STATE OF NEW YORK

DIVISION OF TAX APPEALS

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| In the Matter of the Petition | : | |
| of | : | |
| STAINLESS, INC. | : | DETERMINATION<br>DTA NO. 807415 |
| for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1983 through February 28, 1987. | : | |

Petitioner, Stainless, Inc., 310 Piquette Street, Detroit, Michigan 48202-3598, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through February 28, 1987.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on June 17, 1991 at 1:15 P.M., with all briefs to be submitted by August 31, 1991. Petitioner filed its brief on July 30, 1991, the Division of Taxation responded with its brief on August 16, 1991 and petitioner filed its reply brief on August 30, 1991. Petitioner appeared by Sullivan, Ward, Bone, Tyler and Asher (Marc A. Letvin, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

ISSUES

I. Whether there existed sufficient connection or nexus between petitioner and the State of New York such that petitioner was required to register as a vendor and collect sales and use taxes from its New York customers.

II. Whether petitioner was required to collect tax specifically with respect to two walk-in coolers sold to its customers in New York State.

FINDINGS OF FACT

During 1987 the Division of Taxation conducted and completed a field audit of the potential sales and use tax liability of petitioner, Stainless, Inc. ("Stainless"), for the period

March 1, 1983 through February 28, 1987. This audit was undertaken as a result of information gleaned from audits of certain of petitioner's customers located in New York State. During the period of time covered by the audit, petitioner was engaged in the business of manufacturing and selling restaurant equipment, consisting primarily of kitchen equipment such as fryolators, stoves, food shelving and stacking units, coolers, etc. Petitioner maintains facilities, including manufacturing facilities, in Detroit, Michigan and in Deerfield Beach, Florida. Petitioner has never maintained any facilities in New York State.

Petitioner sells its equipment on a nationwide basis, with its principal customers being Big Boy Restaurants ("Big Boy"), Carrolls Restaurants ("Carrolls"), and Burger King Restaurants ("Burger King").[1] Burger King is headquartered in Florida. Petitioner's equipment is sold both to Burger King company-owned outlets as well as Burger King franchised outlets. Petitioner's sales to Burger King outlets

are processed through petitioner's company headquarters in Deerfield Beach, Florida.

At the commencement of the audit, the auditor requested that petitioner submit its books and records for examination. Petitioner in turn made its books and records available, the same were examined by the auditor, and constitute the basis upon which the audit results and the tax determined to be due were calculated.

During the period under audit, petitioner was not registered as a vendor with the State of New York for sales and use tax purposes. As a result of the auditor's participation in prior audits of restaurants in New York State, he learned that petitioner employed a representative who had contact with petitioner's customers in New York. In this connection, a questionnaire given to petitioner as part of the audit and completed by petitioner's controller, one Russell N. Smith, was introduced in evidence. This document, referred to as a "nexus questionnaire",

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[1]There is no significant evidence in the record relating to Big Boy or Carrolls. In fact, nearly all of the sales examined upon audit and at issue herein were made to Burger King and/or its franchisees. Accordingly, the evidence specific to petitioner's methods of operation pertains solely to its activities related to Burger King and/or Burger King franchisees.

provided, in relevant part, as follows:

> "Question 12 - Do you have any employees, commission agents or sales representatives, whether assigned to New York State or outside New York State, who solicit customers for your company in New York State?
>
> Answer - Yes, see Item number 34."

In turn, "Item number 34" required petitioner to provide a "[b]rief description of [the] company's business activities and products sold". In response to this question, petitioner indicated "[c]ompany has one sales person resident in New York who covers N.E. U.S. region. All orders are administered by home office in Florida. Sales person visits customer's location to inventory final shipments and assure completeness of order and absence of freight damage."

Based largely on the foregoing, the auditor determined that there was a sufficient nexus to hold petitioner subject to sales and use taxes on its sales to customers located in New York. Accordingly, two notices of determination and demands for payment of sales and use taxes due, each dated October 27, 1987, were issued to petitioner assessing sales and use taxes due for the period March 1, 1983 through February 28, 1987 in the aggregate amount of $108,933.08, plus interest. Penalty was not assessed.

Petitioner requested a prehearing conciliation conference. The conference was held on January 27, 1989, and resulted in the issuance of a Conciliation Order, dated July 7, 1989, reducing the amount of sales and use taxes assessed against petitioner to $55,879.78. The basis for this reduction was recognition of a computational error in the amount of tax assessed ($4,342.86), together with a finding, based upon substantiation furnished by petitioner, that $48,710.44 in use tax had been paid by petitioner's customers on equipment they had purchased. Accordingly, revised notices of determination were issued reflecting the reduced total of $55,879.78 as due and owing. In addition, evidence submitted at hearing reveals that an additional amount of $36,172.37 in tax has been paid on the transactions at issue, thereby leaving the amount of tax assessed and outstanding as of the date of these proceedings to be $19,707.41, plus interest.

At hearing, the parties stipulated to the admission of an affidavit made by one Robert L.

Kassab, petitioner's president. By this affidavit, Mr. Kassab alleges, inter alia, that petitioner had no representative, employee or agent who solicited business in New York State during the period in question, but rather that petitioner did have one employee, described as a "field representative", who entered New York State on petitioner's behalf during the period in question. This individual, one Richard Jeffery, resided in New York State and was in petitioner's employ until October 17, 1986, after which date one Mark Haughie, a New Jersey resident, became petitioner's representative handling its New York business. These representatives covered a territory described as the "northeast United States". These representatives were, in some instances, present at the customer's site during delivery of the merchandise, allegedly for the sole purpose of taking an inventory of the products being delivered to assure completeness of the order and lack of damage during shipment. These representatives did not assist petitioner's customers in installation of the products sold by petitioner.

Attached to and made a part of Mr. Kassab's affidavit was a statement describing the facts of petitioner's operation. Petitioner's sales, such as those that are at issue herein, and specifically those to Burger King, are described as "going through" petitioner's headquarters in Deerfield Beach, Florida. Petitioner's sales were generated as the result of petitioner's being on an "approved vendor list" at Burger King's corporate headquarters. Petitioner provided Burger King with a description of its product line and its prices, which list was in turn disseminated by Burger King to its franchisees. In some instances, a sale by petitioner occurred through direct contact initiated by a potential customer who had reviewed the Burger King approved vendor list. In such an instance, no contact was initiated with the potential customer by any Stainless personnel. These instances apparently involved Burger King franchisees with knowledge of the equipment needed to set up a new restaurant (presumably franchisees already operating one or more Burger King outlets). In other instances, Stainless would be notified by Burger King that a franchise site had been approved. Stainless would then contact the franchisee to provide information as to its products. This contact was undertaken from an office outside of New

York, usually by telephone. In most instances, the franchisee would then visit Stainless's manufacturing plant in Florida to review Stainless's products.

After the first contacts described above, sales were carried out on two basic variations. First, a "more sophisticated" Burger King operator would order what that operator wanted, knowing the prices and the products by review of the aforementioned approved vendor list and/or on-site visits to petitioner's Florida facility. In contrast, a "less sophisticated" customer/operator would lack the necessary background to know exactly what would be required for his installation. In these instances, Stainless would provide a representative (the above-described field representative) to coordinate the customer's purchases. This field representative essentially assisted the customer in determining the customer's needs. Equipment purchased was always shipped to the customer by common carrier FOB Florida (or Michigan).

No contracts, standard or otherwise, or any invoices relative to the transactions upon which the tax at issue is based were offered in evidence. The auditor noted that on certain invoices installation charges were included. Petitioner's representative at hearing alleged that a customer would sometimes request Stainless to arrange for installation of the equipment. Such arrangements were made with outside parties (contractors) who actually installed the equipment, with Stainless merely acting as an agent to arrange for the installation. The auditor agreed in this regard that he believed installation was not in fact carried out by petitioner's employees, but by other persons hired or contracted to do the installations. There is no evidence upon which to determine whether the installation charges allegedly appearing on certain invoices represented in fact a pass-through of the actual installation charges, or included some margin or markup to allow for a profit on the service of obtaining an installer.

Petitioner's field representative did not "take" or "write-up" purchase orders. Rather, equipment orders were generally completed when the customer sent its order to Detroit or Florida to be approved by petitioner. The exact method of ordering was not further specified on the record.

There is no evidence that petitioner ever advertised in any publication or other media in

New York, or mailed or otherwise distributed any catalogues, flyers, or other materials save for the approved vendor equipment and price list supplied via Burger King or upon request by a potential customer. In addition, petitioner did not own or maintain any office, facility or property in New York.

A portion of the tax at issue herein is based upon petitioner's sale of two walk-in coolers installed at Burger King outlets. The Division of Taxation stipulated at hearing that such walk-in coolers, when installed, constituted capital improvements thereby leaving no sales tax due from the customer on installation charges. By its brief, the Division agreed to rescind so much of the unpaid balance of the assessment as is attributable to either or both of the two walk-in coolers at issue which were sold to New York customers and "which were installed by the petitioner or by contractors retained by the petitioner for that purpose." The Division's abatement pertains to any tax assessed on the cost of such coolers, as well as any tax assessed on the installation cost allocable to the coolers (computed by dividing the cost of the walk-in coolers by the total cost of equipment purchased, and multiplying the result by the installation charge to the customer). The Division, however, would not concede to abate tax assessed on either of such coolers not installed by petitioner or by contractors retained by petitioner for that purpose. No other evidence was submitted at hearing with regard to the coolers.

SUMMARY OF THE PARTIES' POSITIONS

The Division of Taxation alleges that Stainless's activities, as described, constitute sufficient nexus with New York such that petitioner was a vendor as defined under Tax Law § 1101, was required to register as such, and to collect tax and remit the same to New York (20 NYCRR 526.10[a][1][ii]). The Division notes that petitioner's field representatives came into New York and worked with prospective customers in designing a layout and determining the accompanying kitchen equipment necessary for such layout, pointing out that these representatives thus assisted the customers before sales were actually made. The Division alleged, upon information and belief, that the field representatives were accessible or available to petitioner's customers either before or after a sale. With respect to the walk-in coolers, the

Division stipulated the same to be capital improvements when installed, but alleged use tax to be due on the component parts incorporated in the manufacture of such coolers if the same were not installed by petitioner or by contractors hired by petitioner.

Petitioner argues, by contrast, that its field representative undertakes no solicitation of sales in New York, but rather only assists customers, upon their request, in determining equipment needs and kitchen layout. Petitioner maintains that it provides this service in an effort to assure that what its customers order is appropriate for their operation. Petitioner argues that there is no testimony or other evidence that its products are delivered other than by common carrier with title passing outside of New York (per FOB Florida or Michigan shipping procedures), and, other than that in some instances petitioner arranges for installation, there is no indication that petitioner, through its employees or otherwise, actually installed any of the equipment. Further, petitioner maintains that it does not advertise in New York, service its products in New York or initiate any transactions in New York, explaining that all such transactions and activities are commenced at the request of the customers, as described.

CONCLUSIONS OF LAW

A. Except for the transactions involving the walk-in coolers, all of petitioner's sales of kitchen equipment to New York customers at issue herein were retail sales of tangible personal property. Since, in each instance, the customer took delivery of the materials in New York, sales or use tax was properly payable on each such transaction by the customer (see 20 NYCRR 526.7[e]; 531.4[c][1]). Any liability to petitioner in respect of such sales, however, depends upon whether petitioner was a person required to collect tax pursuant to Tax Law § 1131(1) and was therefore obligated to collect tax from its customers in respect of such sales pursuant to Tax Law § 1132(a).

B. Insofar as is relevant herein, a "person required to collect tax" is defined as "every vendor of tangible personal property or services" (Tax Law § 1131[1]). During the period at issue, Tax Law § 1101(b)(8)(i) defined "vendor", in pertinent part, as follows:

"The term 'vendor' includes:

(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;

(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 this article;

(C) A person who solicits business either by employees, independent contractors, agents or other representatives or by distribution of catalogs 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...."

C. The compensating use tax imposed by Tax Law § 1110 is a tax which is required to be collected by every "vendor" of tangible personal property (Tax Law § 1131[1]). This imposition of a duty to collect the use tax was recognized as a response to the "impracticability of its collection from the multitude of individual purchasers..." (National Geographic Society v. California Equalization Board, 430 US 551, 51 L Ed 2d 631, 636 [1977], citing Miller Bros. v. Maryland, 347 US 340, 98 L Ed 744). In turn, the imposition of this burden of collecting the use tax on behalf of their customers by a vendor is subject to certain constitutional limits. In determining whether a state may impose such a duty, the standard is whether there exists "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (National Bellas Hess v. Dept. of Revenue, 386 US 753, 756, 18 L Ed 2d 505, 509, quoting Miller Bros. v. Maryland, supra). The "simple but controlling question is whether the state has given anything for which it can ask return" (Wisconsin v. J. C. Penney Co., 311 US 435, 444, 85 L Ed 267, 615 S Ct 246).

D. In view of these constitutional factors, the Division of Taxation's regulations on this issue provide that a "vendor shall be deemed to be making sales of tangible personal property in the State if he regularly makes deliveries into the State other than by common carrier or mail, or regularly engages in the servicing of property in the State" (20 NYCRR 526.10[a][1][ii]). The Division's regulations go on to provide at 20 NYCRR 526.10(e) as follows:

"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." (Emphasis supplied.)

E. The regulations also provide the following definition of "soliciting business":

"(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.

(2) A person is deemed to be soliciting business in New York if he distributes catalogs or other advertising material, in any manner in the State.

(3) A person is deemed to be soliciting business if he places advertisements in New York newspapers or over New York radio or television stations, and either requests that orders, payments or inquiries be sent to a New York address or delivers orders to New York in vehicles that he controls." (20 NYCRR 526.10[d].)

In view of the foregoing, in order to conclude that petitioner was liable to collect and remit use tax on its sales to New York customers it must be determined whether petitioner was a vendor, within the definition thereof set forth in the Tax Law and regulations, having that constitutionally required minimal connection with New York State requisite for imposition of the duty to collect the tax in question.

F. Based on the evidence presented in this record, it is concluded that petitioner was not a vendor required to collect the tax in question. This conclusion is based, in part, upon the fact that petitioner's lone employee visiting petitioner's vendees in New York State is a field representative who, although labelled a sales representative, functions essentially as a consultant. That is, the field representative is called in by the approved Burger King franchisee in order to advise that franchisee as to its needs for its particular restaurant layout. While the

Division would liken these activities to acts done in furtherance of or in continuance of establishing a regular, ongoing vendor-vendee relationship, the facts do not lead to such a conclusion. In fact, there is little evidence that petitioner has an ongoing relationship with any of its individual customers, or that its representative entered New York on any systematic or regular basis for the purpose of initiating sales. It appears that petitioner did not (or had no need to) solicit sales, but rather that the reverse situation, where potential customers "solicited" petitioner for its specific products, presents a more accurate description of how sales were generated. In addition, there is no evidence that petitioner's New York field representative or any of its employees serviced, in New York, any of the equipment sold. Petitioner's field representative covered a territory encompassing the entire northeast region as a consultant on layout and, as described, to verify that the equipment shipped arrived intact. There is no indication that such representative "serviced" any customer on a regular basis or, as the Division would liken the activities, acted in furtherance of ongoing sales. In addition, there is no evidence that petitioner ever advertised in New York in any manner. As to ongoing customer relationships, in the form of repeat or future sales, the same would occur only if a franchisee opened subsequent restaurants or if petitioner's equipment became outdated or suffered serious and substantial failure (neither of which latter events would benefit petitioner's image).

Situated against petitioner's position are the facts that no contracts for the sale of equipment were introduced in evidence, nor is there any evidence regarding how repair work or service on the equipment petitioner sold would be handled. It can safely be assumed that repairs would, from time to time, be required on the equipment (presumably all the equipment was not perfect). However, there is no evidence from which to conclude that petitioner itself performed any repairs as opposed to petitioner's customers simply calling in qualified independent repair persons to do the same.

In sum, the evidence produced on the record indicates that petitioner's representatives only visit petitioner's clients at the request of the client, that petitioner does not advertise in New York State, that all of the equipment is shipped FOB Florida, that petitioner owns no

property or facilities in New York, that petitioner does not install its equipment or service the same, and that petitioner's customers are commercial restaurants (generally franchisees) who purchase from petitioner as an approved vendor on the Burger King approved vendor list. Based on such evidence, it is clear that petitioner's activities remain too tenuous to conclude that petitioner was a person required to register as a vendor in New York State and, as such, collect use tax payable by its customers.

G. The foregoing conclusion that petitioner was not a vendor renders moot the issue of whether tax is owed by petitioner with regard to the two walk-in coolers.

H. The petition of Stainless, Inc. is hereby granted and the notices of determination and demands for payment of sales and use taxes due dated October 27, 1987 are cancelled.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE