STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
NADA SERVICES CORPORATION	:	DETERMINATION DTA NO. 810592
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 March 1, 1986 through May 31, 1989.	:	

Petitioner, NADA Services Corporation, 8400 Westpark Drive, McLean, Virginia 22102, 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 March 1, 1986 through May 31, 1989.

A hearing was commenced before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on June 1, 1994 at 9:45 A.M. and was continued to conclusion at the same location before the same Administrative Law Judge on June 2, 1994 at 9:30 A.M., with all briefs and post-hearing documents to be submitted by October 25, 1994. Petitioner, appearing by Webster, Chamberlain & Bean, Esqs. (Alan P. Dye, Esq., and David P. Goch, Esq., of counsel), filed two post-hearing affidavits (per permission granted) on June 10, 1994, followed by a brief on August 10, 1994. The Division of Taxation, appearing by Steven U. Teitelbaum, Esq. (James Della Porta, Esq., of counsel), filed its brief on October 24, 1994.

On November 2, 1994, prior to the due date for petitioner's reply brief (as extended), the Division of Taxation brought a motion seeking a stay of proceedings pending issuance of final decisions by the New York State Court of Appeals in two then-pending cases (Orvis Co. v. Tax Appeals Tribunaland Vermont Information Processing v. Tax Appeals Tribunal) By an Order dated December 22, 1994 the Division of Taxation's request for a stay was granted. In turn, the Court of Appeals issued its decision in the Orvis and Vermont Information Processing cases on June 14, 1995 (the Court considered and decided the two cases together in one opinion, cited as

86 NY2d 165, 630 NYS2d 680), and the briefing schedule in this case was re-established such that the parties' final briefs were to be filed on or before August 7, 1995. The Division of Taxation's post-stay brief was filed on August 1, 1995. Petitioner's post-stay brief was filed on August 7, 1995, which date commenced the six-month period for issuance of this determination (Tax Law § 2010[3]).

ISSUES

I. Whether petitioner, an out-of-state entity, should properly be classified for New York sales and use tax purposes as a "vendor", as defined by Tax Law § 1101(b)(8)(A) and 20 NYCRR 526.10.

II. Whether petitioner's contacts with New York provided sufficient basis, in accordance with Due Process and Commerce Clause considerations, to impose upon petitioner the obligation to collect and remit taxes on its sales to New York purchasers.

III. Whether the required nexus to support imposing tax collection obligations on petitioner may be found through petitioner's relationship with its parent organization, the National Automobile Dealers Association, admittedly a vendor for New York tax purposes and allegedly petitioner's "alter-ego".

FINDINGS OF FACT [1]

GENERAL BACKGROUND

1. Petitioner, NADA Services Corporation ("NADASC"), is a Delaware corporation which was incorporated in 1939. Its principal place of business is located at 8400 Westpark Drive, McLean, Virginia. During the time period relevant to this proceeding (March 1, 1986 through May 31, 1989), NADASC was engaged in the business of publishing and distributing through the U.S. Postal Service the following publications: Automotive Executive, NADA Official Used Car Guide, and Trade-In Guide.

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[1]The parties submitted as Exhibit "G" a Stipulation of Facts. Said stipulated facts are incorporated in the Findings of Fact herein.

2. One hundred percent of the outstanding common stock of NADASC is owned by the National Automobile Dealers Association ("NADA"), and one hundred percent of NADASC's outstanding preferred stock is owned by a separate and independent third party, the NADA Charitable Foundation. NADA, incorporated in 1917, is a Delaware corporation which also has its principal place of business at 8400 Westpark Drive, McLean, Virginia. NADA is a federally recognized IRC § 501(c)(6) tax-exempt trade association.

3. NADA began publishing the NADA Used Car Guide in 1933. This activity quickly became one of NADA's major activities. In the late 1930's, the IRS challenged NADA's exempt organization status, specifically due to the extent of its income from publishing activities. In 1943, the United States Tax Court agreed with and upheld the IRS determination that NADA, as then operating, could not continue to enjoy exempt organization status (National Automobile Dealers Association v. Commr., 2 TCM 291). In response, NADA was reorganized and split into two entities consisting of NADA (the trade association) and The NADA Used Car Guide Company (the publisher). The NADA Used Car Guide Company later changed its name to NADASC (petitioner herein). However, NADASC continues to use the recognized name of The NADA Used Car Guide Company in certain contexts and, as required, files a DBA certificate with the State of Virginia in connection with this use.

ORGANIZATION AND OPERATIONS

4. NADA is engaged in providing automobile dealership consulting, training, technical assistance and lobbying services to its members, franchised new car and truck dealers. NADA also participates in manufacturer/dealer and customer/dealer relationships. In addition to its technical service activities NADA markets a few products, including video cassette tapes and a software system called "Trackmate", which are sold primarily via mail order.

5. NADASC is engaged in publishing, and sells its publications to individual subscribers as well as to bulk-rate customers. During the period at issue, NADASC had numerous bulk-rate subscribers, including NADA. As part of the services paid for by individual subscribers, and by all of its bulk-rate customers, NADASC distributed its publications directly from a separately-

contracted mailhouse to the designated recipients. NADA and other bulk-rate customers provided NADASC with subscriber lists, which were converted into "strip lists" and forwarded to the mailhouse for attachment to the publications.

6. The price at which NADASC sold its publications to both individual and bulk-rate subscribers took into account the cost of mailing, including postage, and such price exceeded the total allocable costs of production and distribution and was accepted by the Internal Revenue Service ("IRS") as a sale at fair market value.

7. During the relevant time period, NADASC obtained the services of several independent contractors to sell display advertising in its publication Automotive Executive in various states around the country. One of NADASC's advertising sales solicitation agreements was with the Orison B. Curpier Company (the "Curpier Company"). The Curpier Company's principal business address, as well as the address listed in NADASC's Automotive Executive for the Curpier Company employee primarily responsible for the NADASC account (Gregory Noonan), was in Cooperstown, New York. Under three separate but identical contracts with petitioner, the Curpier Company was given exclusive rights to represent petitioner in the southwestern states (Arkansas, Iowa, Kansas, Louisiana, Mississippi, Missouri, Nebraska, North Dakota, Oklahoma, Texas and South Dakota), the midwestern states (Illinois, Indiana, Kentucky, Minnesota, Ohio and Wisconsin), and Michigan. These contracts specifically provided that the Curpier Company was an independent contractor, with no employee or agency relationship to petitioner. The Curpier Company could not solicit display advertising for petitioner in any areas other than its own specified territories (i.e., the southwestern states, the midwestern states and Michigan). The Curpier Company paid its own expenses, except where travel was specifically requested by petitioner, in which case petitioner would reimburse expenses. The only instance of specifically requested travel described was for attendance at the NADA annual national convention, which has not been held in New York State. It is noted that, unlike the other two contracts, the Michigan contract required the Curpier Company (or its NADASC account representative) to maintain an office in Michigan.

8. By a contract dated November 16, 1987, NADASC also retained the exclusive services of Ms. Pamela Stockham as an independent contractor to solicit display advertising for the Automotive Executive in the northeast states (Connecticut, Delaware, Maine, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont). This territory was subsequently expanded, by contract amendment, to include Canada. Ms. Stockham operated under the same contractual terms as did the Curpier Company. That is, she was limited to her specific territory and could not solicit in other territories, and paid her own expenses except for travel specifically requested by petitioner. Again, the only such requested travel involved the annual convention. Under the contract terms, Ms. Stockham was required to visit each of the northeast states at least once each calendar quarter. However, she was not required to visit Canada any minimum number of times, although it was "mutually understood" that she would visit Canada from "time to time" for customer contact. Ms. Stockham's office is in New Jersey and, by an affidavit, she described her travel to New York as "sporadic", noting that any trip would involve business for multiple clients. Ms. Stockham's affidavit also notes that she conducts the majority of her work over the telephone.

9. Ms. Stockham was retained as the exclusive display advertising representative for the northeast states in November 1987. Prior thereto, it appears petitioner's exclusive display advertising representative for the northeast states was the firm of Nelson and Miller Associates, Inc. ("Nelson and Miller"), located in Irvington-on-Hudson, New York. This conclusion is based on a November 4, 1985 contract and a February 26, 1986 addendum thereto (included with the Exhibits to the Stipulation of Facts) describing Nelson and Miller in this role, and is buttressed by one visit by petitioner's employees to Nelson and Miller in August 1986 (see Finding of Fact "34"). Although the testimony as to the purpose for this visit was vague, and although no formal contract termination document is in evidence, it would appear clear that contracting the northeast states exclusively to Ms. Stockham would terminate any contract with Nelson and Miller. Like Ms. Stockham, Nelson and Miller was required to visit each of the northeast states at least once each calendar quarter to solicit display advertising.

