STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NEW MILFORD TRACTOR CO., INC.	:	DETERMINATION
AND HARRY T. DOUGLAS, AS OFFICER	:	DTA NO. 808563
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 June 1, 1985 through August 31, 1988.	:	

Petitioners, New Milford Tractor Co., Inc. and Harry T. Douglas, as officer, RD 5, Del Mar Drive, Brookfield, Connecticut 06804, 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 June 1, 1985 through August 31, 1988.

A hearing was commenced before Nigel G. Wright, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 30, 1991 at 1:15 P.M. and continued on February 14, 1992 at 12:00 P.M., April 8, 1992 at 11:30 A.M. and August 3, 1992 at 11:00 A.M. Briefs were submitted by petitioners on August 25, 1992, by the Division of Taxation on October 27, 1992, and by petitioners again on December 7, 1992. Petitioners appeared by Robert Plautz, Esq. The Division of Taxation was represented by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner New Milford Tractor Co., Inc.'s voluntary registration under Tax Law § 1134(a)(3) as a sales tax vendor provides anexus with the State of New York so as to allow the State to require the collection of use tax on goods delivered to New York locations.

II. Whether petitioner had any other contact with New York State so as to require collection of use taxes.

III. Whether petitioner, assuming it had a nexus with New York State, would be required to collect use tax on sales from its Connecticut location, some of which were delivered by common carrier hired by petitioner and some by common carrier hired by the purchaser or by the purchaser itself.

IV. Whether some of petitioner's sales of equipment were picked up at its Connecticut premises by the purchaser or a carrier hired by the purchaser.

V. Whether petitioner has carried the burden of proof as to whether sales of parts are nontaxable.

VI. Whether there is reasonable cause under Tax Law § 1145(a)(1)(iii) to cancel penalties asserted under Tax Law § 1145(a)(1)(i) for failure to timely pay the sales and use taxes due.

FINDINGS OF FACT

(a) New Milford Tractor Co., Inc. (sometimes referred to as "NMT" or "petitioner"[1]) is a Connecticut corporation organized in the early 1960's. It is engaged in the business of retail sales and service of tractors and other construction equipment (but not agricultural equipment) produced by John Deere Corp. Its operations are described as similar to those of a car dealership. It includes a parts department and a six-bay

shop. It has two half-ton pickup trucks which are used on service calls. NMT does not advertise.

(b) NMT's first place of business was in New Milford, Connecticut. In 1976 it moved to Del Mar Drive, Brookfield, Connecticut. From 1984 to 1991 it had a branch on Church Street, Canaan, Connecticut. NMT leased its locations at Brookfield and Canaan. These locations are each about ten miles from the New York border. The nearest John Deere dealer in New York is in Beacon, Dutchess County.

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[1]Unless the context clearly indicates otherwise, "petitioner" will include only NMT. There are no separate issues with respect to Mr. Douglas, as he admits his status with NMT (see Finding of Fact "1[d]").

(c)(1) NMT denies owning or leasing any property in New York State. Its secretary testified that it owned or leased no other buildings than those in Connecticut (Tr., vol. 3, p. 8).[2] The Division of Taxation ("Division") does not specify any property located in New York which NMT might own or lease.

(c)(2) The auditor asserts (Tr., vol. 1, pp. 40-41) that on July 7, 1988 she had a conversation with petitioner's accountant, a Mr. Greenhouse (who did not however have a power of attorney), during which he stated in answer to questions that NMT had salesmen in New York, that it delivered its goods into New York and that it did repairs in New York. Mr. Greenhouse, by affidavit and testimony, denies having made any statements as to salesmen and deliveries (but does not deny the statement as to repairs) (Exhibit 31). The auditor's log for the date in question does not report this conversation. The auditor did not record the exact words

allegedly used so that ambiguities could be detected. The auditor did not obtain further concrete details which could be verified in the face of denials. Therefore, the auditor's testimony as to salesmen and deliveries is rejected.

(c)(3) NMT denies having any salesmen in New York. This was the testimony of its secretary (Tr., vol. 3, pp. 13-14) and, although she admitted she got her knowledge from NMT's salesmen themselves (Tr., vol. 3, pp. 97, 99), the salesmen were apparently on the premises in Connecticut when she received the information. Therefore, it is found that NMT had no salesmen in New York.

(c)(4) NMT made no deliveries of equipment into New York with its own vehicles. It appears uncontested that NMT had no vehicles big enough to carry such equipment. Also, NMT's secretary testified as much. It is therefore found that NMT's vehicles were not used to

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[2]Because of the somewhat haphazard way in which the parties offered their proof, important items in the record are difficult to locate. Therefore, references will be inserted in this determination to the transcript and exhibits when convenient.

make deliveries of equipment into New York.

(c)(5) NMT performed repair services on customers' vehicles. Some of these were performed in New York and would include the sale of needed parts. NMT's secretary testified that in the May test period (see, Finding of Fact "12") there were five repair orders with a total value of $1,315.44 on which the auditor computed a tax of $96.11 (Tr., vol. 3, p. 45). This figure would project out to be 60 repairs in New York in each year, and over the audit period of three years and three months about 195 repairs in New York State which would be valued at $51,000.00 with a tax due of $3,700.00.

(d) Petitioner Harry T. Douglas, president of petitioner, is, as he admits, an officer of New Milford Tractor Co., Inc. responsible for the collection of any sales taxes due.

(e) The secretary and treasurer of NMT was Claudette C. Chafes. She was not a stockholder. Her duties primarily included managing the bookkeeping.

(f) NMT employed a certified public accountant, Mr. Lawrence Greenhouse. Mr. Greenhouse until 1967 practiced accounting in New York State and he is still licensed here. Since then he has practiced in Connecticut and while there has had three to five clients with problems concerning New York sales taxes.

(a) NMT's supplier, John Deere Corp., maintains warehouses at Syracuse, New York and Timonium, Maryland. NMT, at least in the 1960's, occasionally took delivery of equipment at Deere's Syracuse, New York warehouse.

(b) In July 1965 (and again in July 1967) the John Deere Company advised its dealers, wherever located, to register as dealers under the New York sales tax law so that they could accept delivery of equipment at Syracuse, New York with a sales tax resale certificate instead of paying sales tax (Tr., vol. 3, pp. 25-26).

(c) NMT then of 29 Sulbran Road, New Milford, Connecticut received a certificate of registration for the sales tax. This was "validated" by the Sales Tax Bureau on July 30, 1965.

(d) NMT filed annual sales tax returns for the years ended June 30, 1986, 1987 and 1988. It declared no taxable sales.

(a) A Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated August 10, 1989 was issued to New Milford Tractor Co., Inc., for the period June 1, 1985 through August 31, 1988, for total tax due of $312,094.21, plus penalty due of $90,617.31 and interest of $120,126.42, for a total amount due of $522,837.94.

(b) An identical notice of determination, also dated August 10, 1989, was issued to Harry T. Douglas, as an officer of New Milford Tractor, Inc.

(c) An additional notice of determination was issued to New Milford Tractor Co., Inc. on the same date for a penalty under Tax Law § 1145(a)(1)(vi) in the amount of $31,209.42.

(d) An identical additional notice of determination also on the same date was issued to Harry T. Douglas, as an officer of New Milford Tractor Co., Inc.

(e) The determinations were made, in part, pursuant to a consent signed May 10, 1989 extending the period of limitation for the period June 1, 1985 through May 31, 1986 to December 20, 1989.

The asserted tax due of $312,094.21 is the sum of $299,383.14 due on sales of equipment and $12,711.07 due on "other" sales (generally of parts). The total sales assessed was $4,994,365.00.

(a) A conciliation conference was held on February 7, 1990. The conferee, in a letter dated April 5, 1990 to petitioners' former attorney, stated his findings (and in commendable detail) (Ex. 14-D). A Conciliation Order (attached to the petition) was issued to each petitioner dated May 18, 1990. The total tax due as stated in the determinations of $312,094.21 was reduced after conference by the amount of $29,455.76 to $282,638.36. This adjustment was attributable to the submission of exemption certificates on 11 items (Exhibits 16 and N) ($14,720.08), evidence of taxes paid by customers of NMT and verified on seven items (Exhibits 15 and N) ($13,948.27) and tax paid by NMT on a casual sale (Exhibit N) ($787.50).

(b) The Conciliation Order issued to each petitioner also cancelled the penalty asserted for omitting over 25% of tax required to be paid which had been asserted under Tax Law § 1145(a)(1)(vi). The cancellation was based on the honest reliance of the taxpayer on

professional advice.

(a) All records of petitioners were requested during the audit (Tr. vol. 2, p. 148).

(b) The auditor testified that the only records she saw prior to the hearing were the invoices and that she had not seen other records, called inventory cards, which petitioners produced at the hearing to show the delivery of equipment. Petitioners' witness testified that during the audit she had stated that "I certainly could provide her with the paperwork that would prove which sales we arranged delivery on and which sales were picked up by the customer." Based on this testimony it is found that petitioners never tendered the inventory cards to the auditor (Tr. vol. 3, pp. 53-54, 132).

(a) The audit of equipment was done on the basis of invoices alone. The invoices were taken at face value. The auditor examined 226 invoices (Ex. J, pp. 1-5). The auditor eliminated as nontaxable the invoices with a Connecticut address (or other non-New York address) and the invoices with a New York address which also showed either a "pick up" in Connecticut or a tax paid (presumably to Connecticut). The eliminated invoices were not put in evidence by either party. A frequent reason for finding an invoice nontaxable was that the invoice could not be found (Ex. J, pp. 1-5).

(b) Of the 226 invoices, 169 were found taxable showing a tax of $299,383.14 (Ex. 11-D). At a conciliation conference, 18 items, as already explained, were conceded to petitioners showing an amount of $29,455.85. The remaining 151 invoices showed a tax due of $269,927.29. One invoice (Audit number 92) accounting for $11.50 is ignored by the parties thereafter, leaving 150 invoices.

(c) The invoices had separate entry lines for "price of vehicle", "freight, handling and excise tax" and "sales tax". Each invoice also had an "inventory number". The invoices in evidence typically have a handwritten notation on the bottom which were made in preparation for the hearing (Tr. vol. 3, pp. 95-96). Almost all of the 150 invoices found to be taxable (after the conference) had entries on the sales tax line stating "NYS" or "del'd NY" or an equivalent expression and with no amount shown. The exceptions were four items marked with dashes (---

-) (Audit numbers 131, 31, 36, 44; these apparently meant delivered in New York; Tr., vol. 3, p. 101), two items left blank (Audit numbers 184, 215) and one item which showed the amount of tax of $2,788.75 for Westchester County (Audit number 129). None of these items had an entry showing freight charges. These exceptions were not explained by either party at the hearing.

(a) Petitioner admits that 58 items were delivered into New York State by a common carrier and that the common carrier was arranged for by petitioner. It included the cost of the carrier in the cost of the sale (Tr., vol. 3, pp. 106-108) on which it charged its regular markup (Tr., vol. 3, pp. 117, 123). Those 58 items account for tax totaling $137,073.11 (calculated from Ex. 25). (Three items, audit numbers 26, 39 and 47, are not listed in petitioner's brief and are not considered further herein.)

(b) Petitioner at the hearing produced copies of cards it termed "inventory cards" and entitled "machine inventory and sales record". These bore the inventory numbers shown on the invoices. The cards themselves had many entry lines specified for particular sums including "factory freight" and "trucking expense". These, however, as petitioner admits, were not followed (Tr., vol. 3, pp. 102, 105-106). Instead, typically the "excise tax" line contained the cost of shipment from John Deere to petitioner. The cards have other numbers which, as explained by NMT's bookkeeper, were references to work orders from trucking companies for transportation of the item sold (Tr., vol. 3, p. 109). At any rate, the cost of delivery from petitioner to its customers was recorded here and was not shown on the invoice. Based on a careful examination, it is difficult to read these cards even with the explanation of petitioner's bookkeeper at the hearing (<u>see</u>, vol. 3) and impossible to do so without that explanation.

(c) Petitioner admits that some records, termed purchase orders or subsidiary records, for 11 of the invoices, had been available during the audit but had been routinely destroyed in March 1989 (Tr. vol. 3, pp. 51-52, 114-115).

(d) The deliveries of this equipment were made by: Walter Gillette of Woodbury, Connecticut, the primary carrier for NMT from its Brookfield location, then also located in New

Milford, Connecticut (48 items); The Collingwood Transport Co., Inc. ("CTC") of Sheffield, Massachusetts the primary carrier for NMT from its New Canaan location (8 items); and Ted Cheney of Warren, Connecticut doing business as Ted's Tractor Service (2 items). Gillette and Collingwood were qualified with the Interstate Commerce Commission as common carriers. Cheney's business was primarily the repair of tractors but on occasion be would transport them. In doing so Cheney acted as an independent contractor; he was not licensed as a common carrier. The two items Cheney transported (audit numbers 11 and 24) account for tax of $5,245.10. These three carriers together account for 58 items of the 61 items asserted to be delivered by NMT's carriers (Audit numbers 26, 39 and 47 are not accounted for). Two of the items were actually not delivered in New York at all (Tr., vol. 3, pp. 129-132). Audit number 204 was delivered by Collingwood at the customer's Massachusetts property and audit number 68 was delivered by Gillette to a job site in Connecticut. (Petitioner has not requested a recomputation because of this.)

