STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
KARL BRUSSEL D/B/A KALBRUS	:	DECISION DTA No. 808145
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1984 through May 31, 1987	:	

Petitioner Karl Brussel d/b/a Kalbrus, c/o Kleban & Samor, P.C., 2425 Post Road, P.O. Box 763, Southport, Connecticut 06490 filed an exception to the determination of the Administrative Law Judge issued on June 6, 1991 with respect to his petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987. Petitioner appeared by Kleban & Samor, P.C. (Elliot Miller, Stuart Ratner and Meira Rosenberg, Esqs., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation submitted a brief in response.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and, thereby, a person required to collect the taxes imposed under Articles 28 and 29 of the Tax Law.

II. Whether, after January 1, 1986, petitioner voluntarily assumed the duties, obligations and liabilities of a vendor by voluntarily filing a certificate of registration with the Division of Taxation.

III. Whether Tax Law § 1110 and 20 NYCRR 526.10(a)(4)(ii)(e) are unconstitutional both on their face and as applied to petitioner.

IV. Whether petitioner sustained his burden to establish that the audit methodology was unreasonable.

V. Whether petitioner has demonstrated reasonable cause for any failure to comply with the Tax Law.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "2" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

On February 17, 1989, the Division of Taxation (hereinafter the "Division") issued to petitioner, Karl Brussel d/b/a Kalbrus, two notices of determination and demands for payment of sales and use taxes due for the period June 1, 1984 through May 31, 1987. The first notice assessed sales and use taxes in the amount of $37,534.53 plus penalty and interest. The second notice assessed an additional penalty of $5,754.55.

We modify the Administrative Law Judge's finding of fact "2" to read as follows:

> The assessed tax, penalty and interest were determined from an audit of petitioner's business operations and New York sales and use tax liabilities. Petitioner's business was selected for audit as the result of a sales solicitation received by a Division employee in March 1987. The solicitation consisted of a brochure mailed to the employee by a company identified as "Kalbrus." Kalbrus' address is identified as 175 Fifth Ave., New York, New York 10010, and the envelope in which the brochure was received is postmarked New York, New York. The brochure consisted of an offer to sell eight prerecorded videotapes for $58.00. The brochure indicated that petitioner intended to advertise in the future in 12 magazines.[1]

The Division referenced its computerized records of registered sales tax vendors and discovered that Kalbrus was registered as a sales tax vendor in January 1986 under

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[1] We modified finding of fact "2" by adding the last sentence.

identification number 077-26-3105SS and had filed only two sales tax returns after that date. A Certificate of Registration completed by petitioner was entered into evidence by the Division. It bears the signature of Karl Brussel as owner of the business operating as Kalbrus. Mr. Brussel's home address is shown as 133 West 3rd Street, New York, New York. According to the certificate, Kalbrus began doing business in New York in January 1986.

An audit appointment letter dated June 29, 1987 was mailed to "Karl Brussel/Kal Brus" at 175 5th Avenue, New York, New York. The letter scheduled an appointment on July 21, 1987 and requested that petitioner have available all books and records pertaining to his sales tax liability for

the period June 1, 1984 through May 31, 1987, including journals, ledgers, sales invoices, purchase invoices and Federal income tax returns.

On July 16, 1987, the auditor received a telephone call from David Michael, petitioner's accountant, who informed the auditor that petitioner lived in Connecticut and that the address to which the Division's letter was delivered was merely a maildrop. Mr. Michael was unwilling to provide the accountant with petitioner's telephone number in Connecticut, and, at first, he was reluctant to meet with the auditor, stating that petitioner was not transacting business in New York.

A meeting was held between the Division and Mr. Michael on August 14, 1987. Mr. Michael continued to maintain the position that petitioner was not transacting business in New York, and, therefore, was not subject to the New York Tax Law. After some discussion, he provided the Division with copies of petitioner's Federal income tax returns for the years 1984 and 1985. At some point, an auditor left the meeting and went to 175 5th Avenue (the Kalbrus address) which turned out to be the business premises of a commercial company that rents mailboxes and provides a limited number of office services to its customers, photocopying for example.

