STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	DECISION DTA NO. 820885
J. C. NEWMAN CIGAR COMPANY	:	
for Revision of a Determination or for Refund of Cigarette Tax under Article 20 of the Tax Law for the Period May 1, 2000 through April 30, 2003.	:	

Petitioner, J.C. Newman Cigar Company, filed an exception to the determination of the Administrative Law Judge issued on September 27, 2007. Petitioner appeared by Helms & Greene, LLC (James J. Mahon, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Michele W. Milavec, Esq., of counsel).

Petitioner filed a brief in support of its exception and a reply brief. The Division of Taxation filed a brief in opposition. Oral argument, at petitioner's request, was heard on May 14, 2008 in Troy, New York.

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

ISSUES

I. Whether the connection between petitioner and the State of New York was such that under the Commerce Clause of the United States Constitution, New York may require petitioner to register as a distributor of tobacco products and to pay tobacco products tax.

II. Whether petitioner has established that the audit methodology was erroneous or that the amount of tax determined to be due was incorrect.

III. Whether a penalty imposed pursuant to Tax Law § 481 was properly imposed.

FINDINGS OF FACT

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

Petitioner, J.C. Newman Cigar Company, is a firm that manufactured cigars at its facility in Tampa, Florida. In addition to manufacturing cigars, it also imported cigars from various countries such as the Dominican Republic, Honduras and Nicaragua for sale to customers in the United States. Petitioner did not have any offices other than its main office, which was located in Tampa, Florida.

Petitioner sold tobacco products to customers in New York State and arranged for their transportation. Petitioner shipped tobacco products to customers in New York through a common carrier or by a freight line truck if a large quantity of products was going to the same location. A portion of the tobacco products was sold cash on delivery. Petitioner's salesman did not make deliveries of products. During the same period, petitioner filed New York State sales and use tax returns. Petitioner is not registered in New York State as a distributor or wholesaler of tobacco products and did not file tobacco products tax returns in New York State during the periods in issue.

Manufacturing cigars is a very calculated and time-consuming process. Petitioner utilizes the services of a number of different departments in the production of cigars. In addition to the departments engaged in the production of cigars, petitioner has a returns department, a receiving department and a shipping department. In the office, petitioner has an accounts receivable department, a sales department and departments involving human resources, marketing, graphics design and accounting.

Petitioner retains almost every record that is produced including invoices, packing slips and accounting records. In addition to keeping shipping records, petitioner has the daily sales logs, accounts receivable records, daily receipts journals and ledgers. The papers are kept for at least seven years in a space that has numerous rows of paperwork. In 2001, these records were in existence for 2000.

In order to promote the sale of its cigars, petitioner mails catalogs or informational brochures from its home office in Tampa, Florida. It also sends out promotions or specials.

Petitioner employs nine people in its in-house sales department. Their duties consist of answering incoming sales calls over the telephone, discussing products and determining if petitioner has the product on the site. They also process orders through the system until the order goes to shipping.

Petitioner also employs a sales force of approximately 17 people who go into the field to educate customers and promote products. Petitioner's sales strategy is to use brochures and then follow up with a name and face to talk about the product.

Petitioner sells to tobacconists, tobacco outlets, chain stores and certain pharmacy chains. It does not sell directly to individuals.

During the period in issue, petitioner employed a salesperson whose territory consisted of New York and portions of New Jersey and North Carolina. Petitioner filed New York State withholding tax returns and paid New York State withholding tax on this employee. The salesperson visited existing accounts in his designated sales territory from once every six weeks to once every four months depending on the location and needs of the customer.

When petitioner's salesperson visited existing accounts, he could take a customer's order for tobacco products. Alternatively, the customer could place the order directly with petitioner at

its office in Florida. Petitioner's salespersons solicited new accounts on petitioner's behalf and visited the location of prospective customers to make sure that there was a humidor and a proper place to store the inventory.

If petitioner was trying to sell a new product or item it would, from time to time, send samples of the new product to its salespeople. During the period in issue, petitioner's salesperson in New York was Karl Herzog and samples of tobacco products were shipped to Mr. Herzog at 12 Gainsborough Road, Holbrook, New York 11741. Petitioner's salesman used the samples to show to petitioner's customers. The salesperson did not give samples to a customer.

Every new salesman is given a strict policy statement that sets specific limits on the salesman's role within the company. The outside sales force may not maintain an office; may not use their homes as a business address or reference on a business card, store inventory or maintain company property. The official business address of each salesman is the office in Tampa, Florida. The outside sales force is not involved in collecting delinquent accounts, does not make any decisions on credit and is not authorized to accept the return of a product.

In order to establish a customer account with petitioner, the prospective customer is required to complete a credit application with the accounts receivable department. The application asks for, among other things, the name, address, contact information and trade information in order to obtain references. The accounts receivable department also asks for a copy of a sales tax certificate and tobacco license.

Petitioner will not sell cigars until a customer establishes that it is licensed to sell cigars as well as to import them. Petitioner also requires a salesman to visit the location because petitioner prefers its product to be in select stores.

Petitioner has a strict policy on credit, which is handled by petitioner's accounts receivable department. All customers are subject to the same policies.

The decision to discontinue a product is made in the Tampa office. The decision involves petitioner's stopping production of the product or not bringing the product in from the Dominican Republic or another country.

In or about April 2001, the Division of Taxation ("Division") commenced a tobacco tax audit of petitioner for the period May 1, 2000 through April 30, 2003. Petitioner was selected for an audit in order to determine if it should be registered as a distributor of tobacco products. The auditors sent an appointment letter, which listed the books and records that the Division wanted to review, and petitioner responded that it did not think that New York State had the jurisdiction to review the books and records. After exchanging correspondence, the Division was told that it would be given limited access to books and records, and the Division arranged a visit to petitioner's facility in Tampa, Florida.

Prior to the audit, it was petitioner's understanding that the Division was going to be conducting a sales tax audit. When the first meeting took place, it seemed to petitioner that the Division had shifted gears and that it was examining tobacco tax.

During the initial visit to petitioner's location in Tampa, the Division was given pick tickets[1] and shipping records for February and March 2001. The Division reviewed these documents in order to determine the customer base, the method of shipment and whether the New York customers to whom petitioner shipped its tobacco products were registered in New

[1] A pick ticket will differ from an invoice in that the pick ticket will have the bin location so the person packing the box will know where to find the item. An invoice may not have that information. A pick ticket will usually accompany the product, whereas the invoice is actually mailed to the customer and has the best mailing address. Petitioner retains a copy of the pick ticket as well as the invoice.

York as distributors of tobacco products. Based on the documents provided, the Division developed a list of the customers in New York that it believed were not registered as distributors of tobacco products, and the tobacco products tax due on the tobacco products that were sold by petitioner to the purportedly unregistered customers in New York.

The Division returned to petitioner's headquarters in Tampa, Florida in June 2003 in order to complete the audit. At this time, petitioner provided the Division with greater access to the books and records it requested including a list of petitioner's customers in New York State as of June 20, 2003, accounts receivable information and other pick tickets.[2] The Division created a complete listing of all of the customers in New York to whom petitioner sold tobacco products during the audit period, based upon documentation provided to the Division by petitioner including: the New York customer list provided by petitioner, New York customers determined during the initial audit visit in April of 2001 from pick tickets and invoices for the period February 1, 2001 through March 31, 2001, and New York customers that might have been on the accounts receivable lists that were not on the New York customer list provided by petitioner.

The Division used database information for New York State tobacco products tax registration as a wholesaler or distributor of tobacco products to determine if petitioner's customers in New York State were validly registered as tobacco products distributors in New York State for the period in issue. The Division also reviewed additional documentation provided by petitioner to prove the registration status of its New York customers including Certificates of Registration for Cigarettes and Tobacco Products; Appointments of Distributors of Tobacco Products; Licenses of Wholesale Dealers of Tobacco Products; Sales Tax Certificates of Authority; Blanket Certificates of Resale; Certificates of Individual Exemptions from Sales

[2] Source records were unavailable for the period May 1, 2000 through December 31, 2000.

and Excise Taxes on Property or Services Delivered on a Reservation; Permits for Manufacturers of Tobacco Products; Business Licenses and Accounts Receivable information. The Division incorporated this information into a listing of all of the customers in New York State to whom petitioner sold tobacco products during the period in issue.

After the Division attempted to determine which of petitioner's New York customers were not validly registered as New York State distributors of tobacco products during the period in issue, the Division requested account histories from petitioner for those customers that the Division considered to be unregistered. Petitioner responded that the account histories were not available for the year 2000 due to problems with the computer system. Consequently, account histories were not provided to the Division for the period May 1, 2000 through December 31, 2000.

The Division issued a Statement of Proposed Audit Adjustment, dated June 21, 2004, which explained that sales and use taxes were due for the period May 1, 2000 through April 30, 2003 in the amount of $37,581.68, plus penalty and interest, for a balance due of $54,705.90. In order to calculate the amount of tax due for the audit period, the Division computed petitioner's tobacco tax liability using the available account histories for the period January 1, 2001 through April 30, 2003 to determine that taxable tobacco product sales to unregistered New York customers totaled $118,234.65 and that the average monthly sales were $4,222.67. The amount of tax asserted to be due was based upon the application of the average monthly sales to the period where account histories were unavailable and to the subsequent period where they were available. An accompanying letter explained that the Division determined that petitioner was required to register as a distributor of tobacco products.

The Division issued a Notice of Determination, dated November 4, 2004 (Notice # L-024694507) to petitioner assessing sales and use tax in the amount of $37,581.68 plus penalty and interest for the period May 1, 2000 through April 30, 2003.

At the hearing in this matter, petitioner offered additional documents into evidence that were not provided to the Division prior to the issuance of the Notice of Determination. Following the hearing, the Division examined the exhibits that petitioner entered into evidence and based upon this additional documentation, the Division determined that petitioner's New York customers, 100 St. Paul Street, Inc. d/b/a World Wide News and Richard J. Krantz, Jr. and William Krantz d/b/a Little Havana Trading Company were validly registered as distributors of tobacco products in New York State during the period in issue. Thereafter, the Division recalculated the total taxable invoice amount of tobacco products sold by petitioner to customers in New York for the period January 1, 2001 through April 30, 2003 by removing the invoice amounts for sales by petitioner to 100 St. Paul Street, Inc. d/b/a World Wide News and Richard J. Krantz, Jr. and William Krantz d/b/a Little Havana Trading Company. Based on the testimony given at the hearing, additional documentation provided at the hearing and the recalculations performed by the Division's auditor, the Division waived the portion of the tobacco tax assessment relating to the May 1, 2000 through December 31, 2000 for which no account histories showing taxable invoice amounts of sales of tobacco products from petitioner to its unregistered New York customers were used in calculating the tobacco products tax due. The Division calculated the revised tobacco products tax due from petitioner, which only assessed tax for the period January 1, 2001 through April 30, 2003, to be $29,893.10 plus penalty and interest.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

The Administrative Law Judge determined that petitioner's systematic visits to customers in New York during the audit period represented a sufficient presence in the state to satisfy the requirements of the Commerce Clause of the United States Constitution as interpreted in the opinions of the Supreme Court of the United States and the opinion of the New York Court of Appeals in ***Matter of Orvis, infra***. The Administrative Law Judge also sustained the audit methodology employed by the Division, subject to certain adjustments, since petitioner failed to demonstrate that the method was unreasonable or that the resulting amount of tax was erroneous. Finally, it was determined that the imposition of a penalty should be sustained since it was not established that the failure to file a return and pay tax was due to reasonable cause and not willful neglect.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues that its activities in New York were insufficient to meet the requirements of the Commerce Clause. In addition, petitioner asserts that its books and records were complete and demonstrate that its customers were registered vendors that paid the tobacco taxes required by law. Accordingly, petitioner argues that the Division's method of auditing and calculating the tax due was arbitrary and capricious and should be disallowed.

In opposition, the Division argues that petitioner's activities in New York were sufficient to satisfy the Constitutional standard and that the Division therefore had the authority to require petitioner to register as a distributor of tobacco products and to pay the tobacco products tax.

OPINION

Article 20 of the New York Tax Law imposes a tax on tobacco products, including cigars. The statute reads in relevant part as follows:

> 1. There is hereby imposed and shall be paid a tax on all tobacco products possessed in this state by any person for sale . . . . Such tax on tobacco products shall be at the rate of thirty-seven percent of the wholesale price, and is intended to be imposed only once upon the sale of any tobacco products. It shall be presumed that all tobacco products within the state are subject to tax until the contrary is established, and the burden of proof that any tobacco products are not taxable hereunder shall be upon the person in possession thereof.
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> 2. The distributor shall be liable for the payment of the tax on tobacco products which he imports or causes to be imported into the state . . . .
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> 3. Every dealer shall be liable for the tax on all tobacco products in his possession at any time, upon which tax has not been paid or assumed by a distributor appointed by the commissioner of taxation and finance, and the failure of any dealer to produce and exhibit to the commissioner of taxation and finance or his authorized representative upon demand, an invoice by a distributor or licensed wholesale dealer for any tobacco products in his possession shall be presumptive evidence that the tax thereon has not been paid, and that such dealer is liable for the tax thereon unless evidence of such invoice, payment or assumption shall later be produced (Tax Law § 471-b).

"Distributor" is defined to include any person who imports or causes to be imported into the state any tobacco products for sale (***see***, Tax Law § 470.12; 20 NYCRR 89.2[c][1]). "Dealer" is defined to include any person who sells tobacco products in New York State to retail dealers or other persons for purposes of resale (***see***, Tax Law § 470.7, .8; 20 NYCRR 89.2[d]).

While this tax functions much like the sales tax imposed by Article 28 in that it applies only once as goods move from manufacturer to wholesaler to retailer to consumer and is expected to be borne by the ultimate purchaser, there is no blanket sale-for-resale exemption (***see***, Tax Law §§ 1101[a][4][i][A], 1105[b][1], [b][2], [c]). It is thus not sufficient for the wholesaler to demonstrate that the goods were sold to retailers. The wholesaler that fails to collect the tax in effect becomes an insurer of the regulatory compliance of its customers. Consistent with this principle, petitioner was given credit in the audit and at the hearing for sales that were documented to have been made to licensed dealers (***see,*** Division's Exhibits K, L, and M). As to

the remaining customers, it seems clear that petitioner failed to carry the burden of proof expressly imposed on it by the statute quoted above. There is also no suggestion in the record that petitioner resorted to any of the procedural methods that might have produced additional information on this subject, including requests for admissions, subpoenas, or freedom of information requests. Instead, petitioner asserts that the audit methods of the Division were arbitrary because the auditor did not undertake to find exculpatory information to support petitioner's case. We do not believe that the auditors have such a duty under the law.

The Commerce Clause of the United States Constitution (Article I, § 8, cl. 3) states:

"The Congress shall have the Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Under the legal doctrine generally referred to as the "dormant" Commerce Clause, the states may not trespass on this power even in areas where the Congress has not chosen to exercise it. The proscribed interference with the Congressional power may take the form of direct regulation or the imposition of state taxes on interstate commerce. While the scope of the limits on state taxation has developed through various competing interpretations, the modern articulation of the Commerce Clause limitation on state taxation is found in the opinion of the Supreme Court of the United States in ***Complete Auto Transit v. Brady***, 430 US 274 (1977). In that case, the Court concluded that the imposition of a sales tax on transactions in interstate commerce was permissible where (i) the activity taxed had a sufficient nexus with the state, (ii) the tax did not discriminate against interstate commerce, (iii) the tax was not unfairly apportioned, and (iv) the tax was not unrelated to the services provided by the state.

In ***Felt & Tarrant Mfg. Co. v. Gallagher***, 306 US 62 (1939), the Supreme Court held that the Commerce Clause did not prohibit the state of California from requiring an out-of-state seller

of comptometers to collect use tax from California purchasers where the seller solicited sales through full-time commission agents located in California. In ***General Trading Co. v. Tax Commn.***, 322 US 335 (1944), the Court rejected a Commerce Clause challenge to a similar Iowa tax where orders were solicited by traveling salesmen who were sent to Iowa from the seller's Minnesota headquarters. In ***Scripto, Inc. v. Carson***, 362 US 207 (1960), the Court reached the same conclusion where the sales were solicited by 10 independent commission brokers. ***General Trading*** was distinguished by the Court in sustaining a Constitutional challenge to a similar tax where there was no solicitation in the taxing state except by advertising and the goods were sold at an out-of-state store but delivered on the retailer's trucks to customers in the taxing state (***Miller Bros. Co. v. Maryland***, 347 US 340 [1954]). Although these cases were decided under legal principles that preceded the analytical framework established in ***Complete Auto Transit***, there is no reason to think that they would be decided differently today with respect to the first prong of the ***Complete Auto*** test. They were relied on by the Court one month after Complete Auto for the proposition that the "requisite nexus . . . [can] be shown when the out-of-state sales were arranged by the seller's local agents working in the taxing State" (***National Geographic Socy. v. California Bd.,*** 430 US 551, 556-557 [1977]). Their continuing vitality was also confirmed in ***Quill***, ***infra,*** 504 US, at 315.

In ***National Bellas Hess v. Department of Revenue***, 386 US 753 (1967), the Court found a tax to be unconstitutional under the Commerce Clause and the Due Process Clause where there were no sales representatives within the taxing state and solicitation occurred through semiannual mail order catalogues and delivery was accomplished through the mail or common carriers. In ***Quill Corp. v. North Dakota***, 504 US 298 (1992), the Court reached the same conclusion based solely on the Commerce Clause. The Court stated in part as follows:

> Like other bright-line tests, the *Bellas Hess* rule appears artificial at its edges: 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. Cf. *National Geographic Society v. California Bd. of Equalization*, 430 U.S. 551 (1977); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960). This artificiality, however, is more than offset by the benefits of a clear rule . . . .
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> In sum, although in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement, our reasoning in those cases does not compel that we now reject the rule that *Bellas Hess* established in the area of sales and use taxes. To the contrary, the continuing value of a bright-line rule in this area and the doctrine and principles of *stare decisis* indicate that the *Bellas Hess* rule remains good law (504 U.S., at 315-317).

In ***Matter of Orvis Co. v. Tax Appeals Tribunal***, 86 NY2d 165 (1995), the New York Court of Appeals set forth a detailed analysis of the United States Supreme Court decisions discussing nexus and concluded that in order to impose tax without contravening the Commerce Clause, the taxpayer's activities in New York had to be more than the "slightest presence." Specifically, the court stated as follows:

> [N]either in *Bellas Hess* nor in the cases preceding it, or succeeding it up to *Quill* did the Court express any insistence that the physical presence of the interstate vendor be substantial for a valid taxation of sales of or imposition of a use tax collection duty upon the vendor . . . . Surely as a matter of simple logic and semantics, the Supreme Court was not applying a *substantial* physical presence requirement when it upheld the State tax on the in-State activity of the interstate vendor in the following cases: *Felt & Tarrant Co. v. Gallagher* (two nonemployee, commissioned sales solicitors); *Scripto v. Carson* (10 part-time, nonemployee, nonexclusive, commissioned sales brokers); *Standard Steel Co. v. Washington Revenue Dept.*(one engineer-consultant operating an office out of his home); *Goldberg v. Sweet* (an interstate long-distance telephone carrier's billing to an in-State service address for calls originating or terminating in the taxing State).
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> 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* 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*). 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 (86 N.Y.2d, at 175-178 [citations omitted]).

In ***Orvis*** and its companion case ***Matter of Vermont Info. Processing v. Tax Appeals Tribunal*** (206 AD2d 764 [1994], ***revd Matter of Orvis Co. v. Tax Appeals Tribunal***, 86 NY2d 165 [1995], ***cert denied*** 516 US 989 [1995]), the Court of Appeals found that the physical presence requirement was satisfied, respectively, by visits averaging four times per year to as many as 19 New York retailers by Orvis salesmen who resided in Vermont and by 41 "trouble-shooting" visits by computer technicians over a three year period.

In ***Matter of Ohio Table Pad Co.***, Tax Appeals Tribunal, April 22, 1999, we held that the Constitutional standard had been met where an out-of-state manufacturer engaged independent nonexclusive in-state representatives on a commission basis to seek out and maintain business through repeated visits to potential and current retailers to market products, inspect retail displays and inquire about problems with the products. Each store was visited several times a year and some as frequently as monthly.

Petitioner relies on the "carefully limited role" of its sales representative as described in the J.C. Newman Company Policy Statement (Petitioner's Exhibit 1) (***see***, Petitioner's brief in support, tenth unnumbered page). This policy statement seems to represent a kind of self-certification of compliance with Public Law 86-272, 15 USC §§ 381-384, which, if satisfied, would prohibit the imposition of a net income tax on petitioner. Since the tax at issue here is not a "tax imposed on, or measured by, net income" within the meaning of that Federal statute, it has no application. The Supreme Court cases discussed above make clear that the activities of a

nonresident taxpayer can provide the required Constitutional presence in the state even if they are strictly limited to solicitation.

Petitioner also relies on ***Dell Catalog Sales v. Commissioner***, 48 Conn Supp 170, 830 A2d 812 (2003) and ***In re Intercard, Inc.***, 270 Kan 346, 14 P3d 1111 (2000). In ***Dell***, the plaintiff was engaged in a national mail order business selling computers that were delivered to customers located in Connecticut by common carriers and the mail. The seller did not provide warranties of the computer but provided its customers with the opportunity to enter into a service contract with an unrelated computer repair company that operated in Connecticut. While it appeared that the computer seller acted as an agent for the service company in marketing the service contracts, Judge Aronson concluded that the service company was not an agent for the computer seller. The in-state activities of the service company were accordingly not attributed to the computer seller for the purposes of establishing a presence within the state under theory of ***Scripto v. Carson, supra.*** By contrast, it is clear from the record in the present case that petitioner had an employee engaged as its agent in solicitation of customers on a regular basis.

In ***Intercard***, the Supreme Court of Kansas held that the nexus requirement of the Commerce Clause was not satisfied in the case of a manufacturer of data cards and card readers for use in purchasing photocopies where the only in-state activity was the installation of the card readers in a customer's retail shops, which occurred 11 times during three months within a four-year audit period. The court rejected the standard applied by the New York Court of Appeals in ***Orvis***, stating, "We believe that the *Orvis* court missed the point that the Supreme Court was making about National Geographic's presence, *i.e.,* that it had a 'much more substantial presence than a "slightest presence"' in the taxing state" (270 Kan, at 358). The court then cited with approval as "adopt[ing] a standard more consistent with *Quill*" the decision of the Supreme

Court of Florida in ***Florida Dept. of Revenue v. Share Intl.***, 676 So2d 1362 (Fla 1996), which held that conducting an in-state seminar for three days each year, at which products were displayed and sold was insufficient to establish nexus. The Kansas court also relied on the following statement of the Supreme Court of the United States, quoting the Washington Supreme Court, in ***Tyler Pipe Indus. v. Department of Revenue***, 483 US 232, at 250 (1987): "[T]he crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales."

Petitioner's reliance on ***Intercard*** presents two difficulties. First, while the Supreme Court of Kansas is free to reject the legal interpretations of the New York Court of Appeals, we are not. If it is true that ***Orvis*** sets a lower bar for finding nexus than that applied by the courts of other states, we must nevertheless apply the New York standard. It is not at all clear, however, that the Court of Appeals has prescribed a lower standard. In ***National Geographic***, the Supreme Court of California stated the following rule:

> Where an out-of-state seller conducts a substantial mail order business with residents of a state imposing a use tax on such purchasers and the seller's connection with the taxing state is not exclusively by means of the instruments of interstate commerce, the slightest presence within such taxing state independent of any connection through interstate commerce will permit the state constitutionally to impose on the seller the duty of collecting the use tax from such mail order purchasers and the liability for failure to do so (16 Cal. 3d 637, at 644 [1976][underscoring added]).

The Supreme Court of the United States rejected this standard stating as follows:

> Our affirmance of the California Supreme Court is not to be understood as implying agreement with that court's "slightest presence" standard of constitutional nexus. Appellant's maintenance of two offices in the State and solicitation by employees assigned to those offices of advertising copy in the range of $1 million annually . . . establish a much

> more substantial presence than the expression "slightest presence" connotes (430 U.S., at 556 [underscoring added]).

There is no reason to think that the Court of Appeals intended something different by the phrase "demonstrably more" in ***Orvis***. In that case and ***Vermont Info. Processing***, the facts involved numerous employee visits to the state in contrast to the much lower level of activities involved in ***Intercard*** and ***Share Intl.***

In the present case, petitioner had many customers in New York that were visited by its resident employee at intervals ranging from six weeks to four months. Petitioner has cited no case, and we have found none, in which such regular and extensive in-state marketing efforts were held to fall below the minimum contacts required for taxation under the Commerce Clause.

Second, to the extent that the Kansas court relied on a finding that the taxpayer's installation activities were not significantly associated with establishing and maintaining a market under the theory of ***Tyler Pipe***, it is inapposite here where petitioner's in-state solicitation was an important tool for establishing and maintaining a New York market for its cigars.

With respect to the imposition of penalties, we find that petitioner has not established that the failure to file a return and pay the tax due was due to reasonable cause and not due to willful neglect.

Accordingly, it is ORDERED, ADJUDGED, and DECREED that:

1. The exception of J.C. Newman Cigar Company is denied;

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

3. The petition of J.C. Newman Cigar Company is denied; and

4. The Notice of Determination dated November 4, 2004, as modified by Finding of Fact "25" of the Administrative Law Judge's determination, is sustained.

DATED:Troy, New York
November 6, 2008

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner

/s/ Robert J. McDermott
Robert J. McDermott
Commissioner