10. During the relevant time period, NADA members received as part of their NADA memberships an annual subscription to Automotive Executive. Of approximately 25,000 subscriptions to Automotive Executive, approximately 20,000 were held by NADA members. As another benefit of membership, NADA members received a subscription to the Used Car Guide. NADA membership made up only 12% of the Used Car Guide's subscribers/sales, of which 5% accounts for individual sales and 7% multiple sales. NADA members did not receive a subscription to Trade-In Guide. Subscriptions to both Automotive Executive and the Used Car Guide were purchased from NADASC by NADA at a bulk discount rate that was, however, above the cost of production and was accepted by the IRS as a sale at fair market value. Any multiple sales of Automotive Executive or of the Used Car Guide that were made to individual NADA members were made at the full individual subscription rate.[2]

11. NADA hosts an annual trade show. It has never conducted its annual trade show within New York State. During the relevant period, NADA employees made approximately 43 business trips to visit NADA members in the State of New York to provide consulting services aimed at improving efficiency and effectiveness in the operations of such members' dealerships. During this same period, one software system was sold by a NADA consultant and installed by NADA personnel in New York State. NADA paid sales tax to New York State on that sale.

12. NADA's primary market was strictly automobile dealers. In contrast, petitioner's primary market was broader and included, among others, financial institutions, insurance companies, social services agencies, automobile dealers, police departments, libraries, accountants, attorneys, the IRS, and automotive service companies.

13. During the relevant times, NADASC and NADA both maintained their offices within one large office building owned by NADASC. These two entities leased over half of the space in the building. At all relevant times, NADASC was a landlord to NADA. NADA rented

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[2]Reference to mail-back subscription /re-order forms reveals a sliding rate scale (in a roughly inverse relationship) showing price decreases as volume increases from one subscription to one-hundred or more subscriptions. For example, the Used Car Trade-In Guide subscription rate ranged from $32.00 per single subscription dowm to $17.75 per subscription where one-hundred or more subscriptions were purchased. For the Used Car Guide Book the rate ranged in the same manner from $35.00 down to $19.25. Due to the volume of subscriptions it ordered, NADA paid $10.25 per subscription for the Used Car Guide Book.

its office space from NADASC at a rate equal to or above the market rate. This relationship has been subjected to IRS audits and has consistently been found to be at arm's length (requiring "no change" under IRS standards). At times, NADA was paying a rate higher than other tenants in the building. NADA owned the land upon which the NADASC office building was constructed. NADASC entered into a lease agreement with NADA ("the ground lease") to rent the land at a rate equal to fair market value.

14. The various divisions of NADA and NADASC were grouped throughout the building, separated from each other by partitions, office walls or other dividers. NADA and NADASC maintained a single receptionist who was listed as an employee of NADASC. NADA, however, paid an allocable portion of her salary. Each entity paid for its share of the building lease cost based on the actual square footage of space occupied. Such square footage was in fact physically remeasured when any changes were made to space configurations such that each entity's share of cost was accurately recalculated.

15. NADASC's accounting, payroll, and data processing departments, and NADA's human resource and legal departments provided administrative services to the other organization, with the recipient organization paying for the services provided to it by the other organization's departments. Such payments have been accepted by the IRS as satisfying the requirements of IRC § 482 (generally speaking, as representing arm's-length payments).

16. Computer services provided by NADASC personnel to NADA were charged to NADA at the same rate charged to unrelated third parties utilizing NADASC's computer processing division. In the same manner, NADA's human resources group provided various services to NADASC, including services that were also available to NADA employees, with NADASC making payments to NADA based on the number of NADASC employees served. NADA's human resources group was responsible for, among other things, posting NADA and NADASC job availability notices. The job position notices issued by NADA's human resources group listed the group as part of NADA. All such service agreements and payments between

the two organizations have been subjected to IRS audits and have consistently required no change.

17. There is a general telephone number into the office building through which a party would be directed to the proper organization by the receptionist. In addition, both NADASC and NADA maintain separate, direct-dial telephone numbers for their personnel. NADA and NADASC did share an "800" telephone number. Each caller to the "800" line would be electronically switched to the proper organization through an automated system that provides the caller with options so as to direct his or her call to the correct organization.

18. The two organizations allocated telephone bill charges as follows: a.) basic telephone service and general operational costs were divided between the two organizations according to the number of individual telephone units each organization had, and b.) long distance billing and "800" line billing was charged according to which particular organization and/or employee (NADA or NADASC) received or placed the call. Accordingly, all communications costs readily identifiable to one of the organizations were charged to the appropriate organization.

19. NADA and NADASC employees were listed in a common telephone directory that listed the employees separately by the department in which they worked (and on occasion by the organization by which they were employed). This directory also provides, for convenience, an alphabetical listing of all employees of both organizations.

20. During all relevant time periods, the 11-member board of directors of NADASC was comprised of individuals who also served on NADA's board and who made up the NADA executive committee. NADA's board was elected by its members. The members also elected the officers of NADA. The officers of NADA and the board members who are the four regional vice-presidents made up the NADA executive committee. During the years 1986, 1987 and 1988, NADASC's board members possessed 11 of the 59, 11 of the 57, and 11 of the 58 seats, respectively, on NADA's board of directors.

