STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
NEW MILFORD TRACTOR CO., INC. AND HARRY T. DOUGLAS, AS OFFICER	:	DECISION DTA No. 808563
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, 1985 through August 31, 1988.	:	

Petitioners New Milford Tractor Co., Inc. and Harry T. Douglas, as Officer, RD 5, Del Mar Drive, Brookfield, Connecticut 06804, and the Division of Taxation each filed an exception to the determination of the Administrative Law Judge issue on June 3, 1993. Petitioner appeared by Robert Plautz, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

Each party filed a brief in support of their exceptions, in opposition to their adversary's exception and in reply to their adversary's brief in opposition. Oral argument was heard on April 20, 1994 and began the six-month period for the issuance of this decision.

The Tax Appeals Tribunal renders the following decision per curiam.

ISSUES

I. Whether petitioner New Milford Tractor Co., Inc.'s voluntary registration under Tax Law § 1134(a)(3) as a sales tax vendor provides a nexus with the State of New York so as to allow the State to require the collection of use tax on goods delivered to New York locations.

II. Whether petitioner had any other contact with New York State so as to require collection of use taxes.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

1. (a) New Milford Tractor Co., Inc. (sometimes referred to as "NMT" or "petitioner"[1]) is a Connecticut corporation organized in the early 1960's. It is engaged in the business of retail sales and service of tractors and other construction equipment (but not agricultural equipment) produced by John Deere Corp. Its operations are described as similar to those of a car dealership. It includes a parts department and a six-bay shop. It has two half-ton pickup trucks which are used on service calls. NMT does not advertise.

(b) NMT's first place of business was in New Milford, Connecticut. In 1976 it moved to Del Mar Drive, Brookfield, Connecticut. From 1984 to 1991 it had a branch on Church Street, Canaan, Connecticut. NMT leased its locations at Brookfield and Canaan. These locations are each about ten miles from the New York border. The nearest John Deere dealer in New York is in Beacon, Dutchess County.

(c)(1) NMT denies owning or leasing any property in New York State. Its secretary testified that it owned or leased no other buildings than those in Connecticut (Tr., vol. 3, p. 8).[2] The Division of Taxation ("Division") does not specify any property located in New York which NMT might own or lease.

(c)(2) The auditor asserts (Tr., vol. 1, pp. 40-41) that on July 7, 1988 she had a conversation with petitioner's accountant, a Mr. Greenhouse (who did not however have a power of attorney), during which he stated in answer to questions that NMT had salesmen in New York, that it delivered its goods into New York and that it did repairs in New York. Mr. Greenhouse, by affidavit and testimony, denies having made any statements as to salesmen

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[1]Unless the context clearly indicates otherwise, "petitioner" will include only NMT. There are no separate issues with respect to Mr. Douglas, as he admits his status with NMT (see Finding of Fact "1[d]).

[2]Because of the somewhat haphazard way in which the parties offered their proof, important items in the record are difficult to locate. Therefore, references will be inserted herein to the transcript and exhibits when convenient.

and deliveries (but does not deny the statement as to repairs) (Exhibit 31). The auditor's log for the date in question does not report this conversation. The auditor did not record the exact words allegedly used so that ambiguities could be detected. The auditor did not obtain further concrete details which could be verified in the face of denials. Therefore, the auditor's testimony as to salesmen and deliveries is rejected.

(c)(3) NMT denies having any salesmen in New York. This was the testimony of its secretary (Tr., vol. 3, pp. 13-14) and, although she admitted she got her knowledge from NMT's salesmen themselves (Tr., vol. 3, pp. 97, 99), the salesmen were apparently on the premises in Connecticut when she received the information. Therefore, it is found that NMT had no salesmen in New York.

(c)(4) NMT made no deliveries of equipment into New York with its own vehicles. It appears uncontested that NMT had no vehicles big enough to carry such equipment. Also, NMT's secretary testified as much. It is therefore found that NMT's vehicles were not used to make deliveries of equipment into New York.

(c)(5) NMT performed repair services on customers' vehicles. Some of these were performed in New York and would include the sale of needed parts. NMT's secretary testified that in the May test period (see, Finding of Fact "12") there were five repair orders with a total value of $1,315.44 on which the auditor computed a tax of $96.11 (Tr., vol. 3, p. 45). This figure would project out to be 60 repairs in New York in each year, and over the audit period of three years and three months about 195 repairs in New York State which would be valued at $51,000.00 with a tax due of $3,700.00.

(d) Petitioner Harry T. Douglas, president of petitioner, is, as he admits, an officer of New Milford Tractor Co., Inc. responsible for the collection of any sales taxes due.

(e) The secretary and treasurer of NMT was Claudette C. Chafes. She was not a stockholder. Her duties primarily included managing the bookkeeping.

(f) NMT employed a certified public accountant, Mr. Lawrence Greenhouse. Mr. Greenhouse until 1967 practiced accounting in New York State and he is still licensed here.

Since then he has practiced in Connecticut and while there has had three to five clients with problems concerning New York sales taxes.

2. (a) NMT's supplier, John Deere Corp., maintains warehouses at Syracuse, New York and Timonium, Maryland. NMT, at least in the 1960's, occasionally took delivery of equipment at Deere's Syracuse, New York warehouse.

(b) In July 1965 (and again in July 1967) the John Deere Company advised its dealers, wherever located, to register as dealers under the New York sales tax law so that they could accept delivery of equipment at Syracuse, New York with a sales tax resale certificate instead of paying sales tax (Tr., vol. 3, pp. 25-26).

(c) NMT then of 29 Sulbran Road, New Milford, Connecticut received a certificate of registration for the sales tax. This was "validated" by the Sales Tax Bureau on July 30, 1965.

(d) NMT filed annual sales tax returns for the years ended June 30, 1986, 1987 and 1988. It declared no taxable sales.

3. (a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 10, 1989 was issued to New Milford Tractor Co., Inc., for the period June 1, 1985 through August 31, 1988, for total tax due of $312,094.21, plus penalty due of $90,617.31 and interest of $120,126.42, for a total amount due of $522,837.94.

(b) An identical notice of determination, also dated August 10, 1989, was issued to Harry T. Douglas, as an officer of New Milford Tractor, Inc.

(c) An additional notice of determination was issued to New Milford Tractor Co., Inc. on the same date for a penalty under Tax Law § 1145(a)(1)(vi) in the amount of $31,209.42.

(d) An identical additional notice of determination also on the same date was issued to Harry T. Douglas, as an officer of New Milford Tractor Co., Inc.

(e) The determinations were made, in part, pursuant to a consent signed May 10, 1989 extending the period of limitation for the period June 1, 1985 through May 31, 1986 to December 20, 1989.

4. The asserted tax due of $312,094.21 is the sum of $299,383.14 due on sales of equipment and $12,711.07 due on "other" sales (generally of parts). The total sales assessed was $4,994,365.00.

5. (a) A conciliation conference was held on February 7, 1990. The conferee, in a letter dated April 5, 1990 to petitioners' former attorney, stated his findings (and in commendable detail) (Ex. 14-D). A Conciliation Order (attached to the petition) was issued to each petitioner dated May 18, 1990. The total tax due as stated in the determinations of $312,094.21 was reduced after conference by the amount of $29,455.76 to $282,638.36. This adjustment was attributable to the submission of exemption certificates on 11 items (Exhibits 16 and N) ($14,720.08), evidence of taxes paid by customers of NMT and verified on seven items (Exhibits 15 and N) ($13,948.27) and tax paid by NMT on a casual sale (Exhibit N) ($787.50).

(b) The Conciliation Order issued to each petitioner also cancelled the penalty asserted for omitting over 25% of tax required to be paid which had been asserted under Tax Law § 1145(a)(1)(vi). The cancellation was based on the honest reliance of the taxpayer on professional advice.

6. (a) All records of petitioners were requested during the audit (Tr. vol. 2, p. 148).

(b) The auditor testified that the only records she saw prior to the hearing were the invoices and that she had not seen other records, called inventory cards, which petitioners produced at the hearing to show the delivery of equipment. Petitioners' witness testified that during the audit she had stated that "I certainly could provide her with the paperwork that would prove which sales we arranged delivery on and which sales were picked up by the customer." Based on this testimony it is found that petitioners never tendered the inventory cards to the auditor (Tr. vol. 3, pp. 53-54, 132).

7. (a) The audit of equipment was done on the basis of invoices alone. The invoices were taken at face value. The auditor examined 226 invoices (Ex. J, pp. 1-5). The auditor eliminated as nontaxable the invoices with a Connecticut address (or other non-New York

address) and the invoices with a New York address which also showed either a "pick up" in Connecticut or a tax paid (presumably to Connecticut). The eliminated invoices were not put in evidence by either party. A frequent reason for finding an invoice nontaxable was that the invoice could not be found (Ex. J, pp. 1-5).

(b) Of the 226 invoices, 169 were found taxable showing a tax of $299,383.14 (Ex. 11-D). At a conciliation conference, 18 items, as already explained, were conceded to petitioners showing an amount of $29,455.85. The remaining 151 invoices showed a tax due of $269,927.29. One invoice (Audit number 92) accounting for $11.50 is ignored by the parties thereafter, leaving 150 invoices.

(c) The invoices had separate entry lines for "price of vehicle", "freight, handling and excise tax" and "sales tax". Each invoice also had an "inventory number". The invoices in evidence typically have a handwritten notation on the bottom which were made in preparation for the hearing (Tr. vol. 3, pp. 95-96). Almost all of the 150 invoices found to be taxable (after the conference) had entries on the sales tax line stating "NYS" or "del'd NY" or an equivalent expression and with no amount shown. The exceptions were four items marked with dashes (----) (Audit numbers 131, 31, 36, 44; these apparently meant delivered in New York; Tr., vol. 3, p. 101), two items left blank (Audit numbers 184, 215) and one item which showed the amount of tax of $2,788.75 for Westchester County (Audit number 129). None of these items had an entry showing freight charges. These exceptions were not explained by either party at the hearing.

8. (a) Petitioner admits that 58 items were delivered into New York State by a common carrier and that the common carrier was arranged for by petitioner. It included the cost of the carrier in the cost of the sale (Tr., vol. 3, pp. 106-108) on which it charged its regular markup (Tr., vol. 3, pp. 117, 123). Those 58 items account for tax totaling $137,073.11 (calculated from Ex. 25). (Three items, audit numbers 26, 39 and 47, are not listed in petitioner's brief and are not considered further herein.)

(b) Petitioner at the hearing produced copies of cards it termed "inventory cards" and entitled "machine inventory and sales record". These bore the inventory numbers shown on the invoices. The cards themselves had many entry lines specified for particular sums including "factory freight" and "trucking expense". These, however, as petitioner admits, were not followed (Tr., vol. 3, pp. 102, 105-106). Instead, typically the "excise tax" line contained the cost of shipment from John Deere to petitioner. The cards have other numbers which, as explained by NMT's bookkeeper, were references to work orders from trucking companies for transportation of the item sold (Tr., vol. 3, p. 109). At any rate, the cost of delivery from petitioner to its customers was recorded here and was not shown on the invoice. Based on a careful examination, it is difficult to read these cards even with the explanation of petitioner's bookkeeper at the hearing (see, vol. 3) and impossible to do so without that explanation.

(c) Petitioner admits that some records, termed purchase orders or subsidiary records, for 11 of the invoices, had been available during the audit but had been routinely destroyed in March 1989 (Tr. vol. 3, pp. 51-52, 114-115).

(d) The deliveries of this equipment were made by: Walter Gillette of Woodbury, Connecticut, the primary carrier for NMT from its Brookfield location, then also located in New Milford, Connecticut (48 items); The Collingwood Transport Co., Inc. ("CTC") of Sheffield, Massachusetts the primary carrier for NMT from its New Canaan location (8 items); and Ted Cheney of Warren, Connecticut doing business as Ted's Tractor Service (2 items). Gillette and Collingwood were qualified with the Interstate Commerce Commission as common carriers. Cheney's business was primarily the repair of tractors but on occasion he would transport them. In doing so Cheney acted as an independent contractor; he was not licensed as a common carrier. The two items Cheney transported (audit numbers 11 and 24) account for tax of $5,245.10. These three carriers together account for 58 items of the 61 items asserted to be delivered by NMT's carriers (Audit numbers 26, 39 and 47 are not accounted for). Two of the items were actually not delivered in New York at all (Tr., vol. 3, pp. 129-132). Audit number 204 was delivered by Collingwood at the customer's Massachusetts property and audit number

68 was delivered by Gillette to a job site in Connecticut. (Petitioner has not requested a recomputation because of this.)

9. (a) Petitioner asserts that 92 sales were completed by delivery in Connecticut to the purchaser itself or to a common carrier arranged for by the purchaser. The invoices for these sales would in most instances show the statement "delivered in New York" or the equivalent (Tr., vol. 3, p. 56). No Connecticut sales tax was charged on these sales (Tr., vol. 3, p. 57). These sales total $132,871.02 (calculated from Exhibit 25 in evidence).

(b) Inventory cards were introduced for most of these sales. As already found above, these cannot be read without the aid of petitioner's bookkeeper. Petitioner did not offer in evidence for comparison purposes records of sales conceded to be Connecticut sales.

(c) A survey was made by the auditor in May 1992 of all of these customers (Ex. U, V, W). Seventeen replies came back and seven of these gave no information. Of the ten that answered, six stated they took delivery in Connecticut (audit numbers 58, 70, 73, 212, 215 and 218) and 4 stated they took delivery in New York with petitioner arranging the delivery (audit numbers 183, 191 212 and 216). One of these, audit number 216, claimed he paid the tax himself. A follow-up telephone survey of the customers allegedly receiving delivery in Connecticut produced three customers who stated delivery was in New York (audit numbers 29, 79, 191). Because of the poor response to this survey, no finding can be made based upon it concerning the credibility of petitioner's books. (Neither party has requested a recomputation based upon the individual responses to the survey.)

10. The knowledge of petitioner's witness, its secretary-treasurer, of the deliveries of the equipment was obtained from the salesmen (Tr., vol. 3, pp. 97, 99). No salesmen testified at the hearing.

11. The Connecticut Department of Revenue conducted a sales tax audit of NMT for the period January 1, 1988 through December 1991 (thereby overlapping the New York audit by eight months). After that audit, the Connecticut auditor was furnished by the New York auditor

with the 92 invoice numbers which petitioner claims were Connecticut deliveries. The auditor states eight were found within the Connecticut audit period, though he does not identify them (Ex. R). (Six of them can be identified from the dates on the invoices in Exhibit 25 - audit numbers 212, 215, 216, 217, 218 and 221.) The audit resulted in "no change". The auditor states that NMT had properly taxed all sales "where title passed" in Connecticut and where there was no exemption certificate. NMT had told the auditor that it delivered all sales to its out-of-state customers (Ex. R). An exemption is provided for motor vehicles which are for use exclusively outside of Connecticut (Conn. Form SUT-16a-1, marked as Ex. Q).

12. With respect to parts (and other small transactions such as repair orders), the auditor first listed 39 invoices with New York addresses. She then eliminated six for reasons including resale and Connecticut sale. Thirty-three invoices remained. Petitioner has provided the invoices for 16 of the sales (Ex. 18) and points out that all of them provide for a shipping or freight charge with the implication that a shipment was made to the address of the customer in New York. However, these same invoices also list amounts designated as tax which are included in the final price. These amounts and the designation of tax are crossed out and the price is reduced. When this was done is not indicated and what it means was never explained by petitioner's witness. (In fact, the exhibit was never authenticated by petitioner's witness.) Petitioner claims that some of these invoices represent road service (see, Finding of Fact "1[c][4]"). No evidence was adduced as to the other 17 invoices. With respect to the 16 invoices, petitioner has not shown how these invoice figures relate to the amount assessed of $12,711.02.

13. The Division is in possession of an unsworn statement from an "Andrew Weick" (see, audit number 12) alleging that one of NMT's salesmen told him, when selling a tractor to him, that "the sales tax was included." Another customer, Neil Hilpl, in a letter, asserted the same. The truth of these statements cannot be verified.

14. Petitioner was advised in 1962 by its certified public accountant, Mr. Greenhouse, that it did not have to collect the New York sales and use tax (Tr., vol. 3, p. 8). NMT did not

specifically inquire of Mr. Greenhouse as to his experience and expertise with New York sales taxes. Mr. Greenhouse believed that he did not have a full set of New York tax regulations. He admitted he was not familiar with the regulations concerning a vendor's duty to collect use tax. He did, however, have a New York tax service. He did not know that NMT had registered in New York as a vendor.

OPINION

The Administrative Law Judge held that NMT's voluntary registration as a vendor did not in itself constitute a sufficient nexus with New York to justify imposing the duty under section 1132(a) of the Tax Law to collect sales and use taxes.

On exception, the Division argues that the statute and regulations clearly provide that a person who files a certificate of registration automatically assumes the obligations of a vendor. The statutory, regulatory scheme is described by the Division as follows:

> "[v]endor is defined in Tax Law § 1101(b)(8) as including any person making sales to persons within the State of tangible personal property or services, the use of which taxed [sic] by this article, who may be authorized by the Tax Commission to collect such tax by part IV of Article 28. Tax Law § 1131(1) defines 'person required to collect any tax imposed by this article' as including 'every vendor of tangible personal property or services.' Tax Law § 1134(a)(3) provides that a person who makes sales to persons within the State of tangible personal property or services, the use of which is subject to tax under this article, may, if he so elects, file a certificate of registration with the Tax Commission which may in its discretion . . . issue to him a certificate of authority to collect the compensating use tax imposed by this article. 20 NYCRR 533.1(a) summarizes these provisions. It states that every person who elects to file a certificate of registration, though not otherwise required to do so, has the same obligations as a person required to collect tax" (Division's reply brief on exception, pp. 15-16).

The Division asserts that we have no jurisdiction to rule on the facial validity of a statute or regulation and that the implicit premise of the Administrative Law Judge's decision was that the statute and regulations were unconstitutional on their face.

First, we disagree with the Division that we do not have authority to rule on the facial constitutionality of a regulation. Clearly, the Tribunal has the authority to rule on the validity of

the Division's regulations which are at issue in a case (Tax Law § 2006[7]; 20 NYCRR 3000.11[e][3]; see also, Matter of J. C. Penney Co., Tax Appeals Tribunal, April 27, 1989).

Next, although we agree with the Division that we do not have authority to determine the facial constitutionality of statutes, we do not agree that the instant matter raises such a question. As we held in Matter of Waste Conversion (Tax Appeals Tribunal, August 25, 1994), the hallmark of a question of the constitutionality of a statute as applied is that it depends for its resolution on specific facts, while the question of the facial constitutionality of a statute does not. In this case, NMT is arguing that to include it within the statutory definition of vendor subject to the statutory responsibility of a vendor to collect sales and use tax is unconstitutional, based on the specific circumstances of NMT. The resolution of this case obviously depends on the facts of NMT's contacts (whether the corporation has sufficient nexus) with New York and is, thus, a question of the constitutionality of the statute as applied (see, Matter of Vermont Information Processing v. Tax Appeals Tribunal, ___ AD2d ___ [July 28, 1994]; Matter of Orvis Co. v. Tax Appeals Tribunal, ___ AD2d ___, 612 NYS2d 503).

Turning to the merits, we agree with the Administrative Law Judge that the voluntary registration of NMT does not in itself create sufficient nexus to impose the burden to collect use taxes and that the cases of Matter of Franklin Mint Corp. v. Tully (94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280) and Matter of Aldens, Inc. v. Tully (49 NY2d 525, 427 NYS2d 580, appeal dismissed 449 US 802) support this conclusion. In Franklin Mint, the Court found that the petitioner's voluntary registration provided a rational basis for the Division to determine that the petitioner was a vendor within the meaning of section 1101(b)(8)(i) of the Tax Law; however, when the Court addressed the constitutional issue of whether the petitioner had sufficient nexus with the State to impose the duty to collect local use tax, it examined the petitioner's contacts with New York and did not mention, much less rely on, the voluntary registration as a factor to be considered. In a dissenting opinion, where he disagreed with the majority's conclusion that the contacts were sufficient to provide nexus, Presiding Justice Kane specifically noted that the voluntary registration would not require the collection and remittance

of taxes if the taxes were unconstitutional as applied to the petitioner (Matter of Franklin Mint Corp. v. Tully, supra, 463 NYS2d 566, 569). Similarly, the Court of Appeals in Aldens examined and relied on the taxpayer's physical presence in the State to find nexus and did not mention the taxpayer's voluntary registration for this purpose. From these decisions, we conclude that voluntary registration is not in itself a sufficient basis to find nexus and, moreover, is not even a relevant factor to consider when analyzing petitioner's contacts with the State. This conclusion is consistent with our holding in Matter of Brussel (Tax Appeals Tribunal, June 25, 1992).

In the face of these cases which are directly on point, we cannot accept the Division's argument that by voluntarily registering NMT waived its Commerce Clause protection and agreed to be liable to collect the use tax. If this were the controlling legal principle, the Courts in Alden and Franklin Mint need not have addressed the petitioners' other contacts with the State.

The Administrative Law Judge concluded that the sales of services made by petitioner created a sufficient nexus with the State to impose the obligation to collect use tax and petitioner has excepted to this conclusion. Petitioner argues that it does not have a substantial physical presence in the State and that is the standard required under Quill Corp. v. North Dakota (___ US ___, 112 S Ct 1904).

Since the Administrative Law Judge rendered his determination in this matter the Appellate Division, Third Department has issued two decisions, Matter of Vermont Information Processing v. Tax Appeals Tribunal (supra) and Matter of Orvis Co. v. Tax Appeals Tribunal (supra) articulating the Court's interpretation of Quill. In each of these cases, the Court reversed our determination and concluded that the petitioners did not have a sufficient nexus with New York to justify imposing tax. Based on these decisions, we reverse the determination of the Administrative Law Judge and find that NMT did not have sufficient nexus with the State to sustain the liability for use tax.

In Orvis, the Court stated:

> "[i]n the mail order context, 'substantial nexus' requires an in-state physical presence, and thus, the question of 'whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant, or office' (Quill Corp. v. North Dakota, ___ US ___, 112 S Ct 1904, 1914). While the US Supreme Court did not explicitly define what range of commercial activity constitutes 'physical presence,' it is clear that the 'slightest presence' standard is no longer viable (see, id., at 1914 n 8). Thus, the effect of Quill is that it increased the requisite threshold of in-state physical presence from any measurable amount of in-state people or property to substantial amounts of in-state people or property (see, Hamersley, Will the Bellas Hess Physical Presence Requirement Continue to Protect Out-of-State Mail-Order Retailers From State Use Taxes in the Quill Era? Quill Corp. v. North Dakota, 46 Tax Lawyer 515)" (Matter of Orvis Co. v. Tax Appeals Tribunal, supra, 612 NYS2d 503, 505).

Applying this standard, the Court concluded that even if the record established that Orvis' employees traveled to New York on 12 occasions between September 1, 1977 and August 31, 1980 and solicited sales, these "sporadic activities in New York do not satisfy the 'substantial nexus' requirement articulated in Quill Corp v. North Dakota (supra) (see, L.L. Bean v. Commonwealth of Pa., 101 Pa Commw 435" (Matter of Orvis Co. v. Tax Appeals Tribunal, supra, 612 NYS2d 503, 506).

In Vermont Information Processing, the Court gave further definition to its interpretation of the substantial nexus requirement of Quill. The petitioner in Vermont Information Processing had:

> "no office or other place of business, no telephone number, no employees or salespeople, and no means of delivering its products in New York, nor does it advertise in New York newspapers or periodicals. Petitioner's president testified that it is not petitioner's ordinary practice to travel to its customers' places of business, and that on-site visits are only made to approximately 5% of petitioner's customers for the purpose of correcting persistent or difficult problems, or occasionally to install software or train employees" (Matter of Vermont Information Processing v. Tax Appeals Tribunal, supra).

The Court stated that there were no more than 30 or 40 of these visits to New York over a three-year period. The Court held that:

> "[t]his activity, without more, does not rise to the level necessary to justify taxation, for these visits, although perhaps slightly more frequent, are of the same character as those which were found in Matter of Orvis Co. v. Tax Appeals Tribunal (supra) to be inadequate

> to meet the 'nexus' requirement established in Quill" (Matter of Vermont Information Processing v. Tax Appeals Tribunal, supra).

We conclude that the activities of NMT are not meaningfully different from those in Vermont Information Processing and, therefore, that the same result must apply. As indicated in the facts, the record does not disclose that NMT owned or leased real property in the State, NMT had no salesmen in the State and NMT made no deliveries of its equipment into the State. The only activity of NMT in the State during the audit period, other than the voluntary registration discussed above, was the performance of repair services on customers' vehicles. Five repair visits to New York occurred during the one-month test period of the audit. From this test, the Administrative Law Judge projected 60 repairs in New York each year, with a value of $51,000.00 and a tax due of $3,700.00. This is a very small amount of petitioner's overall business activity which is indicated by the fact that the total tax assessed was $312,094.21. Thus, petitioner, like the petitioner in Vermont Information Processing, had only a sporadic presence in New York, this presence was incidental to its principal business activity and was not for the purpose of soliciting sales.

The only difference between the two is that NMT was apparently present in New York more often than the petitioner in Vermont Information Processing: 180 times over a three-year period compared to 30 or 40 for the petitioner in Vermont Information Processing. From the opinion in Vermont Information Processing, we deduce that this increase in the number of visits is of very little significance, and that the character of the contacts controls, in determining nexus. Comparing the 30 or 40 New York trips in Vermont Information Processing to the 12 New York trips in Orvis, the Court in Vermont Information Processing described the former as "perhaps slightly more frequent" but of the same character as those in Orvis (Matter of Vermont Information Processing v. Tax Appeals Tribunal, supra). This conclusion is consistent with the position stated in the American Bar Journal article cited by the Court in Orvis. In this article it is stated that in Quill, "[t]he Court in all practical terms adopted a more subjective and malleable nexus standard that centers on the quality of in-state physical presence" (Will the Bellas Hess Physical Presence Requirement Continue to Protect Out-of-State Mail-Order

Retailers From State Use Taxes in the Quill Era?, supra). Therefore, we conclude that the frequency of NMT's visits to New York does not meaningfully distinguish the instant facts from those in Vermont Information Processing and that NMT's contacts are insufficient to satisfy the requirements of the Commerce Clause.

In the alternative, the Administrative Law Judge suggested that nexus with the State could be found because title to the 58 pieces of equipment delivered by common carrier into the State passed from petitioner to its customers in New York State. Petitioners have argued against this theory on exception, but the Division has not argued in support of it. We reject this theory based on Quill.

The facts of Quill also involved property shipped into the State by common carrier. The trial court found that title to the property passed to the purchaser when received and the Supreme Court referred to this ownership interest, along with the licensing interest in computer software programs, as an interest that was "either insignificant or nonexistent" (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, fn 1). Given the Court's ultimate conclusion that Quill had insufficient nexus with the State, we must reject the Administrative Law Judge's suggestion that retention of title until delivery to the customer created nexus in this case.

As a third alternative, the Administrative Law Judge found that NMT had nexus with the State based on a lack of proof, i.e., that NMT had not introduced sufficient evidence to show the extent of its activities in New York State. On exception, petitioners argue that this conclusion of the Administrative Law Judge is inconsistent with his findings of fact.

We agree with petitioners. The Administrative Law Judge found as a fact, based on the testimony of NMT's secretary, that NMT did not have salesmen in New York. The Administrative Law Judge also found that NMT did not deliver its equipment into the State. Finally, the Administrative Law Judge found that NMT denied owning or leasing any real property and that the Division did not specify any property located in New York which NMT owns or leases. We have reviewed the record, determined that each of these facts is supported

by the record, deferred to the Administrative Law Judge's evaluation of testimony (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992), and have found the facts as found by the Administrative Law Judge. Under these facts, petitioners have sustained their burden of showing by clear and cogent evidence that imposition of the use tax would contravene the Commerce Clause (see, Matter of Orvis Co. v. Tax Appeals Tribunal, supra).

Given the above conclusion, we need not address the remaining issues raised by the parties.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of New Milford Tractor Co., Inc. and Harry T. Douglas, as officer, is granted;

2. The exception of the Division of Taxation is denied;

3. The determination of the Administrative Law Judge is reversed;

4. The petition of New Milford Tractor Co., Inc. and Harry T. Douglas, as officer is granted; and

5. The notices of determination dated August 10, 1989 are cancelled.

DATED: Troy, New York
September 1, 1994

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

/s/Francis R. Koenig
Francis R. Koenig
Commissioner