STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
MONROE DISTRIBUTING, INC.	:	DECISION DTA No. 808812
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 September 1, 1985 through August 31, 1988.	:	

Petitioner Monroe Distributing, Inc., Attention: Richard Baumgart, Trustee in Bankruptcy for Monroe Distributing, Inc., 1100 Ohio Savings Plaza, 1801 East 9th Street, Cleveland, Ohio 44114 filed an exception to the determination of the Administrative Law Judge issued on May 27, 1993. Petitioner appeared by Ronald H. Sinzheimer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

Petitioner filed a brief in support of its exception, the Division of Taxation filed a brief in response and petitioner filed a reply. Oral argument was heard on May 19, 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 was a New York vendor making taxable sales in New York State and therefore required to register and report sales taxes due and collected.

II. Whether petitioner had sufficient nexus with the State of New York to be liable for the imposition and collection of sales taxes.

III. Whether petitioner is liable for additional penalties for failure to pay over tax, failure to file returns, omission of greater than 25% of the audited tax, and making sales subject to tax without obtaining a certificate of authority.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make an additional finding of fact. The Administrative Law Judge's findings of fact and the additional finding of fact are set forth below.

Petitioner, Monroe Distributing, Inc. ("Monroe"), was, during the period in issue, September 1, 1985 through August 31, 1988, an Ohio corporation which applied for and was granted authority to do business in the State of New York on or about May 1, 1985 by the New York State Department of State.

Monroe is principally engaged in the business of selling and servicing amusement devices, such as video games, pinball machines and juke boxes.

At all times during the audit period, Monroe's principal place of business was in the State of Ohio and the corporation maintained no business location within the State of New York.

During an audit by the Division of Taxation ("Division") on one of Monroe's customers in New York State, it was discovered that Monroe was making deliveries of its products into New York State by means of its own trucks. Based upon this information, the Division began an audit of Monroe in September of 1988.

Monroe requested that a full detail audit be performed on its books and this request was complied with by the Division. The auditor examined each and every sale made by Monroe to New York customers during the audit period, taking all of his information from Monroe's sales journal. Purchases were not examined since it was assumed all purchases were made in the State of Ohio.

The auditor also inspected invoices issued by Monroe between September of 1985 and June of 1988 which indicated sales to New York customers. Those invoices totalled $1,343,151.72 which, after allowance for resale certificates provided by Monroe and proof of direct payment permits, in addition to taxes credited for overlapping audits of Monroe's customers, yielded a taxable portion of those invoices equal to $898,992.37. During that

period, the auditor found negative $338.56 in tax paid,[1] while the invoices reflected tax collected in the sum of $12,263.57 (Exhibit "D").

As stated above, the Division was aware of the fact that Monroe was making deliveries into New York State using its own trucks which fact was corroborated by the testimony of petitioner's president during the audit period, Mr. Norman Goldstein, and petitioner's own invoices.

By letter dated March 26, 1985, petitioner's attorney, Lee A. Koosed, Esq., an Ohio attorney, sent a letter to the New York State Secretary of State indicating that Monroe was conducting "various business transactions with customers in the State of New York." The letter expressed a concern with regard to Monroe's sales tax liability and made the following statement:

> "To expedite the remittance of New York State Sales Taxes, Monroe wishes to become a foreign corporation licensed to do business in New York.
>
> "Monroe's customers wish to be assured that all taxes paid by them will be remitted. Under these circumstances, Monroe plans to continue doing business in the same manner without establishing any place of business in New York."

Mr. Koosed did indeed file an application for authority to do business in the State of New York on behalf of Monroe Distributing, Inc. on or about May 1, 1985. However, no follow-up was ever made with regard to obtaining a certificate of authority for sales tax purposes or actually remitting sales taxes collected from customers in New York State.

Even though Monroe did not possess a certificate of authority to collect sales tax until the summer of 1988, it had been collecting New York State sales tax from some of its customers as early as September 1985, without remitting any collections until the quarter ended May 31, 1988. For the quarter ended May 31, 1988, Monroe reported tax of $1,551.47 and for the quarter ended August 31, 1988 it remitted $4,519.46, for a total amount for the two quarters of $6,070.93. The total amount of additional tax due found for all of the quarters in the audit period totalled $70,604.56, which, after credit for the taxes reported for the quarters ended May 31, 1988 and August 31, 1988, yielded additional tax due of $64,533.63.

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[1]See finding below which explains this figure in detail.

Although Monroe's attorney represented that Monroe agreed with the additional taxes found due, by letter dated April 7, 1989, he disagreed with the imposition of penalty, statutory interest and omnibus penalties. It is noted that Monroe never executed consents to the statements of proposed audit adjustment issued to it on or about March 29, 1989 which set forth the additional tax, penalty and interest due as a result of the audit.

On June 14, 1989, the Division issued to Monroe a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth additional tax due of $64,533.63, penalty of $18,707.21 and interest of $19,900.40, for a total amount due of $103,141.24 for the audit period September 1, 1985 through August 31, 1988. On the same date, the Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Monroe setting forth only penalty due of $16,320.19 providing the explanation that the penalty was being imposed pursuant to Tax Law § 1145 based upon the results of the audit.

It is noted that in the audit workpapers, specifically workpaper number 4, the auditor listed a column entitled "Tax Paid" which totalled negative $338.56 for the entire audit period. Although not specifically explained, an analysis of the workpaper indicates that a tax code was assigned to each of the invoices indicating the county of sale and the appropriate tax rate for that county. Where a negative number was entered under the column "Tax Paid", the auditor was explaining the difference between the tax collected and the tax which should have been collected at the appropriate county rate. The total "Tax Paid" figure of negative $338.56 apparently had no bearing on the additional tax found due since that amount, as set forth on workpaper number 4, was $70,604.56 and was carried forward to workpaper number 6, where credit was given for the taxes remitted for the quarters ended May 31, 1988 and August 31, 1988. After said credit, the net amount of tax due, $64,533.63, was the amount carried forward to the notices of determination issued to Monroe on June 14, 1989.

Petitioner's president during the audit period, Norman Goldstein, testified that the company decided to begin making sales in the State of New York in 1985 and immediately called its Ohio attorney, Lee Koosed, Esq., to handle all arrangements in connection with

becoming authorized to do business in New York State. Mr. Goldstein testified that the company placed its entire trust in Mr. Koosed's expertise and relied upon his knowledge of the law to properly authorize Monroe to do business in the State of New York. Mr. Goldstein was unable to explain why New York sales taxes were collected and not remitted during the audit period, while taxes were being paid to other jurisdictions.

Mr. Goldstein also testified that about half of Monroe's sales of items costing over $1,000.00 during the audit period represented merchandise that was delivered into New York State by Monroe's trucks, while approximately 50% were sent by common carrier. During the audit period, Monroe owned two trucks used for the purpose of delivering goods into other states, including New York, and employed two drivers to operate same.

A summary sheet submitted by Monroe's counsel after hearing indicated that of the $1,343,151.72 in sales set forth on the invoices recorded by the auditor during the audit period, in excess of $700,000.00 represented sales of merchandise delivered into New York by Monroe's trucks.

On April 7, 1989, petitioner's representative, Lee Koosed, Esq., wrote to the auditor and stated that Monroe acknowledged unpaid taxes in the sum of $64,553.63 and requested an abatement of all penalties and interest. The basis for said abatement was that Monroe had taken good faith steps to license itself to do business in the State of New York and to properly pay sales taxes as set forth in Mr. Koosed's letter to the Secretary of State in 1985. Mr. Koosed also points out that he promptly answered a request from the Division of Taxation - Corporation Tax for proper address, Form CT-270, once said form was requested in June 1987.

It is noted that said form was sent to Mr. Koosed by the corporation tax processing division which was threatening to dissolve the corporation by proclamation of the Secretary of State as provided for in Tax Law §§ 203-a or 203-b for failure to file corporation franchise tax reports. The required information was forwarded to the corporation tax processing division immediately.

