STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
VERMONT INFORMATION PROCESSING, INC.	:	DETERMINATION DTA NO. 806207
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 December 1, 1983 through November 30, 1986.	:	

Petitioner, Vermont Information Processing, Inc., P.O. Box 470, Hercules Drive, Colchester, Vermont 05446, 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 December 1, 1983 through November 30, 1986.

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 10, 1991 at 1:15 P.M. Petitioner filed a brief on August 9, 1991. The Division of Taxation filed a brief on October 18, 1991, and petitioner filed a reply on October 29, 1991. Petitioner appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUES

I. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby required to collect the taxes imposed under Article 28 of the Tax Law.

II. Whether, if petitioner was a vendor pursuant to the Tax Law, the United States Constitution prevents New York from imposing a duty upon petitioner to collect the use tax imposed under section 1110 of the Tax Law.

III. Whether petitioner has established reasonable cause for its failure to collect and remit the use tax.

FINDINGS OF FACT

On November 27, 1987, the Division of Taxation ("Division") issued to petitioner, Vermont Information Processing, Inc. ("VIP"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1983 through November 30, 1986, assessing tax of $513,112.11 plus penalty and interest.

VIP is a Vermont corporation which produces and sells computer software to beverage distributors throughout the United States. During an audit of a beverage distributor located in Troy, New York, an auditor discovered a letter on VIP letterhead which indicated that VIP was making sales in New York State. As a result, the Division commenced an audit of VIP.

VIP was not registered to collect sales and use taxes on behalf of New York State. At the time of the audit, VIP contended that it was not required to register and had no duty to collect New York taxes. On that basis, it refused the Division access to its records. The Division obtained copies of VIP's Federal and Vermont income tax returns and used information from those returns to estimate New York taxable sales for the audit period of $7,330,173.00, with a use tax due on that amount of $513,112.11.

Following a conciliation conference, VIP agreed to allow the auditors to examine its records for the period December 1, 1983 through November 30, 1986. The VIP sales invoices inspected by the Division showed charges for computer hardware, charges for maintenance and installation of that hardware, charges for "site days" (days spent on the customer's business premises), travel expenses, charges for software systems and charges for the installation and maintenance of the software. The Division determined that receipts from the sale and maintenance of the software were not subject to sales or use tax. Charges associated with the sale, maintenance and installation of computer hardware were deemed to be subject to tax. Reimbursements for travel expenses incurred by VIP in connection with service provided to New York customers and charges for site days (days spent at the customer's location) were not deemed taxable by New York. The Division's review of the invoices resulted in a determination of taxable sales of $1,216,744.00. In accordance with this determination, the Division issued a

conciliation order, dated September 30, 1988, reducing the tax due to $85,172.08 and sustaining the imposition of penalty. Before hearing, the Division agreed to reduce the amount of tax asserted to $73,275.04.

It is VIP's position that it had no duty to collect and remit New York State sales or use tax, and it challenges the assessment on that basis alone. It concedes that if it is finally determined that VIP was under a duty to collect the tax the amount of tax due for the audit period is $73,275.04.

VIP operates its business from its headquarters in Colchester, Vermont. It does not maintain a place of business in New York. During the audit period, it employed between 20 to 30 workers. Two or three employees were engaged in accounting and bookkeeping operations. Harold Aiken, the president of VIP, and another employee were involved in sales. Approximately four employees were identified as installers. Workers in these positions gathered information from customers regarding the customer's computer system, recordkeeping and business operations. The installers (essentially computer programmers) then adapted VIP computer software to the needs of the customer. The installers also were involved in training the customers to operate the VIP programs. VIP also employed two trainers and approximately four people to answer questions from customers by telephone.

VIP had no employees in New York and did not employ salesmen to travel into New York to solicit sales, nor did it advertise in New York newspapers or periodicals or engage in direct mail solicitation. Most of its potential customers heard about VIP through word of mouth and contacted VIP to learn more about its product. VIP representatives spoke to potential customers over the telephone and mailed them brochures describing VIP's products and services. Interested parties were invited to Vermont for a demonstration or encouraged to view an operating VIP system at the workplace of an existing VIP customer in New York.

If a beverage distributor decided to purchase VIP's services, the distributor was sent a contract by United Parcel Service ("UPS"). After execution of the contract, the customer was asked to complete a variety of forms which provided VIP with information regarding the

customer's business operations and recordkeeping systems. The information supplied by the customer was used by VIP to create software suitable for that customer's particular business operations.

If a customer already possessed a viable computer system, VIP sold only the software programs and VIP's services. If a customer did not already own a computer, VIP would attempt to sell it computer hardware as well. VIP was an industry marketer, authorized by IBM to sell IBM computers to beverage distributors. Mr. Aiken described VIP's relationship with IBM as follows:

> Mr. Aiken: "They [IBM] ship equipment to me, they allow me to have 10 or 15 days credit on the equipment, and then I resell it, but I can only resell it to beverage distributors. They do all installation shippings as if it were sold by their regular representative who might be in Los Angeles. They maintain it by their own maintenance people, and the only thing I'm really doing is adding value to it, and I'm putting my software on it, setting the customer on it, training them, providing him on a hotline service afterward and an ongoing thing for years and years."
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> Administrative law judge: "Does your customer have any separate contract with IBM for maintenance, for guarantees or warranties?"
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> Mr. Aiken: "He would have. The agreement we would have him sign is an IBM agreement, it is not a VIP agreement.... We submit the paperwork so it doesn't get lost or messed up, and he is covered under maintenance by IBM."
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> Administrative law judge: "And would you separately charge on your invoice for any of that?"
>
> Mr. Aiken: "No." (Transcript at 76-77.)

VIP also sold computer hardware manufactured by a company named MSI and a third company. Its relationship with those companies was similar to its relationship with IBM.

If a VIP transaction included the purchase of computer hardware, the computer was mailed directly to VIP where the software was loaded, and the computer was then shipped by VIP to the customer, via common carrier. If the customer purchased only software, the program was placed on a disk which was shipped to the customer via common carrier.

VIP's customers were usually trained to use the programs developed for them at VIP's headquarters in Vermont. As part of its services, VIP personnel were available to VIP customers by telephone to answer questions and resolve any problems the customer might be having with the VIP computer program. In addition, VIP installers were able to directly access a customer's computer from VIP's own computer system in Vermont through the use of a

modem. A customer's computer program could be modified or corrected in this fashion, without the VIP employee leaving Vermont.

VIP personnel did not routinely travel to their customers' locales to answer questions or service customer needs. In fact, it was VIP's policy to discourage travel as much as possible. However, VIP did travel to the customer's place of business if absolutely necessary to install or maintain software or handle problems the customer was having with the software. Mr. Aiken estimated that approximately five percent of its customer accounts required some travel.

VIP sold its customers on-going services, such as updating the computer programs, for which it charged a monthly fee. VIP used the terms "maintenance" and "installation" to refer to services connected with the software programs; however, VIP did not install or maintain computer hardware or send its employees to its customer's facilities for the purpose of maintaining or installing such hardware. As Mr. Aiken stated in his testimony: "When we call it installation time, that's like you and I talking, it is hours, it is not-- I don't have a guy that uses a screwdriver. I don't have that" (transcript at 64). Any computer hardware sold by VIP was installed, serviced and maintained at the customer's business location by employees of the the hardware manufacturer.

During the course of the audit, the Division obtained a variety of information which led it to believe that VIP was entering New York to install both hardware and software at its customers' business locations and that VIP entered New York to conduct training sessions. That information consisted of a letter on VIP letterhead, VIP sales invoices, and conversations with VIP customers. Since VIP vigorously disputes the meaning and importance attributed by the Division to this information, it is necessary to review it in some detail.

(a) The Division introduced a letter dated February 13, 1985 from VIP to a Troy, New York customer. As material here, the letter summarizes computer hardware and software purchased by the customer and contains the following statements:

"PAYMENT SCHEDULE:

Due with this letter (hardware deposit 10%) (received)		3,447.90
Due at installation (hardware 90% + software)	36,481.00	

> You should budget one to two days at $60.00 per hour for training and installation on the computer and software, as well as actual per diem expenses. Any applicable sales, use, or excise taxes are your responsibility and should be paid to the proper authorities. All VIP charges will be billed when performed.
>
> If John J. Bolond Dist. and VIP determine that an installer is needed on-site for additional data prep within 60 days of installation, VIP will provide that person at no charge to John J. Boland Dist."

The letter also states separate charges for the maintenance of the hardware and software.

An auditor spoke with a representative of the Troy beverage distributor. When asked the substance of that conversation the auditor stated: "They said that the representative installed the computer and trained them and that they had a seminar in Albany in March of 1987." (Transcript at 33.)

The auditor believed that the letter provided evidence that VIP entered New York for installation and maintenance of computer hardware and training.

(b) The second document relied on by the Division was a VIP sales invoice to a customer in Athens, New York. The customer was charged for VIP travel time and expenses and for training. The invoice does not indicate where the training took place.

(c) Two other invoices to separate New York customers show charges for software, hardware, hardware maintenance, and "PC/Set Up/Test".[1]

(d) Three invoices to a Plattsburgh customer show miscellaneous travel and transportation expenses and charges for "installation". An auditor spoke with an employee of the Plattsburgh customer and was told that a VIP employee went to the business offices in Plattsburgh to "install system and train him" in its use (Exhibit M, notation made by auditor).

(e) An invoice to an Ithaca, New York company shows the sale of hardware and software by VIP.

When reviewing the VIP invoices, the auditor made a listing of each invoice which she

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[1]In his testimony, Mr. Aiken explained this as a charge "to set up a diskette" (transcript at 59).

believed demonstrated VIP's presence in New York in connection with its sales of computer hardware and software in New York. The listing provides the following information for each such invoice: the customer name, the invoice date, the invoice number, the total invoice amount, the amount taxable by New York State, and comments. The comments section identifies those items on the invoice which the auditor construed as evidencing VIP's presence in New York. These items can be separated into two general categories: (1) items of travel expense or charges for site visits and (2) items connected with the installation or maintenance of either computer hardware or software. Approximately 41 invoices contain items in the first category. The remaining 40 invoices show charges for items related to installation and maintenance of computer hardware or software. There is no correlation between the hardware installation charges and the travel or site visit charges. For example, invoice number 121188 showed a $480.00 charge for installation of hardware. The auditor included the invoice in the listing of invoices showing a New York presence, presumably because she believed that a VIP employee traveled into New York to install the hardware. The comments section does not indicate that there was a charge for travel expenses, and there is not a separate invoice for travel expenses which can be correlated to the installation found on invoice number 121188. There are some instances where a charge for installation of software is found on the same invoice as a travel expense charge. Invoice number 730 showed an invoice amount of $149.01 for transportation, room, meals and PC installation. None of this was deemed taxable. The invoices do not undermine the credibility of Mr. Aiken's testimony that VIP did not travel to New York to install, service or maintain computer hardware.

After receiving access to VIP's records, the auditor listed all invoices showing sales of property or services subject to sales or use taxes. Her worksheets list approximately 154 such invoices for the audit period.

Mr. Aiken attended a seminar in New York. The subject of the seminar was New York's bottle bill. Mr. Aiken participated as a presenter at the invitation of the seminar's sponsors. The seminar was not conducted for the purpose of training VIP customers or to solicit business

in New York, and it occurred after the expiration of the audit period.

VIP registered to do business in New York with the Department of State over 10 years ago. On advice from an attorney, VIP ended its registration. VIP also consulted an accountant about 10 years ago who advised VIP that it had no duty to register as a vendor in New York State or to collect New York State use tax.

CONCLUSIONS OF LAW

A. Section 1110 of the Tax Law imposes upon all persons a compensating use tax for use within New York State 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 former § 1101(b)(8)(i),[2] in effect during the audit period, 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".

The Division premised its finding that VIP is a vendor and liable for collection of use tax on two grounds. First, the Division found that petitioner made sales of tangible personal property (computer hardware) in New York. Second, the Division found that VIP employees traveled to New York to perform services subject to tax under Tax Law § 1105(c)(3),

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[2]Effective September 1, 1989, the statutory definition of vendor was modified. Tax Law § 1101(b)(8)(i)(C) now defines a vendor, in pertinent part, as:

> "A person who solicits businesss...
>
> (II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution; 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."

specifically to install, maintain and service the computer hardware.

Petitioner denies that it sold tangible personal property in New York and contends that its employees entered New York only in connection with the servicing of computer software. Even if it did make sales of tangible

personal property in New York, petitioner claims that the State cannot burden it with a duty to collect use tax because it lacks the nexus with New York required by the Commerce Clause and the Due Process Clause of the United States Constitution. In order to determine whether petitioner was a vendor under the Tax Law and to resolve the nexus issue, it is first necessary to determine the nature and extent of VIP's activities in New York as established by the evidence in the record.

B. The Division placed sufficient evidence in the record to establish that it had a reasonable basis for concluding that VIP sold tangible personal property in New York and entered New York to install and maintain that property. That evidence consisted of the letters and invoices obtained by the auditor during her audit and the auditor's conversations with two VIP customers. Moreover, the auditor's analysis of invoices reviewed after the conciliation conference lent support to the Division's position. Accordingly, the burden was upon VIP to show by clear and convincing evidence that it did not sell tangible personal property in New York or enter New York to perform services taxable under article 28 (Matter of Sarantopoulos, Tax Appeals Tribunal, February 28, 1991).

C. Petitioner failed to prove that it did not sell tangible personal property in New York. VIP solicited sales in New York and by reason of that solicitation made sales of tangible personal property (computer hardware) within New York. VIP argued that the computer manufacturers, not VIP, were the actual sellers of the hardware, but the evidence establishes otherwise. In fact, VIP's witnesses consistently spoke of these transactions in terms of a purchase by VIP and a resale to VIP's customers (see, e.g., the testimony of Harold Aiken in Finding of Fact "9"). VIP's contention that it did not solicit business in New York is also

rejected. VIP sent brochures to potential customers in New York, negotiated sales over the telephone, and arranged for potential customers to see VIP computer systems demonstrated either in New York or Vermont. These activities constitute solicitation of business, and by reason of such solicitation VIP made sales of tangible personal property in New York. This activity alone establishes that VIP was a vendor under section 1101(b)(8)(i)(A), (C) of the Tax Law.

Petitioner proved that it performed no services in New York subject to taxation under article 28. There is no question that VIP employees traveled into New York to install computer software, solve problems related to its use and provide training; however, VIP offered the credible testimony of its president and comptroller to establish that VIP did not install, service or maintain computer hardware in New York. Their testimony established that the auditor misapprehended information shown on the invoices and letters she viewed. The confusion was caused, in part, by VIP's practice of referring to services related to the computer software as "installation". A statement on an invoice showing, for example, "PC installation" referred to the placing of a computer program on a disk, an activity that normally occurred in Vermont. The listing of invoices made by the auditor provides no evidence that VIP employees entered New York to install or service computer hardware. Although the listing shows charges related to the hardware and charges for travel or site days, there is never any correlation between the two; that is, the invoices never show a charge for travel expenses that can be directly related to a charge for hardware installation. Thus, the invoices themselves lend credibility to the testimony of VIP's witnesses.

In its brief, the Division states: "If the content of the actual invoices differ [sic] materially from the auditor's transcription, it was the petitioner's burden to produce these records in support of its position" (Division's Brief at 4). The point here is not that the auditor did not accurately transcribe information but that she misinterpreted it. There is no independent evidence in the record that supports the auditor's interpretation, except the hearsay statements of two VIP customers (see Finding of Facts "15[a]" and "15[d]"). The statements themselves are

ambiguous and do not clearly indicate whether the speakers were referring to the installation of computer hardware or software. Moreover, they were related by the auditor who understood the term "installation" to refer to hardware. When contrasted with the testimony of VIP's witnesses, given under oath and subject to cross-examination, those statements can carry little weight. In sum, the evidence shows that VIP employees entered New York only to service and maintain the computer software and to provide training in its use. These are not services subject to tax under article 28.

The Division determined that the receipts from VIP's computer programs and software sales were not subject to tax under article 28 because the programs were adapted and modified for each individual customer's use. Computer programs of this nature are deemed to be intangible personal property, whether directly entered into the computer or placed on disks, tapes, or transmitted by another medium (see, Matter of Economic Information Systems, State Tax Commission, May 26, 1987 [TSB-H-87(218)S]). As an intangible product, such software does not fall within the scope of article 28. Services rendered in connection with the intangible personal property likewise are not subject to the tax imposed under article 28. Thus, VIP would not have been required to register as a vendor or to collect use tax if its only sales transactions involved the creation and servicing of the computer software, even if it maintained a place of business in New York.

The Division argues that it is of no significance that VIP employees serviced only the software, since the software and hardware function as a unit. It may be true that one cannot create or modify a computer program without using a computer. However, the Division itself distinguishes between software and hardware, deeming the former to be intangible personal property not subject to sales or use tax (see, Answer Systems, Inc., Advisory Opinion, January 15, 1991 [TSB-A-91(9)S]). More importantly, the Division recognizes that the services of creating, updating and modifying the software are not taxable by article 28 even where the data or programs are "entered into a computer directly" (Department of Taxation, Technical Services Bulletin 1978-[S]; see also, Answer Systems, supra). Based on the fact that VIP only

provided services in connection with the computer software, it is concluded that it performed no services in New York subject to New York's sales and use tax.[3]

Nonetheless, the evidence is sufficient to establish that under section 1101(b)(8)(i)(A), (C) VIP was a vendor during the audit period because it sold tangible personal property in New York.

D. The conclusion that VIP was a vendor under the Tax Law does not settle the issues raised here however. Past United States Supreme Court decisions have recognized a constitutional limitation upon a state's power to require an out-of-state seller to collect use tax (see, National Bellas Hess v. Department of Revenue, 386 US 753, 87 S Ct 1389, 18 L Ed 2d 505). These constitutional limitations are reflected in the Rules and Regulations of the Commissioner of Taxation and Finance, in effect during the audit period. 20 NYCRR former 526.10(e)(2) limits the definition of a vendor, stating:

> "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."

A person is deemed to be soliciting business for purposes of the regulation if he has employees, salesmen, independent contractors or other agents soliciting potential customers in New York (20 NYCRR former 526.10[d][1]).

Quite clearly, if VIP's sales of tangible personal property in New York involved only the

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[3]The Technical Services Bulletin cited indicates that computer software of a certain nature is "exempt" from sales tax. In fact, the Tax Law does not provide a statutory exemption for software of any kind. Because software (of the kind under discussion) is deemed to be intangible personal property, the receipts from sale of the software are not taxed by article 28. Inasmuch as such receipts do not fall within the scope of article 28, a person whose activities are confined to the selling of such software is not a vendor as defined by section 1101(b)(8) (cf., Matter of Felix Industries, Tax Appeals Tribunal, August 22, 1991 [where the Tribunal held that a vendor is not free from the duty to register because his sales, otherwise taxable under article 28, were exempted from sales tax by specific provisions of the Tax Law]).

solicitation of sales of the computer hardware by mail and telephone and the delivery of that merchandise by common carrier, VIP would not be deemed to be a vendor under the regulation and thus would not be responsible for the collection of use tax. The issue then is whether VIP's sales of tangible personal property in New York coupled with its presence in New York to perform services not taxed by article 28 creates the requisite nexus which would allow New York to require VIP to collect the use tax. VIP claims that the activities it carried on in New York are insufficient to create a nexus between VIP and New York because the receipts from those activities were not subject to sales tax and because the activities were irregular and few in number.

The opinion of the Supreme Court in National Geographic Society v. California Board of Equalization (430 US 551, 51 L Ed 2d 631) is especially instructive in resolving the former issue. The appellant, a not-for-profit corporation, maintained two offices in California that solicited advertising for the Society's magazine but had no connection to the Society's mail order business conducted from its headquarters in the District of Columbia. The California Supreme Court had concluded that the "slightest presence" of the seller in California established sufficient nexus between the State and the seller to support the imposition of the duty to collect use tax. The Society argued:

> "[t]hat there must exist a relationship not only between the seller and the taxing State, but also between the activity of the seller sought to be taxed and the seller's activity within the State" (id at 560, 51 L Ed 2d 631, 639).

The Court rejected both approaches. It surveyed the decisions in this area and concluded that:

> "[t]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities within the State, but simply whether the facts demonstrate 'some definite link, some minimum connection between [the State and] the person...it seeks to tax'." (Id, at 561, 51 L Ed 2d 631, 640, quoting Miller Bros. v. Maryland, 347 US 340, 74 S Ct 535, 539; emphasis added in National Geographic.)

Based on the decision in National Geographic, it is concluded that all of VIP's activities in New York may properly be considered in determining whether VIP had a sufficient connection with New York to warrant imposition of the burden to collect use tax. A sufficient

nexus has been found to exist where local agents of the seller were present in the State and operated out of premises paid for by the seller (Felt & Tarrant Mfg. Co. v. Gallagher, 306 US 62, 83 L Ed 2d 488). A state may impose the tax burden on a company maintaining retail stores in the state even if the retail stores are not directly involved in the company's out-of-state mail order business (Nelson v. Sears, Roebuck & Co., 312 US 359, 85 L Ed 868). In National Geographic, the Court held that the Society's offices in California created sufficient nexus to subject the Society to use tax liability, although the offices had no direct relationship to the seller's mail order business (National Geographic Society v. California Board of Equalization, supra).

VIP's activities in New York are somewhat less substantial than those described in the cited cases. VIP does not own or lease property in New York, it does not have a telephone in New York, and it has no employees or agents in New York. Nonetheless, its activities in New York are more extensive than those of the mail-order company described in Bellas Hess. In determining exactly how much activity and what kind of activity is necessary to create a nexus between the State and the person it wishes to subject to use tax liability, the Supreme Court's examination in National Geographic of the Bellas Hess opinion is notable. The Court stated:

> "National Bellas Hess, Inc. v. Illinois Rev. Dept, (citations omitted) presented the question [of nexus] in the case of an out-of-state seller whose only connection with customers in the taxing State was by common carrier or mail. Illinois subjected appellant Bellas Hess, a national mail-order house centered in Missouri, to use tax liability based upon mail-order sales to customers in that State. Bellas Hess owned no tangible property in Illinois, had no sales outlets, representatives, telephone listings, or solicitors in that State, and did not advertise there by radio, television, billboards, or newspapers. It communicated with potential customers by mailing catalogues throughout the United States including Illinois, twice a year and occasionally supplemented this effort by mailing out 'flyers'. All orders for merchandise were mailed to Bellas Hess' Missouri plant, and the goods were sent to customers by mail or common carrier. Bellas Hess held that, constitutionally, the basis for the requisite nexus was not to be found solely in Bellas Hess' mail-order activities in the State. The Court's opinion carefully underscored, however, the 'sharp distinction...between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like Bellas Hess] who do no more than communicate with customers in the State or by mail or common carrier as part of a general interstate business.'" (National Geographic Society v. State Board of Equalization, supra at 559, 51 L Ed 2d 631, 639, quoting Bellas Hess v. Illinois Rev. Dept., supra at 1392; emphasis added.)

The Court made one other observation pertinent to this determination. It noted that the

only burden placed on the out-of-state seller by the compensating use tax is an administrative one of collecting and remitting the tax. The out-of-state seller becomes liable for the tax only if it fails or refuses to collect it from consumers whose "identification as a resident of the taxing State is self-evident" (id. at 558, 51 L Ed 631, 639).

VIP conducted a substantial amount of business activity in New York. Its sales of taxable items amounted to $1,216,744.00 during the audit period. In addition, it had sales of nontaxable goods and services in an undetermined amount. Undoubtedly, its sales in New York were increased and enhanced by its activities in New York. It was able to promise its potential customers that an installer would visit New York to solve any problems with the systems purchased (Finding of Fact "15[a]"). VIP systems operating at the offices of existing customers in New York were used to demonstrate the VIP product to potential New York customers (Finding of Fact "7"). VIP communicated regularly with existing New York customers over telephone lines, either in the traditional manner or by computer linkage (Finding of Fact "12"). Petitioner claims that the actual number of times its employees visited New York were too infrequent to create a definite link between New York and VIP. The VIP invoices show approximately 41 trips into New York during the audit period based upon charges to its customers for site days and travel expenses (Finding of Fact "16"), and the auditor's workpapers show approximately 154 taxable transactions in New York during the same period. Thus, the actual number of times a VIP employee visited New York is not insignificant in relationship to its sales in New York. More importantly, these visits to New York were significantly connected with VIP's ability to establish and maintain a market for the computer hardware and software it sold in New York. Therefore, it is concluded that VIP's presence in New York through its installers' visits to this State created a sufficient nexus between New York and VIP to subject VIP to use tax liability.

E. Petitioner seeks abatement of penalties on the ground that it had reasonable cause for believing that it was not liable for use taxes. Petitioner contends that reasonable cause is shown by the following facts: (1) petitioner's primary business is the creation of software which is an

activity not subject to tax under article 28; (2) petitioner informed its customers that they were responsible for payment of any taxes due; (3) petitioner believed that IBM was collecting and remitting sales taxes on sales in New York State; (4) petitioner maintained no offices or employees in New York and did not advertise in New York; (4) petitioner consulted an accounting firm which advised it that it had no use tax liability in New York. At hearing, petitioner's attorney argued that this case is one of first impression and that "if nexus is determined in this case it will be as far as the State of New York has ever gotten" (transcript at 87). He argued that a penalty should not be imposed on petitioner in such a case.

Petitioner was assessed penalty under section 1145(a)(1)(i) of the Tax Law which provides for imposition of penalty whenever any person fails "to file a return or pay over any tax...within the time required by or pursuant to [article 28]". Section 1145(a)(1)(iii) allows for abatement of penalty where the petitioner has established that such failure was due to reasonable cause and not due to willful neglect. The taxpayer bears the burden of establishing reasonable cause as well as the absence of willful neglect (see, e.g., Matter of T.V. Data, Inc., Tax Appeals Tribunal, March 2, 1989).

In determining whether reasonable cause exists, an important factor to consider is the extent of the taxpayer's efforts to ascertain its tax liability (see, Matter of John Grace & Co., Tax Appeals Tribunal, May 9, 1990; see also, 20 NYCRR 536.5[d][1], [2]). Reliance on the advice of a tax professional is not necessarily grounds to support a finding of reasonable cause (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557). Here, there was testimony that petitioner consulted with an accounting firm and was advised that it had no use tax liability. However, there was no evidence to show exactly what facts were presented to the tax advisor or to establish the nature and extent of the inquiry made and advice given by the advisor. The cancellation of penalties on the basis of the mere allegation that an accountant's advice was sought would eviscerate the penalty provisions altogether (see, Matter of LT & B Realty v. State Tax Commn., 141 AD2d 185, 535 NYS2d 121, 123).

Petitioner's contention that it believed that either IBM or its customers were remitting any

sales taxes that might be due to New York tends to demonstrate willful neglect rather than reasonable cause. A vendor cannot delegate its statutory duty to collect and remit tax. Petitioner's reliance on others, who also may have had a duty to pay tax, does not demonstrate that petitioner made a good faith effort to ascertain its own tax liability.

Finally, the fact that New York's courts have not ruled on a case presenting the same set of facts as those presented here is not a sufficient basis to establish reasonable cause.[4] In order to establish reasonable cause, the taxpayer must show that he acted with ordinary business care and prudence in attempting to ascertain his tax liability (Matter of A & V Crown, Tax Appeals Tribunal, May 24, 1990; see also, 20 NYCRR 536.5[d][2]). There is no such showing here. For example, petitioner did not contact the Division to ask its interpretation of the law or seek an advisory opinion of the Commissioner. In the absence of such inquiries, petitioner failed to prove that its actions did not constitute willful neglect.

F. The petition of Vermont Information Processing, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes as modified by agreement of the parties (Findings of Fact "4" and "5") is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE

[4]This determination is based on the law that existed during the audit period. There is no attempt here to restrict nexus requirements or to anticipate future Supreme Court decisions (see, e.g., Heitkamp v. Quill Corp., 470 NW2d 203, cert granted ___ vs ___, 112 S Ct 49, 116 L Ed 2d 27).