The Division discovered from conversation with Mr. Michael and documents he provided that petitioner was doing business through several business entities, including PAK

Ventures, Inc. and an unincorporated company called E.V.O.N. After several requests for books and records, the Division was provided with the following documents in addition to the Federal income tax returns: New York sales tax returns filed by Kalbrus for the periods ended August 31, 1986 and November 30, 1986; bank statements from several banks for accounts in the name of Kalbrus and PAK Ventures; a limited number of purchase invoices for a portion of the audit period; a computer generated schedule, purportedly showing sales in New York State and sales in New York City; and accountant's worksheets showing cash receipts and sales.

The Federal income tax returns provided the Division with the following information. A schedule C attached to petitioner's 1984 return indicates that petitioner was self-employed and identifies his business as "mailing list rentals". Petitioner reported gross receipts of $30,810.60. The only deductions or expenses shown on the schedule C are commissions of $16,110.00.

A schedule C attached to petitioner's 1985 Federal income tax return continues to show his principal business as mailing list rentals. His business name is shown as E.V.O.N., and gross receipts are shown as $756,540.00. Petitioner calculated a net profit of $104,072.00 by subtracting cost of goods sold ($551,719.00) and business expenses ($100,749.00) from gross receipts. Petitioner calculated an investment tax credit of $2,423.00; however, the nature of the property upon which the credit was claimed is not in the record. Petitioner also reported a capital loss of $38,463.00 from a business identified as Oysters Too Ltd.

An independent firm of certified public accountants prepared a balance sheet for E.V.O.N. for the fiscal year ended December 31, 1985. Apparently, this was submitted with petitioner's 1985 Federal income tax return. Petitioner's assets as shown on the balance sheet included machinery and equipment valued at $27,261.00 and video rights valued at $13,000.00.

Petitioner also provided the Division with the 1985 Federal income tax return of PAK Ventures, P.O. Box 4630, Stamford, Connecticut. Petitioner is identified on that return as the only officer of PAK Ventures. PAK Ventures reported gross receipts of $4,132,858.00 and cost of goods sold of $3,950,744.00, and other deductions of $179,549.00.

The Division was not provided with a record of the total amount of petitioner's New York sales receipts for the audit period. The computer- generated schedule of sales for 1986, referred to above, consists of two columns of numbers headed "Total Sales New York State" and "Total Sales New York City", respectively; however, the figures shown represent the number of orders filled by petitioner rather than the amount of his sales receipts. As shown on this sheet the total number of New York State orders filled was 11,831 and the total number of New York City orders filled was 5,943. This was the only document offered to the Division as a record of petitioner's sales in New York. The auditor asked for source documentation with which to independently verify the figures on this schedule. He was allowed to review computer-generated mailing lists. These listed the names and addresses of customers who had received direct mail solicitations from Kalbrus in 1985 and 1986. A checkmark placed next to a customer's name indicated that the customer had made a purchase from Kalbrus. The auditor manually counted 7,834 New York City customers who had checkmarks next to their name. Although the audit workpapers and reports continually refer to New York State taxable sales, the auditor only counted New York City sales. Sales to other localities in New York State were ignored. The auditor was told by Mr. Michael that the average amount of each sale was $59.50.

The auditor calculated New York taxable sales for the years 1985 and 1986 of $466,123.00 by multiplying $59.50 times 7,834. Using the Federal income tax returns, bank statements and accountant's worksheets provided to him, the auditor calculated total sales receipts in all localities for the period June 1, 1984 through October 31, 1986 of $4,904,803.00.[2] This amount was divided into audited New York taxable sales of $466,123.00 to compute the percentage of total sales attributable to New York (9.5034%). This percentage was applied to petitioner's total gross sales for the audit period to compute audited New York taxable sales for the entire audit period of $909,970.00, with a tax due on that amount of $75,072.53. Taxes paid were subtracted from audited taxes due to calculate a tax deficiency of $37,534.53.

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[2]Petitioner reported gross receipts in 1984 of $30,810.00. The Division was told that petitioner was running a restaurant in 1984. To account for that portion of gross receipts not attributable to sales of videotapes, the Division included only one-half of petitioner's 1984 gross receipts in its computation of taxable sales.

Petitioner maintained bank accounts in New York City and elsewhere. Petitioner received orders for videotapes at the rented mailbox in New York City. Those orders were then shipped, by common carrier, to petitioner in Connecticut where the orders were filled. Although it is obvious that someone must have prepared the orders for shipment to Connecticut, petitioner's representative denied that petitioner purchased any services from the company from which the mailbox was rented. Purchase invoices establish that petitioner purchased goods and services from businesses located in New York. The purchase invoices in evidence show the purchaser, variously, as Pak Ventures, Kalbrus, Kalbrus c/o Pak Ventures, Pak Ventures-Karl Brussel and Kalbrus Corporation.

Petitioner reported New York taxable sales for the period June 1, 1986 through November 30, 1986 of $466,829.00, almost half the amount calculated by the Division for the entire audit period. The amount reported by petitioner for the period ended August 31, 1986 was intended to include sales made in earlier periods.

Petitioner did not testify or appear at the administrative hearing, and no documentary evidence was offered by his representative.

Petitioner's representative, David Michael, is also employed as Kalbrus' accountant and as a business advisor to Mr. Brussel; however, he was not petitioner's only accountant. The E.V.O.N. balance sheets and the Federal income tax returns for PAK Ventures were prepared by another accounting firm. Mr. Michael is familiar with some of the business operations of Kalbrus, although he denied having detailed information with regard to other businesses operated by Mr. Brussel.

Petitioner did not retain individual sales invoices or order forms. All records of sales were maintained by computer, including records showing the dollar amount of each individual sale made by Kalbrus. These records were used by Mr. Michael to prepare the two sales and use tax returns filed by petitioner. Those records were not made available to the Division on audit. Mr. Michael advised Mr. Brussel that he was not required to register as a vendor in New York

or to file sales and use tax returns. The returns which were filed were filed against Mr. Michael's advice.

Mr. Michael testified that the average selling price of a videotape was less than $59.50, but he presented no documentation to show exact prices used by Kalbrus during the audit period.

Under cross-examination, Mr. Michael stated that petitioner's mailing list rental business might have been conducted in New York, but he was unable to provide any details with regard to that business.

OPINION

In her determination below, the Administrative Law Judge found that the Division established a rational basis for its conclusion that petitioner was a vendor and, therefore, a person required to collect sales and use taxes. The Administrative Law Judge concluded that petitioner then was required to demonstrate by clear and convincing evidence that he lacked the requisite nexus which would make him liable for New York taxes and that petitioner failed to meet his burden of proof.

The Administrative Law Judge determined that: (1) petitioner's mailing of the solicitation in New York, (2) petitioner's maintenance of bank accounts in New York and his purchase of goods and services in New York, and (3) his registration as a New York vendor, indicating a home address of 133 West 3rd Street, New York, New York, taken as a whole, indicate a pattern of activity in New York.

Moreover, the Administrative Law Judge determined that since petitioner voluntarily obtained authority to collect use tax by registering with the Division, he became a vendor and, therefore, is responsible for the collection of use tax on behalf of New York.

The Administrative Law Judge cancelled tax assessed for the period June 1, 1984 through November 30, 1984 since she found no evidence in the record to support a conclusion that petitioner was conducting business in New York in 1984.

Lastly, the Administrative Law Judge concluded that petitioner failed to prove any other error in the audit method or its results.

On exception, petitioner contends that he did not distribute advertising matter and was not a vendor as defined in Tax Law § 1101(b)(8)(i) and 20 NYCRR 526.10.

Petitioner also excepts to the conclusion that he did not adequately support his position and that the burden of proof shifted to him. Rather, petitioner contends that the Division did not meet its initial burden of establishing that its determination that petitioner was responsible for the collection of use tax, and its calculations of the tax due, had a rational basis.

Moreover, petitioner argues that his business activities did not exceed the mere rental of a mailbox and, thus, does not establish a sufficient link to New York. Petitioner also asserts that his registration as a vendor for the collection of use tax on behalf of New York should not provide a separate ground for finding him liable for the collection of use tax since at the time petitioner registered as a vendor, he was not aware that his activities were not subject to use tax. Therefore, petitioner argues that his registration does not turn his otherwise nontaxable activity into taxable activity.

Further, petitioner contends that Tax Law § 1101 is unconstitutional on its face to the extent that it requires a person or corporation to register as a vendor and to collect use taxes when there is not a sufficient link between that person or corporation and New York. Petitioner also asserts that Tax Law § 1101 is unconstitutional as applied to the facts of this case because it requires petitioner to register as a vendor when there is not a sufficient link between the activity being taxed and the State of New York. Lastly, petitioner states that 20 NYCRR 526.10(a)(4)(ii)(e) is unconstitutional on its face and as applied to the extent that it states that the rental of a mailbox in New York is, in itself, a sufficient link with New York to subject an out-of-state taxpayer to the duties and obligations of a vendor under New York law.

In response, the Division argues that the Tribunal does not have jurisdiction to review the constitutional issue in this case since petitioner's contention relates to the constitutionality of a statute on its face.

However, the Division states that if we do have jurisdiction to hear the constitutional issue, the sales and use taxes in this case are clearly constitutional. The Division argues that petitioner has the burden of proof to establish that the statute is unconstitutional and that he has failed to do so.

Further, the Division asserts that:

> "it is not necessary that a nexus or relationship exist between the activity of the vendor subject to tax and the vendor's activity within the State, but simply that the facts demonstrate some definite link, some minimum connection between the State and the person it seeks to tax"
> citing Matter of National Geographic Socy. v. California Bd. of Equalization, 430 US 551, 560.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

First, we address petitioner's assertion that Tax Law § 1101(b)(8) is unconstitutional on its face.

The jurisdiction of this Tribunal, as prescribed in its enabling legislation, does not encompass challenges to the constitutionality of a statute on its face (Matter of Wizard Corp., Tax Appeals Tribunal, January 12, 1989; Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988). At this level of review, we presume that statutes are constitutional.

Next, we address petitioner's assertion that the statute was unconstitutionally applied in this instance. Petitioner argues that the Division has not shown a pattern of activity in the State that establishes a sufficient nexus to justify the tax liability. Petitioner also states that the Division has not established a rational basis for its tax assessment and, therefore, petitioner did not have to demonstrate that the assessment was erroneous.

First, we conclude that the Division had a proper basis to conclude that petitioner was a vendor.

Former Tax Law § 1101(b)(8)(i) defines the term "vendor," in pertinent part, to include:

> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
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> "(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;
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> "(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; and
>
> "(D) Any other person making sales to persons within the state of tangible personal property or services, the use of which is taxed by this article, who may be authorized by the tax commission to collect such tax by part IV of this article."

Since petitioner herein did solicit sales in New York State by distribution of advertising matter and did make sales of tangible personal property to persons within New York State, he is a vendor pursuant to Tax Law § 1101(b)(8)(i)(C). Furthermore, because petitioner voluntarily registered as a vendor, he was a vendor pursuant to section 1101(b)(8)(i)(D) (see, Matter of Franklin Mint Corp. v. Tully, 94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280). Therefore, the issue before us is whether there existed a constitutionally sufficient nexus between petitioner and New York State such that petitioner could be required to collect sales and use taxes (Quill Corp. v. North Dakota, ___ US ___, May 26, 1992; National Bellas Hess v. Department of Revenue, 386 US 753).

As stated in the facts, the record indicates that: (1) petitioner rented a mailbox (address, 175 5th Avenue) which is the business premises of a commercial company which rents mailboxes and provides a limited number of office services to its customers, e.g., photocopying, (2) the solicitation obtained by the Division bore a New York postmark and indicated that petitioner intended to advertise in 12 magazines (Exhibit "G"), (3) petitioner received orders for videotapes at the rented mailbox which orders were then shipped, by common carrier, to petitioner in Connecticut where the orders were filled, (4) purchase invoices establish that petitioner purchased goods and services from businesses located in New York, (5) petitioner, or related companies, maintained bank accounts in New York and purchased goods and services in New York, and (6) petitioner registered as a New York vendor, giving his home address as 133 West 3rd Street, New York, New York and filed two sales tax returns. Based on this

information, the Division treated petitioner as a vendor under Tax Law § 1101(b)(8). We conclude that the Division, based upon the information it acquired concerning petitioner, had a proper basis to conclude that petitioner was constitutionally required to collect tax. At this point, petitioner was required to demonstrate that the assessment was erroneous. It is well established that the taxpayer has the burden to establish that a statute is unconstitutional on its face (see, Matter of Wiggins v. Town of Somers, 4 NY2d 215, 173 NYS2d 579; Matter of Maresca v. Cuomo, 64 NY2d 250, 485 NYS2d 724, appeal dismissed 474 US 802; Matter of Trump v. Chu, 65 NY2d 20, 489 NYS2d 455, appeal dismissed 474 US 915). We can see no reason why this rule does not apply with equal force when a taxpayer is challenging the constitutionality of a statute as applied. Therefore, we conclude that petitioner bore the burden to establish the nature and extent of his presence in New York and to demonstrate that such a presence does not provide a sufficient nexus to impose the tax liability at issue.

Petitioner's argument relies heavily upon the decision in National Bellas Hess v. Department of Revenue (supra) where the Supreme Court held that, since the respondents therein did no more than communicate with customers in Illinois by mail or common carrier as part of a general interstate business, the imposition of use tax violated the due process and commerce clauses (National Bellas Hess v. Department of Revenue, supra). However, petitioner has not established that his contact with New York State was merely through the use of mail or common carrier. Petitioner's representative testified at hearing that petitioner is a Connecticut based national mail order marketer. However, petitioner did not testify and no documents were introduced to support his allegations or to refute any of the connections to New York, that the Division has established existed between petitioner and New York State. We agree with the Administrative Law Judge that petitioner's unsupported denials do not sustain petitioner's burden to establish that there was insufficient nexus between petitioner and New York State.

For the same reason, we reject petitioner's assertion that his activities did not satisfy the definition of vendor in the regulations at former 20 NYCRR 526.10(e)(2). This regulation provides that:

> "(2) 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. However, if such person registers voluntarily, he is under the same obligations as any other vendor."

Petitioner has not responded to the evidence introduced by the Division indicating his presence in this State; therefore, he has not shown that he did not maintain a place of business in the State as defined at former 20 NYCRR 526.10(c) and that he did not solicit business in the State as defined at former 20 NYCRR 526.10(d). In any event, since petitioner did voluntarily register as a vendor, he clearly meets this regulatory definition of vendor.

Petitioner also asserts that 20 NYCRR 526.10(a)(4)(ii)(e) is unconstitutional both on its face and as applied. Although we do have the authority to determine whether the regulations are constitutionally valid (see, Matter of J.C. Penney Co., Tax Appeals Tribunal, April 27, 1989), we decline to address this issue as our decision in this case does not rest on this particular regulation.

With respect to the remaining issues concerning whether the audit methodology was unreasonable and whether petitioner has demonstrated reasonable cause for his failure to file tax returns, we agree with the determination of the Administrative Law Judge below and her reasoning set forth therein. Petitioner has not introduced any evidence to support his position.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Karl Brussel d/b/a Kalbrus is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Karl Brussel d/b/a Kalbrus is granted to the extent indicated in conclusion of law "G" of the determination, but in all other respects is denied; and

4. The notices of determination and demand for payment of sales and use taxes due, as modified according to paragraph "3" above, are sustained.

DATED: Troy, New York
June 25, 1992

/s/John P. Dugan
John P. Dugan
President

/s/Maria T. Jones
Maria T. Jones
Commissioner