21. The two organizations had separate but identical payroll systems and health care plans. The organizations had separate and different retirement plans. If employees switched organizations, they terminated with one before being employed by the other, with all FICA, FUTA and SUI payments being made on the basis of a new employer. In addition, any COBRA payments incurred were charged to the appropriate organization.

22. NADASC files annual reports with the Secretary of State of Delaware and with the Secretary of State of the Commonwealth of Virginia, and files an annual tax return on IRS Form 1120. NADA also files annual reports with the Secretary of State of Delaware and the Secretary of State of the Commonwealth of Virginia, files an annual IRS information return on Form 990, and an annual tax return on Form 990-T.

23. Both corporations keep separate corporate minute books. NADASC holds an annual stockholders meeting, and NADA holds an annual membership meeting. The boards of directors meetings of the two corporations are held separately.

24. The executive committee of NADA and the board of directors of NADASC, which are comprised of the same persons, hold their meetings on the same day, but the NADA executive committee meeting is adjourned prior to the commencement of the NADASC board of directors meeting. Separate minutes are kept of meetings of the NADA board and executive committee, and of the NADASC board.

25. The organizations separately remit payroll and unemployment taxes. NADASC and NADA maintain separate bank accounts. Both NADA and NADASC, in addition to countless other companies nationwide, utilize the Mercer Study to evaluate and help establish their salary grading systems. NADA and NADASC paid an allocable portion of the cost incurred for this study.

26. Pursuant to a licensing agreement between NADASC and NADA, NADASC paid a significant fee for use of the NADA name, logo, and the phrase "The official publication of the National Automobile Dealers Association." This agreement was identical to one which NADA had with a completely unrelated third party. Furthermore, this arrangement, and the other

royalty arrangements between NADA and NADASC, have been reviewed by the IRS and have been left unchanged.

27. NADA advertised in Automotive Executive in addition to other similar magazines, and paid an arm's-length rate for such advertisements. Automotive Executive also carried advertisements for other automotive-related organizations. The rates paid by NADA for advertising in Automotive Executive have regularly been reviewed by auditors from the IRS, and the reasonableness thereof has never been challenged.

28. NADA and NADASC have been the subjects of a number of IRS audits, examining their accounting principles, their "shared" employees, existing business relations, their lease agreement, and virtually every other aspect of the two organizations. These audits have consistently resulted in "no change" to the accounting and reporting methods, and "no change" to the tax liability of NADA and NADASC, except for the 1981 and 1982 tax years in which NADASC agreed to pay additional tax in connection with the sale of Automotive Executive.[3]

Audit Related Facts

29. In or about mid-1987, the Division of Taxation ("Division") commenced audit activities with regard to NADA and NADASC. The Division's auditor explained that the audit of NADA was initially spawned as the result of an audit of a New York State auto dealership which had purchased the NADA Used Car Guide, but had paid no sales tax per the invoice for such purchase. The auditors called the "800" number listed on the invoice and heard a listing of extensions for various services provided. The auditors, at this point, believed that the Used Car Guide was sold by NADA, that NADA had representatives entering New York State for consulting and training purposes, and that there might be sufficient nexus to require NADA's registration as a vendor. At this initial stage, the auditors believed there was only one entity involved, to wit, NADA. In light of these circumstances, a "nexus questionnaire" was forwarded to NADA on or about July 2, 1987.

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[3]The record does not specify, but it is assumed that such additional tax represents (corporation) income tax paid to the Federal government.

30. After review of the returned nexus questionnaire and further consideration, the Division determined to conduct a field audit of NADA, and an initial meeting was scheduled with NADA in McLean, Virginia. The auditor testified that up to this point, he continued to assume that only one entity, NADA, was involved and that he was unaware of NADASC.

31. The initial audit meeting took place at 8400 Westpark Drive, McLean, Virginia in March 1989. The auditors described a "fairly modern high rise building" with one receptionist located in the lobby. Testimony at hearing revealed that at the commencement of the initial audit meeting, the auditors were advised that there were two entities, NADA and NADASC. It is also noted, however, that such information was clearly indicated on the nexus questionnaire as returned to the Division by NADA. The auditors were advised that NADASC sold publications, whereas NADA provided consulting and training to dealerships. The Division was also advised that NADASC employed no outside salesmen or staff to solicit sales in New York. Neither NADA nor NADASC were, at the time of the audit, registered vendors for New York sales tax purposes.

32. The auditors reviewed employee expense vouchers to determine if employees visited New York. According to testimony, the vouchers identified employees by department but not by specific organization, and were filed together in cabinets containing vouchers for both organizations. At this point in the audit review process, the auditors believed that employees visited New York, but that all were employees of NADA. The auditors, however, decided to pursue the issue of "nexus via alter ego", whereunder the activities of NADA, for purposes of nexus with New York, could be linked to NADASC. In furtherance of this approach, the auditors reviewed the minutes from various board of directors meetings, as well as finance committee and executive committee meetings, for both organizations.

33. On December 19,1990, the Division issued to petitioner (NADASC) a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing tax due in the amount of $144,136.91, plus interest, for the audit period March 1, 1986 through May 31, 1989. This assessment was based on the described field audit activities undertaken by the Division.

At hearing, the parties agreed that the dollar amount of the assessment and the method by which it was computed are not in dispute, thus leaving the issue to be whether petitioner was, either in its own right or through NADA, obliged to collect tax on its sales of publications to New York recipients.

34. The Division's auditor's review of travel expense vouchers revealed a total of seven instances where petitioner's employees travelled to New York during the audit period. More specifically, two of these trips were to meet with the independent display advertising firms described previously, to wit, an August 21, 1986 trip to meet with Nelson and Miller, and a November 15-16, 1988 trip to meet with the Curpier Company. The remaining five trips consisted of: one visit on November 1, 1988 to meet with auto industry analysts for a magazine story, one trip on March 23-24, 1989 to attend an automobile show in New York City, and three visits to attend "Folio". Folio was described as an independent organization which presented educational programs consisting of a series of seminars on all aspects of journalism, including graphics, writing and publishing.

35. In addition to the above seven visits discovered by the auditors, petitioner reviewed its employees' travel expense vouchers and discovered an additional thirteen day trips to New York. Twelve of these trips were for the purpose of attending Folio educational seminars, while one trip was made by an employee who had been accorded the honorary position of judge at an award ceremony.

36. At hearing, petitioner's assistant treasurer, Normand Raymond, testified and described in detail the internal cost accounting methods by which various expenses are allocated between the two entities NADASC and NADA. In general terms, the accounting system was described as "extremely cost centered", with the aim that there should be "no big unallocated pots of costs" such that each organization could know almost precisely how much it cost to operate and deliver its services. Mr. Raymond noted that the cost allocation system was developed in the 1960's and, as described above, has been accepted upon audit by the IRS. He also testified that there is no cross-marketing between the two organizations or, even more

specifically, within each entity. That is, each entity is itself broken down into various subgroups performing certain specific services. In turn, each subgroup within each entity tends to function independently. Petitioner's witness emphasized that there is no "cross-selling" of products or advertisements between the organizations. One benefit of NADA membership is receipt of subscriptions to Automotive Executive and to the Used Car Guide. However, NADA personnel do not carry samples of NADASC publications, or promote or solicit sales thereof, in their dealings with NADA members or others. Similarly, there is no evidence of cross-entity financing or loan guarantees.

37. Those employees who, as described, provided shared functions, (generally involving administrative functions), would respond to inquiries on either organization's letterhead as appropriate to the inquiry. The management information services and accounting departments were generally NADASC operations, whereas the legal and human resources departments were NADA departments. Mr. Raymond explained that the services of such departments were shared between the organizations for the simple reasons of efficiency and cost effectiveness, but that the main services, products, operational methods, goals and objectives of the two organizations were entirely different. Furthermore, as described above, the costs associated with such shared services were charged back to the appropriate organization pursuant to very detailed cost allocation methods. Mr. Raymond further noted that no profit is charged between the organizations on services provided to each other.

38. Petitioner is not registered as a vendor or authorized to do business in New York, neither owns nor rents any property including offices in New York, has no employees including salespersons stationed in New York, and holds no board of directors meetings or other similar meetings in New York. Petitioner's main and most effective means of obtaining subscriptions for its publications is through mail-back subscription/re-order cards which are included in its publications. Petitioner's publications, including specifically its Used Car Guide, were described as essentially "self-selling".

39. In contrast, there is no dispute that NADA did business in New York through its employees, including on-site consulting and training, and that at the conclusion of its audit NADA agreed that there was nexus between itself and New York, registered as a vendor, and paid tax for the period at issue.[4]

40. The NADA annual convention was described as involving 20,000 to 25,000 thousand attendees, 3500 to 4000 franchised automobile dealers, and 150 to 200 exhibitors. Having advertising representatives as well as employees attend this convention was described by petitioner's witness as simply sensible, given that this convention represented the largest assembled group of likely buyers of petitioner's publications and advertisements therein.

CONCLUSIONS OF LAW

A. During the period in issue, the term "vendor" was defined by Tax Law § 1101(b)(8)(i) as follows:

> "(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. . . . "

B. In addition to the statutory language above, 20 NYCRR former 526.10(e), as in effect during the subject period and pertaining to interstate vendors, provided that a person outside of New York is not required to register as a vendor or to collect tax on tangible personal property delivered into New York if that person:

> "(1) . . . [makes] sales to persons within the State . . . . (2) . . . 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. . . ."

