida Sales and Use Tax on Services Does Not Discriminate Against Interstate Commerce

The Association of National Advertisers, et al. contend that the tax violates the third prong of the Complete Auto Transit test, in that it "discriminates against out-of-state taxpayers." Natl. Adv. Brief, at 63. This mistakes the relevant standard, for the commerce clause is concerned not with discrimination per se, discrimination against out-of-state taxpayers, or even discrimination against commerce, but only with discrimination against interstate commerce. The Commerce Clause protects commerce and not the individual taxpayers engaged in commerce. Tatarowicz & Mims-Velarde, "An Analytic Approach to State Tax Discrimination Under the Commerce Clause," 39 Vand. L.R. 879, 927 (1986). Two examples of unequal treatment cited by opponents of the tax include the exemptions for the state of Florida and its political subdivisions; Florida nonprofit, organizations providing certain benefits to minors in Florida; Florida state-supported or nonprofit educational institutions; nonprofit scientific organizations in Florida; and nonprofit nursing homes. The argument is that these entities are exempt from the Florida sales or use
tax on services when the use occurs in Florida while their counterparts in other States are not. This, however, mischaracterizes the meaning of the commerce clause as well as the effect of this statute.

First, it is difficult to conceive of these non-profit service organizations as being engaged in interstate commerce within the meaning of the Commerce Clause. Their activity, by definition, is neither commercial nor trade. The Commerce Clause is concerned with "equality for the purposes of competition and the flow of commerce." Halliburton Oil Well Co. v. Reily, 373 U.S. 64, 70 (1963). In no real sense does exempting local nonprofit service organizations create inequality among competitors, let alone erect an impermissible one barrier to interstate commerce.

Second, these exemptions are drawn verbatim from the language of pre-existing Ch. 212; some have existed for decades. They are not created by Ch. 87-6, the proper subject of this Advisory Opinion.

Third, the validity or invalidity of the specific exemptions is a question apart from the constitutionality of the taxing scheme. If they violate the Constitution, they alone will fall given the savings provision of the statute. As a consequence, these taxpayers will not escape their own liability for the tax.

Aside from this minor contention, no opponent attempts to argue that the sales and use tax on services
unconstitutionally discriminates against interstate commerce. The sales tax is equally applicable under the same circumstances and at the same rate, regardless of whether the seller or buyer are in-state or out-of-state residents. Indeed, the use tax bears more heavily on in-state taxpayers than out-of-state taxpayers. This, however, is not constitutionally suspect. Cf. Alaska v. Arctic Maid, 366 U.S. 199 (1961). For example, in-state taxpayers bear the full burden of the use tax, subject only to credits for sales or use taxes actually paid elsewhere. Out-of-state individual taxpayers, on the other hand, are presumed to enjoy the benefit of a service where it is sold -- if sold outside Florida, no use tax is due. Out-of-state multistate corporate taxpayers and advertisers are taxed on a use in Florida under apportionment formulas. An out-of-state business which does business exclusively outside Florida is presumed to enjoy the benefit of a non-situs-specific service in the state where it does business. In all cases, the tax burden on the out-of-state taxpayer is equivalent to or less than that on the in-state taxpayer.

In almost all cases applying the analysis required under Complete Auto Transit, "the court has treated the apportionment and discrimination tests as equivalent." Michael, "The Constitutionality of Minnesota's Business Tax Credits After Westinghouse Electric Corp.," 4 J.St. Tax'n 163, 166 (1985). If the tax is fairly apportioned, as this
tax clearly is, then it is found not to discriminate against interstate commerce. *Container Corp. v. Franchise Tax Board*, 463 U.S. 159, 171 (1983).

D. The Sales and Use Tax on Services is Fairly Related to the Services Provided by the State

The fourth prong of the *Complete Auto Transit* test requires that the state tax be fairly related to the services provided by the state. 430 U.S. at 279. This requirement is closely intertwined with the first prong, or nexus requirement, a common test of both the state's ability to invade the exclusive province of the Congress to regulate interstate commerce and the requirements of due process. Articulated in the Commerce Clause context, the incidence of the tax as well as its measure [must be] tied to the earnings which the State ... has made possible, insofar as government is the prerequisite for the fruits of civilization for which ... we pay taxes." *Wisconsin v. J.C. Penney Co.*, 311 U.S. 435, 444 (1940). Similarly, under the Due Process Clause "the question is whether the State has exerted its power in proper relation to [the taxpayer's] activities within the state and to [its] consequent enjoyment of the opportunities and protections which the State has afforded. ... The simple but controlling question is whether the State has given anything for which it can ask return." *General Motors Corp. v. Washington*, 377 U.S. 436, 440-41 (1964). The fourth prong is essentially an addi-
tional nexus test, going not to incidence but to the extent or measure of the tax. Commonwealth Edison Co. v. Montana, 453 U.S. 609, 626 (1981). The Association of National Advertisers, et al. contend that the State of Florida has provided absolutely no services or benefits to the advertisers who nevertheless flock to advertise their wares here. They further cite Murdock v. Pennsylvania, 319 U.S. 105 (1943) for the proposition that the state cannot tax advertising because it is a privilege granted by the Constitution, not the State. Murdock is inapposite, for it concerned a flat license or privilege tax imposed specifically on solicitation. The Florida sales and use tax on services is not a user fee or license tax but is a broad-based general revenue tax, and like all broad taxes, is not properly conceived of as a "charge" for specific privileges or benefits bestowed by the state. In Commonwealth Edison Co. v. Montana, the Supreme Court unequivocally repudiated this notion that the amount of tax paid must be quantitatively related to the value or cost to the state of services provided to the taxpayer by the state. 453 U.S. 609, 622, 625 (1981). The court held that the "fairly related" test meant only that the measure of the tax had to be "reasonably related to the extent of the [taxpayer's] contact" with the state. The court stated that its "consistent rule" had been:

"Nothing is more familiar in taxation than the imposition of a tax upon . . . individuals who enjoy no direct
benefit . . . and who are not responsible for the condition to be remedied.

"A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate the burden on those who pay them, and would involve abandonment of the most fundamental principle of government -- that it exists primarily to provide for the common good."

Commonwealth Edison, 453 U.S. at 622-23 (quoting Carmichael v. Southern Coal & Coke Co. 301 U.S. 495, 521-23 (1937)). The court in Commonwealth observed that there was no reason to believe that this "latitude" afforded the states under the Due Process Clause was "divested" by the Commerce Clause merely because it involved interstate commerce -- "particularly when the tax is levied on an activity conducted within the State. 'The exploitation by foreign corporations [or consumers] of intrastate opportunities under the protection and encouragement of local government offers a basis for taxation as unrestricted as that for domestic corporations.'" Commonwealth Edison, 453 U.S. at 623 (quoting Ford Motor Co v. Beauchamp, 308 U.S. 331, 334-35 (1939)). The alternative rule sought by opponents of the tax would put out-of-state taxpayers in a privileged position vis-a-vis in-state taxpayers which the legislature may
constitutionally seek to avoid. Commonwealth Edison, 453 U.S. at 623-24. The "just share" of a state's tax burden, as broadly conceived by the Supreme Court, includes sharing in the cost of the "advantages of a civilized society." Id. at 624. When a tax does not discriminate against interstate commerce and is apportioned to activities occurring within the state, the state may freely "pursue its own fiscal policies . . . if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society." Wisconsin v. J.C. Penney, 311 U.S. at 444. Clearly, "interstate commerce may be required to contribute to the cost of providing all government services, including those services from which it arguably receives no direct 'benefit.'" Commonwealth Edison, 453 U.S. at 627 n. 16.

In this instance, the out-of-state taxpayer has a general obligation to contribute to the cost of government in all states which it touches in interstate commerce. Moreover, it is simply ludicrous for the Association to contend that out-of-state advertisers derive no benefit from Florida state government. Their very presence in this courtroom illustrates the significant benefits they derive from state government. The advertisers are deliberately, continuously, and systematically exploiting an organized
market in Florida for which the government bears a large responsibility. The state educates the public, encourages employers and industry to locate in Florida, and promotes economic development -- it has a primary role and influence in creating and shaping the market sought by the advertisers. The state regulates the Florida economy and may, within Constitutional limits, regulate advertising itself. The advertiser who exploits the Florida market hopes to sell its product in Florida. When it does, it expects Florida to provide roads and protection for its transport; credit, banking, and financial transaction mechanisms for its payment; and all judicial and enforcement processes for its collection. It fully anticipates that it will be protected under Florida law and that all the services of the state will be immediately available, and its structures its business dealings accordingly. Regardless of whether the advertiser has yet to take advantage of these state services, the very existence and maintenance of such services is an expensive benefit which is conferred on the out-of-state advertiser. For all this, the state is entitled to require interstate commerce to help shoulder the burden of providing a civilized society in which to conduct its interstate business.

In this instance, the measure of the tax imposed is the value of the use in Florida. Thus, it is reasonably related to the services provided within the meaning of Complete Auto Transit.