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

TSB-A-86(28)S
Sales Tax
July 18, 1986

STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S850318A

On March 18, 1985, a Petition for Advisory Opinion was received from Harfred Operating Corporation, 350 Seventh Avenue, New York, New York 10001.

The issue raised is whether wholly-owned subsidiaries, X and Y to be created by Petitioner and its parent corporation, The Fur Vault, Inc. ("The Fur Vault") will be required to collect and remit New York State sales or use taxes. In order to make this determination, two issues must be addressed: (1) whether such subsidiaries will have sufficient nexus with New York State to satisfy the Due Process and Commerce Clauses of the United States Constitution and (2) if there will be sufficient nexus, whether such subsidiaries will be "vendors" as that term is defined by the New York State Sales and Use Tax Law and therefore required to collect New York State sales or use tax on sales made to New York residents.

Petitioner, a Delaware corporation, is a wholly-owned subsidiary of The Fur Vault, a holding company incorporated in Delaware, and is engaged in the retail merchandising of fur garments in New York and New Jersey. The Fur Vault is also doing business in New York.

Petitioner intends to transfer to X Corporation, a newly formed Delaware corporation, all of its assets and liabilities relating to its New Jersey operations for X stock which stock will then be distributed to The Fur Vault. The Fur Vault also intends to form Y Corporation, a Delaware corporation, which will also be engaged in the retail merchandising of fur garments in New Jersey. Afterward, The Fur Vault will own directly 100% of the stock of Harfred, X and Y.

The directors and officers of X, Y and Petitioner will be the same individuals. All compensation to directors and officers will be paid by The Fur Vault, subject to reimbursement by X, Y and Petitioner for their respective shares. The administrative offices of X and Y will be located in New Jersey. Credit applications will be processed, finance agreements will be prepared and submitted, and collections will be made and deposited, in New Jersey. X and Y will engage The Fur Vault or Petitioner, at an arms length rate, to compile and audit its books and records. The Fur Vault's and Petitioner's administrative offices are located in New York City.

Y will operate retail stores throughout the State of New Jersey. X will lease space, and operate a fur garment department (hereafter also referred to as X's "store"), in Alexander's Paramus, New Jersey store. Petitioner will continue to lease space and operate a fur garment department in Alexander's New York stores. (Each Alexander's store is a separate corporation.) X's and Petitioner's fur garment departments will have the same tradename: "Fred TheFurrier's Fur Vault."

All sales will be made on the premises of the various stores. No stores operated by X or Y will be located in New York. No mail order sales will be solicited. Due to the proximity of New York to New Jersey, many of X's and Y's customers will be New York residents. On request, X and Y will ship the purchased items by common carrier (possibly, United Parcel Service) to the customer. No deliveries will be made in trucks owned or controlled by X or Y.

X's, Y's and Petitioner's operations will be conducted independently of each other. Separate books and records will be kept; separate warehouse facilities will be maintained at each store's location; and each corporation will employ its own sales personnel.

The corporations will utilize joint advertising in newspapers and on television. In the advertisements, the stores owned by X, Y and Petitioner will all be designated as "Fred the Furrier's Fur Vaults" with their locations separately listed.

Although one of X's departments will be located in Alexander's Paramus, New Jersey store, X's inventory will not be included in Alexander's catalogues or any advertising mailings made by Alexander's. X will not be affiliated with Alexander's, except in the capacity as a lessee. To the extent that X or Y engages in direct mail advertising into New York State, the mailings will originate (printed and mailed) outside of New York.

ISSUE 1 - Nexus

A state can require an out-of-state seller to collect the state's sales or use tax only when there is a sufficient nexus between the seller and the taxing state, as required by the Commerce Clause of the United States Constitution (Art. I, 8, cl. 3) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. National Geographic Society v. California Board of Equalization, 430 US 551.

The test to determine whether a particular state exaction violates the Commerce Clause by invading the exclusive authority of Congress to regulate trade between the states, and the test to determine whether a state has complied with the requirements of due process in this area, are similar. National Bellas Hess, Inc. v. Department of Revenue, 386 US 753. "[T]he 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 at 561.

Activities in a state that have been found to be constitutionally sufficient to establish nexus to require an out-of-state corporation to collect state taxes include the operation of retail stores of the corporation in the state, Nelson v. Sears, Roebuck and Co., 312 US 359; Nelson v. Montgomery Ward, 312 US 373; the presence of traveling salesmen in the state, General Trading Co. v. Tax

Commission, 322 US 335; and the presence of independent contractors or agents of the corporation in that state, Scripto, Inc. v. Carson, 362 US 207. In the most recent United States Supreme Court opinion on the issue of nexus for use tax collection purposes, National Geographic Society v. California Board of Equalization, supra, the corporation, National Geographic, operated two offices in the state. Although the activities in those offices were unrelated to the corporation's mail order activities, the Court held that it was permissible to impose the administrative burden of collecting use taxes on National Geographic. Since the two California offices, regardless of the nature of their activities, had the advantage of the same services, e.g., fire and police protection, as they would have had had their activities included assistance to the mail order operations that generated the use taxes, there was a definite link between National Geographic and the State of California.

Activities in a state that have been held insufficient to establish the necessary nexus to impose the duty to collect use taxes include mail order sales where delivery of the goods was made from out-of-state by common carrier or United States mail, National Bellas Hess, Inc. v. Illinois, supra, and over the counter sales made in a bordering state to state residents with only occasional deliveries being made into that state, Miller Brothers Co. v. Maryland, 347 US 340. In both these cases, the Court found that the requisite relationship between the state and the out-of-state seller was lacking.

To determine whether there will be sufficient nexus for New York State to impose a requirement to collect use taxes on X and Y, it is necessary first to determine whether there will be some relationship or minimum connection between X and Y and New York State. Under the facts presented here, X and Y will not operate directly in New York State, nor will they have any offices in this state. Their sales will be made in New Jersey. Deliveries to New York will be made by common carrier. Under the holdings of the National Bellas Hess and Miller Brothers cases cited above, on these facts alone X and Y will not be required to collect tax. However, Petitioner and The Fur Vault, the parent corporation of X, Y and Petitioner, have nexus with New York because they are doing business in New York State. The question thus becomes whether the presence in New York of a parent or an affiliated corporation, e.g., another corporation such as Petitioner owned by a common parent, will be sufficient to establish nexus for X and Y with New York.*

As a general rule, corporations are treated as separate legal entities, Rapid Transit Subway Const. Co. v. City of New York, 259 NY 472, and the presence of a parent corporation in one state does not require a finding of presence in that state for its wholly-owned subsidiary. However, under

*This opinion will assume that no agency relationship exists between X and Y and any of their affiliated corporations. If an agency relationship did exist, it might establish that there was a definite nexus between the State and X and Y. Taca International Airline S.A. v. Rolls Royce of England Ltd., 15 NY2d 97; Frummer v. Hilton Hotels International Inc., 19 NY2d 533; see also McCray, "Overturning Bellas Hess," 1985 Brigham Young Univ. L. Rev. 265, 287.

certain circumstances in order to prevent fraud or injustice, the corporate structure will be disregarded and the separate entity rule discarded. Astrocom Electronics, Inc. v. Lafayette Radio Electronics Corp, 63 AD2d 765; Giblin v. Murphy, 97 AD2d 668; Berkey v. Third Ave. Railway Co., 244 NY 84. In Nelson v. Sears, Roebuck and Co., supra the Supreme Court held that the departmentalization of the corporation's operations (i.e., the mail order and retail stores operations were separately administered) did not preclude the finding of sufficient nexus. In New York, there has been a "steady movement towards holding that in determining whether a corporation has engaged in activities in the state it is immaterial whether these are conducted through a branch or through a subsidiary corporation" Boryk v. de Haviland Aircraft Co., 341 F2d 666, 668. In certain cases, this concept should be applied to corporate reorganizations. It would be unjust to permit a corporation to use a corporate reorganization as a cloak for the evasion of its tax obligations.

The status of the subsidiary as a separate entity should be ignored in situations where the parent so dominates and controls the affairs of the subsidiary that the subsidiary is an instrumentality of the parent. Coastal States Trading, Inc. v. Zenith Navigation SA, 446 F. Supp. 330; Fiur Co. v. Ataka & Co., 71 AD2d 370. In such situations, the subsidiary should be considered to be the alter ego of the parent. See, Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., Inc., 30 NY2d 34.

While "New York law in this area is hardly as clear as a mountain lake in springtime," Brunswick Corp. v. Waxman, 599 F2d 34, 35, in order to invoke this alter ego doctrine, the parent corporation must dominate the finances, policy and business practices of the controlled corporation. Fisser v. International Bank, 282 F2d 231. Indicia such as common officers and directors, common offices and telephone numbers between corporate entities, are relevant but are not sufficient by themselves to show that one corporation is the alter ego of another. Consideration must also be given to factors such as the degree of overlap of personnel, the amount of business discretion displayed by the corporations, whether the entities operate independently of each other, whether the parent corporation owns all or most of the stock of the subsidiary and whether the parent corporation causes the incorporation of the subsidiary. United States Barite Corp. v. M. V. Haris, 534 F. Supp. 328; Ioviero v. CIGA Hotels, Inc., 101 AD2d 852; Lincoln Center v. State Tax Commission, 113 Misc. 2d 329; Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F Supp 64. Also significant is whether the corporations trade under their own names and whether they hold themselves out to the public as separate and distinct businesses. Mangan v. Terminal Transportation System, Inc., 247 AD 853; Matter of Sbarro Holding, Inc., 111 Misc. 2d 910, aff'd 91 AD2d 613; Matter of Typhoon Industries, Inc., 6 BR 886; see, also, Plainview Realty v. Board of Managers, 86 Misc. 2d 515; Henn and Alexander, Laws of Corporations and Other Business Enterprises 3d Ed. (1983), pp. 354-356. Note that while many of the cases relating to this alter ego doctrine concern parent and subsidiary corporations, this same reasoning should be applicable to affiliated corporations, i.e., corporations owned by a common parent. CIT Fin. Services Consumer Discount Co. v. Director, Div. of Taxation, 4 N.J. Tax 349, CCH 201-026; Frummer v. Hilton Hotels, Inc., 19 NY2d 533; Matter of Bowen Transports, Inc., 551 F2d 171.

If the affairs of a subsidiary or affiliated corporation are so dominated and controlled by its parent or affiliate that the dominated and controlled corporation is the alter ego of the other, then the nexus of one with New York State for tax jurisdiction purposes will provide sufficient nexus with New York State for the other. CIT Fin. Services Consumer Discount Co. v. Director, Div. of Taxation, supra; Minnesota Tribune Co. v. Commissioner of Taxation, 37 NW2d 737; Franklin Mint Corp. v. Tully, 94 AD2d 877, aff'd, 61 NY2d 980. (Other cases supporting a finding of nexus premised on a parent/subsidiary relationship include Aldens, Inc. v. Tully, 49 NY2d 525; Reader's Digest Association, Inc. v. Mahin, 44 Ill. 2d 354, 255 NE2d 458, appeal dismissed, 399 US 919; Appeal of Dresser Industries, Inc., California State Board of Equalization, CCH 400-485. See Barber, "Piercing the Corporate Veil," 17 Williamette L. Rev. 371, 397.)

Viewing the totality of the circumstances presented in this Petition, X and Y will be operating as the alter egos of their New York affiliate, Petitioner, and their New York parent, The Fur Vault. They would be incorporated by Petitioner and The Fur Vault as a means to make sales in New Jersey to New York residents in order to avoid collecting New York tax. All the stock of these corporations would be owned by The Fur Vault. There would be a significant degree of overlap of administration and personnel. Further, X, Y and the Petitioner would be held out to the public as one entity, i.e., "Fred the Furrier's Fur Vault". Having held themselves out to the public as one entity, X and Y should be stopped from claiming that they are separate entities for purposes of avoiding sales or use taxes. Permitting X and Y to avoid the collection of New York State sales or use taxes would clearly produce injustice and inequitable consequences and, accordingly, under the facts there is sufficient nexus with New York to compel X and Y to collect New York State sales or use taxes.

ISSUE 2 - Status as a Vendor

In addition to establishing the constitutionally required nexus with New York, in order to compel a corporation to collect New York State tax, it must also be determined that such corporation is subject to the provisions of the New York State Sales and Use Tax Law. Section 1131 of the 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). The term "vendor" is defined under section 1101(b)(8) to include among others

> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
>
> (B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;" Tax Law, 1101(b)(8)(i)(A) and (B).

The term person includes a corporation or combination of corporations. Tax Law, 1101(a).

If the affairs of a subsidiary or affiliated corporation are dominated and controlled by its parent or other affiliate to such a degree that it will be considered the alter ego of the parent or affiliated corporation and the parent or affiliated corporation qualifies as a "vendor", then the new corporation will also be considered a "vendor". Lincoln Center v State Tax Commission, 113 Misc. 2d 329.

Section 526.10 of the Sales and Use Regulations expounds upon the activities that bring a person within the definition of "vendor". Section 526.10(e)(1) specifically concerns interstate vendors and provides that a person outside New York is required to collect 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 section 526.10(d), or
>
> (b) maintains a place of business in New York as defined in Regulation section 526.10(c). 20 NYCRR 526.10(e)(1)

Section 526.10(c) provides that a vendor shall be considered to maintain a place of business in the state if he, directly or through a subsidiary, has a store, salesroom, sampleroom, showroom, distribution center, warehouse, service center, factory, credit and collection office, administration office or research facility in the state. 20 NYCRR 526.10(c). Petitioner and its parent corporation, The Fur Vault, each maintain a place of business in New York and clearly qualify as vendors. 20 NYCRR 526.10(a)(2); 526.10(c). Consequently, X and Y, determined to be the alter egos of their parent corporation and Petitioner, will, as a result of that relationship, be considered to be maintaining a place of business in New York and qualify as vendors under this section of the Regulations. As vendors, X and Y will be required to collect and remit tax.

DATED: July 18, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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