

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

---

In the Matter of the Petition :

of :

**THE OHIO TABLE PAD CO., INC.** :

DECISION  
DTA NO. 815122

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 March 1, 1990 through February 28, 1995. :

---

Petitioner The Ohio Table Pad Co., Inc., 1915 Nebraska Avenue, P.O. Box 2843, Toledo, Ohio 43607-0843, filed an exception to the determination of the Administrative Law Judge issued on February 5, 1998. Petitioner appeared by Byrne, Costello & Pickard, P.C. (F. Scott Molnar, Esq., of counsel). The Division of Taxation appeared by Terrence M. Boyle, Esq. (Robert Tompkins, Esq., of counsel).

Petitioner filed a brief in support of its exception. The Division of Taxation filed a brief in opposition and petitioner filed a reply brief. Oral argument, at petitioner's request, was heard on October 27, 1998 in Troy, New York.

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

### ***ISSUES***

I. Whether there is sufficient nexus between petitioner and the State of New York such that New York may impose an obligation on petitioner to register as a vendor and collect sales and use taxes from its New York customers.

II. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and 20 NYCRR 526.10(a)(3) or (4) and, therefore, a person required to collect sales and use taxes under Articles 28 and 29 of the Tax Law on its mail order sales to customers in New York State.

***FINDINGS OF FACT***

We find the facts as determined by the Administrative Law Judge except for finding of fact “10” which has been modified. The Administrative Law Judge’s findings of fact and the modified finding of fact are set forth below.

Petitioner, Ohio Table Pad Co., Inc. (“OTPC”), is a manufacturer of furniture protective items including custom built table pads, storage packs for furniture, place mats, and expansions for card tables. OTPC’s products are sold through chain stores, department stores and individual businesses in the continental United States and Canada. It also sells directly to customers through a retail division.

OTPC’s home office and headquarters are located in Toledo, Ohio which is petitioner’s only state of incorporation. Petitioner has manufacturing plants in Lagrange, Indiana with 25 employees, Lawrenceville, Georgia with 20 employees and Carson City, Nevada with 5 employees. OTPC also has eight employees in the home office. In each of the foregoing states, petitioner is registered to do business, pays an annual registration fee, and files an annual tax return. No employees of OTPC reside in New York or carry out their duties on behalf of OTPC in New York.

In 1991, the Division of Taxation (“Division”) mailed to petitioner a form entitled “Northeastern States Tax Questionnaire”. The form asked petitioner to answer a series of questions regarding its activities in seven different jurisdictions including New York. In essence,

petitioner replied that it had no activity in New York State and that no one was representing it or selling for it in New York. Upon receipt of the questionnaire, no further action was taken by the Division.

About two years after the questionnaire was returned, the Division learned from the Internal Revenue Service that OTPC had issued Form 1099s to individuals with New York addresses.

In January 1994, following a telephone conversation with an employee of petitioner, the Division concluded that petitioner had sales representatives who were soliciting sales in New York and therefore it was required to register as a vendor. In accordance with this determination, the Division sent petitioner a sales tax registration application, sales tax returns, and a copy of the Division's regulations.

In a letter dated July 15, 1994, the Division advised petitioner that the sales tax registration application and sales tax returns had not been received. Petitioner was told that they should be completed and returned no later than August 1, 1994.

In a letter dated January 10, 1995, petitioner was advised that its failure to respond made it necessary to begin formal assessment proceedings. The letter further stated that the failure to respond within 30 days by submitting the requested information would result in the issuance of a statutory assessment followed by warrants and judgments. Thereafter, the Division issued a Notice of Determination, dated April 24, 1995, which assessed a penalty in the amount of \$10,000.00. The notice stated:

The penalties shown are being imposed pursuant to section 1145 of the New York State Sales and Use Tax Law for failure to register 20 days prior to taking possession of, or paying for, business assets and/or for operating a business while unregistered.

During the years in issue, OTPC maintained an association with individuals known as referral sources. At the hearing, OTPC presented the testimony of Gordon Webb as representative of individuals who operated as referral sources. Mr. Webb officially took over the account of OTPC during the year prior to the hearing. Before taking over the account, Mr. Webb assisted a Mr. Hourigan who was an OTPC referral source. As a result, Mr. Webb handled the OTPC account for five or six years prior to the hearing.

Mr. Webb regards himself as a furniture manufacturers' representative. In this capacity, he works for furniture companies to ensure that their product is properly displayed in stores. Mr. Webb simultaneously represents four different manufacturers: Hammary Furniture Company ("Hammary"), Moosehead Manufacturing Company ("Moosehead"), Woodline Production ("Woodline"), and OTPC. Hammary produces occasional tables, living room tables, entertainment centers and upholstery. Moosehead makes bedroom and dining room furniture and Woodline makes accessories, lazy Susans, and various items out of oak. OTPC ranks third as a source of income to Mr. Webb.

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

Although Mr. Webb did not consider himself to be an employee of OTPC and had only a verbal agreement with petitioner, his function on behalf of OTPC was to locate stores for OTPC to contact. In order to accomplish this task, Mr. Webb first determined whether a particular establishment was a proper store to sell OTPC products. This was dependent on whether the store sold dining room products and whether it sold table pads from another manufacturer. In order to interest a retailer in petitioner's products, Mr. Webb pointed out: that the company had been in business for a long period of time; that the product was of high quality; that the company stood behind the product; and that, if

there was a problem with the product, it was resolved. Many times a referral source would use a sample of petitioner's product to demonstrate the difference between petitioner's product and a competitor's product. Mr. Webb also tried to find out if the retailer had any problems with a competitor because the difficulty may provide an opportunity to attract a new customer. When Mr. Webb identified a potential referral, his next step was to alert petitioner to the store. This was accomplished by putting the retailers name on a form and sending it to petitioner.<sup>1</sup>

Once a store is identified, the additional activity is performed by petitioner. OTPC's national sales manager sends the retail outlet a formal proposal along with materials. The presentation, which OTPC regards as the heart and soul of its program, includes a sample table pad, charts with colors and accessory products and a four-color brochure. The order form has the plant addresses and a toll-free telephone number. None of the order forms or other documentation mention the referral sources. Referral sources are not asked to provide display materials. Nevertheless, on occasion, Mr. Webb delivers samples of OTPC products and some literature which includes a price schedule. The sales literature provided by the referral source is printed and supplied by petitioner. Even when Mr. Webb delivers a sample, petitioner will usually do the same.

When Mr. Webb visits a store that carries OTPC products, he checks on the location and condition of the display. In order to promote sales, the displays should be in a location where the sales people can use them. Mr. Webb also determines whether the display is worn. If the display is not in an acceptable condition, the referral source sends a form to OTPC which explains what samples and materials are needed. Mr. Webb discusses the displays on his own initiative, not because of instructions from OTPC. However, petitioner likes referral sources to bring to its

---

<sup>1</sup>We modified this finding of fact to better reflect the record.

attention problems with displays. Mr. Webb checks on displays with the other product lines, but with furniture it is more complicated because there are floor samples, backup stock and warehouses to examine. During the visits to the retailers who carry petitioner's products, Mr. Webb also asks whether they are encountering any problems.

Referral sources are not told to follow a specific program on how to pursue an account. Referral sources are not told to revisit stores, how to arrange displays, or to conduct in-store activities on behalf of OTPC. Referral sources never tell petitioner about unsuccessful calls.

The presentation mailed by OTPC must be comprehensive because petitioner's products are ancillary to large furniture programs. Consequently, for a store to "push" a product it has to be able to do it easily and quickly. As a result, OTPC makes its products as easy to use as possible.

Mr. Webb is able to identify stores for petitioner because he has been traveling the territory for over 20 years and is familiar with most of the stores. When Mr. Webb is at a store performing duties on behalf of Hammary or Moosehead, he also tries to establish a connection between the retailer and petitioner. It would be rare for Mr. Webb to visit a retail location strictly on behalf of petitioner. Consequently, Mr. Webb's ability to identify referrals and then refer them to OTPC is incidental to his activities as a representative for the other manufacturers. Some percentage of the stores that Mr. Webb visits in the course of a month do not carry petitioner's table pads. At the hearing, Mr. Webb was able to say only that this percentage was less than a majority.

After Mr. Webb's identification of a customer and OTPC's introduction of its products to that retailer, Mr. Webb does not: (1) negotiate or conclude price or terms of delivery on behalf of petitioner; (2) assemble purchase orders on behalf of petitioner; (3) distribute or deliver

petitioner's products; (4) handle customer service items following the sale; (5) have responsibility for collecting sales revenues for OTPC; (6) have contact with the ultimate purchaser of the product; or (7) have any role in connection with the sale of OTPC products. When OTPC receives an inquiry from a new retailer in New York, referral sources are not asked to follow up on the inquiry.

There are times when a problem will develop between OTPC and one of the furniture stores. When this occurs, the store will usually contact the factory. If the store contacts Mr. Webb about a problem, he will refer them to the factory. Mr. Webb does not follow up on whether the problem has been resolved because he knows that OTPC takes care of problems.

On one occasion, OTPC contacted Mr. Webb regarding the failure of a retailer to make a payment. In response, Mr. Webb asked the furniture dealer if there was a problem and then reminded the store that it should pay its bill. Usually, when an account does not pay, petitioner utilizes the services of a collection agency located in Columbus, Ohio.

Mr. Webb visits larger stores once a month and smaller stores two or three times a year. There are 30 to 40 stores that Mr. Webb sees once or twice a year. At least one-half of the larger stores carry OTPC products. Less than one-half of the retailers that Mr. Webb visits once or twice a year sell petitioner's products.

OTPC established the boundaries of Mr. Webb's territory. Outside of that territory there are other referral sources. Mr. Webb does not confer or coordinate his activities with referral sources in other territories. If contact with a retailer shows that there is a need for supplies, Mr. Webb advises OTPC. Otherwise, he does not tell OTPC which stores he visited. Mr. Webb's contacts with OTPC are by mail, electronic transmission, or telephone.

Mr. Webb receives a monthly commission on the sale of OTPC products at an average rate of six percent.<sup>2</sup> Petitioner sends Mr. Webb a monthly report that shows petitioner's sales and the commission due on the sales. As a result, Mr. Webb knows the amount of commission that he is owed. The commissions constitute approximately 3 percent to 5 percent of Mr. Webb's gross revenues for a year. Prior to taking over the account, Mr. Webb was compensated by the person he was helping. Mr. Webb's commission rate from Hammary is from 3 to 6 percent depending on the type of product sold. The commission rate from Moosehead is 6.6 percent.

It is OTPC's practice to provide commissions on all sales to furniture retailers in a referral source's territory including those from telemarketing companies. Therefore, the monthly statements which Mr. Webb receives from OTPC do not reflect the number of stores referred by Mr. Webb because it shows sales to furniture retailers whether or not Mr. Webb identified that furniture retailer as a referral in the first instance. If a retail customer orders a table pad directly, the sale is not included in the calculation of the referral source's compensation. A direct sale to a customer would result from a magazine mail order program. Mr. Webb accepts the monthly reports as accurate.

Mr. Webb's relationship with OTPC is based on a verbal understanding. If petitioner stopped paying a commission to Mr. Webb, he would probably sue it.

Petitioner's retail customers are homeowners. These customers learn of OTPC through advertising in national publications. Petitioner does not print and distribute catalogues through a

---

<sup>2</sup> Referral sources receive a seven percent commission on some accounts while they receive a commission of four percent on other accounts.



bulk mailing to prospective customers. It does not send employees or agents into the State of New York to solicit retail sales or conduct telephone solicitations to identify retail clients.

