

**BEFORE THE HEARING OFFICER  
OF THE TAXATION AND REVENUE DEPARTMENT  
OF THE STATE OF NEW MEXICO**

**IN THE MATTER OF THE PROTEST OF  
Barnesandnoble.com llc  
TO ASSESSMENT ISSUED UNDER  
LETTER ID NO. #L1806543104**

**No. 11-10**

**DECISION AND ORDER  
ON DEPARTMENT'S MOTION FOR SUMMARY JUDGMENT AND  
BARNESANDNOBLE.COM LLC CROSS MOTION FOR SUMMARY JUDGMENT**

A formal hearing on the above-referenced protest was held on April 29, 2010, before Monica Ontiveros, Hearing Officer. The Taxation and Revenue Department ("Department") was represented by Tonya Noonan Herring, Special Assistant Attorney General. Barnesandnoble.com llc ("Taxpayer") was represented by George S. Isaacson, Esq. and Tim R. Van Valen, Esq. This matter was presented on cross Motions for Summary Judgment. On February 1, 2010, the parties filed its Joint Stipulations of Fact. On March 1, 2010, the Department filed its Motion and Memorandum in Support of Motion for Summary Judgment and on April 1, 2010, Taxpayer filed its Memorandum in Opposition to the Department's Motion for Summary Judgment. On March 1, 2010, Taxpayer filed its Motion for Summary Judgment and on March 31, 2010, the Department filed its Reply to Protestant's Motion for Summary Judgment.

Based on the Stipulation of Facts, review of exhibits and arguments presented, IT IS  
DECIDED AND ORDERED AS FOLLOWS:

**FINDINGS OF FACT**

1. The Department requested a hearing in this matter on February 23, 2009. A Notice of Administrative Hearing and Scheduling Order was entered on March 30, 2009 setting a hearing

for October 20-21, 2009.

2. On July 28, 2009, Taxpayer with the concurrence of the Department filed a Motion for a New Hearing Date.

3. On July 30, 2009, an Order Vacating and Rescheduling Hearing was issued setting the hearing for October 13-14, 2009.

4. On August 31, 2009, the Department filed a Motion for New Hearing Date and to Amend the Scheduling Order. Taxpayer was not opposed to the Motion.

5. On September 17, 2009, an Order Vacating and Rescheduling Hearing and Amending Scheduling Order was issued setting the hearing for February 1-2, 2010.

6. On January 8, 2010, a Joint Motion to Vacate Hearing Date, File Motions for Summary Judgment, and Issuance of Revised Scheduling Order was filed by both parties.

7. A Fourth Amended Notice of Administrative Hearing and Amended Scheduling Order was issued setting this matter for hearing on April 29, 2010.

8. Taxpayer is a limited liability company in good standing, organized under the laws of the State of Delaware, with all of its operations, facilities, and personnel located outside of the State of New Mexico. Exhibit C2, pg. GN1.

9. Taxpayer is headquartered at 76 North Avenue, New York, NY and is a leading internet-based retailer of books, music, DVD/video and online courses. Exhibit C2, pg. GN1.

10. The Department issued Assessment Letter ID #L1806543104 to Taxpayer on June 5, 2006 (the "Assessment") for gross receipts tax in the principal amount of \$534,563.11, plus interest, for tax periods 01/31/1998 through 07/31/2005 (the "Audit Period"). No penalty was

assessed against Taxpayer. Taxpayer signed a Waiver of Limitation dated June 5, 2006. Exhibit C1, pg B58.

11. The Assessment was based on the assertion that Taxpayer was obligated to collect and remit New Mexico gross receipts tax on its Internet sales to residents of the State of New Mexico. During the Audit Period, Taxpayer was a non-filer with the Department. Exhibit C.

12. On July 3, 2006, Taxpayer filed a written protest to Assessment Letter ID # 1806543104, and the protest was filed timely. The Department acknowledged receipt of the protest on July 25, 2006.

13. During the Audit Period, Taxpayer did not have a building location in New Mexico. It sold books, music, and movies in a variety of formats to consumers throughout the United States, including to residents of New Mexico through the Internet. Much of the merchandise sold by Taxpayer consisted of third-party branded items that were also available at on-line sites such as amazon.com, as well as at a wide variety of retail stores. Such sales by Taxpayer were sold exclusively via the Internet through Taxpayer's web site located at <http://www.bn.com>. Joint Stp. #6; Exhibit C-2, pg. GN1.

14. Until October 31, 1998, the bn.com business was conducted by a wholly-owned subsidiary of Barnes & Noble, Inc. Joint Stp. #8.

15. Effective October 31, 1998, Barnes & Noble, Inc. ("Barnes & Noble") and Bertelsmann AG ("Bertelsmann") completed a transaction that established Taxpayer as the owner and operator of the bn.com business. The completion of this transaction resulted in Barnes & Noble and Bertelsmann each having a 50% beneficial ownership in bn.com llc, through their

respective holding companies. At all times relevant hereto, there was no cross-ownership between Barnes & Noble and Bertelsmann; they were unaffiliated corporations. Joint Stp. #9.

16. On March 10, 1999, barnesandnoble.com inc. (“BN.com Inc.”) was established as a new Delaware subsidiary wholly-owned by Barnes & Noble and incorporated to act as a holding company for Taxpayer as well as its sole member. Barnes & Noble, through a wholly owned subsidiary called B&N.com Holding Corp. (“Holding Corp.”) and Bertelsmann, through a wholly owned subsidiary called BOL.USOnline, Inc. (“Bertelsmann Online”), each had a 50% equity interest in BN.com INC. Joint Stp. #10.

17. BN.com Inc.’s only business was to act as the sole manager of Taxpayer on behalf of Holding Corp. and Bertelsmann Online. Joint Stp. #11.

18. On May 25, 1999, BN.com INC completed a public offering of its stock which resulted in Barnes & Noble having a 40% equity interest in BN.com Inc. and Bertelsmann having a 40% equity interest in BN.com INC. (through their respective holding companies described above), and 20% of the stock of BN.com INC. being publically traded. Joint Stp. #12.

19. From May 25, 1999 through September 15, 2003, Barnes & Noble, through its wholly owned subsidiary, Holding Corp., effectively owned only a minority interest (approximately 40%) of Taxpayer. Joint Stp. #13.

20. On September 15, 2003, Barnes & Noble acquired the entire equity shares of Bertelsmann in BN.com, INC. and transferred the shares to Holding Corp. From September 15, 2003 through May 2004, Barnes & Noble effectively owned an eighty (80) percent interest in Taxpayer through Holding Corp. The remaining (20) percent of Taxpayer was owned by BN.com

Inc., whose stock was publically traded. Joint Stp. #14.

21. On May 25, 2004, Barnes & Noble acquired the remaining stock of BN.com INC. that was publically traded and transferred the stock to Holding Corp. From May 25, 2004 through the end of the Audit Period, July 31, 2005, Barnes & Noble effectively owned one-hundred (100) percent of Taxpayer through its subsidiary, Holding Corp. Joint Stp. #15.

22. During the Audit Period, Taxpayer at all times was a separate, limited liability company. Taxpayer paid for and maintained its own separate offices and facilities, all of which were in buildings separate from those occupied by other Barnes & Noble corporations. Taxpayer had over 1,000 employees who ran all aspects of its operations. Taxpayer's officers were responsible for all aspects of the management and operation of the business. Taxpayer maintained its own books and records regarding all aspects of its business. Joint Stp. #16.

23. During some periods, certain directors of Barnes & Noble were also directors of BN.com INC. Joint Stp. #17.

24. During the Audit Period, Taxpayer neither owned nor leased real or personal property of any kind located in the State of New Mexico. Joint Stp. #18.

25. During the Audit Period, Taxpayer had no employees, either permanently or temporarily, employed in the State of New Mexico. Joint Stp. #19.

26. During the Audit Period, all products sold by Taxpayer including to residents of the State of New Mexico, were delivered by the United States Postal Service or other interstate common carriers from points outside of the State of New Mexico. Joint Stp. #20.

27. During the Audit Period, Taxpayer did not maintain any telephone number, or

mailing address in the State of New Mexico, nor did it advertise in any local newspapers or magazine, or on local television or radio stations, in New Mexico. Joint Stp. #21.

28. During the Audit Period, Taxpayer communicated with customers and potential customers across the United States, including in the State of New Mexico, using e-mail originating from outside of the State of New Mexico. Joint Stp. #22.

29. During the Audit Period, Taxpayer had certain contractual agreements with Barnes & Noble: Supply Agreement; Services Agreement; and Database and Software License Agreement. Exhibits D1, D2 and D3.

30. During the Audit Period, Barnes & Noble Booksellers, Inc. (“Booksellers”) was a separate corporation from Taxpayer, but a wholly-owned subsidiary of Barnes & Noble. Joint Stp. #24.

31. Booksellers owned and operated retail stores across the United States. Booksellers has three retail bookstores in New Mexico, one in Coronado Shopping Mall in Albuquerque, business start date 09/25/2001; one in Cottonwood Mall in Albuquerque, business start date 11/27/1996 and one in Mesilla Valley Mall in Las Cruces, business start date 08/21/2003. During the Audit Period, Taxpayer’s website provided information regarding the locations of the Barnes & Noble bookstores, including in New Mexico, through a store locator link. Joint Stp. #25.

32. The website link led to a web page displaying physical addresses of the Booksellers’ stores, including those in New Mexico, and their phone numbers. Joint Stp. #25.

33. Beginning in 2000, the bn.com website included a link to a web site listing store events at Booksellers’ bookstores. In both cases, these links led to web pages and databases

owned and paid for by Barnes & Noble. Barnes & Noble compensated Taxpayer for the links. Exhibit Y.

34. At all times during the Audit Period, Booksellers had no ownership interest in Taxpayer. During the Audit Period, Booksellers did not have an operational role in any activities of or decision-making by Taxpayer. Likewise, Taxpayer never had any ownership interest, or operational role, in any activities of or decision-making by Booksellers. Joint Stp. #26.

35. Booksellers maintained (a) separate offices and facilities at different locations than the offices and facilities of Taxpayer; (b) separate computer systems; (c) separate communications systems (including phone numbers and email addresses); (d) separate customer and sales transaction files as to which Taxpayer had no access; (d) separate pricing strategies; and (f) separate employees and staff which were not shared with Taxpayer. Joint Stp. #27.

36. At no time did Taxpayer and Booksellers intermingle any of their corporate assets. Joint Stp. #27.

37. BN.com INC. filed United States Securities and Exchange Commission Form 10K Annual Reports for fiscal years ending December 31, 1999 through 2003. Exhibits G, H, I, J, K & L.

38. During the Audit Period, Booksellers accepted products originally purchased from all competing retailers (including, but not limited to Taxpayer) in exchange for a gift card or store credit only redeemable in Booksellers' store. Joint Stp. #30.

39. It was Booksellers' return policy prior to May 2001 that Booksellers would accept returns in a saleable condition purchased from another retailer, including but not limited to

Borders, amazon.com and Taxpayer, in exchange for a Barnes & Noble gift card redeemable only at Booksellers. Joint Stp. #31 and Exhibit M.

40. Starting in May 2001, it was Booksellers' policy to provide its customers with a store credit (usable only at a Booksellers' bookstore) in exchange for saleable books purchased from other retailers (including, but not limited to Taxpayer). In-store credits for Taxpayer's on-line purchases could not be redeemed on-line, but had to be used at any Booksellers store. Joint Stp. #33 and Exhibit N.

41. Booksellers' return policy was discussed on Taxpayer's web site, but Taxpayer had no role in determining Booksellers' return policy. Taxpayer's website did not discuss the return policies of retailers other than of itself and Booksellers. Joint Stp. #35.

42. Booksellers at no time advised Taxpayer as to whether returns from Taxpayer, if any, occurred. Joint Stp. #36.

43. Booksellers did not provide, nor did Taxpayer request it to provide, any returned books to Taxpayer, nor was any accounting or payment made by or to Taxpayer, or between Booksellers and Taxpayer in connection with such returns. Joint Stp. #37.

44. During the Audit Period, Taxpayer never authorized or instructed Booksellers or any other retailer or person located in New Mexico to accept the return by customers of products purchased from Taxpayer. Taxpayer had no contractual or other relationship, financial or otherwise, with Booksellers or any other person or company regarding product returns at any location in New Mexico. Joint Stp. #38.

45. Starting in October 1999 and continuing through the fall of 2002, Booksellers sold

gift cards which were redeemable at Booksellers' stores, but not with Taxpayer. Joint Stp. #39.

46. Beginning in the fall of 2002, Booksellers and Taxpayer each began selling multi-retailer gift cards also offered for sale through a number of other retailers. Participating retailers, including Taxpayer sold gift cards on behalf of Marketing Services (Minnesota) Corporation, Inc. ("MSMC"), a subsidiary of Barnes & Noble located outside of the State of New Mexico. At all times, MSMC owned the gift cards and, through a contract with a third-party, kept track of the gift cards and the value of such cards. Joint Stp. #40 and Exhibits E1 and E2.

47. Beginning in the fall of 2002, the Booksellers stores, including in New Mexico, advertised and sold gift cards with the bn.com or barnesandnoble.com name on the reverse side of the cards. The Barnes & Noble gift cards were redeemable at Booksellers' retail stores and on-line. Cards purchased online from Taxpayer were redeemable at Booksellers' stores. Joint Stp. #41.

48. Upon the sale of each such gift card by Taxpayer, the proceeds of the sale were remitted to MSMC and the participating company received a fee from MSMC for making the sale. Taxpayer received no benefit when the cards were redeemed at another retailer, including Booksellers. Joint Stp. #42.

49. All participating retailers, including Taxpayer and Booksellers, were obligated under their contracts with MSMC to accept these gift cards when they were presented by customers, irrespective of from which retailer those cards were purchased. MSMC paid to each participating retailer the face value of all redeemed cards. Taxpayer was not obligated to remit any portion of the gift card's value to another retailer; nor would Taxpayer know from what

retailer the gift card was purchased. Joint Stp. #43.

50. At no time did Taxpayer authorize or direct other participating retailers to direct or encourage gift card purchasers or recipients to purchase products from Taxpayer --- although Taxpayer was aware that the fact of its participation in the gift card program was reflected in materials utilized by all program participants. Joint Stp. #44.

51. Beginning in March 2001, Taxpayer participated in a Barnes & Noble customer loyalty program known as the Membership Program or Readers' Advantage Program (the "loyalty program"). Other participating retailers included Booksellers. Joint Stp. #45.

52. Under this loyalty program, consumers could purchase a membership for twenty-five dollars (\$25.00) that entitled them to special offers and discounts on purchases made at participating retailers. With this membership card, customers receive discounts of 10% on all Barnes & Noble bookstore purchases and 5% on all bn.com llc purchases prior to March 2005. In March 2005, the discount for members at bn.com llc was increased to 10%. Joint Stp. #46.

53. The loyalty program was similar to many other programs for which a consumer pays a single price and receives discounts or other benefits at participating retailers. The benefits of the loyalty program were promoted in Booksellers' stores and on Taxpayer's website. Customers were encouraged to enroll in the loyalty program. Joint Stp. #47.

54. The loyalty program was run by Barnes & Noble utilizing a third-party contractor. The third-party contractor was not located in New Mexico. Joint Stp. #48.

55. Membership fees collected by participating retailers, including Taxpayer were sent to Barnes & Noble. Service fees and expenses for running the program, including fees charged by

the third-party administrator, were deducted from the aggregated membership fees, and then the balance remaining from those membership fees were distributed by Barnes & Noble amongst participating retailers based upon the percentage of overall discounts awarded to customers by those retailers. So, for example, if Taxpayer gave its customers 10% of the overall loyalty program discounts, it would receive 10% of the aggregated membership fees after the deduction of service fees and expenses associated with running the program. As a result, there was no incentive for Taxpayer to promote sales of another participating retailer, because compensation under the program was entirely tied to sales made by Taxpayer. In fact, sales made through other retailers would reduce the portion of membership revenue paid to Taxpayer. The same system applied to all participating retailers. Many of the participating retailers were subsidiaries of Barnes & Noble. Joint Stp. #49.

56. The participating retailers, including Booksellers and Taxpayer, would benefit only when a member used the membership to make purchases from the retailer itself. Joint Stp. #50.

57. During the Audit Period, Taxpayer had no knowledge of (nor could it determine) where individual memberships were purchased or in what numbers (except those sold by Taxpayer), or through which participating retailer a customer joined the loyalty program. Joint Stp. #51.

58. At no time did Taxpayer authorize or direct other participating retailers in the loyalty program, including Booksellers, to promote or advertise in any way Taxpayer's participation in the program or to director or encourage members to shop with Taxpayer. Joint Stp. #52.

59. Booksellers' store customers were encouraged to sign up for the Reader's Advantage card when they checked out. Store customers were also asked for email addresses but were not required to provide one. Taxpayer had access to the email addresses of members, irrespective of where or how they were collected. Taxpayer sent marketing messages via email to customers whose names appear in the member database. Joint Stp. #53.

60. During the Audit Period, Booksellers at all times operated a proprietary merchandising and inventory management system known as "Bookmaster." Joint Stp. #54.

61. The Bookmaster system functioned as follows: Bookmaster searched the inventory of various wholesalers and distributors from which a Booksellers' store could source items not currently in the store's inventory. When a customer requested an item that was not contained in the store's inventory, a Booksellers' employee could use Bookmaster to order the item and have the item shipped by the wholesaler or distributor directly to the customer's home address or to the store for customer pick up. The system would identify a wholesaler or distributor based on proximity to the customer and availability of the item. Joint Stp. #55.

62. The store would collect sales tax on its sale to its customers of these books located using Bookmaster, including books mailed to the stores or books mailed to customers' home addresses. Joint Stp. #56.

63. All such sales of books located using Bookmaster were booked as sales by the store, including books mailed to the stores or books mailed to customers' home addresses. Joint Stp. #57.

64. Prior to November 2001, Taxpayer was not one of the wholesalers or distributors

with searchable inventory in the Bookmaster system, which at that time included independent distributors such as Ingram and Baker & Taylor. Joint Stp. #58.

65. Beginning in November 2001, Taxpayer was added as only one of the many wholesalers and distributors included in the system, including independent distributors such as Ingram and Baker & Taylor. Joint Stp. #59.

66. In August 2002, several other wholesalers and distributors were added, including Bookpeople, Booksource, Koen, Bookazine, Partners, The Distributors and MBS. Joint Stp. #60.

67. As a wholesaler included in Bookmaster after November 2001, Taxpayer would occasionally sell products, at wholesale, to Booksellers for resale to Booksellers' customers in the following circumstances: When a product was not available in one of the Booksellers' stores and Bookmaster identified Taxpayer, as opposed to one of Booksellers' other wholesale vendors, as the source of the product, Taxpayer charged Booksellers the wholesale price for the products (which included cost, plus a mark-up), and delivered the product by interstate common carrier either to one of Booksellers' stores or to a Booksellers customer (at the instruction of Booksellers). Joint Stp. #61.

68. Following the wholesale transactions between Taxpayer and Booksellers, Booksellers then resold those products for its own account to its customers; received payment directly from those customers; issued a receipt to such customers; and collected and remitted applicable state and local sales tax on such sales. Joint Stp. #62.

69. Taxpayer did not have access to the Bookmaster system, but booksellers had access to Taxpayer's in-stock inventory information as it does for all of its wholesale vendors. Joint Stp.

#63.

70. During the Audit Period, Taxpayer did not participate in or honor any discount or special purchasing arrangements, such as corporate accounts or institutional accounts or discounts, offered or allowed by Booksellers stores in New Mexico or elsewhere. Joint Stp. #64.

71. During the Audit Period, there were no kiosks, computer terminals, catalogs, order forms, or other equipment or materials at Booksellers New Mexico store through which consumers could place director orders with Taxpayer, although Booksellers employees could order products for sale to those customers using Bookmaster System described above. Joint Stp. #65.

72. For a portion of the Audit Period, Taxpayer had an agreement with Booksellers under which Taxpayer was provided access to a general database of books and other publications in print. The database did not include customer information of any kind and was located and maintained outside of the State of New Mexico. Joint Stp. #66.

73. Barnes & Noble issued annual statements to the shareholders of Barnes & Noble which included statements from Leonard Riggio, CEO, entitled "A Letter to Our Shareholders" regarding the financial condition, the policies and the trends of the company and its subsidiaries. Exhibits O, P, Q, R, S, T, and U.

74. During the Audit Period, Taxpayer had no subsidiaries transacting business in the State of New Mexico. During the Audit Period, Taxpayer did not maintain, directly or indirectly, or through a subsidiary, an office, distribution house, sales house, warehouse, or other place of business in New Mexico. Joint Stp. #68.

75. During the Audit Period, Taxpayer did not engage in regular or systematic

solicitation of a consumer market in New Mexico by the distribution of catalogs, periodicals, or advertising fliers or by means of radio or television media, or by mail, telegraphy or telephone. Taxpayer communicates with New Mexico customers via their email addresses, in part obtained from a database maintained by Booksellers, to promote in-store discounts, promotions, events and disseminator other bookstore information. Joint Stp. #69.

76. From October 1998 to October 31, 2005, Taxpayer made the following net taxable sales to New Mexico residents:

10/01/98-12/31/98	\$ 343,781
01/01/99-12/31/99	\$ 964,000
01/01/00-12/31/00	\$1,523,976
01/01/01-12/31/01	\$1,832,420
01/01/02-12/31/02	\$1,993,229
01/01/03-12/31/03	\$1,847,570
01/01/04-12/31/04	\$1,770,168
01/01/05-12/31/05	\$1,357,980

Exhibit C2.

77. Barnes & Noble College Bookstores, Inc. (“College Bookstores”) was the registered owner of Barnes & Noble trademarks used by Taxpayer, and licensed the use of those trademarks to Taxpayer under an Amended Trademark Licensing Agreement. Exhibits CC.

78. During the relevant tax periods, the bn.com website provided a link called “Find a B&N store” that allowed internet customers to locate a Barnes & Noble retail store nearest them.

Exhibit 1.

79. During the relevant tax periods, the bn.com website also provided a link, often next to the store locator link, called “Easy Returns” to a page that explained the return policy of Barnes&Noble Booksellers and bn.com. Exhibit 1.

80. Exhibits A through Z and AA through DD were tendered and were admitted into the record. Exhibit 1 was introduced into the record.

81. Affidavit of Kevin Frain is admitted into the record as Exhibit BB.

82. Affidavit of Joe Lopez is admitted into the record. It was attached to the Summary Judgment Motion and is not listed as a separate exhibit.

83. Affidavit of Patricia A. Silva is admitted into the record as Department Exhibit 1.

### **DISCUSSION**

The sole issue to be determined is whether the activities or contacts of Booksellers in the State of New Mexico could be attributed to Taxpayer to constitute “substantial nexus” under an analysis of *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992). If so, then, whether Taxpayer was required to file and remit gross receipts tax on its New Mexico sales from October 1998 to October 31, 2005. Taxpayer did not own any brick and mortar stores in New Mexico during the Audit Period. The Department argues and identifies seven activities of Booksellers that caused Taxpayer to have “substantial nexus” in New Mexico. Those activities are: close corporate relationship and common ownership, cross marketing, the return policy, the gift cards policy, the loyalty program, the reader’s advantage card and the Bookmaster program.

Taxpayer argues that it had no physical presence in New Mexico of any kind during the Audit Period and the activities of Booksellers do not rise to the level of “substantial nexus” in New Mexico. It cites to *St. Tammany Parish Tax Coll. V. Barnesandnoble.com*, 481 F. Supp. 2nd 575 (E.D. La 2007) and *In re barnesandnoble.com LLC*, ATC 06-85 (March 26, 2009) to support its position that the contacts and activities of Booksellers were insufficient to rise to the level of

“substantial nexus.”

If “substantial nexus” is found, the Department and Taxpayer have stipulated that there were net taxable sales of property in New Mexico from October 1998 to October 31, 2005, and gross receipts tax would be due on the sales listed in Findings of Fact #76. Joint Stp. #70; Exhibit C2. There is no dispute that Taxpayer sold property in New Mexico during the tax period in question pursuant to the NMSA 1978, Section 7-9-4 (1990). These sales occurred when New Mexico customers placed orders for merchandise through the Internet on Taxpayer’s website. The merchandise was shipped and delivered to customers in New Mexico through a common carrier.

**Burden of Proof and Standard of Review.**

NMSA 1978, Section 7-1-17 (2007) provides that any assessment of taxes made by the Department is presumed to be correct. Accordingly, it is Taxpayer’s burden to present evidence and legal argument to show that it is entitled to an abatement, in full or in part, of the assessment issued against it. When a taxpayer presents sufficient evidence to rebut the presumption, the burden shifted to the Department to show that the assessment is correct. *See MPC Ltd. v. N.M. Taxation and Revenue Dep’t.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308. In this case, Taxpayer rebutted the presumption by presenting evidence that there was no substantial nexus between the State of New Mexico and Taxpayer. See Exhibits A through DD. The burden then shifts to the Department to prove by a preponderance of the evidence that the assessment is correct. *MPC Ltd. v. N.M. Taxation and Revenue Dep’t.*, 2003-NMCA-021, ¶ 13, 133 N.M. 217, 62 P.3d 308; *Grogan v. New Mexico Taxation and Revenue Dep’t.*, 133 N.M. 354, 357-58, 62 P.3<sup>rd</sup> 1236, 1239-40 (2002).

Summary Judgment is appropriate when there is no genuine as to any material fact and the moving party is entitled to prevail as a matter of law. *Romero v. Philip Morris, Inc.*, 2009-NMCA-22, 145 NM 658, 203 P.2d 873. In this case both parties simultaneously moved for Summary Judgment and replied to each other's Motions for Summary Judgment. In reviewing the record and all the exhibits that were tendered in this matter, there is no issue as to any material fact and the issue presented is a question of law.

### **Substantial Nexus**

Taxpayer argues that the imposition of the gross receipts tax on an out-of-state entity violates the Commerce Clause of the United States Constitution because there were insufficient contacts between the State of New Mexico and Taxpayer. U.S. Const. art. I, section 8. The Department argues that close corporate relationship and common ownership between Booksellers and Taxpayer along with the activities of Booksellers were sufficient to establish "substantial nexus" between the State of New Mexico and Taxpayer.<sup>1</sup>

Prior to a tax being imposed on an out-of-state entity, a state or taxing authority must establish that the tax is consistent with the Commerce Clause of the Constitution. *Quill Corp. v. North Dakota*, 504 U.S. 298, 305, 112 S.Ct. 1904, 1910 (1992). The test to be applied is whether the "(1) tax is applied to an activity with a **substantial nexus** with the taxing state, (2) is fairly apportioned, (3) does not discriminate against interstate commerce, and (4) is fairly related to the services provided by the State. *Quill* at 311, 112 S.Ct. 1912, (quoting *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 97 S.Ct. 1076, 1977). In *Quill* The Court held that "a vendor whose

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<sup>1</sup> The nexus test as stated in *Quill* at 504 U.S. 305-308, 112 S.Ct. 1909-1911 derived from the Due Process clause of the Fifth and Fourteenth Amendments of the United States Constitution is not addressed in this Decision.

only contacts with the taxing State are by mail or common carrier lacks the ‘substantial nexus’ required by the Commerce Clause.” *Quill* 504 U.S. at 311, 112 S.Ct. 1912. The Court in *Quill* stated that advertising in national publications and licensing company-owned software to instate clients was also insufficient to create the requisite nexus. *Quill* at 313, 315 n. 6 and 8, 112 S.Ct. 1913, 1915. The Court noted that it rejected a “slightest presence” standard to meet the requirement for constitutional nexus. *Quill* at 315 n. 8, 112 S.Ct. 1914. Taxpayer, in effect, makes this argument that you need more than a “slightest presence” to meet the “substantial nexus” requirement and that there was no “shred of evidence” to meet the “slightest presence” standard.

The Department argues that Taxpayer is attempting to apply a “bright-line” test or a brick and mortar test instead of “flexible balancing analysis” as articulated in *Quill*. *Quill* at 314, 112 S.Ct. 1914. The “flexible balancing analysis” that the Department is referring to is commonly called attributional nexus test which is set out in a number of cases. In *Scripto, Inc. v. Carson* 362 U.S. 207, 80 S.Ct. 619, 4 L.Ed.2d 660 (1960), the Supreme Court held that a company may not avoid a sufficient nexus merely by calling its agents independent contractors. *Scripto* at 211, 80 S.Ct. 623. In *Scripto*, an Atlanta company hired brokers to solicit sales mechanical pencils within the State of Florida. The brokers actively solicited sales within taxing state. This principle of attributing nexus through the business activities of agents to an out of state entity was reaffirmed in *Tyler Piper Industries Inc. v. Wash. State Dept. of Revenue*, 483 U.S. 232 250, 107 S.Ct. 2810, 97 L.Ed.2d 199 (1987) where the Court held that an out-of-state entity had “substantial nexus” because it had in-state sales representatives conducting business on behalf of the company.

The leading case in New Mexico on “substantial nexus” is *Dell Catalog Sales L.P. v. Taxation and Revenue Department of the State of New Mexico*, 2009-NMCA-001, 145 N.M. 419, 199 P.3d 893, *cert. denied*, 129 S.Ct. 1616 (March 23, 2009). In *Dell* the New Mexico Court of Appeals found “substantial nexus” without finding brick and mortar or without applying a “bright-line” test. In *Dell*, a third party repair provider, Banc Tec provided repair services on computers sold by Dell. The activities of a third party’s non-sale activities were found to be constitutional nexus even though the third party, Banc Tec, did not solicit or promote sales in New Mexico. The court found that because Dell exercised authority and control over the Banc Tec technicians that provided on-site installation and repair services for Dell’s customers that Dell established and maintained a market through the actions of its contractor or agent, Banc Tec.

The facts in *Dell* are not similar to the facts of this case. In *Dell*, Dell sold service contracts to its customers who bought computers, and provided customer assistance with in-home service repairs on the computers. Purchasers of computers had the option of purchasing a service contract at the time they purchased the computer or at any subsequent time. Dell’s merchandise was covered by a manufacturer’s limited warranty, but the warranty did not provide for on-site repair services; rather, it required that a customer ship the defective part(s) back to Dell in Texas for repair or replacement. If the customer was willing to replace a defective part, then Dell would mail the replacement part to the customer and include a prepaid return shipping label for the customer to return the defective part. BancTec repaired Dell computers at the customers’ homes under service contracts that Dell sold to customers.

The service agreements between Dell and BancTec were extremely specific as to the obligations of Banc Tec technicians. BancTec technicians had to contact the customer within thirty minutes of a call, track every service call, and train its technicians to meet a certain skill level. BancTec's employees had to conduct themselves in a manner that would professionally and positively represent the parent company as well as Dell Computer Corporation and other partners. Dell would ship any parts necessary for a repair to a warehouse in Austin, Texas, owned by Dell and subleased by BancTec. BancTec was required to use replacement parts issued by Dell, and BancTec was prohibited from using the parts that Dell provided except for the purpose that Dell stated. If BancTec could not resolve the problem or had further complications on a call, the BancTec technician was required to call Dell for additional assistance.

Furthermore, if the customer was unsatisfied with the BancTec technician, the customer did not report the complaint directly to BancTec but instead registered the complaint with Dell, Technical Support, which in turn reported the problem to BancTec management. BancTec's work was warranted through Dell. Dell had no ownership interest in BancTec, and BancTec owned no part of Dell's limited partnership. The court found that it was the totality of all of these contacts that established “substantial nexus” between the Banc Tec contractors or agents and Dell, which was sufficient to show that Banc Tec established and maintained a market for Dell in New Mexico. *Dell* at 48, 145 NM at 429, 199 P.3d at 873.

In this case, the Department was not able to prove that Booksellers established and maintained a market for Taxpayer. The Department was able to prove that while Booksellers are physically located (brick and mortar) in New Mexico and participated in activities or had

connections with Barnes & Noble and Taxpayer, none of the activities or connections provided Taxpayer with an exclusive retail advantage or economic advantage. The Department was unable to prove, as in *Dell*, that the agent or in this case Booksellers acted solely at the discretion or behalf of Taxpayer. In reviewing the extensive factual record, it is clear that Taxpayer created a fairly elaborate corporate organization and had some economic activity and contact with aided Taxpayer in its business. But the economic connections and activity of Booksellers did not rise to the level of exclusivity and agency that was present in *Dell*. *But see*, Gordon, *Up the Amazon Without a Paddle: Examining Sales Taxes, Entity Isolation, and the "Affiliate Tax,"* 11 N.C.J.L. & Tech. 299 (Spring 2010).

#### **Close Corporate Relationship and Common Ownership.**

The Department argues that Taxpayer, an out-of-state entity with no brick and mortar buildings in the State of New Mexico had a close corporate relationship and common ownership with Booksellers which by itself was sufficient to find "substantial nexus." Taxpayer argues that to attribute nexus from Booksellers' activities to it, the Department must do more than find a close corporate relationship and common ownership; it must pierce its corporate veil and its separate corporate status. See, e.g., *Bloomington's By Mail, Ltd. V. Department of Revenue*, 567 A.2d (Pa. Commw. Ct. 1989), *aff'd*, 591 A.2d 1047, *cert. denied*, 112 S.Ct. 2299 (1992) (absent one company acting as the local agent of the other, a tax authority must successfully "pierce the corporate veil" to attribute the substantial nexus of one affiliated company to another); *accord SFA Folio Collections, Inc. v. Tracy*, 73 Ohio St. 3d 119, 652 N.E. 2<sup>nd</sup> 693 (1995); *SFA Folio Collections, Inc. v. Bannon*, 585 A.2d 666 9Conn.), *cert. denied*, 111 S. Ct. 2839 (1991).

In reviewing the corporate relationship between Booksellers and Taxpayer, there was an elaborate corporate relationship but it was not sufficient to find “substantial nexus.” First a review of the facts is helpful with this discussion. There was no intermingling of marketing strategies, payroll, property or employees, directors or corporate officers to suggest that Booksellers and Taxpayer were in essence the same company or had close corporate connections. During the Audit Period, Taxpayer at all times was a separate, limited liability company from Booksellers. Taxpayer paid for and maintained its own separate offices and facilities, all of which were in buildings separate from those occupied by other Barnes & Noble corporations. Taxpayer had over 1,000 employees who ran all aspects of its operations. Taxpayer’s officers were responsible for all aspects of the management and operation of the business. Taxpayer maintained its own books and records regarding all aspect of its business.

Taxpayer did not own or lease real or personal property of any kind located in the State of New Mexico during the Audit Period. There were no employees, either permanently or temporarily employed in the State of New Mexico of Taxpayer during the Audit Period. Taxpayer did not maintain any telephone number, or mailing address in the State of New Mexico, nor did it advertise in any local newspapers or magazine, or on local television or radio stations, in New Mexico. Taxpayer only communicated with customers and potential customers across the United States, including in the State of New Mexico, using e-mail originating from outside of the State of New Mexico.

All products sold by Taxpayer were sold by originating the sale on-line outside of New Mexico. These products were not delivered by Taxpayer’s carrier but by the United States Postal

Service or other interstate common carriers from points outside of the State of New Mexico. At no time during the Audit Period did Booksellers have an operational role in any activities of or decision-making by Taxpayer. Likewise, Taxpayer never had any ownership interest, or operational role, in any activities of or decision-making by Booksellers.

Booksellers maintained separate offices and facilities at different locations than the offices and facilities of Taxpayer. Booksellers had a separate computer systems; separate communications systems (including phone numbers and email addresses); separate customer and sales transaction files as to which Taxpayer had no access; separate pricing strategies; and separate employees and staff which were not shared with Taxpayer. At no time did Taxpayer and Booksellers intermingle any of their corporate assets, property or employees.

In addition the Department argues that the existence of common ownership between a corporation that has physical presence in a taxing state and an out-of-state entity that has no brick and mortar physical presence in the state is sufficient to find “substantial nexus.” The Department relies on *Borders Online, LLC v. State Board of Equalization*, 129 Cal.App.4<sup>th</sup> 1179, 29 Cal.Rptr 176 (2005) and certain facts in the record.<sup>2</sup> In support of its argument, the Department argues the following facts. On March 10, 1999, Barnes & Noble created and established barnesandnoble.com inc. Barnes & Noble owned 100% of a B&N.com Holding Corp., which in turn owned 100% of barnesandnoble.com inc. Barnesandnoble.com inc. controlled the major decisions of Taxpayer. Exhibit V. During most of the Audit Period (10/98 – 09/03), Barnes &

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<sup>2</sup> The court held that a separate entity must pay tax on its internet sales because the in state stores acted as agents for the out of state entity because it accepted returns of items purchased online, advertise the online entity on its website and store receipts, and store personnel referred customers the online site to buy merchandise not available at the store. Id. at 90.

Noble and Bertelsmann were minority owners of Taxpayer (40% ownership each). From October 2003 through May 2004, Barnes & Noble owned 80% of Taxpayer through a subsidiary, B&N.com Holding Corp. From May 2004 through July 31, 2005, Barnes & Noble owned 100% of Taxpayer through B&N.com Holding Corp. During the Audit Period, Barnes & Noble owned Booksellers. Booksellers had three retail business locations in New Mexico: one in Coronado Shopping Mall in Albuquerque, business start date 09/25/2001; one in Cottonwood Mall in Albuquerque, business start date 11/27/1996 and one in Mesilla Valley Mall in Las Cruces, business start date 08/21/2003. At all times during the Audit Period, Booksellers had no ownership interest in Taxpayer. While it seems clear that Booksellers and Barnes & Noble may have shared common ownership interests, there was no evidence presented to show that the brothers Leonard Riggio and Stephen Riggio or any of the other core individuals (Maria Tolantis, Michael Rose, Kevin Frain) controlled both the dot com companies (barnesandnoble.com inc. and barnesandnoble.com llc). Exhibits H, pgs 2-3; Exhibit G, p. 32; Exhibit I, pgs. 29 & 49, Exhibit J, p. 20, Exhibit K, pgs. 24025 and Exhibit L., p. 25. There is a Stipulation of Fact, No. 17, that provided that some of the directors of Barnes & Noble, Inc. were also directors of barnesandnoble.com Inc., but there was no sharing of directors between Taxpayer and Booksellers.

*Borders Online* is not dispositive in this matter because in *Borders Online* there were two subsidiaries wholly owned by the same parent, Borders Group, Inc. 29 Cal. Rptr. 3d at 179. That type of direct corporate ownership does not exist in this case. In addition, in *Borders Online* the distinguishing facts are that the returns policy and the policy to purchase merchandise through

distributors was exclusive. As discussed below, that sort of financial arrangement is not present in this case.

While there was a corporate relationship between Taxpayer, Barnes & Noble and Booksellers it did not meet the “substantial nexus” requirements articulated in *Quill*.

### **Cross Marketing.**

The Department argues that even though Taxpayer did not own brick and mortar buildings in New Mexico that Booksellers was acting as an agent to Taxpayer because of the cross marketing that occurred between the Booksellers and Taxpayer. As evidence that cross marketing occurred, the Department argued that Booksellers and Taxpayer used the same trademark, logo and store locator within Taxpayer’s website which created a synergy that created cross marketing. The Department argues that Taxpayer used the same trademark and logo as Barnes & Noble and Booksellers. Exhibit G, page 4. However, while a synergy may be created by the use of the same trademark, logo and store locator, the use of a trademark or trade name is not sufficient to find nexus. *See, e.g., SFA Folio Collections, Inc. v. Bannon*, 217 Conn. 220, 229-31, 233-34 (1991) (rejecting a nexus claim involving related companies sharing the same trademarks or trade name).

In furtherance of this argument, the Department argues that the SEC 10K annual filings of barnes&noble.com inc. state that Booksellers advertised and promoted Taxpayer’s online services. See Exhibits G through L. The advertising and promoting included the use of the trade name and “leveraging of a relationship” between Booksellers and Taxpayer. These statements within the SEC 10K annual filing of barnes&noble.com inc. are amorphous and are not sufficient to find attributional nexus, especially considering *SFA Folio Collections, Inc. v. Bannon*, 217

Conn. 220, 229-31, 233-34 (1991).

There was not sufficient evidence to show that other than a use of the trade name, logo and the use of the store locator within Taxpayer's website that active cross marketing occurred. The evidence did not establish that Booksellers created a joint marketing strategy or advertised Taxpayer's services at his retail stores in New Mexico. Other than the SEC filings, there was no directed purposeful events or meetings to show that Booksellers was marketing and advertising of Taxpayer's business. In fact, Taxpayer was able to show that it was a separate corporate structure from Booksellers, and that this includes not relying on Booksellers to advertise for it. (For example, Booksellers maintained separate offices and facilities at different locations than the offices and facilities of Taxpayer. Booksellers had a separate computer systems; separate communications systems (including phone numbers and email addresses); separate customer and sales transaction files as to which Taxpayer had no access; separate pricing strategies; and separate employees and staff which were not shared with Taxpayer.)

**Return Policy.**

The Department argued that Bookseller's return policy was mutually beneficial and that the return policy could be used as evidence to find "substantial nexus." In *Borders Online*, the theory was that the bookstores in California were agents, in part because there existed a preferential return or refund policy. In this case, the facts do not support a preferential return or refund policy, but support a nondiscriminatory policy as Taxpayer has suggested.

It was Booksellers' return policy prior to May 2001 that Barnes & Noble bookstores would accept returns in a saleable condition purchased from a number of retailers, including but not

limited to Borders, amazon.com and Taxpayer. In exchange for the return, the customer would receive a Barnes & Noble gift card redeemable only at Barnes & Noble bookstore. Starting in May 2001, it was Booksellers' policy to provide its customers with a store credit (usable only at a Booksellers' bookstore) in exchange for saleable books purchased from other retailers (including, but not limited to Taxpayer). In-store credits for Taxpayer's on-line purchases could not be redeemed on-line, but had to be used at any Booksellers store. Booksellers' return policy was at time discussed on Taxpayer's web site, but Taxpayer had no role in determining Booksellers' return policy. Taxpayer's website did not discuss the return policies of retailers other than of itself and Booksellers. Booksellers at no time advised Taxpayer as to whether returns from Taxpayer, if any, occurred. Booksellers did not provide, nor did Taxpayer request it to provide, any returned books to Taxpayer, nor was any accounting or payment made by or to Taxpayer, or between Booksellers and Taxpayer in connection with such returns. During the Audit Period, Taxpayer never authorized or instructed Booksellers or any other retailer or person located in New Mexico to accept the return by customers of products purchased from Taxpayer. Taxpayer had no contractual or other relationship, financial or otherwise, with Booksellers or any other person or company regarding product returns at any location in New Mexico.

This return policy while mutually beneficial with Taxpayer did not create a special agency relationship or a contractual relationship between Taxpayer and Bookseller since the return policy applied to a number of other retailers. Booksellers accepted a number of returns from other retailers and not exclusively from Taxpayer. There was no evidence introduced that Booksellers acted in a special agency capacity for Taxpayer by accepting Taxpayer's returns and therefore this

contact between Taxpayer and Booksellers is not sufficient of a connection between Taxpayer and Booksellers to rise to the level to find “substantial nexus.”

**Gift Cards.**

Beginning in the fall of 2002, Booksellers and Taxpayer each began selling multi-retailer gift cards also offered for sale through a number of other retailers. Participating retailers, including Taxpayer sold gift cards on behalf of Marketing Services (Minnesota) Corporation, Inc. (“MSMC”), a subsidiary of Barnes & Noble located outside of the State of New Mexico. A third party contractor serviced the gifts cards while MSMC owned the gift cards. The third party contractor was not located in New Mexico. The third party contractors kept track of the gift cards and the value of such cards. Beginning in the fall of 2002, the Booksellers stores, including in New Mexico, advertised and sold gift cards with the bn.com or barnesandnoble.com name on the reverse side of the cards. The Barnes & Noble gift cards were redeemable at Booksellers’ retail stores and on-line. Cards purchased online from Taxpayer were redeemable at Booksellers’ stores. Upon the sale of each such gift card by Taxpayer, the proceeds of the sale were remitted to MSMC and the participating company received a fee from MSMC for making the sale. Taxpayer received no benefit when the cards were redeemed at another retailer, including Booksellers. All participating retailers, including Taxpayer and Booksellers, were obligated under their contracts with MSMC to accept these gift cards when they were presented by customers, irrespective of from which retailer those cards were purchased. MSMC paid to each participating retailer the face value of all redeemed cards. Taxpayer was not obligated to remit any portion of the gift card’s value to another retailer; nor would Taxpayer know from what retailer the gift card was purchased.

At no time did Taxpayer authorize or direct other participating retailers to direct or encourage gift card purchasers or recipients to purchase products from Taxpayer.

The gift card program administered through a third-party contractor who was not located within the State of New Mexico did not provide contact with State of New Mexico to meet the “substantial nexus test.” While Taxpayer was required to sell and redeem gift cards through its website, Taxpayer did not derive any revenue from sales of the gift cards that were not from its own sales. There was no economic benefit that inured to Taxpayer from the gift card program because of Booksellers’ activities. The gift card program was not sufficient of a connection between Taxpayer and Booksellers to rise to the level to find “substantial nexus.”

**Loyalty Program.**

Beginning in March 2001, Taxpayer participated in a Barnes & Noble customer loyalty program. Booksellers were a participating retailer. Under the loyalty program, customers could purchase a membership for twenty-five dollars (\$25.00) that entitled them to special offers and discounts on purchases made at participating retailers. With this membership card, customers received discounts of 10% on all Barnes & Noble bookstore purchases and 5% on all of Taxpayer’s purchases prior to March 2005. In March 2005, the discount for members through Taxpayer was increased to 10%. The benefits of the loyalty program were promoted in Booksellers’ stores and on Taxpayer’s website, and customers were encouraged to enroll in the loyalty program. The loyalty program was run by Barnes & Noble utilizing a third-party contractor who was not located in New Mexico. Membership fees collected by participating retailers, including Taxpayer were sent to Barnes & Noble. Service fees and expenses for running

the program, including fees charged by the third-party administrator, were deducted from the aggregated membership fees, and then the balance remaining from those membership fees were distributed by Barnes & Noble amongst participating retailers based upon the percentage of overall discounts awarded to customers by those retailers. The third-party administrator was not physically located in New Mexico and there are no facts to support that the third-party administrator acted like an agent for Taxpayer. There was no incentive for Taxpayer to promote sales of another participating retailer, because compensation under the program was entirely tied to sales made by Taxpayer. In fact, sales made through other retailers would reduce the portion of membership revenue paid to Taxpayer. The same system applied to all participating retailers. The participating retailers, including Booksellers and Taxpayer, would benefit only when a member used the membership to make purchases from the retailer itself.

Of all Booksellers' activities, this activity is the activity that gives pause and thoughtful consideration. Clearly the loyalty program administered out of the Booksellers stores in New Mexico provided some economic incentive to Taxpayer. However, Taxpayer did not derive any compensation from the loyalty program that was not related to its own internet sales. There was no exclusive or special agency relationship that established and maintained a market. Because compensation was tied to its own internet sales, and not the sales of Booksellers, the loyalty program does not rise to the level to find "substantial nexus."

#### **Reader's Advantage Card.**

Booksellers' customers were encouraged to sign up for the Reader's Advantage card when they checked out. Store customers were also asked for email addresses but were not required to

provide one. Taxpayer had access to the email addresses of members, irrespective of where or how they were collected. Taxpayer sent marketing messages via email to customers whose names appear in the member database.

While this was an indirect economic benefit to Taxpayer, again this contact between Taxpayer and Booksellers is not sufficient of a connection between Taxpayer and Booksellers to rise to the level to find “substantial nexus.” Taxpayer was not compensated for other retailer’s sales or activities.

### **Bookmaster System.**

The Department argued that the Bookmaster system available and utilized in the Booksellers retail stores in New Mexico is another activity which provides a basis for “substantial nexus.” The Bookmaster system was utilized during the Audit Period, by Booksellers. It was operated as a proprietary merchandising and inventory management system. The Bookmaster system functioned as follows: Bookmaster searched the inventory of various wholesalers and distributors from which a Booksellers’ store could source items not currently in the store’s inventory. When a customer requested an item that was not contained in the store’s inventory, a Booksellers employee could have used Bookmaster to order the item and have the item shipped by the wholesaler or distributor directly to the customer’s home address or to the store for customer pick up. The system would identify a wholesaler or distributor based on proximity to the customer and availability of the item. The store would collect sales tax on its sale to its customers of these books located using Bookmaster, including books mailed to the stores or books mailed to customers’ home addresses. Prior to November 2001, Taxpayer was not one of the wholesalers

or distributors with searchable inventory in the Bookmaster system, which at that time included independent distributors such as Ingram and Baker & Taylor. Beginning in November 2001, Taxpayer was added as only one of the many wholesalers and distributors included in the system, including independent distributors such as Ingram and Baker & Taylor. In August 2002, several other wholesalers and distributors were added, including Bookpeople, Booksource, Koen, Bookazine, Partners, The Distributors and MBS. As a wholesaler included in Bookmaster after November 2001, Taxpayer would occasionally sell products, at wholesale, to Booksellers for resale to Booksellers' customers in the following circumstances: When a product was not available in one of the Booksellers' stores and Bookmaster identified Taxpayer, as opposed to one of Booksellers' other wholesale vendors, as the source of the product, Taxpayer charged Booksellers the wholesale price for the products (which included cost, plus a mark-up), and delivered the product by interstate common carrier either to one of Booksellers' stores or to a Booksellers customer (at the instruction of Booksellers). Following the wholesale transactions between Taxpayer and Booksellers, Booksellers then resold those products for its own account to its customers; received payment directly from those customers; issued a receipt to such customers; and collected and remitted applicable state and local sales tax on such sales. Taxpayer did not have access to the Bookmaster system, but Booksellers had access to Taxpayer's in-stock inventory information as it does for all of its wholesale vendors.

The facts do not support a special financial relationship or contractual relationship between Taxpayer and Booksellers with the Bookmaster program since independent distributors such as Ingram and Baker & Taylor and in August 2002, several other wholesalers and distributors were

added, including Bookpeople, Booksource, Koen, Bookazine, Partners, The Distributors and MBS. In addition Taxpayer charged Booksellers the wholesale price for the products (which included cost, plus a mark-up) indicating that the transaction was an arms-length transaction. There was no evidence introduced that Booksellers acted in a special agency capacity for Taxpayer by including Taxpayer amongst the list of distributors in its Bookmaster system. The Bookmaster system is not sufficient of a connection between Taxpayer and Booksellers to rise to the level to find “substantial nexus.”

**Unfair Surprise, Due Process and APA.**

The Hearing Officer does not rule on this issue and reserves on it. Taxpayer’s claim was that it was deprived of due process because the Legislature did not enact a statute taxing internet sales and the Department did not provide any advance notice either within its regulations or other publication that it intended to collect gross receipts tax on internet sales.

The Hearing Officer agrees with the Department that the Administrative Procedures Act does not apply to this matter. NMSA 1978, Section 12-8-23 (1969).

The Hearing Officer notes for the record that all Motions and Replies were extremely thorough and well prepared and both parties presented their respective positions with clarity.

For the reasons stated above, the Department has not proven by a preponderance of the evidence under the tests articulated in *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992) and in *Dell Catalog Sales L.P. v. Taxation and Revenue Department of the State of New Mexico*, 2009-NMCA-001, 145 N.M. 419, 199 P.3d 893, *cert. denied*, 129 S.Ct. 1616 (March 23, 2009) that Barnes & Noble Booksellers, Inc. established and maintained a market for Barnesandnoble.com

llc., which provided the “substantial nexus” to New Mexico during the Audit Period.

#### CONCLUSIONS OF LAW

A. Barnesandnoble.com llc filed a timely written protest to the principal and interest assessed under Letter ID #L1806543104, and jurisdiction lies over the parties and the subject matter of this protest.

B. During the Audit Period, Barnesandnoble.com llc sold property pursuant to the New Mexico Gross Receipts Tax Act, Sections 7-9-1 through 7-9-114 in New Mexico.

C. Barnesandnoble.com llc did not had “substantial nexus” to the State of New Mexico during the Audit Period.

D. Barnesandnoble.com llc did not have sufficient contacts with the State of New Mexico as required under the Commerce Clause of the United States Constitution.

E. Barnes & Noble Booksellers, Inc. did not act in an agency relationship with Barnesandnoble.com llc.

F. The actions and activities of Barnes & Noble Booksellers, Inc. did not create and establish and maintain a market for Barnesandnoble.com llc.

For the foregoing reasons, Barnesandnoble.com llc’s protest is GRANTED.

DATED: April 11, 2011.