(a) Petitioner asserts that 92 sales were completed by delivery in Connecticut to the purchaser itself or to a common carrier arranged for by the purchaser. The invoices for these sales would in most instances show the statement "delivered in New York" or the equivalent (Tr., vol. 3, p. 56). No Connecticut sales tax was charged on these sales (Tr., vol. 3, p. 57). These sales total $132,871.02 (calculated from Exhibit 25 in evidence).

(b) Inventory cards were introduced for most of these sales. As already found above, these cannot be read without the aid of petitioner's bookkeeper. Petitioner did not offer in evidence for comparison purposes records of sales conceded to be Connecticut sales.

(c) A survey was made by the auditor in May 1992 of all of these customers (Ex. U, V, W). Seventeen replies came back and seven of these gave no information. Of the ten that answered, six stated they took delivery in Connecticut (audit numbers 58, 70, 73, 212, 215 and 218) and 4 stated they took delivery in New York with petitioner arranging the delivery (audit numbers 183, 191 212 and 216). One of these, audit number 216, claimed he paid the tax himself. A follow-up telephone survey of the customers allegedly receiving delivery in

Connecticut produced three customers who stated delivery was in New York (audit numbers 29, 79, 191). Because of the poor response to this survey, no finding can be made based upon it concerning the credibility of petitioner's books. (Neither party has requested a recomputation based upon the individual responses to the survey.)

The knowledge of petitioner's witness, its secretary-treasurer, of the deliveries of the equipment was obtained from the salesmen (Tr., vol. 3, pp. 97, 99). No salesmen testified at the hearing.

The Connecticut Department of Revenue conducted a sales tax audit of NMT for the period January 1, 1988 through December 1991 (thereby overlapping the New York audit by eight months). After that audit, the Connecticut auditor was furnished by the New York auditor with the 92 invoice numbers which petitioner claims were Connecticut deliveries. The auditor states eight were found within the Connecticut audit period, though he does not identify them (Ex. R). (Six of them can be identified from the dates on the invoices in Exhibit 25 - audit numbers 212, 215, 216, 217, 218 and 221.) The audit resulted in "no change". The auditor states that NMT had properly taxed all sales "where title passed" in Connecticut and where there was no exemption certificate. NMT had told the auditor that it delivered all sales to its out-of-state customers (Ex. R). An exemption is provided for motor vehicles which are for use exclusively outside of Connecticut (Conn. Form SUT-16a-1, marked as Ex. Q).

With respect to parts (and other small transactions such as repair orders), the auditor first listed 39 invoices with New York addresses. She then eliminated six for reasons including resale and Connecticut sale. Thirty-three invoices remained. Petitioner has provided the invoices for 16 of the sales (Ex. 18) and points out that all of them provide for a shipping or freight charge with the implication that a shipment was made to the address of the customer in New York. However, these same invoices also list amounts designated as tax which are included in the final price. These amounts and the designation of tax are crossed out and the price is reduced. When this was done is not indicated and what it means was never explained by petitioner's witness. (In fact, the exhibit was never authenticated by petitioner's witness.)

Petitioner claims that some of these invoices represent road service (see, Finding of Fact "1[c][4]"). No evidence was adduced as to the other 17 invoices. With respect to the 16 invoices, petitioner has not shown how these invoice figures relate to the amount assessed of $12,711.02.

The Division is in possession of an unsworn statement from an "Andrew Weick" (see, audit number 12) alleging that one of NMT's salesmen told him, when selling a tractor to him, that "the sales tax was included." Another customer, Neil Hilpl, in a letter, asserted the same. The truth of these statements cannot be verified.

Petitioner was advised in 1962 by its certified public accountant, Mr. Greenhouse, that it did not have to collect the New York sales and use tax (Tr., vol. 3, p. 8). NMT did not specifically inquire of Mr. Greenhouse as to his experience and expertise with New York sales taxes. Mr. Greenhouse believed that he did not have a full set of New York tax regulations. He admitted he was not familiar with the regulations concerning a vendor's duty to collect use tax. He did, however, have a New York tax service. He did not know that NMT had registered in New York as a vendor.

CONCLUSIONS OF LAW

A. (1) Petitioner's voluntary registration as a vendor does not of itself constitute a sufficient nexus with New York to justify the imposition under Tax Law § 1132(a) of the duty to collect sales and use taxes. Petitioner makes sales of equipment at least some of which are delivered into New York by common carrier where they are, or will be, subject to use tax on the purchaser. Petitioner is also registered as a vendor and there is no argument that such registration is ineffective or invalid. Petitioner is therefore a vendor within the meaning of Tax Law § 1101(b)(8)(i)(D).

(2) The due process clause of the Constitution prohibits a tax on a taxpayer which has no "nexus" with the State. While the physical presence of the taxpayer within the State is not required for such nexus (at least when there is solicitation which is "purposefully directed" toward the State), it is still necessary that the tax is "related to the benefits" the taxpayer

receives from the State (Quill Corp. v. North Dakota, ___ US ___, 119 L Ed 2d 91, 104; Wisconsin v. J. C. Penney Co., 311 US 435, 444, 85 L Ed 2d 267, 270). Similarly, a tax is prohibited under the commerce clause where the taxpayer has no "substantial nexus" with the State and where the tax is not "fairly related to the services provided by the State" (Complete Auto Transit v. Brady, 430 US 274, 279, 51 L Ed 2d 326, 331; Quill Corp. v. North Dakota, supra). In either case, a quid pro quo either to benefit the taxpayer or to benefit commerce appears necessary. A voluntary registration to collect sales and use tax, as there is in the present case, is quite obviously something that the taxpayer is doing for the State. Without more, there is simply nothing that the State is doing for the taxpayer to justify a tax. It is also obvious that without more than the voluntary registration, the taxpayer has no physical presence in New York to allow taxation under the commerce clause.

(3) The case law cited by the Division that voluntary registration is sufficient to establish nexus is not persuasive. In Matter of Aldens, Inc. v. Tully (49 NY2d 525, 427 NYS2d 580, appeal dismissed 449 US 802), the petitioner had a subsidiary doing business in New York with four offices and 29 employees. It collected the portion of the use tax imposed by the State and the portion imposed by the localities where it had offices. The court held that the petitioner must also collect local use taxes of the jurisdictions in which it had no offices. The court held that the local taxes are imposed by the State statute and so a nexus with the State alone is sufficient for their validity. In Matter of Franklin Mint Corp. v. Tully (94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280) it was held that the voluntary registration qualified the taxpayer as a vendor and it was also one of the grounds of the Tribunal decision in Matter of Brussel (Tax Appeals Tribunal, June 25, 1992). In both these cases, however, it was expressly held that the application of the statute was constitutional because of the taxpayers' actual contacts (apart from registration) with the State. In Franklin Mint, the petitioner had a plant manufacturing packaging which was, during the first part of the audit period, a subsidiary of the petitioner and, for the last part, by merger, a division of the petitioner. In Brussel, the taxpayer clearly had activities in New York and could show no activities outside of New York.

(4) There is an additional reason (though not argued by the taxpayer) to reject the Division's position that petitioner's registration in New York compels it to collect sales and use tax. The registration in this case was clearly done so that petitioner would be authorized to issue a resale certificate to its supplier (see, 20 NYCRR 532.4[c][2]) in lieu of paying the sales tax (compare, Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d 1001, 482 NYS2d 150, lv denied 65 NY2d 604, 493 NYS2d 1025). As such, the registration was not voluntary (and once registered there is no statutory provision authorizing the withdrawal of the registration). I question whether such an involuntary registration was intended to come within the scope of the statute. In any event, I certainly would have to hold that there is a violation of the commerce clause when the right of an out-of-state business to purchase goods in New York is conditioned upon a requirement to collect use taxes on its own sales (see, Frost & Frost Trucking Co. v. Railroad Commn., 271 US 583, 46 Sup Ct 605, 70 L Ed 1101; American Oil Co. v. Neill, 380 US 451, 458, 14 L Ed 2d 1, 6-7). Even if this registration was completely voluntary, other issues would arise which would have to be briefed and argued. One issue is whether the statute, Tax Law § 1134(a)(3), permitting "[a] person" to register "if he so elects", can be implemented without the "discretion" of the Tax Commissioner with respect to the individual person and the "conditions" permitted on the registration which the statute appears to contemplate (compare, Matter of Allen v. State Tax Commn., 126 AD2d 51, 512 NYS2d 916, 918) and which appear to be absent in this case. (The "conditions" could presumably provide for the time and events for termination of the registration and state in detail the situations when a tax would be collected and paid over to the State.) But even if the statute has been correctly applied by the Division, questions would still exist as to whether such a voluntary agreement could qualify as a "tax" at all and therefore entitled to the summary enforcement procedures of the Tax Law (see, Matter of Legum v. Goldin, 99 Misc 2d 654, 416 NYS2d 712, affd 78 AD2d 1020, 435 NYS2d 426, appeal dismissed 52 NY2d 1071).

B. (1) Petitioner makes sales of services in New York and for that reason alone comes within the statutory definition of "vendor" under Tax Law § 1101(b)(8)(i)(A) so as to be subject

to the requirement to collect use tax and further, for the same reason, it has sufficient "nexus" with New York so that such requirement does not violate the Constitution. The duty to collect the sales or use tax is imposed by Tax Law §§ 1132(a) and 1131(1) on every "vendor". The term vendor is defined (Tax Law § 1101[b][8]) to include persons making sales in New York. In particular, a person is subject to the sales and use tax law if he regularly enters New York to perform services (20 NYCRR 526.10[a][1][ii]; example 4). In this case, petitioner enters New York to do repairs and does so about 60 times a year (see Finding of Fact "1[c][4]"). The performance of such services is sufficient to come within the statutory definition of vendor. The physical presence in the State required by the performance of such services is of course sufficient to satisfy the nexus requirement to tax a taxpayer under the due process clause (Scripto, Inc. v. Carson, 362 US 207, 4 L Ed 2d 660; Quill Corp. v. North Dakota, supra). Since the performance of such services alone constitutes taxable transactions in New York, petitioner must have had "fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign" (Quill Corp. v. North Dakota, supra, quoting Shaffer v. Heitner, 433 US 186, 218, 53 L Ed 2d 683). In addition, the repairs in this case are sufficiently important to satisfy the "substantial nexus" requirement of the commerce clause (Complete Auto Transit v. Brady, supra; Quill Corp. v. North Dakota, supra). I am aware that this argument may imply that a single taxable repair in New York could trigger a duty to collect tax on a great many sales which are merely delivered into New York. This issue need not be confronted in this case, however, because the volume of repairs appears to me to be substantial enough to justify the duty to collect. This I feel is true whether the repairs are profitable in themselves or whether they merely aid petitioner's sales of equipment. Indeed, a somewhat similar repair service has been claimed by the Tax Commissioner to cause a foreign corporation to be liable for franchise tax (Petition for Advisory Opinion of American Crane Corp., October 24, 1991, TSB-A-91[19]C).[3]

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[3]In fact, under regulations promulgated April 30, 1990, after the years here in question, the quantity of repairs done in New York would meet the sales and use tax nexus standard asserted by the Tax Commissioner for the requirement to collect use tax on sales and services which are

(2) Petitioner would also come within the same definition of vendor (Tax Law § 1101[b][8][i][A]) because its sales of heavy equipment which were delivered into New York by common carrier were legally made in New York. Mere delivery (transfer of possession) of the equipment into New York of course qualifies as a sale (Tax Law § 1101[b][5]) which is subject to sales and use tax. While the mere delivery, if made by a common carrier or by mail, may be protected from taxation by the destination state by the due process and commerce clauses, it is not clear to me that such protection extends to cases where title also passes in the destination state. It is uncontested that petitioner did make 58 sales to persons who received delivery in New York (see Finding of Fact "8[a]"). The term sale includes the transfer of title (Tax Law § 1101[b][5]). The title to the 58 sales that were delivered into New York passed in New York. While petitioner delivered by common carrier, it did not bill its customer for only the cost of the carrier but also charged its regular markup on this service. This implies to me that petitioner is responsible for delivery to the destination to the same extent that it would be if it delivered in its own vehicles. Under normal sales concepts, title therefore passes at destination (see, e.g., UCC § 2-401[2][b]). (It is true that, in some situations, the place where only title passes has been ruled irrelevant to the New York sales and use tax (see, e.g.,Opinion of Counsel, March 11, 1966, New York State Tax Rep [CCH] ¶ 60-225.57; 20 NYCRR 526.7[e][2]). However, this has not been so ruled in cases of shipments into New York. There were in fact 58 such deliveries in the 39-month audit period, or about 1½ a month.[4]

(3) I must also find that petitioner has a nexus with New York simply because of lack

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merely delivered into New York after being otherwise completed out of state. For that purpose 12 deliveries a year are sufficient (20 NYCRR 526.10[a][5]; 539.2[c]). The instant case involves repairs performed solely in New York.

[4]See, footnote "2".

of proof. Clearly, some contact with New York is necessary for New York's regulatory and tax statutes to apply (14 NY Jur 2d Business Relationships, § 433; see, People ex rel Manila Elec. RR & Lighting Corp. v. Knapp, 229 NY 502). While some argument might be made that the burden is on the Division to produce any evidence concerning petitioner's activities in New York (14 NY Jur 2d, Business Relationships, § 486; see, Monjo v. State Tax Commn., 218 App Div 1, 217 NYS 669), still the Tax Appeals Tribunal has stated, in a case where, as here, constitutional issues are involved, that "petitioner bore the burden to establish the nature and extent of his presence in New York . . ." (Matter of Orvis, Inc., Tax Appeals Tribunal, January 14, 1993). This would require evidence from the taxpayer to negate its presence and activities in New York or that its property and activities outside of New York constitute all of its proprty and activities. In this case, petitioner has offered only slight evidence as to its property and activities in New York and has generally been satisfied simply to deny the Division's allegations as to its property and activities in New York. It has produced no evidence that it has no other

property or activities in New York or that its property and activities outside of New York constitute all of its property and activities. In particular, petitioner did not offer the testimony of Mr. Douglas, the president of petitioner, who sat through the whole hearing. Under the Tribunal's decision, I must find that petitioner has a nexus with New York.

C. Petitioner delivered 58 items of heavy equipment into New York by common carrier. Nexus with New York for use tax purposes has been established at least by the repairs (paragraph "B" above). It follows that NMT had a duty to collect a use tax on the sales of the equipment (20 NYCRR 526.10[a][1][ii]). There is no doubt that this is a valid requirement under the Constitution (Nelson v. Sears Roebuck & Co., 312 US 359, 85 L Ed 888).

D. The duty to collect use tax on the 92 items allegedly transported into New York by the purchaser or purchaser's carrier presents problems of proof. The fact that petitioner knew the equipment was destined for New York would of course be alone insufficient to require use tax

collection on these sales. (Thus over-the-counter sales on credit cards were not subject to use tax collection on behalf of another state [Montgomery Ward & Co. v. State Bd. of Equalization, 272 Cal App 2d 728, 78 Cal Rptr 373, cert denied 396 US 1040; compare Matter of Bloomingdale Bros. v. Chu, 70 NY2d 218, 519 NYS2d 347].) However, if petitioner, having a nexus with New York, itself delivers into New York, it must collect use tax on such sales (Nelson v. Sears Roebuck & Co., supra). Petitioner's position seems to be that it can show such sales were not delivered by itself to New York simply because of the absence from evidence of any records that it hired the carrier for such equipment. As stated above, the Tax Appeals Tribunal has ruled that the taxpayer has the burden of proof in these matters. In this

case, petitioner has failed to place in evidence the necessary information concerning the delivery of equipment.

E. Petitioner has not carried the burden of proof with respect to the sales of parts (and other small transactions). As I have found (Finding of Fact "12"), petitioner has not even related the 16 invoices it has produced to the amount of tax in dispute. Even if the underlying information is in the record, I am not inclined to fish it out and make the necessary computations. It has been aptly stated that a deficiency in tax "is neither a legal theory nor an intangible concept. It is an amount of tax due . . ." (Clark v. Campbell, 501 F2d 108, 127, 74-2 US Tax Cas ¶ 9687, cert denied 423 US 1091; 9 Mertens, Law of Federal Income Taxation § 49C.06). My determination revising the determination of tax in issue here must arrive at an amount and the computation of that amount should be contained in an express finding, or at least the fundamental facts from which the computation is made must be stated (Novak & Co. v. Facilities Development Corp., 109 AD2d 1013, 486 NYS2d 490, appeal after remand 116 AD2d 891, 498 NYS2d 492; see also, Matter of Sachs New York v. Tully, 79 AD2d 1056, 435 NYS2d 172).

F. (1) The penalty should be remitted. The statute provides that the penalty may be remitted if the "failure or delay was due to reasonable cause and not due to willful neglect" and the Tax Commissioner shall promulgate rules and regulations as to what constitutes "reasonable cause" (Tax Law § 1145[a][1] as amended by L 1979, ch 714, effective January 1, 1980). Those rules and regulations have always provided that reasonable cause could include any cause "which appears to a person of ordinary prudence and intelligence as a reasonable cause" but that "[i]gnorance of the law . . . will not be considered reasonable cause."[5] It is true that the Tax

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[5]Regulations in effect from December 27, 1982 to September 3, 1985 provided that reasonable cause could include: (1) illness of the taxpayer; (2) destruction of records by casualty; (3) misplaced records; (4) inability to get information; (5) pending hearings in other cases concerning same issues; and:

> "(6) any other cause for delinquency which appears to a person of ordinary prudence and intelligence as a reasonable cause for delay in filing a return and which clearly indicates an absence of gross negligence or willfil intent to disobey

Appeals Tribunal has upheld penalties where the taxpayer has relied upon a tax advisor, at least in circumstances which might imply bad faith (see, e.g., Matter of Norwest Bank Int'l., Tax Appeals Tribunal, May 3, 1990 [where there had been adverse rulings in similar cases which were widely known]; see also, Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121 [where the taxpayer had not consulted the most knowledgeable of his two advisors]). However, I cannot hold that petitioner lacked good faith or was unreasonable in his reliance upon his certified public accountant, Mr. Greenhouse. In particular, I know

of no case where the Tribunal has required, as the Division argues, that a taxpayer must cross-examine a certified public accountant concerning his knowledge and experience. As the United States Supreme Court has said:

> "To require the taxpayer to challenge the attorney, to seek a 'second opinion,' . . . would nullify the very purpose of seeking the advice of a presumed expert in the first place . . . . 'Ordinary business care and prudence' does not demand such actions" (United States v. Boyle, 469 US 241, 251, 83 L Ed 2d 622).

In fact, there appears to be no precedent upholding a penalty where, as in this case, the advisor has been an independent certified public accountant licensed in New York who has been

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> the taxing statutes. Past performance will be taken into account. Ignorance of the law, however, will not be considered reasonable cause." (20 NYCRR 536.1[b] prior to September 3, 1985; 20 NYCRR 536.5[b] from September 3, 1985 to September 29, 1987; compare Federal income tax guidelines in IRM Audit, § 4562.2 reprinted in Standard Federal Tax Reporter [CCH] ¶ 40,375.356.)

In 1987, the regulation was amended to drop the provision with respect to misplaced records, to expand the discussion of the other provisions and to change, slightly, the provision with respect to other causes to read as follows (and as it reads currently):

> "(6) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, howver, will not be considered as a basis for reasonable cause." (20 NYCRR 536.5[c][5] since September 29, 1987.)

unequivocal in his advice to his client. I can add that while Mr. Greenhouse admitted to the failure to have certain New York tax materials, no such materials (apart from the statute itself, of course) would have given him any help on the issues which are crucial in this case: the significance of the repair services and passage of title in New York. While the advisor in this case may have made a mistake in the reading of the statute, there appears to be no reason to attribute the mistake directly to petitioner or to expect the taxpayer itself to know such intricacies. If that could be done, then every determination of tax due would carry a penalty and there would be no reason to have a statutory section for the remittance of penalties. Thus, I believe reasonable cause does exist in this case. (I want to note that I am aware that the conferee in this case found that petitioner reasonably relied on the accountant in this case [Finding of Fact "5(b)"]. This has not played a part in my conclusion.)

(2) In remitting the penalty, I am necessarily rejecting one argument put forth by the Division. The Division argues in its brief (p. 22) that the sales in question were correctly identified as New York sales by the Connecticut State auditor (see Finding of Fact "11"). It argues that otherwise we must conclude that the designation of "New York State" on petitioner's invoices was to disguise what were really Connecticut sales and commit a fraud on the State of Connecticut. By implication, petitioner should be estopped from benefiting from such a fraud. I must, however, reject this argument. The designation of New York State on petitioner's invoices can be considered as appropriate on books and records mandated under the Connecticut Sales Tax Law. That tax would not apply where the title to goods would pass in New York. That would be true of the 58 items of equipment delivered to New York by common carrier since, as found, petitioner assumes responsibility for such deliveries when it charges its regular markup on the carrier's cost. The Connecticut sales tax taxes a "sale" which is defined to mean a transfer of title to property (Conn Gen Stat §§ 12-408[1], 12-407[2]). To decide title questions, the Connecticut courts look to Article 2 of the Uniform Commercial Code (New England Yacht Sales v. Commr. of Revenue Services, 198 Conn 624, 504 A2d 506). The UCC provides that, unless otherwise agreed to, title passes at the place where the

seller completes his performance and, more particularly, "if the contract requires delivery at destination, title passes on tender there" (Conn Gen Stat § 42a-2-401[2]). It appears also that this applies even where (as alleged) equipment is delivered directly to the customer at petitioner's premises. This is so because Connecticut grants an exemption for motor vehicles which, though sold in the state, are sold to a nonresident and will be registered in another state (Conn Gen Stat § 12-412[60]). New York has a similar exemption (Tax Law § 1117). I must assume that petitioner would claim that exemption and do the necessary paperwork to qualify for it, at least in the absence of any allegations by the Division to the contrary. The Connecticut audit of petitioner in fact referred to such an exemption (<u>see</u>, Finding of Fact "11").

G. The petition of New Milford Tractor Co., Inc. and Harry T. Douglas, as officer, is granted to the extent indicated in Conclusion of Law "F". The notices of determination under review are modified to exclude the penalty and interest in excess of minimum interest and, except as so modified, the notices, as adjusted by the Conciliation Order, are in all other respects sustained.

DATED: Troy, New York
June 3, 1993

/s/ Nigel G. Wright
ADMINISTRATIVE LAW JUDGE