STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ORVIS, INC.	:	DETERMINATION DTA NO. 805391
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, 1977 through August 31, 1980.	:	

Petitioner, Orvis, Inc.,[1] 10 River Road, Manchester, Vermont 05254, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through August 31, 1980.

A hearing was held before Frank W. Barrie, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on November 20, 1990 at 9:15 A.M., with all briefs to be submitted by April 16, 1991. Petitioner's brief was filed on January 25, 1991. The Division of Taxation's answering brief was filed on March 15, 1991, and petitioner's reply brief on April 16, 1991. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau, Esq., Mark S. Klein, Esq., and Robert D. Plattner, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

[1]During the period at issue, petitioner, which operates a mail order business, was known as The Orvis Company, Inc.

ISSUES

I. Whether it is impossible for petitioner to obtain a fair hearing by an impartial administrative law judge in the Division of Tax Appeals because Andrew Marchese, the supervising administrative law judge, was involved in the issuance of an advisory opinion adverse to petitioner and John P. Dugan, the president of the Tax Appeals Tribunal, and Francis R. Koenig, a Commissioner on the Tribunal, in their former positions of Deputy Commissioner and Counsel of the Department of Taxation and Finance and of Commissioner on the State Tax Commission, respectively, may have unfavorable opinions concerning the relief sought by petitioner because of prior involvement in the issuance of the adverse advisory opinion and/or settlement negotiations.

II. Whether the Division of Taxation introduced adequate proof to show that the statutory notice was properly mailed to petitioner.

III. Whether the Division of Tax Appeals lacks jurisdiction to consider the underlying issues because the statutory notice utilized an incorrect street address for petitioner, an incorrect name for the mail order business, and an incorrect Federal employer identification number.

IV. Whether the Administrative Law Judge's refusal to rule upon petitioner's motion which asserted the alleged jurisdictional defect noted in Issue III, supra, prior to the commencement of the hearing violated petitioner's constitutional due process rights, and as a result the hearing was improperly held.

V. Whether the Division of Taxation should be defaulted because its answer was filed more than 60 days from the acknowledgement of receipt of the petition in proper form.

VI. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby a person required to collect sales and use taxes imposed under Articles 28 and 29 of the Tax Law on its mail-order sales to customers in New York State.

VII. Whether the statutory and regulatory requirements regarding out-of-state mail order vendors are so vague as to violate petitioner's due process rights under the United States Constitution.

VIII. Whether the audit of petitioner and subsequent assessment represented selective enforcement by the Division of Taxation of the sales and use tax law in violation of petitioner's equal protection rights under the United States Constitution.

IX. Whether due process and commerce clause limitations under the United States Constitution require the Division of Taxation to shoulder the burden of proving that petitioner, an out-of-state mail order company, maintained a significant presence or nexus in New York State so that the Division of Taxation may impose (i) sales and use tax and (ii) collection responsibilities upon petitioner, or whether the Division of Taxation must establish merely a rational basis for the issuance of the statutory notice and the burden of proving the lack of an adequate nexus or of a significant presence in New York State must be carried by petitioner.

X. Whether, assuming the activities in New York State of petitioner's wholesale employees established the link between petitioner and New York State permitting the State to impose a duty of tax collection, petitioner must collect and pay over sales and use taxes on mail-order sales during sales tax quarters when petitioner's wholesale employees did not conduct any activities within New York State.

XI. Whether petitioner may raise an estoppel issue after the hearing in its brief, and, if so, whether the Division of Taxation should be estopped from asserting tax and interest due because of an unreasonable delay in issuing its adverse advisory opinion.

FINDINGS OF FACT

A desk audit of petitioner, Orvis, Inc., was commenced by a letter dated February 23, 1981 of John Hulse, an auditor in the Central Sales Tax Section, to petitioner, who was named in the letter as "Oruis [sic], 10 River Road, Manchester, Vermont." This letter provided as follows:

> "It has been brought to my attention that your company's products are sold through locations in New York State.
>
> Based on available information, I am unable to find your company registered for sales and use tax purposes.
>
> So that I may verify that proper reporting procedures are being followed, please supply the following information relating to your sales into New York:
>
> (1) A description of the products or services sold.

(2) How are sales solicited from locations in the State?
(3) Names of salesmen, independent agents or manufacturer's representatives who visit your dealers.
(4) How are your products distributed?
(5) A list of your company's retail locations.
(6) Do you consign products to retailers?

If your company is registered, please provide the name and identification number in your reply."

Approximately one month later, by a letter dated March 27, 1981, Thomas Vaccaro, described as treasurer of petitioner, responded to Mr. Hulse's letter on a letterhead that showed the name "Orvis" in one-inch high bold letters and in a smaller typeface underneath, "The Orvis Company, Inc." The address shown on the letterhead did not include a street address, just Manchester, Vermont. Mr. Vaccaro wrote as follows:[2]

"In response to your questionnaire dated February 23, 1981, this letter is to describe the extent of The Orvis Company's activities in the State of New York. The Orvis Company is a catalogue mail order house located in Manchester, Vermont. Customers in New York order sporting goods through the catalogue. The Orvis Company maintains no offices or stores in the State of New York; The Orvis Company has no salesmen who reside in the State of New York.

Some salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores. The salesmen in no way bind the Orvis Company; all orders are approved in Vermont.

Due to the fact that The Orvis Company, Inc. is doing no business in the State of New York, please refrain from sending the company questionnaires and notices."

In his letter, dated May 8, 1981 to Mr. Vaccaro, Mr. Hulse requested that petitioner complete and return a "registration kit". It appears that the auditor concluded after reviewing Mr. Vaccaro's letter that petitioner was required "to register for sales and use tax" because of petitioner's "use of salesmen to solicit business in New York." Mr. Hulse also requested by his letter the following information from petitioner for 1978 through 1980: petitioner's total sales volume, amount of sales shipped or delivered into New York State, amount of sales to dealers or stores in New York State, and amount of mail order sales to customers located in New York State.

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[2]In his affidavit dated November 19, 1990, Mr. Vaccaro distanced himself from this response asserting that it was prepared by petitioner's accountants, who prepared it "without engaging in a detailed investigation of the facts."

Hewitt B. Shaw, Jr., an attorney with the Cleveland, Ohio law firm of Baker & Hostetler, Esqs., responded on behalf of petitioner in a letter dated December 10, 1981 to the auditor's request for further information.

Mr. Shaw's letter, which referenced petitioner as "The Orvis Company, Inc." provided the following response concerning petitioner's sales:

"The following chart responds to the four questions set forth in your May 8, 1981 letter.

		Fiscal Year Ending		
Question No.	Description	September 1978	September 1979	September 1980
1	Total Sales Volume	$13,370,073	$15,449,284	$19,144,478
2	Amount of Sales shipped or delivered into New York State	$ 1,024,139	$ 1,127,153	$ 1,453,149
3	Amount of Sales to dealers or stores in New York State	$ 138,276	$ 160,187	$ 178,489
4	Amount of Mail Order Sales to Customers located in New York State	$ 885,863	$ 966,966	$ 1,274,660"

Mr. Shaw also stated that "it is the position of the taxpayer that Orvis is not doing business in New York and is therefore not required to collect and remit New York sales tax with respect to mail order sales made to customers located in New York." Mr. Shaw noted that:

> "Orvis' connection or 'nexus' with New York is substantially less than that described in the United States Supreme Court cases cited in your May 22, 1981 letter to Orvis' accountants - Alexander Grant."[3]

Auditor Hulse was unpersuaded and in a letter dated December 28, 1981, he responded

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[3] This letter was not introduced into evidence.

to Mr. Shaw's letter as follows:

> "I received your letter of December 10, 1981 with a chart of Orvis Company sales within New York State.
>
> Based on this information, I have calculated tax and interest due, as shown on the enclosed statement. The interest computed is the minimum charge for late payment of tax, which is mandated by the tax law.
>
> You indicated in our phone conversation, you would like to meet before any formal action is taken. I shall hold up on issuing a Notice of Determination and Demand for Sales Tax due [sic], until we can arrange a conference at a mutually convenient time.
>
> Please contact me to arrange the meeting."

Attached to Mr. Hulse's letter of December 28, 1981 was a copy of a Statement of Proposed Audit Adjustment, also dated December 28, 1981, against "The Orvis Company, Inc., Manchester, Vermont 05254." The Statement of Proposed Audit Adjustment noted that it was based on "correspondence" and showed total sales and use taxes due of $223,559.20 plus interest as follows:

Period Ended	Tax	Interest	Total
Nov. 1977	$ 15,830.82	$ 5,060.96	$ 20,891.78
Feb. 1978	15,830.82	4,776.00	20,606.82
May 1978	15,830.82	4,484.72	20,315.54
Aug. 1978	15,830.82	4,193.43	20,024.25
Nov. 1978	17,280.17	4,262.85	21,543.02
Feb. 1979	17,280.17	3,951.81	21,231.98
May 1979	17,280.17	3,633.85	20,914.02
Aug. 1979	17,280.17	3,315.90	20,596.07
Nov. 1979	22,778.81	3,956.46	26,735.27
Feb. 1980	22,778.81	3,550.99	26,329.80
May 1980	22,778.81	3,131.86	25,910.67
Aug. 1980	22,778.81	2,712.73	25,491.54
Total	$223,559.20	$47,031.56	$270,590.76

It was not until approximately four and one-half years later that a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against petitioner. The notice, dated April 22, 1986,[4] asserted as tax due the same amounts as noted in

[4]In the space labelled "Date of Notice", April 22, 1986 was shown. However, the notice has a date of April 29, 1986 stamped in red on the upper left hand corner. This later date was unexplained.

the Statement of Proposed Audit Adjustment detailed in Finding of Fact "5", supra. However, interest was recomputed as of the date of the notice. No penalty was asserted against petitioner. The notice was issued against "The Orvis Company, Inc." with an incorrect street address of 10 Riverside Road. The notice also utilized an identification number, 133166609, which was the identification number for the corporation known as Orvis New York, Inc.

Petitioner's Restructuring

On January 3, 1983, The Orvis Company, Inc. changed its name to Orvis, Inc. One day later, on January 4, 1983, Orvis, Inc. (the parent corporation) created a new subsidiary which used the parent's former name of The Orvis Company, Inc. The newly-created The Orvis Company, Inc. obtained a new Federal employer identification number of 03-0285804 since Orvis, Inc. assumed the Federal employer identification number of the former The Orvis Company, Inc., which was 03-0215459. The newly-created The Orvis Company, Inc. was formed to separate petitioner's catalogue mail-order sales from its wholesale sales. A second new subsidiary, Orvis Services, Inc., was formed at the same time. Orvis Services, Inc. was created to carry on the wholesale business activities formerly conducted by petitioner. In addition, on June 1, 1983, a separate wholly-owned subsidiary of Orvis, Inc. named Orvis New York, Inc. was formed to operate a retail store in New York

City. According to a letter dated June 5, 1986 of petitioner's attorney Shaw this restructuring was done for the following reason:

> "As a result of the March, 1981 inquiry of the Department of Taxation [auditor Hulse's initial letter dated February 23, 1981 described in detail in Finding of Fact "1", supra] that resulted in that Notice of Determination [dated April 22, 1986 described in Finding of Fact "6", supra], Orvis ceased sending employees into the State of New York for any purpose. An employee of The Orvis Company, Inc. last entered the State of New York on May 1, 1981.
>
> ...In other words, since January of 1983 the retail mail order activities and the wholesale activities have been conducted in separate wholly-owned subsidiaries of Orvis, Inc. [the new The Orvis Company, Inc. and Orvis Services, Inc., respectively], which functions essentially as a holding company. No employees of [the new] The Orvis Company, Inc.--the corporation conducting the mail order

business--have entered the State of New York.

...Orvis undertook this corporate restructuring based on a ruling obtained from the New York Sales Tax Instructions and Interpretations Unit dated November 24, 1981.... The Instructions and Interpretations Unit ruling concludes that an out-of-state mail order company will not be required to collect New York sales and use tax on mail order sales to New York residents where that company has a wholly-owned subsidiary that is engaged in a separate wholesale business involving independent New York dealers. Based on this ruling, the wholesale activities of Orvis Services, Inc. and the retail activities of Orvis New York, Inc. will not require [the new] The Orvis Company, Inc., their brother-sister corporation, to collect New York sales and use tax on mail order sales to New York."

During the four and one-half years between the issuance of the Statement of Proposed Audit Adjustment dated December 28, 1981 and the issuance of the notice of determination dated April 22, 1986, the parties attempted to settle this matter by negotiations. Petitioner submitted a request dated January 4, 1983 for an advisory opinion using its identification number 03-0215459. Although the record does not disclose whether the parties agreed that a notice of determination would be delayed until the issuance of an advisory opinion, the Division of Taxation did not issue a notice of determination until the advisory opinion process was exhausted. In fact, an advisory opinion first issued to The Orvis Company, dated October 8, 1985, was modified by a subsequent so-called "Modified Advisory Opinion" dated February 20, 1986 that was also issued to The Orvis Company, Inc.

It appears that petitioner was dissatisfied with the advisory opinion dated October 8, 1985 and attempted to negotiate a modification of the opinion. On December 20, 1985, Robert E. Helm, petitioner's prior representative met with John Dugan, then Deputy Commissioner and Counsel for the Department of Taxation and Finance.[5] Mr. Helm, by a letter dated January 2, 1986 to Mr. Dugan, argued petitioner's position that the definition of vendor in Tax Law § 1101(b)(8)(i)(c) did not apply to it because "the employee's activities in New York really did

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[5]20 NYCRR 901.3(d), as in effect during the years in which the advisory opinion process herein was going forward, provided that "The Technical Services Bureau may request legal advice from the Law Bureau of the Department of Taxation and Finance with respect to the proper disposition of a petition for advisory opinion", which would explain Mr. Dugan's involvement in the process.

not rise to the level of solicitation", and "even assuming that the employees were soliciting business from the retail stores...such solicition would not make Orvis a vendor, since the sales were not of property 'the use of which is taxed'." Mr. Helm also asserted that the advisory opinion dated October 8, 1985 took "a position [with regard to nexus] which goes significantly beyond the current Supreme Court decisions." Finally, Mr. Helm noted that he and Mr. Dugan had reached an agreement that "the Department would reexamine the decision [advisory opinion] to specifically identify the activities which were relied upon as a basis for nexus." Subsequently, the Modified Advisory Opinion dated February 20, 1986 was issued. The issues addressed in the Modified Advisory Opinion were described as follows:

> "(1) whether a sufficient nexus exists between Petitioner and New York State to satisfy the due process and commerce clauses of the U.S. Constitution and (2) whether Petitioner is a 'vendor' for purposes of the New York State Sales and Use Tax and therefore required to collect New York State Sales and Use Tax on retail mail order sales made to New York customers."

This advisory opinion was based upon the following facts:[6]

> "Petitioner is a Vermont corporation in the business of selling fishing and hunting equipment, fashion and outdoor clothing, and various gift items. Petitioner sells its various products on a retail basis through a mail order catalog business and on a wholesale basis to independent retailers.
>
> Petitioner's mail order sales are generated by catalogs distributed via the United States mails. Three basic catalogs are distributed per year. All mail order merchandise sold by Petitioner is shipped to the customers via the United States mail or common carrier.
>
> Petitioner receives orders from and ships merchandise to customers in New York State. However, Petitioner has no property or permanent employees in New York, does not advertise in New York with the exception of the previously mentioned catalogs, does not solicit sales over the phone and does not have a telephone listing in the state....

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[6]Tax Law § 171.24 requires a taxpayer's petition for an advisory opinion to "contain a specific set of facts". 20 NYCRR 901.2(a) provides that the taxpayer's petition for an advisory opinion "should set forth the specific set of facts to which the request for the advisory opinion relates, the exact issue sought to be resolved and the petitioner's reasons for requesting the advisory opinion." Although a copy of petitioner's petition for an advisory opinion was not introduced into the administrative record herein, it is reasonable to presume that the facts set forth above correspond to the facts set forth by petitioner in its petition for an advisory opinion.

Petitioner is also engaged in the business of wholesale sales of merchandise. Petitioner's mail order business and wholesale business are not separate corporate entities but simply different divisions within the same corporation.

The wholesale business sells to retail establishments located in several states, including New York. Virtually all of the wholesale orders placed with Petitioner are made by mail or by telephone. Wholesale orders are shipped to the retailers via mail or common carrier.

There are located in the State of New York several retailers which purchase merchandise from Petitioner on a wholesale basis for the purpose of resale. As of December 1977, Petitioner sold merchandise to approximately nine retailers in New York. The number of Petitioner's New York retailers increased to sixteen by December, 1981.

Historically, employees of Petitioner have visited each of their New York retailers at least once a year, although sometimes less. Petitioner contends the purpose of the visits was to communicate with the retailers about problems, not to solicit business.

Employees of Petitioner come into New York State on other occasions for various business related reasons. They do, at times, come to make visual inspections of their retailers' establishments. While in New York, Petitioner's employees have assisted retailers in preparing their opening orders with Petitioner. Also, on occasion, employees of Petitioner accompany retailers to sportsmen's shows in New York State. Petitioner contends that the only purpose of these shows was to promote the business and sales of the retailers."

The modified advisory opinion, dated February 20, 1986, adverse to petitioner was prepared by the Technical Services Bureau within the Division of Taxation and signed by Frank J. Puccia, the Director of the Technical Services Bureau. This opinion was transmitted by a cover letter signed by Andrew F. Marchese, then Chief of Advisory Opinions, to Robert E. Helm, Esq., petitioner's former representative. Mr. Marchese's letter did not merely transmit the opinion but also commented on the opinion and indicated that he had had a prior discussion with Mr. Helm concerning the issues raised. In short, the letter reflects Mr. Marchese's personal involvement in the analysis adverse to petitioner.

This advisory opinion represented the "expression of the views of the State Tax Commission as to the application of law, regulations and other precedential material to the set of facts specified in the petition for advisory opinion" (20 NYCRR 901.4, as in effect during the years that the advisory opinion process herein was going forward). Francis R. Koenig, currently a Commissioner on the Tax Appeals Tribunal, was a Commissioner on the State Tax

Commission at the time this opinion was issued.

Approximately two months after the issuance of the modified advisory opinion dated February 20, 1986, the notice of determination dated April 22, 1986 was issued against The Orvis Company, Inc., as noted in Finding of Fact "6", supra.

In the interval between the issuance of the advisory opinion dated October 8, 1985 and the modified advisory opinion dated February 20, 1986, the Division of Taxation continued its audit of Orvis related entities. By a letter dated December 10, 1985, James J. Carney, an auditor in the Central Sales Tax Section, requested additional information concerning the sales volume of The Orvis Company, Inc., including total sales volume, amount of sales delivered into New York State, and amount of mail-order sales to customers located in New York State. It appears that Mr. Carney was unaware that the former The Orvis Company, Inc. had become Orvis, Inc., which had then created two subsidiaries, a newly-created The Orvis Company, Inc. to carry on the catalogue mail-order business and Orvis Services, Inc. to conduct the wholesale business, as noted in Finding of Fact "7", supra, since Mr. Carney's request for additional information was directed to The Orvis Company, Inc., only. Mr. Carney's letter does show that he was aware of the entity known as Orvis New York, Inc., because he requested information concerning its tax return. Mr. Carney received a letter dated February 5, 1986 from Holly DeFries, an associate in the law firm of Helm, Shapiro, Anito & Aldrich, that formerly represented petitioner. Ms. DeFries responded as follows:

> "In response to your December 10 letter to The Orvis Company, Inc., requesting further information regarding Orvis New York, Inc. activities, please be advised that the Company is gathering the information which you have requested.
>
> In response to your request for information to aid in continuation of the Orvis Company, Inc. audit, I again draw your attention to the fact that the advisory opinion which was issued October 8, 1985, and upon which the deficiency pertaining to the Orvis Company, Inc. is based, is currently under review by the Department. Thus we feel it inappropriate to begin assembling this data until the Department comes to a final decision on the matter."

No mention was made by Ms. DeFries of petitioner's restructuring. The letter of Ms. DeFries also indicates that copies were sent to Messrs. John Dugan, Thomas Vaccaro, and Hewitt B. Shaw, Jr.

After the issuance of the modified advisory opinion dated February 20, 1986, auditor Carney renewed his request for additional information "to continue our audit of your [The Orvis Company, Inc.] sales activities in New York State" by a letter dated March 3, 1986 to petitioner at the incorrect street address of 10 Riverside Road (instead of 10 River Road) in Manchester, Vermont. It appears that petitioner's response to Mr. Carney's letter was not immediate. Attorney Hewitt B. Shaw, Jr., in a letter dated May 21, 1986 to Mr. Carney, wrote as follows:

> "This letter will confirm our telephone conversation of today wherein I indicated to you that I will be meeting with our client on May 28, 1986 regarding your request for additional information and that we will respond to your request by June 6, 1986."

Mr. Shaw's letter indicates that a copy was sent to Mr. Thomas Vaccaro, Robert E. Helm, Esq., and J. Richard Hamilton, Esq.

Subsequently, Mr. Shaw, by a letter dated June 5, 1986, provided the additional sales information and also explained to Mr. Carney the corporate restructuring of petitioner, as noted in Finding of Fact "7", supra.

On July 18, 1986, petitioner filed its petition with the former Tax Appeals Bureau protesting the notice of determination dated April 22, 1986. In its petition, petitioner referred to the taxpayer as "The Orvis Company, Inc." with an employer identification number of 13-3166609, which was the identification number shown on the statutory notice which, as noted in Finding of Fact "6", supra, was, in fact, the number for Orvis New York, Inc. However, a review of this petition discloses that petitioner understood that the entity, against which the Division had asserted tax due, was "Orvis", a Vermont corporation which had maintained "a mail order division and a wholesale division selling to independent retail stores" during the period at issue. The petition included five grounds upon which relief was claimed: (1) Orvis was not a vendor under the statutory definition of vendor, (2) activities of Orvis' wholesale division did not make it a vendor under the statutory definition of vendor, (3) activities of Orvis' mail order division did not make it a vendor because of a specific regulatory exemption for persons making sales to customers in New York State by the interstate distribution of catalogs by mail, (4) even if activities of the wholesale division were considered solicitation, Orvis was

not a vendor because such activities were "unrelated to the sales of the mail order division" and taxable sales did not result from any acts of solicitation by wholesale division employees, and (5) imposition of tax on Orvis was unconstitutional because of an insufficient nexus with New York. This petition was filed on behalf of petitioner by its former representative, Robert E. Helm, Esq. The power of attorney, dated December 13, 1985, attached to the petition appointing Mr. Helm[7] was executed by Thomas Vaccaro, as treasurer of The Orvis Company, Inc.

A conciliation order dated February 19, 1988, sustaining the statutory notice was issued subsequent to the holding of a conciliation conference on October 21, 1987 wherein petitioner appeared by its former representative, attorney Robert E. Helm.

Petitioner then filed a petition with the Division of Tax Appeals on March 23, 1988 which asserted the same facts and grounds for relief, which had been asserted in its earlier petition dated July 17, 1986, as noted in Finding of Fact "12", supra.

The answer of the Division of Taxation to the petition was dated July 27, 1988, and assuming that it was mailed on such date was apparently two months late.[8] Attorney Della Porta's letter transmitting the answer noted that "(b)ecause the parties are still engaged in settlement discussions, no request will be made to the Division of Tax Appeals to schedule this matter for hearing."

The answer of the Division of Taxation included 12 paragraphs of affirmative statements which made clear that the Division was targeting the Orvis entity which made mail order retail sales to New York residents and wholesale sales of goods to retailers located in New York.

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[7]The power of attorney also names Hewitt B. Shaw, Jr., Esq., and Richard Hamilton, Esq., of the Cleveland law firm of Baker & Hostetler in the space for appointed representative.

[8]20 NYCRR 3000.4 requires the law bureau to serve an answer within 60 days from the date the supervising administrative law judge acknowledges receipt of a petition in proper form.

It appears that, even as late as April 26, 1989, the parties by the Helm, Shapiro, Anito & Aldrich, P.C. law firm and by Deputy Commissioner and Counsel William F. Collins were negotiating the possible settlement of this matter. It is also observed that a letter dated April 26, 1989 on the

letterhead of the Helm Shapiro law firm referenced petitioner as "Orvis, Inc."

On November 5, 1990, the Division of Tax Appeals received copies of motion papers dated October 31, 1990 from petitioner's new representatives, Paul R. Comeau, Esq., Mark S. Klein, Esq., and Robert D. Plattner, Esq., of the Hodgson, Russ, Andrews, Woods & Goodyear law firm, which sought to dismiss the notice of determination dated April 22, 1986 on constitutional and jurisdictional grounds. The administrative law judge by a letter dated November 5, 1990 noted that the hearing scheduled for November 20, 1990 would go forward because it had been adjourned twice before, and that "petitioner should be prepared to present its complete case on the merits" as well as raising the jurisdictional and constitutional issues set forth in the motion papers. By a letter dated November 14, 1990, attorney Comeau requested that a ruling be made "at the outset of the November 20 hearing in accordance with the requests for relief contained in our letter and motion." He also requested that at the outset of the hearing if petitioner's motion was denied that the administrative law judge issue a ruling "which would identify the taxpayer." Mr. Comeau asserted that "the identity of the taxpayer covered by the alleged Notice remains unknown" because of the errors set forth in Issue "III", supra.

In response, by a letter dated November 15, 1990 to attorney Comeau, the administrative law judge responded as follows:

> "At the formal hearing scheduled for November 20, 1990, I intend to initially ask Mr. Della Porta, the attorney representing the Division of Taxation, to introduce into evidence the petition, the answer and the statutory notice at issue. I will then ask him to state the issue or issues from the State's point of view. I can ensure you that Mr. Della Porta will note who it is that the State contends owes additional tax. At that point, you will be given the opportunity to restate the issue and/or make a brief opening statement. The State will then be required to establish a rational basis for the issuance of the statutory notice against the particular taxpayer. The usual custom is for the State to present the testimony of an auditor and introduce into evidence relevant portions of the audit file. You will then be

given an opportunity to cross-examine the auditor and will be able to probe the issue you have raised concerning what entity the Division of Taxation intended and/or did, in fact, audit and assess.

If you are, in fact, taken by surprise by the Division's presentation, I will consider a request to continue the hearing to conclusion at a later date. But in light of the fact that this matter has been scheduled for hearing on two earlier dates, May 31, 1990 and September 26, 1990, I will not permit the further delay of the formal hearing by use of motion practice. I would also like to note that all motions at this late stage will be taken under advisement and ruled upon after completion of the formal hearing as part of my decision."

Petitioner introduced two affidavits into evidence in support of its petition. Leigh H. Perkins stated in his affidavit dated November 16, 1990 that he is "the President of The Orvis Company, Inc. (between January, 1983 and January, 1990 [to date], known as Orvis, Inc.)". He described petitioner's activities and its New York State contacts during the audit period in his affidavit as follows:

"a. Orvis, Inc. was engaged in the business of selling camping, fishing and hunting equipment, casual and outdoor clothing, food, and various gift items.

b. Orvis, Inc. sold its various products on a retail basis through mail order catalogs. Mail order customers included individuals, businesses and 'exempt' organizations.

c. Orvis, Inc.'s mail order sales were generated by catalogs distributed throughout the United States via the United States mail. Mail order and telephone orders from New York customers were received and accepted by Orvis, Inc. at its offices in Manchester, Vermont.

d. Orvis, Inc.'s Manchester, Vermont offices received catalog orders from customers in New York State via mail and telephone.

e. All orders were subject to acceptance by Orvis, Inc. at its Manchester, Vermont offices, and all mail and telephone order merchandise sold by Orvis, Inc. was shipped to customers in New York via United States mail or common carrier.

f. Orvis, Inc. did not own or lease any real estate or tangible personal property in New York, nor did it maintain any physical facilities in New York. To the best of my recollection, Orvis, Inc. did not have any bank accounts, investment accounts or professional advisors in New York or have any employees stationed in New York. Orvis, Inc. did not own or operate any retail or wholesale locations in New York.

g. To the best of my knowledge, Orvis, Inc. did not engage in any radio, television, billboard or local magazine or newspaper advertising in New York.

h. Orvis, Inc. did not solicit sales to New York residents via the telephone.

i. Orvis, Inc. did not have a telephone listing in New York.

j. To the best of my knowledge, Orvis, Inc. did not commence any actions in the courts of New York, avail itself of any police or fire protection or other state, county or municipal services in New York, or obtain any advances, loans or subsidies from any New York source.

k. Orvis, Inc. also engaged in the business of wholesale sales of merchandise to retail establishments located throughout the United States and owned by persons completely unrelated to Orvis, Inc. From time to time, New York retailers contacted Orvis, Inc. to request Orvis, Inc. products for resale to customers. Orvis,

Inc. mailed a questionnaire to each of these retailers and based upon responses to the questions it either supplied the requested product or refused the request. Retail establishments approved by Orvis, Inc. purchased merchandise from Orvis, Inc. and other suppliers for resale to their customers.[9]

l. Orvis, Inc.'s mail order business and wholesale business were carried out by different divisions within the corporation.

m. Retailers placed wholesale orders with the wholesale division of Orvis, Inc. by mail or telephone.

n. Products shipped in fulfillment of wholesale orders were shipped by the wholesale division of Orvis, Inc. to retailers via mail or common carrier.

o. Employees of Orvis, Inc.'s wholesale division visited New York retailers and retailers in other states on a sporadic, irregular basis. One wholesale division employee handled most of the visits, but two other wholesale division employees also visited the retailers on some occasions.

p. The purpose of the visits was to communicate with the retailers about problems, such as problems in shipments to the retailers, questions concerning the proper way to display or demonstrate products, and to inspect the establishments of retailers who sold products bearing the "Orvis" trademark. The purpose of these visits was not to solicit sales to retailers nor

to obtain purchase orders from the retailers. The wholesale division employees did not receive any commission compensation.

q. Orvis, Inc. wholesale division employees who visited retailers generally traveled in a loop originating in Manchester, Vermont and passing through New York, Pennsylvania and other states.

r. Based upon findings during these visits, Orvis, Inc. made decisions whether to continue or terminate supplying products to particular retailers."

The affidavit of Thomas S. Vaccaro also dated November 19, 1990 repeated many of the same facts noted in Mr. Perkins affidavit. He also attached to his affidavit the following "allocation of the sales and use tax assessed...among those quarters [quarters when no wholesale division employees travelled to New York State and in which, therefore, petitioner contends no tax would be due] based on mail order sales occurring during each of those quarters, rather than evenly, as set forth on the assessment":

Quarter Ended	Number of Dealer Visits	Sales Tax	Interest through 10/20/90	Total	"0" Visits Sales Tax

[9] Petitioner introduced into evidence a form letter which it apparently used to transmit a credit application to retail establishments, which were considering purchasing merchandise from it for resale. The form letter indicated that a "minimum stocking order of $3,000.00" was required and future orders "will be accepted in compliance with Dealer Price List and the Dealer Terms in effect at the time of said orders." The form letter shows the name of Donald E. Owens as Dealer Sales Manager.

November 30, 1977	0	$ -	$ -	$ -	$ 30,740.00
February 28, 1978	1	12,705.00	23,990.73	26,695.73	
May 31, 1978	2	8,764.00	16,198.15	24,962.15	
August 31, 1978	1	11,115.00	20,098.71	31,213.71	
November 30, 1978	0	-	-	-	$ 34,015.00
February 28, 1979	2	14,409.00	24,920.78	39,329.78	
May 31, 1979	1	9,348.00	15,797.75	25,145.75	
August 31, 1979	0	-	-	-	$ 11,351.00
November 30, 1979	0	-	-	-	$ 43,761.00
February 29, 1980	1	17,729.00	27,840.44	45,569.44	
May 31, 1980	3	12,833.00	19,638.44	32,471.44	
August 31, 1980	1	16,791.00	25,023.58	41,814.58	
		$103,694.00	173,508.58	277,202.58	$119,867.00
"0" visits sales tax	119,867.00				
		$223,561.00			

Mr. Vaccaro also noted in his affidavit that "[i]f Orvis, Inc. had been obligated to collect the tax, this would have imposed an additional significant economic burden on Orvis, Inc." Orvis' data processing system then in place did not have the capability of accounting "for sales and use tax collection obligations to reflect use tax rates in the 82 separate local tax jurisdictions in New York State. The time and cost involved in developing that capability...would have been prohibitive."

Furthermore, Mr. Vaccaro claimed in his affidavit that "Now that we are engaged in preparation for a hearing before the Division of Tax Appeals, a genuine question has arisen in my mind as to which corporate entity was the target of the April 22, 1986 Notice."

Petitioner in further support of its contention that it was "genuinely confused" concerning the entity assessed by the statutory notice at issue herein points out that an Accounts Receivable Statement dated June 18, 1986 issued against Orvis New York Inc. by the Tax Compliance Bureau asserted tax due of $223,559.20, the same amount assessed by the statutory notice. Further, the identification number on the Accounts Receivable Statement was 13-3166609, the same number on the statutory notice.[10] Petitioner also argues that a chronological

[10]Collection activity was stopped according to a letter dated August 8, 1986 of Carol Brennan, the head clerk of the Tax Compliance Division to the Helm, Shapiro law firm. According to Ms. Brennan, "your client should not receive any further collection notices until the appeals process has been completed." Petitioner contends this adds to its confusion since the collection activity was against Orvis New York, Inc., and the Division of Taxation contends this proceeding is against Orvis, Inc., the successor entity to the former The Orvis Company, Inc.

report prepared for use by the Division of Taxation's Law Bureau supports its position that the statutory notice was defective. The chronological report included the following rhetorical (and unanswered) question as an entry, after an entry for September 5, 1986:

> "Does the use of Orvis New York Inc.'s NYS sales tax ID #13-3166609 on the notice issued against the parent corporation jeopardize the validity of the assessment?"

Further, petitioner points out that its Petition for Advisory Opinion dated December 29, 1982 names petitioner as "The Orvis Company, Inc." with an identification number of 03-0215459.

The parties by their representatives executed a Stipulation dated November 20, 1990. The following facts stated by Leigh H. Perkins in his affidavit dated November 16, 1990, as detailed in Finding of Fact "18", supra,[11] were stipulated to by the parties: a, c, d, e, f, g, h, i, j and r. The Division of Taxation specifically refused to stipulate to the factual assertions lettered k, o, and p (which pertained to activities of petitioner's wholesale operations). The parties also stipulated that "on an infrequent basis, ads appeared in national publications such as Field and Stream, Outdoor Life, and Rod and Reel" for petitioner's products.

Furthermore, the parties stipulated to the following "retail sales to New York customers during the period beginning September 1, 1977 and ending August 31, 1980":

	1977	1978	1979	1980
Jan		$ 65,616	$ 60,502	$105,792
Feb		48,721	60,593	62,526
Mar		43,587	46,127	64,201
Apr		46,317	50,039	67,178
May		32,663	34,572	48,104
June		38,234	41,942	54,803
July		70,824	83,793	95,278
Aug		46,389	33,025	84,764

[11]Finding of Fact "18", supra, incorporates an excerpt from Mr. Perkins' affidavit and the lettering of paragraphs was taken from his affidavit.

Sept	114,192	87,614	202,186	
Oct	149,221	180,868	196,324	
Nov	166,517	207,252	213,537	
Dec	63,359	80,426	79,646	
TOTAL	$493,289	$948,511	$1,102,286	$582,646

The sales tax on these sales (at a 7.15% composite rate) is approximately $223,559.00, the figure used in the notice.

Furthermore, other relevant portions of the Stipulation have been incorporated into the Findings of Fact, supra.

Included as an exhibit attached to the Stipulation is a photocopy of "Orvis Dealers Wholesale Terms" dated Spring 1982. According to the Stipulation, "Orvis offered its merchandise to independent retailers in New York and other States according to the same price lists, and did not give special discounts to any dealers" and this document was referenced in support. A close review of this document raises certain unanswered questions concerning petitioner's wholesale activities. Pursuant to these "wholesale terms", an "authorized Orvis dealer" could order merchandise to be "shipped directly to the retail customer...." Furthermore, there is also a paragraph entitled "Dealers Referrals" which would seem to indicate that the retailers also acted as middlemen and did not merely resell items purchased wholesale from petitioner:

> "In the cases where dealers refer their customers to us and merchandise is to be selected by the customers at the Orvis Showroom in Manchester, a letter of authorization to us from the dealer must accompany the customer and a maximum discount of 20% will apply only, in as much as the merchandise is coming out of The Orvis Company warehouse and the customer is being serviced by Orvis retail personnel."

Petitioner did not offer the oral testimony of any witnesses. The Division of Taxation offered the oral testimony of an auditor, Robert Pilatzke, who had no direct involvement in the audit at the time it was conducted by the Central Office Audit Bureau through correspondence. However, he was aware of the audit of petitioner at such time because he was then involved in a special project concerning an unrelated mail order vendor and had spoken to the auditors, Messrs. Ireland and Carney, who had been involved in petitioner's audit. Mr. Pilatzke noted

that he knew of "no company with similar circumstances as Orvis where the Department has not pursued a tax assessment against it." Mr. Pilatzke also testified that Orvis was rejected as a test case because of the uniqueness of the facts herein.

The Division of Taxation introduced into evidence an affidavit dated December 3, 1990 of James Featherstone, a senior audit clerk in charge of the clerical section of Central Office Audit Bureau, whose regular duties include the mailing of notices of determination. Attached to Mr. Featherstone's affidavit was a copy of the certified mail record dated April 22, 1986 of the notices of determination to be mailed on April 22, 1986. In his affidavit, Mr. Featherstone described the general practice for the issuance of notices of determination. After a clerk under his supervision (in this instance, Ms. Francis Exposito[12]) has "proof

read [sic] all notices before they are mailed...they are deposited in envelopes...the envelopes are compared with the mailing record", and Mr. Featherstone then personally repeats this task before initialling the mailing record. The mailing record and envelopes are then transferred to the outgoing mailing unit for delivery to the United States Postal Service. A post office stamp is affixed to the certified mail record.

A review of the certified mail record attached to the affidavit bears out Mr. Featherstone's general practice. The notice of determination issued to The Orvis Company, Inc. at 10 Riverside Road, Manchester, Vermont with an assessment number of S860415400C was assigned certified number 499947. The last page of the certified mail record dated April 22, 1986 shows the April 22, 1986 stamp of the Albany, New York, Roessleville Branch of the United States Postal Service. Mr. Featherstone noted that the general practice was not to request or retain return receipts.

Petitioner submitted 23 proposed findings of fact. Proposed findings of fact "1", "4", "6", "7", "8", "20", and "22" are accepted and incorporated into this determination.

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[12]This is the spelling of the name in the affidavit.

The following proposed findings of fact are not accepted because they are based upon the affidavits described in Finding of Fact "18", which do not adequately establish such facts for the reasons discussed in Conclusion of Law "H", infra: "3", "5", "9", "10", "11", "13", "14", "15", "16", "17", "18", "19" and "23".

Proposed findings of fact "2" and "21" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

(i) Proposed finding of fact "2" includes the inexact statement that retail establishments which made wholesale purchases from Orvis, Inc. were "located throughout the United States." Details concerning the number and location of such establishments were not provided to support such generalization which minimizes the fact that, as noted in Finding of Fact "8", supra, petitioner sold merchandise to approximately nine retailers in New York as of December 1977 and to sixteen by December 1981.

(ii) Proposed finding of fact "21" includes an implication, that is not supported by the record, that the Division of Taxation was aware that The Orvis Company changed its name to Orvis, Inc. on or about the date such event transpired (January 3, 1983) when, in fact, it would appear that attorney Shaw's letter of June 5, 1986 as described in Finding of Fact "7", supra, may have been the initial notification by petitioner of such change.

Proposed finding of fact "12" is not accepted because it is an ultimate finding of fact, more in the nature of a Conclusion of Law.

Petitioner has also proposed 25 conclusions of law which will be addressed, as necessary, in the Conclusions of Law, infra. However, there is no requirement in the law or regulations to rule on them per se. (State Administrative Procedure Act § 307[1] requires a ruling upon each proposed finding of fact. 20 NYCRR 3000.10 permits the parties to submit proposed findings of fact and conclusions of law, but does not require that each one be ruled upon.)

SUMMARY OF THE PARTIES' POSITIONS

Petitioner contends that it may be unable to obtain a fair hearing commensurate with due process requirements before the Division of Tax Appeals because "the supervising

administrative law judge and two members of the Tax Tribunal have conflicts in this particular case that may make a fair hearing...difficult and perhaps impossible."

Further, petitioner asserts that the Division of Taxation failed to adequately prove that the statutory notice was properly mailed. The statutory notice also failed to achieve its fundamental purpose "to make clear the person that the taxing entity means to assess" thereby failing to satisfy constitutional due process requirements, and therefore must be dismissed with prejudice. Petitioner argues that it was prejudiced by having to prepare for a hearing on the merits when it was confused about the entity assessed. It also asserts that the Division of Taxation should be defaulted because of the late service of its answer. Petitioner further contends that the Division of Taxation should be estopped from assessing taxes or interest because of its delay in issuing an advisory opinion and its delay in assessing taxes. In addition, petitioner contends that the Division of Taxation failed to introduce sufficient evidence to sustain its burden of proving that petitioner's nexus with New York State was sufficient to obtain jurisdiction over petitioner and require it to collect sales and use taxes on its mail-order sales. The burden is upon the Division of Taxation to establish a jurisdictional nexus because, "If the burden of disproving the State's jurisdiction were placed on out-of-state companies, the Division could arbitrarily assess every out-of-state mail order vendor which ships goods by interstate carrier to its New York customers...."

On the merits, petitioner contends that it was not a vendor, as defined by statute and regulations, required to collect use tax. It had no place of business in New York State and did not solicit sales as defined in 20 NYCRR 526.10(d)(1). Petitioner argues that even if its wholesale activities in New York State are viewed as the soliciting of sales, such activities did not result in sales of property "the use of which is taxed". Furthermore, petitioner may not be required to collect and remit use tax during tax quarters when no wholesale activities were conducted in New York State. It also contends that the assessment was unconstitutional because petitioner lacked a sufficient nexus with New York State to be required to collect and pay over sales and use tax to New York State. In its reply brief, petitioner asserts:

> "An examination of recent federal and state cases makes clear that no court has been willing to find nexus and impose use tax collection obligations based on contacts as minor and sporadic as those present here. Indeed, recent cases in other states have uniformly rejected state claims of nexus under similar fact patterns."

Furthermore, the activities of petitioner's wholesale employees were unrelated to catalog sales which the State seeks to tax. Finally, according to petitioner, the statutory and regulatory framework regarding out-of-state mail order vendors is so vague as to violate petitioner's due process rights.

In contrast, the Division of Taxation contends that the fact that "the Administrative Law Judge's Administrative Supervisor may allegedly have a bias does not taint the Administrative Law Judge, particularly if the Supervisor has no involvement with the substantive determination of the case." Canon 3 of the Code of Judicial Conduct would permit the administrative law judge to hear and decide this matter. Further, it is "for the members of the Tribunal to decide whether they must remove themselves from a case" and not for the administrative law judge to so determine.

According to the Division of Taxation, the statutory notice was properly issued, and the alleged errors on the notice were harmless errors. Petitioner's claim of confusion regarding the entity assessed is incredible "(a)fter five years of discussion with the Division regarding its sales tax status and an additional four years of contesting the notice." Furthermore, since petitioner has not filed sales and use tax returns, the statutory notice could be reissued at any time. The Division also contends that petitioner was not prejudiced because its answer was served approximately 60 days late, especially since it was served late because the Division was conducting settlement negotiations with petitioner. The Division argues that petitioner's estoppel argument has no merit because there was no reliance by petitioner on the Division of Taxation. "(P)etitioner's failure to collect tax was never caused by any representation by the Division." Furthermore, the Division objected to the raising of the estoppel issue by petitioner in its brief, because the Division "has not had an opportunity to present evidence as to the circumstances of the delay or present evidence that petitioner was not prejudiced by the delay."

On the merits, the Division argues that it established a rational basis for the issuance of

the statutory notice by the introduction of correspondence and an auditor's testimony. Petitioner "by presenting a limited description of its activities in New York" failed to sustain its burden of proving that it lacked nexus to New York for constitutional purposes: "(T)he inference has to be drawn that a full disclosure of all the relevant facts would not be helpful to petitioner's case." It is the Division's position that petitioner's wholesale activities in New York State constituted the soliciting of business in New York State. Therefore, petitioner was a vendor under the statutory and regulatory framework, which was constitutional on its face. The Division of Taxation rejects petitioner's alternate argument that it may not be required to collect and remit tax on sales made during quarters that it did not conduct wholesale activities in New York State because "there was continuity of sales solicitation activity in New York during the period at issue."

CONCLUSIONS OF LAW

A. Pursuant to Tax Law § 2000, it is the responsibility of the Division of Tax Appeals to ensure a taxpayer's right to have a just system for resolving controversies with the Division of Taxation (cf., Matter of Mitnick, Tax Appeals Tribunal, January 25, 1991). Under Tax Law § 2010, administrative law judges, who have the authority to issue determinations which "finally decide the matters in controversy unless any party to the hearing takes exception by timely requesting a review by the tax appeals tribunal", must "conduct administrative adjudicatory proceedings fairly and impartially". Furthermore, the Code of Judicial Conduct, which is applicable to administrative agencies with adjudicatory functions,[13] requires a judge to

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[13]Ethics Opinion 617 - 2/5/91 (25-89), reprinted in the New York State Bar Journal (July/August 1991), responded to the following question:

> "May an administrative law judge employed in the Division of Tax Appeals...who formerly served as a staff attorney representing the Department [of Taxation and Finance] in proceedings brought in the DTA now hear cases involving taxpayers who had cases pending in the DTA while the ALJ was serving as an attorney for the Department?"

This opinion emphasized that the Code of Judicial Conduct was applicable in resolving this question.

perform his duties impartially and "unswayed by partisan interests, public clamor, or fear of criticism" (Code of Judicial Conduct Canon 3).

In addition, the Code of Judicial Conduct provides the following guidance for determining when a judge should disqualify himself:

"C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as a lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter,[14] or the judge or such lawyer has been a material witness concerning it;

(c) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have an interest that could be

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[14] The Code of Judicial Conduct includes the following "commentary" with regard to this provision:

"A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association." (Code of Judicial Conduct Canon 3.)

substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding...." (Code of Judicial Conduct Canon 3.)

Furthermore, relevant case law requires that an administrative law judge be unbiased (cf., 1616 Second Ave. Rest. v. Liquor Auth., 75 NY2d 158, 551 NYS2d 461; Hughes v. Suffolk County Dept. of Civil Service, 74 NY2d 833, 546 NYS2d 335; O'Connor v. Hartnett, 165 AD2d 946, 561 NYS2d 318; Washington County Cease, Inc. v. Persico, 99 AD2d 321, 473 NYS2d 610, affd 64 NY2d 923).

B. Applying the standard set forth in Conclusion of Law "A", supra, it is possible for petitioner to obtain a fair hearing by an impartial administrative law judge in the Division of Tax Appeals. This determination has been written and issued without the involvement of Mr. Marchese, who as noted in Finding of Fact "8", supra, was personally involved in the preparation and issuance of the modified advisory opinion adverse to petitioner. In addition, as noted in Conclusion of Law "A", supra, the Tax Appeals Tribunal does not have the authority to review this determination unless one of the parties takes exception to it and timely requests a review by the Tribunal. Consequently, petitioner's contention concerning the alleged bias of two members of the Tax Appeals Tribunal is not ripe for review. Moreover, it is for the members of the Tribunal to decide whether they must remove themselves from a case (cf., Code of Judicial Conduct Canon 3; Willett v. Dugan, 161 AD2d 900, 557 NYS2d 465, lv denied 76 NY2d 708, 560 NYS2d 990).

C. Petitioner has challenged the validity of the notice of determination dated April 22, 1986 for several reasons, as noted in the statement of Issues "II" and "III", supra. First, it is concluded that the evidence introduced by the Division of Taxation to prove the issuance and mailing of the notice of determination dated April 22, 1986, as detailed in Finding of Fact "24", supra, was adequate to establish that it was issued and mailed to petitioner on April 22, 1986 (cf., Novar TV & Air Conditioner Sales & Service, Tax Appeals Tribunal, May 23, 1991; Matter of Malpica, Tax Appeals Tribunal, July 19, 1990). Consequently, the requirement under

Tax Law § 1147(a)(1) that "[a] notice of determination shall be mailed promptly by registered or certified mail" was met.

Petitioner also contends that the statutory notice dated April 22, 1986 was invalid because the Division of Taxation used: (1) an incorrect address for petitioner, 10 Riverside Drive instead of 10 River Road; (2) an incorrect name for the mail-order business, The Orvis Company, Inc. instead of Orvis, Inc.; and (3) an incorrect Federal employer identification number, 133166609, which is the identification number for Orvis of New York, Inc., instead of 030215459, the Federal employer identification number of Orvis, Inc. The Tax Appeals Tribunal has noted that any lack of care in preparing a statutory notice should be deplored (Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989). Nonetheless, if the errors in the statutory notice did not prejudice the taxpayer's ability to effectively challenge the notice, it should not be voided (see, Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892 [statutory notice referenced an incorrect sales tax quarter]; Matter of Tops, Inc., supra [two sales tax quarters incorrectly listed on the statutory notice]; Matter of City Linen and Towel Supply Co., Inc., Tax Appeals Tribunal, March 2, 1989 [statutory notice incorrectly noted that assessment had been estimated when in fact it was based upon a detailed audit of purchase invoices described in a nine-page schedule]).

In Olsen v. Helvering (88 F2d 650), Judge Learned Hand addressed a similar issue. Robert Olsen filed a tax return as executor of the estate of Neal S. Olsen, who had died on December 13, 1931. Two and one-half years after Neal S. Olsen's death, the Internal Revenue Service issued a notice of deficiency which was addressed to the deceased, Neal S. Olsen, at apparently the deceased's former Brooklyn address. Nonetheless, the notice reached Robert Olsen, the executor, at his business address in Manhattan, and he timely petitioned the notice. (Parenthetically, Robert Olsen's petition did not raise an issue concerning the validity of the notice, but rather addressed the merits and also contended that he was not liable as executor because he had been discharged as executor some time before the date the notice of deficiency was issued. It was only on appeal to the Court of Appeals, after losing before the Board of Tax

Appeals, that Robert Olsen raised the issue concerning the validity of the notice of deficiency.) Judge Learned Hand determined that the notice of deficiency was effective in assessing Robert Olsen, as executor:

> "In fact the notice reached Robert M. Olsen without delay and answered every purpose of a notice properly addressed to him; he knew that the Commissioner meant to assess him as administrator; he understood the reason for the assessment and that it was his duty to respond. His petition of review to the Board makes it perfectly plain that he was not misled, and had enjoyed every privilege which a notice formally correct would have given him. This being true, we are unwilling to construe even a tax statute in the archaic spirit necessary to defeat this levy; the notice is only to advise the person who is to pay the deficiency that the Commissioner means to assess him; anything that does this unequivocally is good enough."

Petitioner, as the successor to the entity which had conducted the Orvis mail-order catalog sales during the period at issue, is the person who would be responsible for paying any assessment that may be upheld. The mistakes in the notice of determination dated April 22, 1986 did not rise to the level of frustrating the purpose of notifying Orvis, Inc. of its need "to pursue remedies of protest and review", which, in fact, it pursued in an exhaustive fashion as detailed in the Findings of Fact, supra (cf., Pepsico, Inc. v. Bouchard, supra, 477 NYS2d 892, 893). Petitioner's allegations, only made of late, of prejudice and confusion are unconvincing. Furthermore, Tax Law § 1147(b), which in part provides that "where no return has been filed...the tax may be assessed at any time", would seem to allow the Division of Taxation to reissue a new statutory notice, if the notice dated April 22, 1986 is voided due to the errors noted above, because petitioner has not filed any sales tax returns for the period at issue.

D. As noted in Finding of Fact "17", supra, this matter had been adjourned on two occasions. Consequently, petitioner's request for a further adjournment of the hearing of November 20, 1990 was properly denied. It also was not unfair to proceed with the hearing prior to a determination concerning Issue "III", especially since, as noted in Conclusion of Law "C", supra, petitioner received adequate notice of the assessment at issue herein in order "to pursue remedies of protest and review" (Pepsico, Inc. v. Bouchard, supra). In fact, petitioner chose to limit its introduction of evidence, by producing no witnesses and centering its case on an argument that sought to shift the burden of proof to the Division of Taxation, as detailed in

Conclusion of Law "H", infra.

E. Tax Law § 1138 (former [a][1]), as in effect at the time petitioner filed its petition, required that a petition be filed within 90 days of the issuance of a notice of determination. There was no comparable provision in the Tax Law governing the filing of an answer in response to a petition. In fact, the Tax Law nowhere required the Division to file an answer in response to a petition.

To insure the orderly administration of the Tax Law, the Tax Appeals Tribunal promulgated the regulation found at 20 NYCRR 3000.4 requiring the Division to serve an answer within 60 days of the date receipt of the petition is acknowledged. New York's courts have recognized the general principle that such time periods may be directory rather than mandatory (see, Matter of Geary v. Commr. of Motor Vehicles, 92 AD2d 38, 459 NYS2d 494, affd 59 NY2d 950, 466 NYS2d 304). Therefore, the Division's lateness in answering is not in itself a sufficient basis for granting petitioner's motion (see, Matter of Macbet Realty, Tax Appeals Tribunal, May 17, 1990).

When an administrative agency fails to meet a time constraint established by its own regulations, petitioner must show that the delay resulted in substantial prejudice to its position before a default determination will be awarded (see, e.g., Matter of Cortlandt Nursing Home v. Alexrod, 66 NY2d 169, 495 NYS2d 927, cert denied 476 US 1115; Matter of Maggin, Tax Appeals Tribunal, March 8, 1991). Petitioner has not demonstrated substantial prejudice. In fact, the parties were "still engaged in settlement discussions" and no request was made to schedule this matter for hearing at the time the Division of Taxation served its answer, as noted in Finding of Fact "15", supra. In sum, there is no basis to default the Division of Taxation because its answer was filed late.

F. Tax Law § 1110 imposes upon all persons a compensating use tax for use within New York of any tangible personal property purchased at retail, except to the extent that such property has already been subject to sales tax. The obligation to collect the use tax is imposed upon every vendor of tangible personal property (Tax Law § 1131[1]). Pursuant to Tax Law

§ 1101(b)(8)(former [i]), as in effect during the period at issue, a vendor includes:

> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by [article 28];
> (B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by [article 28];
> (C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogues or other advertising matter and by reason thereof makes sales to persons within the state of tangible personal property or services, the use of which is taxed by this article." (Emphasis added.)

There is no question that petitioner solicited sales in New York by distribution of catalogues and made sales of tangible personal property to persons within New York as a result. Accordingly, it was a "vendor" as defined by statute. Therefore, petitioner's argument (based on a strained reading of the applicable regulations) that it could not be viewed as a vendor because, assuming that its wholesale employees solicited business in New York, such solicitation did not result in sales of tangible personal property "the use of which is taxed" is rejected. Nonetheless, the Division of Taxation in the past[15] recognized a constitutional limitation upon

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[15]Effective September 1, 1989, the statutory definition of vendor was modified in an attempt to require large mail-order sales companies to collect and remit New York State sales tax. Tax Law § 1101(b)(8)(i)(E) now provides that a vendor includes:

> "A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs...to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United States Constitution."

Further, Tax Law § 1101(b)(8)(iv) now creates a presumption of regular or systematic solicitation of business in New York if a person has had more than $300,000.00 of gross receipts from sales of property delivered in New York "for the immediately preceding four quarterly periods" and more than 100 sales of property delivered in New York during such four quarterly periods.

Consequently, under the current law and regulations, petitioner would have been responsible for the collection and remittance of use tax on its sales to New York customers provided that "the nexus requirement of the United States Constitution" was satisfied.

New York's power to require an out-of-state mail-order vendor to collect and remit use tax (cf., National Bellas Hess v. Department of Revenue, 386 US 753, 18 L Ed2d 505). In National Bellas Hess, the Supreme Court stated that the standard to be used in determining whether a state may impose such a duty is whether there exists "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (id. at 756, quoting Miller Bros. Co. v. Maryland, 347 US 340, 98 L Ed 744).

Consequently, 20 NYCRR former 526.10(e) limited the statutory definition of "vendor" vis-a-vis "interstate vendors" as follows:

> "(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, who solicits the sales in New York, as defined in subdivision (d) of this section, or who maintains a place of business as defined in subdivision (c) of this section, is required to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York.
>
> (2) A person making sales to his customers within the State, who has solicited such sales by the interstate distribution of catalogs or other advertising material by mail and who delivers the merchandise through the mail or by common carrier, and who neither maintains a place of business as defined in subdivision (c) of this section, nor solicits business as defined in subdivision (d) of this section, is not required to register as a vendor. However, if such person registers voluntarily, he is under the same obligations as any other vendor."

20 NYCRR former 526.10(d) defined "soliciting business" and provided examples as follows:

> "(d) Soliciting business. (1) A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State.
>
> Example 1: An out of State company that has a sales representative contacting customers in the State is soliciting business and is a vendor.
>
> Example 2: An out of State company that has an independent salesman contacting customers in the State is soliciting business and is a vendor. The fact that the independent salesman represents other companies as well is irrelevant.
>
> Example 3: An out of State company that has a booth at a trade fair, staffed by its promotion men, is soliciting business in the State and is a vendor."

Therefore, in order to conclude that petitioner was liable to collect and remit use tax on its mail-order sales to New York customers, it must be determined whether it "solicited"

business in New York.

G. The Division of Taxation was required to establish a rational basis for the tax assessment against petitioner (see, Matter of Fokos Lounge, Inc., Tax Appeals Tribunal, March 7, 1991; Matter of Shop Rite Wines & Liquors, Inc., Tax Appeals Tribunal, February 22, 1991). The Division's conclusion that petitioner was soliciting business in New York and therefore was a vendor responsible for the collection and remittance of use tax was rationally based upon the following: (i) the letter of Mr. Vaccaro dated March 27, 1981, described in Finding of Fact "2", supra, which noted that Orvis salesmen called on non-Orvis-owned stores and who, the letter strongly implies, took nonbinding orders in New York which were then approved in Vermont; (ii) the specific set of facts which petitioner developed for its petition for an advisory opinion submitted on January 4, 1983, as detailed in Finding of Fact "8", supra, which noted that petitioner's salesmen, while in New York, assisted New York retailers in preparing their opening wholesale orders and accompanied New York retailers to spokesmen's shows in New York; and (iii) the fact, as noted in Finding of Fact "22", supra, that wholesale terms dated spring 1982 indicated that New York retailers could as an "authorized Orvis dealer" order merchandise to be "shipped directly to the retail customer".

H. Since it is concluded that the assessment was rational, petitioner had the burden of proof to show, by clear and convincing evidence, that the result of the audit was erroneous (Matter of Sarantopoulos, Tax Appeals Tribunal, February 28, 1991). Petitioner has not sustained this burden.

As noted in Finding of Fact "23", supra, petitioner did not offer the oral testimony of any witnesses. Instead, petitioner relied on a stipulation executed by the parties and two affidavits to sustain its position. Affidavits are clearly admissible in administrative hearings (cf., Flanagan v. State Tax Commn., 154 AD2d 758, 546 NYS2d 205; Mira Oil Company v. Chu, 114 AD2d 619, 494 NYS2d 458; see also, 20 NYCRR 3000.10[c][5]). However, in Flanagan v. State Tax Commn. (supra) and Mira Oil Company v. Chu (supra), the hearsay evidence was utilized by the Division of Taxation merely to make out a rational basis for its assessments. It is

a very different matter when a taxpayer seeks to utilize affidavits or hearsay evidence to shoulder its burden of proving, by clear and convincing evidence, that an audit was erroneous. The evaluation of the credibility of a witness is an important part of the hearing process (cf., Stevens v. Axelrod, 162 AD2d 1025, 557 NYS2d 809). Consequently, "facts" set forth in petitioner's two affidavits can be given little weight, especially in light of the varying facts noted in Conclusion of Law "G", supra. In addition, the Division of Taxation's lack of an opportunity to cross-examine petitioner's affiants is of significant concern.

Furthermore, petitioner's complaint that it would be unfair to require it to prove a negative, that it did not have adequate nexus with New York to require it to collect use tax, is rejected. There is nothing unusual about proving a negative (see, e.g., Matter of Roncolato, Tax Appeals Tribunal, August 15, 1991 [where the taxpayer was required to shoulder a burden of proving that he was not a person required to collect sales tax on behalf of a corporation]).

I. Petitioner argues that the "statutory and regulatory terms" are so vague as to violate its due process rights. Since the Division of Tax Appeals's enabling legislation does not extend the scope of review to determine the facial constitutionality of Tax Law statutes, only the regulations may be reviewed to determine whether they are constitutionally valid, both facially and as applied (Matter of J. C. Penney Co., Inc., Tax Appeals Tribunal, April 27, 1989). However, petitioner does not specify the terms it perceives as "so vague" that petitioner had to guess as to its application and its responsibilities. Its complaint against the "regulatory framework" is rejected in that it would seem that the regulatory definition of "interstate vendor" and of "soliciting business", as noted in Conclusion of Law "F", supra, may, in fact, be understood to "a reasonable degree of certainty so that individuals of ordinary intelligence are not forced to guess at [their meaning]" (Matter of J. C. Penney Co., Inc., supra, citing 41 Kew Gardens Road Associates v. Tyburski, 70 NY2d 325, 336, which, in turn, cited Foss v. City of Rochester, 65 NY2d 247, 253). In fact, petitioner is faced with a regulatory definition of "soliciting business" which is fairly expansive. Engaging in activities such as providing advice to retailers about the best way to display goods has been viewed as the solicitation of business

(cf., Gillette Co. v. State Tax Commn., 56 AD2d 475, 393 NYS2d 186, affd 45 NY2d 846, 410 NYS2d 65).

J. As noted in Conclusion of Law "F", supra, the Division of Taxation's regulations, as in effect during the period at issue, reflected the Supreme Court's ruling in National Bellas Hess v. Department of Revenue (supra). Since it has been concluded that petitioner is responsible for the collection and remittance of use tax under the regulations, which were drafted with this Supreme Court ruling in mind, a lengthy discussion concerning the constitutional standard to determine whether a state may impose such a duty is not necessary. Nonetheless, a response is in order to petitioner's assertion, detailed in paragraph "26", supra, that "no court has been willing to find nexus and impose use tax collection obligations based on contacts as minor and sporadic as those present here" and that "recent cases in other states have uniformly rejected state claims of nexus under similar fact patterns." To the contrary, in Heitkamp v. Quill Corp. (470 NW2d 203, cert granted ___ US ___ [N.Y. Times, Oct. 8, 1991, at D1, col 2]), the Supreme Court of North Dakota imposed the responsibility to collect and remit use tax on an out-of-state mail-order company. The court noted that the United States Supreme Court has been expanding states' authority to tax interstate commerce (Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 US 232, 97 L Ed 29 199) and has also significantly broadened the closely-related due process analysis in personal jurisdiction cases (Burger King Corp. v. Rudzewicz, 471 US 462, 85 L Ed2d 528). It emphasized the changes in the "mail order" business since 1967, the year National Bellas Hess (supra) was decided:

> "The economic, social, and commercial landscape upon which Bellas Hess was premised no longer exists.... In the quarter- century which has passed in the interim, 'mail order' has grown from a relatively inconsequential market niche into a goliath [sic] now more accurately delineated as 'direct marketing.' The burgeoning technological advances of the 1970's and 1980's have created revolutionary communications abilities and marketing methods which were undreamed of in 1967 (footnote omitted).
>
> ...Technology has triggered this transformation, with computerized database marketing allowing mailings directed to specific demographical groups.... Technology has also changed the method of receiving orders, with the increased efficiency of toll-free telephone lines, fax orders, and direct computer ordering replacing the less-immediate 'mail' order, and advances in the parcel delivery industry allow a wide variety of options, including overnight delivery.

> Perhaps the greatest change in mail order since 1967 has been in terms of sheer volume. Gone are the days of the Spring and Fall Sears catalog being the definition of mail order. It is estimated that in 1990 13.6 billion catalogs were mailed to consumers in the United States, an increase of 7.8 billion in ten years. Over 54 percent of Americans -- 98 million -- made a mail order purchase, an increase of 40 million since 1983 (footnote omitted). Mail order sales, in the neighborhood of $2.4 billion in 1967 [see Bellas Hess, supra, (Fortas, J., dissenting)], reached the staggering figure of $183.3 billion in 1989 (footnote omitted). By the mid-1980's, mail order accounted for more than 15 percent of total sales nationally. See, e.g., 43 Cong.Q. 2571 (Dec. 7, 1985); Hartman, Collection of the Use Tax on Out-of-State Mail-Order Sales, 39 Vand.L.Rev. 993 (1986)" (Heitkamp v. Quill Corp., 407 NW2d 203, 208-209).

It has also been suggested in the professional literature that "[t]he Supreme Court will not ignore the reality of modern technology when it [again] analyzes an issue such as the interstate commerce burden" (Cain, "The Taxing Problem Surrounding Mail-Order Sales", Taxes, May 1990). Professor Cain opined that "[c]ontinued attempts by mail-order sellers to fight sales tax collection may be like trying to shout down a storm." Professor Paul J. Hartman, in his treatise, Federal Limitations on State and Local Taxation, critiqued the majority's opinion in National Bellas Hess (supra):

> "The majority in Bellas Hess seems to represent considerable thinking by the Court that a few 'warm bodies' in the State, either in an office, or traipsing around hawking the seller's wares, constitute a more satisfactory nexus with a State, for constitutional purposes, than other more substantial and meaningful connections. Benefits from the taxing State, unrelated to physical contact with the State, may be of vastly greater significance than those derived from the presence of a whole swarm of drummers soliciting business. Practically speaking, it is hardly essential to the existence of a nexus with the taxing State that there must be personnel, directly engaged in some form of physical activity within the State in furtherance of a business purpose. The connection between the taxing State and the out-of-state collector-seller to establish nexus should be an economic rather than a physical relationship. When the out-of-state seller takes advantage of the economic milieu within the taxing State for the purpose of realizing a profit, a sufficient nexus to require the seller to collect the use tax could be found." (Hartman, Federal Limitations on State and Local Taxation, § 10:8, at 631.)

It is observed that the United States Supreme Court recently refused to review a case that had been decided adverse to the state tax collector. However, unlike the plaintiff in SFA Folio Collections, Inc. v. Bannon (585 A2d 666, cert denied 1115 S Ct 2839, 115 L Ed2d 1008), petitioner (during the period at issue) did not maintain separate corporate entities for its wholesale business and mail-order operations. In SFA Folio Collections, Inc., the taxpayer, Folio (a mail-order business), was a separate entity from an affiliated corporation that operated

a Sales Fifth Avenue department store in Connecticut.

K. While petitioner correctly asserts that, in general, fairness and policy considerations embodied in administrative law demand that agencies treat similarly situated parties consistently, this principle does not apply where a reasonable explanation for disparate treatment is stated by the reviewing agency (Matter of Balan Printing, Inc., Tax Appeals Tribunal, April 17, 1991, citing Matter of Field Delivery Serv., 66 NY2d 516, 498 NYS2d 111, 114). As noted in Finding of Fact "23", supra, a reasonable explanation for disparate treatment was provided by auditor Pilatzke. The uniqueness of petitioner's wholesale operations created the connections to New York which made it reasonable to pursue an assessment against petitioner. Furthermore, in order to establish a claim of selective enforcement there must be a showing that the selective application of law was deliberately based on an impermissible standard such as race, religion or some other arbitrary classification (cf., Petro Enterprises, Inc., Tax Appeals Tribunal, September 19, 1991).

L. As noted in Finding of Fact "19", supra, petitioner contends, in the alternative, that in sales tax quarters when no wholesale division employees travelled to New York, no tax should be due. However, as noted in Finding of Fact "21", supra, the Division of Taxation refused to stipulate to factual assertions contained in Mr. Perkins' affidavit concerning the activities in New York of petitioner's wholesale division employees. As noted in Conclusion of Law "H", supra, the hearsay evidence contained in the affidavits of Messrs. Perkins and Vaccaro cannot be given much weight. As a result, the allocation of sales among quarters detailed in Finding of Fact "19", supra, was not adequately proven. Consequently, Issue "X" is rendered moot.

M. Petitioner's exhaustive pinpointing of issues is exemplified by its brief, which raised an additional issue concerning whether the Division of Taxation should be estopped from asserting tax and interest due because of an unreasonable delay in issuing its adverse advisory opinion. Although the amendment of pleadings is freely allowed, it would not be fair to allow petitioner to raise this additional issue at such a late stage (see, Matter of Gasit, Inc., Tax Appeals Tribunal, July 19, 1990; 20 NYCRR 3000.4[c]). Moreover, a condition for estoppel is

detrimental reliance which would appear to be lacking herein since petitioner's failure to collect and remit use tax on its mail-order sales was its own decision and was not caused by any representation by the Division of Taxation (cf., Matter of D'Angelo, Tax Appeals Tribunal, August 22, 1991).

N. The petition of Orvis, Inc. is denied, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated April 22, 1986 is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE