STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MONROE DISTRIBUTING, INC.	:	DETERMINATION DTA NO. 808812
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1985 through August 31, 1988.	:	

Petitioner, Monroe Distributing, Inc., 5101 Naiman Parkway, Solon, Ohio 44139, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1985 through August 31, 1988.

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 19, 1992 at 9:15 A.M., with all briefs filed by December 2, 1992. Petitioner appeared by Ronald H. Sinzheimer, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Arnold M. Glass, Esq., of counsel).

ISSUES

I. Whether petitioner was a New York vendor making taxable sales in New York State and therefore required to register and report sales taxes due and collected; or, in the alternative, whether petitioner had sufficient nexus with the State of New York to be liable for the imposition and collection of sales taxes.

II. Whether petitioner was required to register as a vendor for the collection of tax on all sales in New York.

III. Whether petitioner is liable for additional penalties for failure to pay over tax, failure to file returns, omission of greater than 25% of the audited tax, and making sales subject to tax without obtaining a certificate of authority.

IV. Whether petitioner was entitled to amend its petition to include a challenge to tax as well

as penalty and interest.

FINDINGS OF FACT

Petitioner, Monroe Distributing, Inc. ("Monroe"), was, during the period in issue, September 1, 1985 through August 31, 1988, an Ohio corporation which applied for and was granted authority to do business in the State of New York on or about May 1, 1985 by the New York State Department of State.

Monroe is principally engaged in the business of selling and servicing amusement devices, such as video games, pinball machines and juke boxes.

At all times during the audit period, Monroe's principal place of business was in the State of Ohio and the corporation maintained no business location within the State of New York.

During an audit by the Division of Taxation ("Division") on one of Monroe's customers in New York State, it was discovered that Monroe was making deliveries of its products into New York State by means of its own trucks. Based upon this information, the Division began an audit of Monroe in September of 1988.

Monroe requested that a full detail audit be performed on its books and this request was complied with by the Division. The auditor examined each and every sale made by Monroe to New York customers during the audit period, taking all of his information from Monroe's sales journal. Purchases were not examined since it was assumed all purchases were made in the State of Ohio.

The auditor also inspected invoices issued by Monroe between September of 1985 and June of 1988 which indicated sales to New York customers. Those invoices totalled $1,343,151.72 which, after allowance for resale certificates provided by Monroe and proof of direct payment permits, in addition to taxes credited for overlapping audits of Monroe's customers, yielded a taxable portion of those invoices equal to $898,992.37. During that period, the auditor found negative $338.56 in tax paid[1], while the invoices reflected tax

[1]See Finding of Fact "9" below which explains this figure in detail.

collected in the sum of $12,263.57 (Exhibit "D").

As stated above, the Division was aware of the fact that Monroe was making deliveries into New York State using its own trucks which fact was corroborated by the testimony of petitioner's president during the audit period, Mr. Norman Goldstein, and petitioner's own invoices.

By letter dated March 26, 1985, petitioner's attorney, Lee A. Koosed, Esq., an Ohio attorney, sent a letter to the New York State Secretary of State indicating that Monroe was conducting "various business transactions with customers in the State of New York." The letter expressed a concern with regard to Monroe's sales tax liability and made the following statement:

> "To expedite the remittance of New York State Sales Taxes, Monroe wishes to become a foreign corporation licensed to do business in New York.
>
> "Monroe's customers wish to be assured that all taxes paid by them will be remitted. Under these circumstances, Monroe plans to
>
> continue doing business in the same manner without establishing any place of business in New York."

Mr. Koosed did indeed file an application for authority to do business in the State of New York on behalf of Monroe Distributing, Inc. on or about May 1, 1985. However, no follow-up was ever made with regard to obtaining a certificate of authority for sales tax purposes or actually remitting sales taxes collected from customers in New York State.

Even though Monroe did not possess a certificate of authority to collect sales tax until the summer of 1988, it had been collecting New York State sales tax from some of its customers as early as September 1985, without remitting any collections until the quarter ended May 31, 1988. For the quarter ended May 31, 1988, Monroe reported tax of $1,551.47 and for the quarter ended August 31, 1988 it remitted $4,519.46, for a total amount for the two quarters of $6,070.93. The total amount of additional tax due found for all of the quarters in the audit period totalled $70,604.56, which, after credit for the taxes reported for the quarters ended May 31, 1988 and August 31, 1988, yielded additional tax due of $64,533.63.

Although Monroe's attorney represented that Monroe agreed with the additional taxes

found due, by letter dated April 7, 1989, he disagreed with the imposition of penalty, statutory interest and omnibus penalties. It is noted that Monroe never executed consents to the statements of proposed audit adjustment issued to it on or about March 29, 1989 which set forth the additional tax, penalty and interest due as a result of the audit.

On June 14, 1989, the Division issued to Monroe a Notice of Determination and Demand for Payment of Sales and Use Taxes Due setting forth additional tax due of $64,533.63, penalty of $18,707.21 and interest of $19,900.40, for a total amount due of $103,141.24 for the audit period September 1, 1985 through August 31, 1988. On the same date, the Division issued a second Notice of Determination and Demand for Payment of Sales and Use Taxes Due to Monroe setting forth only penalty due of $16,320.19 providing the explanation that the penalty was being imposed pursuant to Tax Law § 1145 based upon the results of the audit.

It is noted that in the audit workpapers, specifically workpaper number 4, the auditor listed a column entitled "Tax Paid" which totalled negative $338.56 for the entire audit period. Although not specifically explained, an analysis of the workpaper indicates that a tax code was assigned to each of the invoices indicating the county of sale and the appropriate tax rate for that county. Where a negative number was entered under the column "Tax Paid", the auditor was explaining the difference between the tax collected and the tax which should have been collected at the appropriate county rate. The total "Tax Paid" figure of negative $338.56 apparently had no bearing on the additional tax found due since that amount, as set forth on workpaper number 4, was $70,604.56 and was carried forward to workpaper number 6, where credit was given for the taxes remitted for the quarters ended May 31, 1988 and August 31, 1988. After said credit, the net amount of tax due, $64,533.63, was the amount carried forward to the notices of determination issued to Monroe on June 14, 1989.

Petitioner's president during the audit period, Norman Goldstein, testified that the company decided to begin making sales in the State of New York in 1985 and immediately called its Ohio attorney, Lee Koosed, Esq., to handle all arrangements in connection with

becoming authorized to do business in New York State. Mr. Goldstein testified that the company placed its entire trust in Mr. Koosed's expertise and relied upon his knowledge of the law to properly authorize Monroe to do business in the State of New York. Mr. Goldstein was unable to explain why New York sales taxes were collected and not remitted during the audit period, while taxes were being paid to other jurisdictions.

Mr. Goldstein also testified that about half of Monroe's sales of items costing over $1,000.00 during the audit period represented merchandise that was delivered into New York State by Monroe's trucks, while approximately 50% were sent by common carrier. During the audit period, Monroe owned two trucks used for the purpose of delivering goods into other states, including New York, and employed two drivers to operate same.

A summary sheet submitted by Monroe's counsel after hearing indicated that of the $1,343,151.72 in sales set forth on the invoices recorded by the auditor during the audit period, in excess of $700,000.00 represented sales of merchandise delivered into New York by Monroe's trucks.

On April 7, 1989, petitioner's representative, Lee Koosed, Esq., wrote to the auditor and stated that Monroe acknowledged unpaid taxes in the sum of $64,553.63 and requested an abatement of all penalties and interest. The basis for said abatement was that Monroe had taken good faith steps to license itself to do business in the State of New York and to properly pay sales taxes as set forth in Mr. Koosed's letter to the Secretary of State in 1985. Mr. Koosed also points out that he promptly answered a request from the Division of Taxation - Corporation Tax for proper address, Form CT-270, once said form was requested in June 1987.

It is noted that said form was sent to Mr. Koosed by the corporation tax processing division which was threatening to dissolve the corporation by proclamation of the Secretary of State as provided for in Tax Law §§ 203-a or 203-b for failure to file corporation franchise tax reports. The required information was forwarded to the corporation tax processing division immediately.

In a May 3, 1989 letter from Mr. Koosed to the auditor, Mr. Koosed stated that he was

never informed that sales taxes were delinquent or that there had been a failure to file necessary tax forms. Mr. Koosed believed that the Division's failure to pursue Monroe for the taxes and returns due enhanced his argument that Monroe made good faith efforts to comply with the Tax Law.

SUMMARY OF PETITIONER'S POSITION

Petitioner believes that its contacts with the State of New York lack sufficient nexus for the imposition of a sales tax on its sales to New York customers. Further, petitioner contends that even if sales by petitioner delivered by its own trucks are subject to State sales tax, those made by common carrier are exempt.

Petitioner also contends that since it made good faith efforts to comply with the sales tax laws of the State of New York, no penalties or additional interest should be charged.

Finally, petitioner made a motion to conform the pleadings to the proof in this matter, specifically with regard to raising issues with regard to the tax assessed. The Division objected to this motion on the grounds that petitioner's representative had already made statements in his correspondence with the Division indicating petitioner's acquiescence to said tax.

CONCLUSIONS OF LAW

A. Petitioner's motion to conform the pleadings to the proof, specifically its assertion that the tax is not due based upon insufficient nexus between petitioner and the State of New York for the imposition of sales and use taxes, must be granted. Petitioner's additional argument and basis for relief was based upon a Supreme Court decision decided on May 26, 1992, Quill Corp. v. North Dakota (___ US ___, 119 L Ed 2d 91), which, if applicable to the instant matter, might be dispositive of all issues.

Since the petition to the Division of Tax Appeals in this matter specifically noted that sales and compensating use taxes were in question, that the stated amount of tax contested was ambiguous, and that petitioner never clearly presented its position with regard to the tax in the petition, petitioner should not be precluded from constitutionally challenging the tax at this time. Further, the Division was not detrimentally affected by petitioner's assertion of this new

basis for relief since it had ample opportunity to challenge said theory through its own or petitioner's witness, during its summation at hearing and in its brief following hearing. The Tax Appeals Tribunal's own regulations provide that pleadings may be amended to conform to the evidence upon such terms, as may be just. (20 NYCRR 3000.4[c].)

It is determined that it was just to allow petitioner to develop the record in support of its theory that Monroe's contacts with the State of New York lacked sufficient nexus for imposition of a sales tax.

B. Tax Law § 1105 provides, in pertinent part, as follows:

> "On and after June first, nineteen hundred seventy-one, there is hereby imposed and there shall be paid a tax of four percent upon:
>
> "(b) The receipts from every sale . . . ."

Further, the sales tax is a "destination tax"; that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate (20 NYCRR 525.2[a][3]).

Tax Law § 1101(b)(8) provides, in pertinent part, as follows:

> "Vendor. (i) The term 'vendor' includes:
>
> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article . . . ."

"Person" is defined in Tax Law § 1101 to include corporations (Tax Law § 1101[a]).

It is not disputed that Monroe made retail sales in the State of New York during the audit period, delivering over half of its sales of larger items by its own trucks and employees.

Monroe argues, however, that it had insufficient nexus with the State of New York to be subject to the sales tax. The Division correctly notes that petitioner's exploitation of the New York market, coupled with its physical presence of telephone contact with customers and making routine deliveries in its own trucks using its own employees and charging and collecting New York State sales tax, provide the sufficient or substantial contacts with New York which subject Monroe to the New York sales tax laws. Monroe's activities in New York were sufficient to distinguish it from National Bellas Hess v. Dept. of Revenue (386 US 753 [1966]),

Miller Bros. Co. v. Maryland (347 US 340 [1954]), and Quill Corp. v. North Dakota (supra).

Petitioner contends that the instant matter cannot be distinguished from Miller Bros Co. v. Maryland; but, the instant matter is very different from Miller Bros. Miller Bros. was a Delaware merchandising corporation which had no physical presence within Maryland other than to deliver goods by its own trucks within that state. Miller Bros. conducted no solicitation within the State of Maryland other than the incidental effects of general advertising, and without any invasion or exploitation of the consumer market in Maryland. On occasion, it sold and then delivered goods to Maryland inhabitants who had travelled from Maryland to Delaware to exploit Delaware's less tax-burdened selling market. These Maryland inhabitants incurred a use tax liability when they used, stored or consumed the goods in Maryland, but the Supreme Court refused to shift the burden of collecting or paying that use tax to the Delaware corporation in the absence of a jurisdictional basis therefor.

The facts of the instant matter are very different. Monroe consummated substantial retail sales within New York State and, as such, was subject to the imposition of New York sales tax as a vendor of tangible personal property. (See, Tax Law §§ 1101[b][8]; 1105[a]; 20 NYCRR 525.2[a][3].)

The significant physical presence of Monroe in the State of New York distinguishes it from the facts of Quill and National Bellas Hess, where the vendors' contacts with the state were limited to the solicitation of sales and the delivery of merchandise by mail or common carrier (see also, Matter of Stainless, Inc., Tax Appeals Tribunal, April 1, 1993). The regulations promulgated pursuant to Tax Law § 1101(b)(8), defining the term "vendor", provided that:

> "(i) A person making sales of tangible personal property or services, the receipts of which are subject to tax.
>
> * * *
>
> "(ii) 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 . . ." (20 NYCRR former 526.10[a][1][i], [ii]).

The example given by the regulations to demonstrate such a vendor was as follows:

> "Example 5: A company in Ohio makes weekly deliveries of business forms in

> leased trucks to its customers in New York. The forms were ordered through the mail or over the telephone. The company is deemed to be a vendor making sales of tangible personal property in New York" (20 NYCRR former 526.10[a][1][ii], example 5).

The same regulation also defined "interstate vendor" required to collect sales tax as a person outside the State making sales to persons within the State, who solicited sales in New York, and delivered the property in New York. (20 NYCRR former 526.10[e].)

One example given for an "interstate vendor" was very similar to Monroe:

> "Example 4: An out of State corporation advertises in a New York newspaper or by other media. Orders are sent to the out of State location, filled from that location, and delivered to New York by trucks that it controls. The corporation has the responsibilities of a vendor"[2] (20 NYCRR former 526.10[e]).

It is evident from the record in this matter that Monroe was a vendor within the meaning and intent of Tax Law § 1101 and the regulations promulgated thereunder. Although petitioner tried, albeit halfheartedly, to notify the State of its intent to do business within the State of New York in 1985, it failed subsequently to prudently investigate the proper procedure for collecting and remitting sales taxes on sales made in the State of New York. Merely sending a few letters to the New York State Secretary of State and then expecting to be informed if anything was wrong while simultaneously collecting taxes and not remitting them to the State of New York was both unreasonable and imprudent. Further, the fact that petitioner collected tax on some sales and not on others indicated that it did not have proper guidance or knowledge with regard to New York State

sales tax and that it should have made an inquiry to the proper taxing authority concerning proper collection and remittance of tax.

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[2] It is noted that the issue of solicitation by Monroe was never raised in this matter. It is assumed that solicitation, as defined in the regulation at 20 NYCRR former 526.10(d), occurred herein. In fact, Monroe's president, Norman Goldstein, testified that New York sales were solicited by telephone calls to prospective customers in the State of New York by its sales personnel (see also, Matter of Vermont Information Processing, Tax Appeals Tribunal, January 21, 1993).

The fact that it merely responded to a request for a new address sent because the corporation had not been heard from in several years is not a basis on which petitioner can now rely as a good faith effort to comply with New York sales tax law. The request came from the Corporation Tax Unit, not the Sales Tax Unit and its clear purpose was to admonish Monroe that its failure to file returns might cause its loss of authority to do business in New York State.

C. Tax Law § 1134(a)(1)(i) requires every person commencing business required to collect any tax imposed by Article 28 to file a certificate of registration with the Commissioner of Taxation and Finance at least 20 days prior to the commencing of business. In turn, Tax Law § 1136(a) requires every person required to register with the Commissioner to file either quarterly or monthly sales tax returns with the Commissioner. Tax Law § 1137(a) requires every person required to file a return under section 1136 to pay over the tax imposed pursuant to Tax Law § 1105(a).

Since it has been established that petitioner was in fact a vendor, it was required to be registered (Tax Law § 1134[a][1][i]) and was responsible for collecting and remitting tax on all sales to New York regardless of the method of shipment (see, Franklin Mint Corp. v. Tully, 94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280).

Petitioner confused the nexus analysis with the responsibilities of a vendor (see, 20 NYCRR 526.10[b]; 20 NYCRR Parts 532 [collection of tax] and 533 [vendor's obligations]). It is noteworthy that petitioner collected the tax regardless of how the merchandise was delivered to New York and even made an effort to collect the proper tax for counties of delivery.

Therefore, as noted in the Division's brief, apportionment of tax would be improper in the instant matter since the tax is levied against the amount of each sale to New York during the audit period.

Clearly, Monroe realized its obligation to collect sales tax and did so since 1985 as indicated on several invoices. Tax Law § 1132(a) states that when tax is collected from a customer by the person required to collect it, the person does so as trustee for and on account of

the State. Monroe clearly ignored its obligations as trustee of the taxes it collected by not remitting them to the Division during the years in issue.

D. In addition to the taxes assessed, Monroe was also assessed penalties under three different provisions of Tax Law § 1145. The first provision is that set forth in Tax Law § 1145(a)(1)(i) which stated, in pertinent part, as follows:

> "Any person failing to file a return or to pay or pay over any tax to the tax commission within the time required by or pursuant to this article (determined with regard to any extension of time for filing or paying) shall be subject to a penalty of ten percent of the amount of tax due if such failure is for not more than one month, with an additional one percent for each additional month or fraction thereof during which such failure continues, not exceeding thirty percent in the aggregate."

Tax Law § 1145(a)(1)(iii) provides that if the failure or delay was due to reasonable cause and not due to willful neglect, penalty and additional interest shall be remitted. But ignorance of the law is not a basis for finding reasonable cause (20 NYCRR former 536.1[b][6]). Also, Monroe's reliance on its Ohio counsel cannot be considered reasonable. Given its counsel's ignorance of New York law and Monroe's knowledge that taxes were being collected but not remitted for years, any reliance upon the advice of counsel must be deemed unreasonable (Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557; Matter of LT & B Realty Corp. v. New York State Tax Commn., 141 AD2d 185, 535 NYS2d 121).

It is determined that the failure to file a return and pay over the tax due was not due to reasonable cause. As set forth above in Conclusion of Law "B", petitioner did not take reasonable and prudent steps to comply with the Tax Laws or regulations. Petitioner's attorney's one statement with regard to its desire to pay sales tax made in a letter to the New York State Secretary of State is not sufficient to absolve it from its obligations under the Tax Law. Further, its reliance upon its Ohio attorney to provide it with competent advice with regard to the State of New York and its laws of taxation was not reasonable. No attempt was ever made to contact the New York State Department of Taxation and Finance or to remit the taxes which it was collecting from New York customers. Petitioner's assertion that it was waiting to hear from the State of New York to receive forms was equally imprudent. Finally, petitioner's contention that the Division's request for a new address and its immediate response thereto shows a good faith

intent to comply with the tax laws of the State of New York is without merit. The Division's letter was an admonishment to petitioner that if it did not file franchise tax reports it would be in jeopardy of losing its franchise to do business in the State of New York by dissolution by proclamation of the Secretary of State. At a minimum, a prudent and reasonable taxpayer would have immediately inquired of the New York State Department of Taxation and Finance corporation tax processing division for further information. Given all these factors, the assessment of additional penalties and interest was warranted and no reasonable cause has been shown for the remittance of penalty and additional interest herein.

The second provision of Tax Law § 1145 under which petitioner has been assessed penalty is Tax Law § 1145(a)(3)(i) which provides as follows:

> "Any person required to obtain a certificate of authority under section eleven hundred thirty-four who, without possessing a valid certificate of authority, (A) sells tangible personal property or services subject to tax, receives amusement charges or operates a hotel, (B) purchases or sells tangible personal property for resale, or (C) sells automotive fuel, shall, in addition to any other penalty imposed by this chapter, be subject to a penalty in an amount not exceeding five hundred dollars for the first day on which such sales or purchases are made plus an amount not exceeding two hundred dollars for each subsequent day on which such sales or purchases are made, not to exceed ten thousand dollars in the aggregate."

Given petitioner's inability to show reasonable cause for its failure to obtain a certificate of authority, other than those reasons set forth above, this penalty may not be remitted.

Finally, petitioner has been assessed penalty pursuant to Tax Law § 1145(a)(1)(vi) for omission of greater than 25% of the tax due. Since the initial issue of penalties and interest assessed pursuant to Tax Law § 1145(a)(1)(i) has been determined against petitioner herein, this add-on penalty must also be sustained in the absence of a showing of reasonable cause.

E. The petition of Monroe Distributing, Inc. is denied and the two notices of determination and demands for payment of sales and use taxes due issued on June 14, 1989 are sustained.

DATED: Troy, New York
May 27, 1993

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE