

New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-85(48.1)S
Sales Tax
February 20, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

MODIFIED ADVISORY OPINION PETITION NO. S830104B

On October 8, 1985, an Advisory Opinion was issued to The Orvis Company, Inc., 10 Riverside Road, Manchester, Vermont 05254. Such Advisory Opinion is modified as provided in this Advisory Opinion.

The issues raised are (1) whether a sufficient nexus exists between Petitioner and New York State to satisfy the due process and commerce clauses of the U.S. Constitution and (2) whether Petitioner is a "vendor" for purposes of the New York State Sales and Use Tax and therefore required to collect New York State Sales and Use Tax on retail mail order sales made to New York customers.

Petitioner is a Vermont corporation in the business of selling fishing and hunting equipment, fashion and outdoor clothing, and various gift items. Petitioner sells its various products on a retail basis through a mail order catalog business and on a wholesale basis to independent retailers.

Petitioner's mail order sales are generated by catalogs distributed via the United States mails. Three basic catalogs are distributed per year. All mail order merchandise sold by Petitioner is shipped to the customers via the United States mail or common carrier.

Petitioner receives orders from and ships merchandise to customers in New York State. However, Petitioner has no property or permanent employees in New York, does not advertise in New York with the exception of the previously mentioned catalogs, does not solicit sales over the phone and does not have a telephone listing in the state. Petitioner contends it does not have to charge New York sales tax on mail order sales because these retail sales are not made within New York. Petitioner also contends it does not have to collect and remit New York use tax on these retail sales because it has no place of business in New York and does not solicit mail order sales in New York.

Petitioner is also engaged in the business of wholesale sales of merchandise. Petitioner's mail order business and wholesale business are not separate corporate entities but simply different divisions within the same corporation.

The wholesale business sells to retail establishments located in several states, including New York. Virtually all of the wholesale orders placed with Petitioner are made by mail or by telephone. Wholesale orders are shipped to the retailers via mail or common carrier.

There are located in the State of New York several retailers which purchase merchandise from Petitioner on a wholesale basis for the purpose of resale. As of December 1977, Petitioner sold merchandise to approximately nine retailers in New York. The number of Petitioner's New York retailers increased to sixteen by December, 1981.

Historically, employees of Petitioner have visited each of their New York retailers at least once a year, although sometimes less. Petitioner contends the purpose of the visits was to communicate with the retailers about problems, not to solicit business.

Employees of Petitioner come into New York State on other occasions for various business related reasons. They do, at times, come to make visual inspections of their retailers' establishments. While in New York, Petitioner's employees have assisted retailers in preparing their opening orders with Petitioner. Also, on occasion, employees of Petitioner accompany retailers to sportsmen's shows in New York State. Petitioner contends that the only purpose of these shows was to promote the business and sales of the retailers.

ISSUE 1

A state can require an out of state seller to collect the state's sales and use tax only when there is a sufficient nexus between the seller and the taxing state, as required by the commerce clause (Art. I, 8, cl. 3) and the due process clause of the Fourteenth Amendment. National Geographic v. California Equalization Board, 430 U.S. 551.

In most general terms, the due process clause requires that there be some minimum relationship between the taxpayer or collector and the taxing state that provides a taxable "nexus". The commerce clause, on the other hand, mandates that there must not be an unreasonable burden on the free flow of goods across state lines. Rowe-Genereux, Inc. v. Vermont Department of Taxes, 411 A. 2d 1345 (1980). The test whether a particular state exaction is such as to invade the exclusive authority of Congress to regulate trade between the States, and the test for a state's compliance with the requirements of due process in this area, are similar. National Bellas Hess, Inc. v. Department of Revenue, 386 US 753.

"The relevant constitutional test to establish the requisite nexus for requiring an out of state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate some definite link, some minimum connection, between [the State and] the person it seeks to tax: National Geographic Society v. California Board of Equalization, 430 US 551, (quoting Miller Bros. v. Maryland, 347 US at 344-345. (Emphasis added). The basic question is "whether the state has given anything for which it can ask in return." National Bellas Hess, Inc. v. Illinois Rev. Dept., 386 U.S. 753, 756 (quoting Wisconsin v. J.C. Penney Co., 311 US 435, 444).

Petitioner's mail order division is not a separate corporate entity from the wholesale division. Therefore, it is the Orvis Company Inc., as a whole and its contacts with the state to which we look in determining whether a sufficient nexus between it and New York State exists.

Petitioner's contacts with New York are not slight and inconsequential. Three times a year merchandise catalogs are mailed into New York State for the purpose of soliciting orders and stimulating sales. Also, located in New York are at least sixteen retail establishments selling Petitioner's products to customers in New York State. Employees of Petitioner come into the state to inspect the retail establishments selling their goods. They also enter the state to assist retailers in preparing their opening order with Petitioner. In addition, employees of Petitioner accompany retailers to sportsmen's shows in New York State, in hopes of promoting the business and sales of the retailer, which would inevitably increase the sales made by Petitioner to the retailer.

In consideration of the numerous contacts with and benefits derived from carrying on business in New York State, it is evident a sufficient nexus exists between Petitioner and the state. The existence of this nexus satisfies the requirements of the commerce clause and due process clause, thereby making the requirement to collect the sales and use taxes constitutional.

Issue 2

Section 1131 of the New York State Tax Law requires, in pertinent part, that every vendor of tangible personal property or services is required to collect sales and use taxes imposed under Article 28. Tax Law 1131(1). As further provided under Section 1101(b)(8)(i) of the Tax Law, the term "vendor" is defined to include among others

- (C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article. . . .

Petitioner is clearly a person who solicits business by distribution of catalogs and by reason thereof makes sales to persons within the State of tangible personal property the use of which is taxed by Article 28 of the Tax Law.

Regulation section 526.10, issued in accordance with the foregoing, expounds upon what activities bring a person within the definition of "vendor".

In the case of interstate vendors, section 526.10(e)(1) of the sales tax regulations specifically provides that a person outside New York is required to collect sales tax on tangible personal property delivered in New York if that person:

- (1) makes sales to persons within the state, and
- (2) either (a) solicits such sales in New York as defined in regulation 526.10(d), or
(b) maintains a place of business in New York as defined in regulation 526.10(c).

TSB-A-85(48.1)S
Sales Tax
February 20, 1986

For purposes of regulation section 526.10(d), a person is deemed to be soliciting business if "he distributes catalogs or other advertising material, in any manner in the state." Petitioner is clearly a person who makes sales to persons within the State who solicits such sales in New York by the distribution of catalogs in the state.

However, regulation section 526.10(e)(2) provides, in part:

A person making sales to his customers within the State, who has solicited such sales by the interstate distribution of catalogs or other advertising material by mail and who delivers the merchandise through the mail or by common carrier, and who neither maintains a place of business as defined in subdivision (c) of this section, nor solicits business as defined in subdivision (d) of this section, is not required to register as a vendor....

Regulation section 526.10(d) provides, in part:

A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State....

Inasmuch as Petitioner has promotion men, missionary men or service representatives soliciting potential customers in the State, Petitioner is not a person who "neither maintains a place of business... nor solicits business as defined in subdivision (d)...." Thus, Petitioner does not fall within the exception to the requirement to register which is provided by regulation section 526.10(e)(2).

Accordingly, since Petitioner falls within the definition of "vendor" as defined in section 1101(b)(8)(i) of the Tax Law and section 526.10(e)(1) of the sales tax regulation and since Petitioner does not fall within the exception provided by section 526.10(e)(2), Petitioner is a vendor for purposes of the sales and use taxes imposed under Articles 28 and 29 of the Tax Law. Furthermore, since Petitioner satisfies the minimum contacts requirements of the commerce clause and the due process clause of the Fourteenth Amendment, Petitioner is required to collect New York State sales and use tax on its retail mail order sales made to customers in New York.

DATED: February 20, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.