WILLIAM J. SCOTT
ATTORNEY GENERAL
STATE OF ILLINOIS
500 SOUTH SECOND STREET
SPRINGFIELD

July 24, 1972

FILE NO. S-498

TAXATION AND REVENUE:
Use Tax - Taxability of sales of tangible personal property from out of state mail order corporate subsidiary of foreign corporation maintaining local sales office in Illinois.

Honorable George E. Mahin
D i r e c t o r
Department of Revenue
State of Illinois
Springfield, Illinois

Dear Director Mahin:

I have your recent communication, together with supplemental material which you have forwarded to me, in which you request my opinion as to the liability, or non-liability, for payment of Illinois use tax by The Robbins Company with respect to mail order sales made from outside Illinois by that company's wholly owned subsidiary, The International Mint, Inc. of Washington, D. C. The factual situation has been presented to you as follows:

"The Robbins Company (Robbins), a Delaware corporation, engaged in the manufacture and sale of jewelry and specialties, has its principal office and plant in Attleboro, Mass., and other sales offices throughout the country. One of these offices is located in Illinois and Robbins files and pays the requisite Illinois State taxes. It collects and remits sales taxes from its consumer customers in Illinois.

"Among the products Robbins manufactures and sells is a line of commemorative coins. These are sold principally to its wholly owned subsidiary, The International Mint, Inc. (International).

"International is a Delaware corporation with its only place of business in Washington, D. C. As indicated above, it purchases its merchandise principally from Robbins, but it does have a few other sources. International sells its merchandise through direct mail solicitation. It has no salesmen, solicitation or any other agent in Illinois, and owns no property in Illinois. Orders and payments are received in D.C. Orders are forwarded to Robbins, under an arrangement for fulfillment. In accordance with this arrangement, Robbins ships the orders in the name of International -- title to the merchandise passing to International in Attleboro, Mass. International pays for all postage and insurance. Shipment tracing, if necessary, is International's burden.

"We are puzzled by the nature of your proposed assessment, namely, the Use Tax against the Robbins Company. While Robbins is the parent company of

> International, it is no more than a vendor of International. As a matter of fact, International has recently determined that it can purchase some of its merchandise cheaper from sources other than Robbins, and may pursue such a plan."

In the supplemental correspondence with the Department of Revenue from the representative of The Robbins Company the cases of National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U. S. 753 and The Reader's Digest Association, Inc. v. Mahin, 44 Ill. 2d 354, are relied upon by Robbins in contending that it is not liable for collection of Illinois use tax measured by the gross receipts from sales of commemorative coins manufactured by Robbins upon orders forwarded to it by its subsidiary, International Mint. It is also stated therein that the Department of Revenue cannot rely upon my Opinion No. S-65 (Opinions of the Attorney General, 1969, p. 103) as the basis for imposition of use tax upon Robbins.

Section 3 of the Illinois Use Tax Act (Ill. Rev. Stat. 1971, Ch. 120, Par. 439.3) imposes a tax "upon the privilege of using in this State tangible personal property purchased at

retail from a retailer." It also provides that the tax "shall be collected from the purchaser by a retailer maintaining a place of business in this state.....". Section 2 of the Act (Ill. Rev. Stat. 1971, Ch. 120, Par. 439.2) defines a "Retailer maintaining a place of business in this State" as any retailer:

> "1. Having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or
>
> "2. Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State."

Rule 2, Subsection 9 of the Department of Revenue's Use Tax Rules provides:

> "9. Retailer Maintaining a Place of Business in this State. 'Retailer maintaining a place of business in this State', or any like term, shall mean and include any retailer having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse

> or other place of business, or any agent or other representative operating within this State under the authority of the retailer or its subsidiary, irrespective of whether such place of business or agent or other representative is located here permanently or temporarily, or whether such retailer or subsidiary is licensed to do business in this State, or
>
> "It does not matter that an agent may engage in business on his own account in other transactions, nor that such agent may act as agent for other persons in other transactions, nor that he is not an employee but is an independent contractor acting as agent. The term 'agent' is broader than the term 'employee'. 'Agent' includes anyone acting under the principal's authority in an agency capacity."

Nearly all of the case law for the past twenty-five or thirty years involving the power of a state to impose its taxes upon a foreign corporation revolves about the question of whether there is, or is not, a sufficient "nexus" or "minimum contact" of such corporation with the taxing state so as to justify the imposition of the tax.

"Nexus" is defined generally as a "connection, interconnection, tie, link" - Webster's Third New International Dictionary (1963) p. 1524. In its legal connotation it is

referred to as the "nexus theory" or "minimum contact tests" (Ballentine's Law Dictionary 3d edition, p. 802.) It has been stated that:

> "The 'contact' or 'nexus' theory was established by International Shoe Co. v. Washington, (1945) 326 U. S. 310, 90 L. Ed. 95, 66 S. Ct. 154, 161 A.L.R. 1057, in which it was held that due process as to jurisdiction of a state to render a judgment in person or against a defendant has 'certain minimum contacts' with the state 'such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice".' The 'nexus' or 'contact' thereof has been applied to test a state's power to tax a foreign corporation."
> 67 A.L.R. 2d Annotated p. 1330.

A brief review of the leading pertinent cases discloses that in Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U. S. 62, it was held that under Section 6 of the California Use Tax Act (similar to Section 3 of the Illinois statute) an Illinois corporation unqualified to do business in California but maintaining a place of business in that state, could be compelled to collect use tax from customers in the state where sales were made through general agents subject to the approval of its out of state office.

The companion cases of Nelson v. Sears, Roebuck & Co., 312 U. S. 359 and Nelson v. Montgomery Ward & Co., 312 U. S. 373, both concerned foreign mail order firms registered to do business in the State of Iowa and maintaining retail stores there. The court upheld the State's requirement that these companies collect use tax on mail orders sent by Iowa purchasers to their out of state branches to be filled by direct mail shipments or by common carrier. The court stated:

> "* * * * * *
>
> So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in Monamotor Oil Co. v. Johnson, 292 U. S. 86, and Felt & Tarrant Mfg. Co. v. Gallagher, 306 U. S. 62. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in

> Iowa would merely be a result of the 'impotence of state power'. Wisconsin v. J. C. Penney Co., supra. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the full benefits flowing from its Iowa business. Cf. Wisconsin v. J. C. Penney Co., supra. Respondent cannot avoid that burden though its business is departmentalized. Whatever may be the inspiration for these mail orders, however they may be filled, Iowa may rightly assume that they are not unrelated to respondent's course of business in Iowa. They are nonetheless a part of that business though none of respondent's agents in Iowa actually solicited or placed them. Hence to include them in the global amount of benefits which respondent is receiving from Iowa business is to conform to business facts.
> * * *"
> Nelson v. Sears, Roebuck Co., supra, p. 364.

In General Trading Co. v. State Tax Commission, 322 U. S. 335, it was held that a foreign corporation neither qualified to do business in the state (Iowa) nor maintaining any place of business therein, but accepting and filling orders from its home office in Minnesota obtained through solicitation of traveling salesmen, was "a retailer maintaining a place of business in this state" within the meaning of the Iowa statute and so required to collect and remit the use tax.

Scripto, Inc. v. Carson, 362 U. S. 207, involved the sale of advertising specialty merchandise by a Georgia corporation, which had no place of business, store or merchandise in the State of Florida, to Florida purchasers who were solicited by so-called "advertising specialty brokers", who signed the orders to be forwarded to Scripto as a "salesman". The court in holding that there existed a sufficient "nexus" for the imposition of the Florida use tax upon Scripto stated, inter alia:

> "* * *Florida has well stated the course of this Court's decisions governing such levies, and we need but drive home its clear understanding. There must be, as our Brother Jackson stated in Miller Bros. Co. v. Maryland, 347 U. S. 340, 344-345 (1954), 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.' We believe that such a nexus is present here. First, the tax is a nondiscriminatory exaction levied for the use and enjoyment of property which has been purchased by Florida residents and which has actually entered into and become a part of the mass of property in that State. The burden of the tax is placed on the ultimate purchaser in Florida and it is he who

enjoys the use of the property, regardless of its source. We note that the appellant is charged with no tax--save when, as here, he fails or refuses to collect it from the Florida customer. Next, as Florida points out, appellant has 10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders from that State to Atlanta for shipment of the ordered goods. The only incidence of this sales transaction that is nonlocal is the acceptance of the order. True, the 'salesmen' are not regular employees of appellant devoting full time to its service, but we conclude that such a fine distinction is without constitutional significance. The formal shift in the contractual tagging of the salesman as 'independent' neither results in changing his local function of solicitation nor bears upon its effectiveness in securing a substantial flow of goods into Florida. This is evidenced by the amount assessed against appellant on the statute's 3% basis over a period of but four years. To permit such formal 'contractual shifts' to make a constitutional difference would open the gates to a stampede of tax avoidance. See Thomas Reed Powell, Sales and Use Taxes: Collection from Absentee Vendors, 57 Harv. L. Rev. 1086, 1090. Moreover, we cannot see, from a constitutional standpoint, 'that it was important that the agent work for several principals.' Chief Judge Learned Hand, in Bomze v. Nardis Sportswear, 165 F. 2d 33, 36. The test is simply the nature and extent of the activities of the appellant in Florida. In short, we conclude that this case is controlled by General Trading Co., Supra. As was said there, 'All these differentiations are without constitutional significance.* * *'"

The two leading cases wherein the imposition of use tax upon foreign corporations was interdicted by the Supreme Court of the United States were Miller Brothers Co. v. Maryland, 347 U. S. 340 and National Bellas Hess, Inc. v. Department of Revenue of the State of Illinois, 386 U. S. 753.

In the Miller Brothers case the Delaware vendor had no store, merchandise, salesmen nor any other indicia of business in the State of Maryland. All purchases were made by the residents of Maryland at vendor's store in Delaware, some of which purchases were carried away by the buyers and some of which were delivered to them in Maryland by common carrier. No telephone or mail orders were taken or solicited. The vendor made use of radio, television and newspaper media in Delaware in the advertisement of its products. The State of Maryland sought to compel the Delaware vendor to collect and remit use tax on all sales made to Maryland residents, however delivered. The Supreme Court of the United States held this to be in violation of the due process clause of the federal constitution

as an unwarranted extension of the state's taxing power beyond its borders, no valid jurisdictional basis for such action having been established. Examination of these stipulated facts in the appendix to the opinion clearly indicates that the minimum contact test, or nexus theory, could not have been sustained had it been advanced. Indeed, the court in its opinion said that:

> "* * * * * *
> due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.* * *" (PP. 344-45) (Emphasis supplied)

In National Bellas Hess, Inc. v. Department of Revenue, supra, the vendor was a mail order concern located at North Kansas City, Missouri, a Delaware corporation also licensed to do business in Missouri. The State of Illinois sought to impose the duty of collecting and remitting use tax upon the vendor as to all sales of tangible personal property to Illinois residents. Vendor had no Illinois office, warehouse or any other place of business in Illinois, no agent, salesman or solicitor, no telephone listing and conducted no advertising in any of the media, by billboards or in any other form, except

through mail order catalogues only. The court's majority, in a 6 to 3 opinion, held that solicitation of Illinois business through mail order catalogues only with deliveries of merchandise being made by common carrier was an insufficient "nexus" upon which to predicate imposition of the tax. The dissenting opinion, which would have affirmed the collection of the use tax, was based, in a large part, upon the fact that over two million dollars worth of Illinois business had been conducted by National Bellas Hess in a 15 month period preceding the Department's proposed assessment, plus the volume of the mail order advertising, Justice Fortas stating (p. 761):

> "* * * * * *
>
> There should be no doubt that this large-scale, systematic, continuous solicitation and exploitation of the Illinois consumer market is a sufficient 'nexus' to require Bellas Hess to collect from Illinois customers and to remit the use tax, especially when coupled with the use of the credit resources of residents of Illinois, dependent as that mechanism is upon the State's banking and credit institutions. Bellas Hess is not simply using the facilities of interstate commerce to serve customers in Illinois. It is regularly

> and continupusly engaged in 'exploitation of the consumer market' of Illinois (Miller Bros. Co. v. Maryland, 347 U. S. 340, 347 (1954)) by soliciting residents of Illinois who live and work there and have homes and banking connections there, and who, absent the solicitation of Bellas Hess, might buy locally and pay the sales tax to support their State. * * *"

The majority opinion through Justice Stewart, however states (p. 757):

> "* * * * * * *
>
> In applying these principles the Court has upheld the power of a State to impose liability upon an out-of-state seller to collect a local use tax in a variety of circumstances. Where the sales were arranged by local agents in the taxing State, we have upheld such power. Felt & Tarrant Co. v. Gallagher, 306 U. S. 62; General Trading Co. v. Tax Comm'n, 322 U. S. 335. We have reached the same result where the mail order seller maintained local retail stores. Nelson v. Sears, Roebuck & Co., 312 U. S. 359; Nelson v. Montgomery Ward, 312 U. S. 373. In those situations the out-of-state seller was plainly accorded the protection and services of the taxing State." (Emphasis supplied)

and at page 758 that:

> "* * *the Court has never held that a State may impose the duty of use tax collection and payment upon a seller whose only connection with customers in the State is by common carrier

or the United States mail. Indeed, in the Sears Roebuck case the Court sharply differentiated such a situation from one where the seller had local retail outlets, pointing out that 'those other concerns... are not receiving benefits from Iowa for which it has the power to exact a price.' 312 U.S. at 365. And in Miller Bros. Co. v. Maryland, 347 U. S. 340, the Court held that Maryland could not constitutionally impose a use tax obligation upon a Delaware seller who had no retail outlets or sales solicitors in Maryland. There the seller advertised its wares to Maryland residents through newspaper and radio advertising, in addition to mailing circulars four times a year. As a result, it made substantial sales to Maryland customers, and made deliveries to them by its own trucks and drivers.

"In order to uphold the power of Illinois to impose use tax burdens on National in this case, we would have to repudiate totally the sharp distinction which these and other decisions have drawn between mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business. But this basic distinction, which until now has been generally recognized by the state taxing authorities, is a valid one, and we decline to obliterate it." (Emphasis supplied)

In the case of Reader's Digest Association v. Mahin, 44 Ill. 2d 354; certiorari denied, 399 U. S. 919, the Supreme

Court of Illinois held that Reader's Digest Association, Inc., (hereinafter, Reader's Digest) was a "retailer maintaining a place of business in this state" under Section 2 of the Use Tax Act. Reader's Digest, was a Delaware Corporation with office headquarters in New York. It was not licensed to do business in Illinois, nor did it have any office, sales house, warehouse, real or personal property or any telephone listing in Illinois. However, Reader's Digest did wholly own two subsidiaries, both Delaware corporations, one licensed to do business in Illinois, and also held a majority interest in another Delaware corporation not licensed to do business in Illinois. It was through these subsidiaries that the court held Reader's Digest to be a "retailer maintaining a place of business in this State" even though the subsidiaries were not connected with the items subject to the measure of tax, namely books and phonograph albums sold by Reader's Digest to residents of the State of Illinois by mail order from outside the State.

The Illinois court set forth the basis for its denial of tax exempt status to Reader's Digest Association in the following language (pps. 357-359):

"* * * * * *

Defendant next contends that the activities and presence of plaintiff's subsidiaries and Quality School Plan, Inc. in this State subject plaintiff to use-tax liability. While Section 2 of the Use Tax Act does include, within 'a retailer maintaining a place of business in this State,' any retailer 'having or maintaining within this State, directly or by a subsidiary, an office, distribution house, sales house, warehouse or other place of business' (emphasis added), this section also must be construed in light of United States Supreme Court limitations. In National Bellas Hess the court required the presence of a retail outlet, solicitor, or property within the State to subject an out-of-state vendor to liability for use-tax collection. Plaintiff admits that Reader's Digest Sales and Services, Inc., solicits advertising in the State of Illinois for plaintiff's 'Reader's Digest' magazine. But plaintiff argues that Reader's Digest Sales and Services, Inc., is an agent for the solicitation of advertising only and therefore it should not be considered a basis for taxing the sale of the books and albums. In Nelson v. Montgomery Ward & Co. (1941), 312 U.S. 373, 85 L. Ed. 897, 61 S. Ct. 593, the United States Supreme Court considered the validity of the Iowa use tax in relation to separate departments of Montgomery Ward. Respondent Montgomery Ward which had 29 retail stores in Iowa, argued that because its mail order business was separate and had no connection with that State, it was not liable for use-tax collection for its mail order business. The court held: 'Some of respondent's

> employees are in Iowa representing it in the course of business which it is conducting pursuant to its permit to do business in that state. The fact that other of its employees who work in the mail order houses and handle the mail orders here involved are not in Iowa is wholly irrelevant. It does not permit respondent to escape the burden which Iowa has exacted as a price of enjoying the full benefits flowing from its aggregate Iowa business.' (312 U.S. at 375.) Through its solicitors in the State of Illinois, plaintiff would be liable for use-tax collection on its magazine sales, absent its exemption. However, this exemption does not extend to other products, i. e., books and albums, sold to Illinois residents. Considering the full benefits flowing to plaintiff's aggregate business from its resident solicitors and local advertising, we find without further examination of the other subsidiaries an adequate basis for use-tax liability." (Emphasis supplied)

As to my opinion (S-65, supra) adverted to by the Robbins Company as the "Spencer Opinion", the question concerned a proposed method of business operation by the companies involved rather than a proposed assessment of use tax measured by gross receipts derived from sales already made. The subsidiary corporate retail outlet proposed as a representative of another subsidiary mail order corporation was deemed

sufficient to provide the necessary "connection between the state and the person, property or transaction it seeks to tax" mentioned in National Bellas Hess, Inc. supra, upon which to predicate imposition of the tax. I adhere to that opinion.

Under the facts as presented in your inquiry, the contact of The Robbins Company with the State of Illinois is in its ownership and operation of a sales office in Illinois where it, admittedly, collects and remits "sales taxes" from its consumer customers in Illinois, plus its ownership and control of The International Mint, Inc., vendor of commemorative coins, which company receives in the District of Columbia orders for such merchandise from, inter alia, Illinois purchasers which, according to your inquiry, are "forwarded to Robbins under an arrangement for fulfillment".

That there are good and sufficient business reasons for the foregoing arrangement between Robbins and International is not denied. That Robbins derives benefits, from the operations of its subsidiary, International, in Illinois as well as in other states is scarcely contestable. If Robbins

obtained the orders for the commemorative coins which it manufactures and sold them by mail order only there is no doubt that because of its operation of a sales outlet in Illinois selling different merchandise, that it would fall squarely within the ambit of The Reader's Digest Association and National Bellas Hess cases, supra, as having the minimum contacts requisite to the imposition of use tax by the Illinois Department of Revenue.

It is evident from an examination of all of the foregoing authorities, whether they uphold or deny imposition of use tax on interstate business, that the facts determine the application of the legal principles involved.

It is my view, based upon the close connection of The Robbins Company, conducting business and paying taxes in Illinois, and its wholly owned subsidiary, International Mint, Inc., which forwards all of its orders to Robbins "for fulfillment" that the Illinois Department of Revenue, whatever may be the reasons for such orders to be retailed by mail, or however they may be filled, may rightly assume that

they are not unrelated to Robbins' course of business in Illinois. See Nelson v. Sears, Roebuck & Co., 312 U. S. 359, 364. It would likewise appear that Robbins and its subsidiary, International, are "plainly accorded the protection and services of the taxing State" (Illinois). See National Bellas Hess, Inc. v. Department of Revenue, etc., supra, p. 757.

It is my opinion, in light of the foregoing, that Illinois may properly require remittance of its use tax from The Robbins Company measured by the gross receipts from sales made by its wholly owned subsidiary, International Mint, Inc., to Illinois purchasers.

Very truly yours,

ATTORNEY GENERAL