The principal magazines that OTPC advertises in are Good Housekeeping, Better Homes and Gardens and Southern Living. Petitioner also advertises in Colonial Homes, Country Homes, Country Living, Traditional Homes, Woman's Day, and Sunset Magazine. Petitioner does not advertise in any magazines or newspapers that are local to New York only.

If a retail customer in New York makes an inquiry, OTPC sends him or her a product information kit through the United States mail. The product information kit explains how to measure the customer's table and has information on pricing and colors. It may also have a promotional flyer which will modify the price structure during the promotional period.

OTPC processes orders when they are submitted by a customer. If needed, OTPC calls customers to check on dimensions. Petitioner's personnel do not enter New York to measure a customer's table or to provide customer service. Usually, customers make payment on credit cards. Once payment is made, the product is built and shipped to the customer by United Parcel Service.

In 1990, OTPC supplied 305 retail accounts in New York and in 1995 it supplied 278 retail accounts. The reason for the decline is that furniture stores are under an economic strain. Larger stores are dominating the market and the furniture market as a whole is declining.

Not all of OTPC's wholesale sales in New York stem from referral sources. Stores learn of OTPC's products by word of mouth or referrals. Some stores have had long-standing relationships. Because of its concern with the declining market, in 1994 petitioner utilized the services of a firm located in Toledo, Ohio, known as MGD Marketing, to conduct an extensive

telemarketing campaign. As a result of the efforts of the telemarketing firm, the number of accounts increased from 232 in 1993 to 278 in 1995. Petitioner's continued ability to have its products carried by retailers is due in large part to its telemarketing campaign.

During the course of his association with petitioner, Mr. Webb was able to refer approximately 12 to 18 stores to OTPC. During the period March 1, 1990 through February 28, 1995, Mr. McCartin, whose territory was the New York City metropolitan area, referred 12 stores to OTPC.

Both a retail and wholesale sale result from a purchase order being submitted to an out-of-state office. Orders are processed, billed and shipped from out-of-state offices. Orders are shipped by United Parcel Service, Roadway Package System, Inc., or United States Mail. Even in the case of wholesale sales, 70 percent of the sales are shipped directly to the consumer.

Mr. Webb does not work for companies that are related to petitioner.

Petitioner does not mail catalogues into New York. It does not deploy full-time personnel into New York to facilitate sales. Petitioner does not have a retail location in New York and does not direct employees to install products. It does not direct employees to travel to New York to provide post-sale customer service in New York. Petitioner does not need to send personnel into New York for any reason.

During the years in issue, petitioner's retail and wholesale sales in New York were as follows:

Wholesale	Retail	Total
-----------	--------	-------

1990	\$264,792.00	\$61,059.00 <sup>3</sup>	\$325,851.00
1991	226,438.00	81,589.00	308,027.00
1992	236,384.00	81,589.00	317,973.00
1993	187,836.00	78,151.00	265,987.00
1994	173,617.00	77,949.00	251,566.00
1995	204,133.00	72,642.00	276,775.00

During the year 1995, the amount of wholesale sales in New York and the corresponding sales commissions paid were as follows:

Referral Source	Wholesale Sales	Commission Paid
Versalie	\$46,563.00	\$2,700.00
Hourigan	69,200.00	4,844.00
McCartin	84,285.00	5,900.00

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

Relying on the Court of Appeals decision in *Matter of Orvis Co. v. Tax Appeals Tribunal* (86 NY2d 165, 630 NYS2d 680, ***cert denied*** 516 US 989, 133 L Ed 2d 426), the Administrative Law Judge held that petitioner was required to register as a vendor in New York. The Administrative Law Judge found that petitioner's referral sources were commissioned manufacturer's representatives whose activities exceeded the "slightest presence" test as set forth in *Orvis*, clearly demonstrating the conduct of economic activities in New York. In addition, the

---

<sup>3</sup> The amount of retail sales for 1990 and 1991 were obtained from petitioner's exhibit "10". Petitioner's exhibit "8" shows retail sales of \$34,279.00 for 1990 and \$62,771.00 for 1991. There is no explanation for the discrepancy in the record.

systematic visits to many stores which carried petitioner's products further supported the conclusion that petitioner had more than the "slightest presence" in New York.

The Administrative Law Judge found that petitioner's referral sources were acting as its representatives in their dealings with the stores. The Administrative Law Judge cited *Matter of Stainless, Inc.* (Tax Appeals Tribunal, April 1, 1993) in support of his finding that petitioner's representatives were "soliciting" orders on behalf of petitioner, noting that solicitation included the entire process associated with the invitation of orders, including all activities ancillary to requesting purchases, provided the activities did not serve an independent business function distinct from their connection to the solicitation of orders (*citing Wisconsin Dept. of Revenue v. Wrigley Co.*, 505 US 214, 120 L Ed 2d 174). The Administrative Law Judge also found that the referral sources were instrumental in finding new vendors for petitioner's products and then maintaining those relationships. For these reasons, the Administrative Law Judge found that petitioner was soliciting business in New York, consistent with the definition in *Stainless*, and was obligated to collect and remit tax as a vendor (Tax Law § 1101[b][8][i][C] and 20 NYCRR 526.10[a][3]).

#### ***ARGUMENTS ON EXCEPTION***

Petitioner raises the same arguments on exception that it raised below. First, it contends that it is not obligated to register as a vendor in New York because its activities in New York State are not "demonstrably" greater than the "slightest presence," as derived from the constitutional analysis found in the *Orvis* case. The key to petitioner's argument is its interpretation of what constitutes "slightest presence" in light of the Court of Appeals' provision that it could be the mere "presence in the taxing State of the vendor's property or the conduct of

economic activities in the taxing State performed by the vendor's personnel or on its behalf" (*Matter of Orvis Co. v. Tax Appeals Tribunal, supra*, 630 NYS2d, at 687). Petitioner compared the incidents of nexus in *Orvis* with those in the instant matter and concluded that it did not meet the "slightest presence" test and, therefore, was not obligated to register as a vendor.

In addition, petitioner contended that our decision in *Matter of Stainless, Inc. (supra)* required a representative capacity for there to be a determination of solicitation, and that such representative capacity was lacking from the facts of this matter. Petitioner believed that a determination of whether it "solicits" business in New York is important to the analysis of whether its activities in New York rise to the level of demonstrating a slightest presence in the State. Based on the facts in *Stainless*, petitioner concluded that it cannot be held to have solicited business in New York.

Finally, petitioner maintains that the Division, through various Opinions of Counsel, has adopted its interpretation of the *Orvis* standard with regard to slightest presence. These opinions included such factors as hiring a New York entity to provide promotional and publishing services and to direct mail products to customers. One opinion did not find the requisite presence where the out-of-state vendor demonstrated products at trade shows in New York.

The Division argues that petitioner incorrectly applied *Orvis* because the facts of each case will drive the result of the test set forth therein, i.e., that the presence be demonstrably more than merely the slightest presence. Given the facts herein, the Division believes the Administrative Law Judge's analysis was correct and petitioner's activities constituted more than a slight presence. Further, the Division contends that petitioner's activities in New York constituted

solicitation within the meaning and intent of Tax Law § 1101(b)(8)(i)(C)(I) and, therefore, was obligated to file a certificate of registration as a vendor

### ***OPINION***

We affirm the determination of the Administrative Law Judge.

From the facts presented, we believe petitioner's activities in New York constituted more than the "slightest presence." The Court of Appeals was clear in its rationale in ***Orvis***:

We think the foregoing survey of the decisional law discloses the true import of the physical presence requirement within the substantial nexus prong of the ***Complete Auto*** [***Complete Auto Transit v. Brady***, 430 US 274, 51 L Ed 2d 326] test under contemporary Commerce Clause analysis. While a physical presence of the vendor is required, it need not be substantial. Rather, it must be demonstrably more than a "slightest presence" (see, ***National Geographic Socy. v. California Bd. of Equalization***, 430 US 551, 51 L Ed 2d 631). And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf (***Matter of Orvis Co. v Tax Appeals Tribunal, supra***, 630 NYS2d, at 686-687).

Petitioner paid independent contractors to seek out, solicit and maintain business on its behalf in consideration of a specific monthly commission on all sales of petitioner's products in the independent contractor's territory and additional sales resulting from telemarketing. Although not explicitly set forth in a contract, the independent contractor's income was inextricably linked with its ability to find and maintain accounts. Although petitioner attempts to distinguish the salesmen's efforts as mere bird dogging, it was far more than identifying names of potential retail vendors. As set forth in the facts, finding and maintaining accounts was accomplished by repeated visits to potential and current retailers, constant marketing of the

product, inspection of displays, inquiring about problems with the product and specific comparison of petitioner's product with those of competitors. In our view, maintaining a battery of independent contractors in New York, all performing the activities mentioned above, met the requirement for "slightest presence" set forth in *Orvis*. Further, without a doubt, these activities constitute speech or conduct that implicitly invites an order and is, therefore, solicitation (*see, Matter of Stainless, Inc., supra* [wherein we adopted the flexible and practical meaning of solicitation from the United States Supreme Court in *Wisconsin Dept. of Rev. v. Wrigley Co. (supra)* which held that any speech or conduct which implicitly invites an order constitutes solicitation, as in the instance where a salesman extols the virtues of his company's product to the retailer of a competitive brand]).

Based on these facts, petitioner is a "vendor" as that term is defined in Tax Law § 1101(b)(8)(i)(C)(I), soliciting business through the use of independent contractors (*see also*, 20 NYCRR 526.10[a][3] and 526.10[a][4][i], [ii]). Therefore, the Division of Taxation was correct in requiring petitioner to file a certificate of registration (Tax Law § 1134[a][1][i]). Further, as a vendor of tangible personal property in New York State, petitioner is required to collect sales and use tax on sales to persons within the State (Tax Law § 1131[1]).

Petitioner's argument that the referral sources do less than the contracted direct mail services is without merit (*see*, TSB-M-96[3]C/[10]S). Petitioner's arrangement with its independent contractors provided a personal representative who met with potential accounts. These representatives, whose activities on behalf of petitioner are well documented above, were clearly more of a presence than direct mail companies that provided promotion and publishing services to out-of-state vendors which, in fact, was stated in the Opinion of Counsel. Likewise,

petitioner's citation to TSB-A-96(83)S and TSB-A-96(62)S is not on point. The demonstration of products at trade shows cannot be compared with the personal interaction and solicitation of petitioner's referral sources. In fact, both advisory opinions directly stated that one of the factors weighing in that petitioner's favor was that it had no independent contractors in the State soliciting sales.

We have reviewed the remaining arguments raised by petitioner on exception and find them to be the same as those raised before the Administrative Law Judge. Since the Administrative Law Judge fully and correctly analyzed and determined those arguments, we affirm for the reasons set forth in his determination.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of The Ohio Table Pad Co., Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of The Ohio Table Pad Co., Inc. is denied; and
4. The Notice of Determination, dated April 24, 1995, is sustained.

DATED: Troy, New York  
April 22, 1999

/s/Donald C. DeWitt

Donald C. DeWitt  
President

/s/Carroll R. Jenkins

Carroll R. Jenkins  
Commissioner

/s/Joseph W. Pinto, Jr.

Joseph W. Pinto, Jr.  
Commissioner