In a May 3, 1989 letter from Mr. Koosed to the auditor, Mr. Koosed stated that he was never informed that sales taxes were delinquent or that there had been a failure to file necessary tax forms. Mr. Koosed believed that the Division's failure to pursue Monroe for the taxes and returns due enhanced his argument that Monroe made good faith efforts to comply with the Tax Law.

In addition to the facts found by the Administrative Law Judge, we find the following:

> All of the sales petitioner made to New York customers during the audit period were the result of orders placed by telephone.

OPINION

The Administrative Law Judge concluded that petitioner had sufficient nexus with New York State to be subject to the New York State sales tax laws. The Administrative Law Judge found this sufficient nexus to be petitioner's "exploitation of the New York market, coupled with its physical presence of telephone contact with customers and making routine deliveries in its own trucks using its own employees and charging and collecting New York State sales tax" (Determination, conclusion of law "B"). The Administrative Law Judge also concluded that this significant physical presence distinguished the instant facts from Quill Corp. v. North Dakota (___ US ___, 112 S Ct 1904) and National Bellas Hess v. Dept. of Revenue of State of Illinois (386 US 753). The Administrative Law Judge also concluded that petitioner was a vendor within the meaning of section 1101(b)(8) of the Tax Law and the applicable regulations, an interstate vendor as defined by 20 NYCRR former 526.10(e) and was required to register pursuant to section 1134(a)(1)(i) of the Tax Law. Finally, the Administrative Law Judge found that petitioner was not entitled to an abatement of the three penalties imposed as petitioner did not establish reasonable cause for for its failure to pay tax or its failure to obtain a certificate of authority.

We deal first with petitioner's exception to the conclusion that it was an interstate vendor. Petitioner argues that there was no finding of fact that it solicited sales during the audit period. Petitioner is correct as the Administrative Law Judge stated in a footnote to his conclusion of

law "B" that the issue of solicitation was never raised in this matter but he "assumed" that petitioner solicited sales. The Division did not respond to this point in its brief on exception, but at oral argument agreed with the substance of the footnote, to the extent it stated that solicitation was not an issue in the case. The Division stated that the theory of the case was that petitioner delivered merchandise in the State (Oral argument Tr., p. 16). The definition of interstate vendor in the regulation requires that the vendor has solicited business in the State and "soliciting business" is a defined term at 20 NYCRR 526.10(d). Because the parties and the Administrative Law Judge agree that solicitation was not an issue, we decline to decide whether petitioner was an interstate vendor within the meaning of the regulation. However, we affirm the Administrative Law Judge's determination that petitioner was a vendor, pursuant to section 1101(b)(8) of the Tax Law and 20 NYCRR former 526.10(a)(1)(i) because petitioner made sales of tangible personal property in the State. Petitioner has not excepted to this conclusion.

Next, we address petitioner's claim that imposition of the instant tax violates the Commerce Clause because petitioner did not have sufficient nexus with the State. In Matter of Vermont Information Processing v. Tax Appeals Tribunal (___ AD2d ___, 615 NYS2d 99) and Matter of Orvis Co. v. Tax Appeals Tribunal, ___ AD2d ___, 612 NYS2d 503), the Appellate Division, Third Department interpreted the Supreme Court decision in Quill Corp. v. North Dakota (supra) to require that a vendor have a substantial physical presence before liability for the use tax can be imposed. We conclude that petitioner satisfies this standard.

As the Administrative Law Judge noted, petitioner consummated a substantial amount of retail sales in New York. It is undisputed that petitioner delivered, using its own trucks and employees, over 1/2 of its larger items (those items costing more than $1,000.00) to its New York customers. According to information submitted by petitioner's representative, these sales totalled more than $700,000.00 out of the total of $1,343,151.72 for all New York sales. The sales tax is a transaction tax, i.e., liability for the tax accrues at the time of the transaction (Matter of D.J.H. Construction v. Chu, 145 AD2d 716, 535 NYS2d 249; see also, 20 NYCRR 525.2[a][2]). The sales tax is also, as noted by the Administrative Law Judge, a destination tax,

that is, the point of delivery or point at which possession is transferred by the vendor to the customer or his designee controls the incidence of tax and its rate (20 NYCRR 525.2[a][3]). Thus, a substantial portion of the assessment is based on taxable transactions in which petitioner participated in New York. In this respect, the instant facts are significantly different than those in Quill, Vermont Information Processing and Orvis which all concerned a vendor's responsibility for collecting the use tax, which is imposed on a transaction, the use of the property, to which the vendor is not a party. In our view, the fact that petitioner actually consummated a substantial number of sales in New York constitutes a substantial physical presence and creates a sufficient nexus to impose the taxes at issue.

In challenging the Administrative Law Judge's determination, petitioner relies principally on Miller Bros. Co. v. State of Maryland (347 US 340, reh denied 347 US 964) and argues that the Supreme Court concluded that Millers Brothers' delivery of merchandise in its own vehicles to customers in Maryland was not sufficient nexus to require Miller Brothers to collect Maryland's tax.

We are not certain the decision in Miller Brothers continues to have precedential value. Miller Brothers was decided under the Due Process Clause; discussion of the application of the Commerce Clause was explicitly withheld (Miller Bros. Co. v. State of Maryland, supra, at 347). Quill reversed the Supreme Court's earlier rulings to the extent that they held that the Due Process Clause required a physical presence in the State (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1910). However, even if Miller Bros. is still good law, we find the facts of Miller Bros. are different in one important regard from the facts before us. In Miller Bros., the vendor was a Delaware corporation which only sold directly to customers at its store in Delaware. It did not take orders for sales by mail or telephone. Customers came from Maryland to the store and made purchases (Miller Bros. v. State of Maryland, supra, at 341). Here, petitioner received all of the orders for New York sales by telephone. Therefore, the vendor in Miller Bros. only delivered merchandise in Maryland (see, Matter of National Geographic Socy. v. California Bd. of Equalization, 430 US 551, 559 [where the Supreme Court discusses this

aspect of Miller Bros.]) but petitioner delivered merchandise and at the same time completed sales in New York.

Next, petitioner argues that even if the items shipped by Monroe truck are subject to sales tax, the portion of sales that were not shipped by Monroe's trucks are not subject to tax. To the extent we understand petitioner's argument to be that its nexus with New York does not provide authority to New York to tax all of its New York sales, we disagree on the basis of the Supreme Court decision in Matter of National Geographic Socy. v. California Bd. of Equalization (supra). In National Geographic, the Court held that the maintenance of two offices in California by National Geographic created sufficient nexus to sustain California's imposition of use tax on National Geographic with respect to its mail order sales in the State, even though the offices performed no activities related to the mail order business. Accordingly, we conclude that the substantial physical presence of petitioner completing sales in New York creates a nexus with New York that is also sufficient to sustain the liability for use tax on those sales that were not delivered into New York by petitioner's trucks.

With respect to the penalties asserted, petitioner asserts that "[i]ts conduct of registering with the State and filing a change of address with the State indicates that there was was no willful neglect on the part of the petitioner and, therefore, the penalty should be waived" (Petitioner's brief on exception, p. 10). Petitioner's assertion that it had a reasonable belief that no taxes were owed is totally negated by the fact that petitioner collected some tax from its customers but did not remit the taxes to New York. As the Administrative Law Judge noted, petitioner was required to establish that its failures to pay tax and file a certificate of authority were based on reasonable cause and not due to willful neglect. We agree with the Administrative Law Judge's conclusions with respect to the penalties imposed and affirm for the reasons stated in his determination.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Monroe Distributing, Inc. is denied;

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

3. The petition of Monroe Distributing, Inc. is denied; and

4. The notices of determination and demand dated June 14, 1989 are sustained.

DATED: Troy, New York
October 6, 1994

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

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