These regulations went on to define "soliciting business" as follows:

> "(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.

* * *

[4]Although the matter herein was commenced as an audit of NADA only, the discovery that two entities existed led the Division to conduct separate audits.

"(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." (20 NYCRR former 526.10[d].)

C. Petitioner does fall within the definition of a vendor per the above-described statutory and regulatory framework. While the only sales representatives entering the state on petitioner's behalf were the independent contractors who solicited display advertising (the sale of which is not subject to tax), petitioner also distributed other advertising material, to wit, the mail back subscription/re-order forms included in its publications. Accordingly, petitioner falls within the literal definition of a vendor as set forth above.

D. Although petitioner may fall within the definition of a vendor, as above, there remains the overriding question of whether petitioner's contacts with New York in their own right, or as discussed hereinafter through the activities of its parent organization NADA, rose to the level of requisite nexus with New York sufficient to satisfy constitutional concerns vis-a-vis the imposition of vendor obligations on petitioner. Stated simply, the question is whether the number and quality of petitioner's contacts with New York were sufficient to constitute more than the "slightest physical presence" in the State. Such simple statement, however, requires a far more involved discussion of the evolution and application of that standard.

E. Petitioner argues on the basis of several United States Supreme Court cases, including most notably Quill Corp. v North Dakota (504 US 298, 119 L Ed 2d 91), that its contacts with New York were so minimal that New York lacked sufficient nexus to either petitioner, or to the transactions and items sold by petitioner, to impose tax collection obligations upon petitioner, an out-of-state seller. Petitioner maintains that its contacts with New York were insufficient to reach the requisite nexus threshold for either Due Process (US Const, 14th Amend) or Commerce Clause (US Const, art I, § 8, cl 3) purposes. In contrast the Division, relying mainly upon the same line of Supreme Court cases and upon Orvis Co. v. Tax Appeals Tribunal (86 NY2d 165, 630 NYS2d 680), argues that petitioner's New York contacts in their own right more than sufficed as a New York presence for purposes of allowing the State to impose tax collection obligations upon petitioner. Further, the Division believes it is appropriate to

attribute to petitioner the New York contacts of its parent, NADA, admittedly a New York vendor, thereby providing sufficient nexus between New York and petitioner. Petitioner in response maintains that its separate corporate existence must be respected and that it is improper to pierce the corporate veil and attribute NADA's contacts to petitioner for purposes of establishing nexus.

F. In Quill Corp. v. North Dakota (supra) the Supreme Court found sufficient contact between the Quill Corporation and the State of North Dakota to satisfy Due Process standards but not to satisfy Commerce Clause standards. In so doing, the Court defined and preserved a distinction between Due Process and Commerce Clause requirements for nexus. In Quill, North Dakota sought to require the Quill Corporation to collect and pay tax on goods sold for use within the State. Quill was an out-of-state mail-order house that sold office equipment and supplies through catalogues, flyers, advertisements in national periodicals and telephone calls. Quill had no employees that worked within North Dakota, owned no real property and little or no tangible personal property in the State, and had no outlets or sales representatives there. Quill's annual national sales were over $200,000,000.00, of which close to $1,000,000.00 were made to about 3,000 customers in North Dakota. Quill was the sixth largest seller of office supplies in North Dakota. The corporation's North Dakota customers received their merchandise by mail or common carrier from out-of-state locations.

G. Analyzing first the nexus requirement in the context of the Due Process Clause, the Court in Quill stated:

> "The Due Process Clause 'requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax,' Miller Bros. Co. v. Maryland, 347 US 340, 344-345, 98 L Ed 744, 74 S Ct 535 (1954), and that the 'income attributed to the State for tax purposes must be rationally related to "values connected with the taxing State."' Moorman Mfg. Co. v. Bair, 437 US 267, 273, 57 L Ed 2d 197, 98 S Ct 2340, (1978) (citations omitted).
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> "Our due process jurisprudence has evolved substantially in the 25 years since Bellas Hess, particularly in the area of judicial jurisdiction. Building on the seminal case of International Shoe Co. v. Washington, 326 US 310, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057 (1945), we have framed the relevant inquiry as whether a defendant had minimum contacts with the jurisdiction 'such that the maintenance of

> the suit does not offend "traditional notions of fair play and substantial justice."'Id., at 316, 90 L Ed 95, 66 S Ct 154, 161 ALR 1057 (qouting Milliken v Meyer, 311 US 457, 463, 85 L Ed 278, 61 S Ct 339, 132 ALR 1357 (1940)). In that spirit, we have abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable, in the context of our federal system of government, to require it to defend the suit in that State. In Shaffer v Heitner, 433 US 186, 212, 53 L Ed 2d 683, 97 S Ct 2569 (1977), the Court extended the flexible approach that International Shoe had prescribed for purposes of in personam jurisdiction to in rem jurisdiction, concluding that 'all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny.'
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> "Applying these principles, we have held that if a foreign corporation purposefully avails itself of the benefits of an economic market in the forum State, it may subject itself to the State's in personam jurisdiction even if it has no physical presence in the State.
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> "Comparable reasoning justifies the imposition of the collection duty on a mail-order house that is engaged in continuous and widespread solicitation of business within a State. Such a corporation clearly has 'fair warning that [its] activity may subject [it] to the jurisdiction of a foreign sovereign.' Shaffer v Heitner, 433 US, at 218, 53 L Ed 2d 683, 97 S Ct 2569 (Stevens, J., concurring in judgment).
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> "In this case, there is no question that Quill has purposefully directed its activities at North Dakota residents, that the magnitude of those contacts is more than sufficient for due process purposes, and that the use tax is related to the benefits Quill receives from access to the State. We therefore agree with the North Dakota Supreme Court's conclusion that the Due Process Clause does not bar enforcement of that State's use tax against Quill" (Quill Corp. v. North Dakota, supra, 119 L Ed 2d at 102-104).

H. In addition to its Due Process argument, petitioner also maintains that it did not have sufficient presence in or contact with New York to satisfy constitutional standards for imposing tax collection obligations under the Commerce Clause as interpreted by the Court in Quill. On this score, the current governing standard for Commerce Clause purposes is set forth in Complete Auto Transit v. Brady (430 US 274, 51 L Ed 2d 326). Specifically, a state tax will be sustained against a Commerce Clause challenge provided the tax:

> "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State" (Complete Auto Transit v. Brady, supra, 51 L Ed 2d at 331).

In this case, the only issue presented concerns the first criteria, i.e., substantial nexus. In Quill, the Court noted that although the Due Process and Commerce Clauses both have a nexus

test, the standards are not the same because they are driven by different concerns (Quill Corp. v. North Dakota, supra, 119 L Ed 2d at 106). In Quill, the Court explained the differences as follows:

> "Due process centrally concerns the fundamental fairness of governmental activity. Thus, at the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him. We have, therefore, often identified 'notice' or 'fair warning' as the analytic touchstone of Due Process nexus analysis. In contrast, the Commerce Clause, and its nexus requirement, are informed not so much by concerns about fairness for the individual defendant as by structural concerns about the effects of state regulation on the national economy." (Id.)

I. On the basis of the difference in considerations, the Court concluded in Quill that physical presence in the taxing state was not required to support jurisdiction under the Due Process Clause (Id., 119 L Ed 2d at 104; see, Matter of Orvis Co. v. Tax Appeals Tribunal, supra.). However, in order to support jurisdiction to tax under the Commerce Clause, the Court in Quill adhered to the precedent it established in National Bellas Hess v. Dept of Revenue of Illinois (386 US 753, 18 L Ed 2d 505), and held there must be some physical presence of an interstate mail-order vendor in the taxing state. The Court presented two reasons for requiring the physical presence of the vendor for Commerce Clause purposes: (1) it established a "bright line" test and thus created a "discrete realm of commercial activity that is free from interstate taxation" (Quill Corp v. North Dakota, supra, 119 L Ed 2d at 108) and, (2) it satisfies the demands of stare decisis (id., 119 L Ed 2d at 110).

J. As subsequently interpreted by the New York Court of Appeals in Orvis, while physical presence of a mail-order vendor is required it need not be substantial, but rather must only be clearly greater than a "slightest presence". Thus, in Orvis, the Court (over a two-judge dissent which would have required a more substantial in-state physical presence to reach substantial nexus) required physical presence which is "demonstrably more than a 'slightest presence'", explaining further that such presence "may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." (Orvis Co. v. Tax Appeals Tribunal,

supra, at 178, 630 NYS2d at 687.) Applying this standard, the Court of Appeals found sufficient physical presence through Orvis' personnel making solicitation visits to wholesale purchasers of Orvis' products in New York. Although the exact number of visits was not precisely settled, the frequency was described as constituting "systematic visitation".[5] Likewise, in the companion Vermont Information Processing, Inc. (86 NY2d 165, 630 NYS2d 680, cert denied ___US___, 64 USLW 3271) case, decided together with Orvis, the Court found that some 41 "troubleshooting visits" by technical personnel in support of computer hardware and software systems sold to New York purchasers "significantly contributed" to the vendor's successful New York market and thus provided the requisite in-state physical presence to support tax collection obligations.

K. It is clear that New York has "some minimum connection" with petitioner, and with the sales on which it seeks to have tax collected on its behalf by petitioner. Petitioner undoubtedly directed sales efforts toward New York customers, specifically through the inclusion of mail-back subscription/reorder cards in its publications, which publications themselves were ultimately shipped to and received by New York purchasers. Although it may be true that petitioner's publications were so well known and sought after that they virtually sold themselves, it remains that petitioner purposefully directed its activities at New York (as well as at perhaps every other state in the Union and to Canada) in a manner sufficient to meet the comparatively lower Due Process nexus standard. Accordingly, since there is no requirement of in-state physical presence and no argument

[5]The in-state visits by Orvis personnel were first described (in a letter responding to an initial audit inquiry) as involving some Vermont resident salesmen travelling into New York to call on non-Orvis owned stores. Thereafter, affidavits made by Orvis' president and by its treasurer claimed there were only 12 visits, and that such visits were not for the purpose of soliciting sales. Ultimately, the Court of Appeals agreed with the Tax Appeals Tribunal's decision to accord little weight to these affidavits, and with the Tribunal's conclusion that Orvis' "substantial wholesale business in [New York] was generally accomplished by means of its sales personnel's direct solicitation of retailers through visits to their stores in New York. . . ." The Court also observed that the affidavits themselves described the "trips to New York of Orvis' personnel as 'in a loop' suggesting systematic visitation of all of its as many as 19 wholesale customers on the average of four times a year" (Orvis Company v. Tax Appeals Tribunal, supra, at 179, 180 630 NYS2d at 688; emphasis added).

here that petitioner did not have "notice" or "fair warning" that its sales could be subject to tax (see, Quill Corp. v. North Dakota, supra), there is no Due Process impediment to imposing tax collection obligations on petitioner.

L. Turning to the Commerce Clause argument presents a more difficult decision. As above, petitioner did have "some minimum connection" with the State. The difficulty, of course, lies in deciding whether the totality of petitioner's contacts with New York, though not needing to be "substantial", nonetheless exceeded the "slightest" level so as to support tax collection obligations.

M. On the issue of Commerce Clause nexus the Supreme Court has, via its physical presence requirement, refuted State attempts to impose tax obligations where the only connection between the State and the seller was through the mail and common carriers with no physical presence by the seller in the State (see, Quill Corp. v North Dakota, supra; National Bellas Hess, Inc. v. Dept of Revenue of Illinois, supra). In contrast, the Supreme Court has upheld State imposed tax obligations against out-of-state sellers where there was some definable in-state presence (see, Felt & Tarrant Mgf. Co. v. Gallagher, 306 US 62, 83 L Ed 488 [engagement of two nonemployee commissioned sales agents to solicit orders plus the rental of office space for them]; Scripto, Inc. v. Carson, 362 US 207, 4 L Ed 2d 660 [ten part-time, nonemployee, nonexclusive commission advertising specialty brokers soliciting sales of mechanical writing instruments constituted "continuous local solicitation in Florida"]; Standard Pressed Steel Co. v. Washington, 419 US 560 42 L Ed 2d 719 [one resident engineer-employee operating from his home and consulting with Boeing regarding anticipated parts needs for manufacturing and clearing up shipping problems or other problems encountered in using the vendor's products]).

Later cases have further refined the first prong of the Complete Auto Commerce Clause test, to wit, "activity with a substantial nexus to the taxing state". In National Geographic Society v. California Board of Equalization (430 US 551, 51 L Ed 2d 631), a use tax collection duty was upheld on interstate mail order sales premised upon the physical presence of two in-

state advertising sales offices in California maintained by the taxpayer. In its ruling, the Court pointed out that "(1) the required nexus with the taxing State need not necessarily be directly related to the activity being taxed, 'but [could] simply [be] whether the facts demonstrate "some definite link, some minimum connection, between [the taxing State] and the person it seeks to tax"' . . . and (2) the required physical presence of the vendor in the taxing State must be more than the slightest 'presence'" (see, Orvis Co. v. Tax Appeals Tribunal, supra at 174, 630 NYS2d at 684). Thus, the Court's holding in National Geographic may be read as entirely consistent with its later Quill decision in finding Due Process nexus via some minimum connection with the State, albeit not necessarily directly related to the activity being taxed, and Commerce Clause nexus via some more than slightest physical presence, to wit, the two offices. Finally, as noted, the Court in Quill retained the physical presence requirement although, as observed in Orvis, the same appeared to be "a somewhat begrudging retention of the Bellas Hess physical presence requirement - - a 'result', as the Court in its opinion remarked 'not dictate[d] * * * were the issue to arise for the first time today [citation omitted] (Orvis Company v. Tax Appeals Tribunal, supra, at 177, 630 NYS2d at 686).

N. After considering petitioner's contacts in light of the Supreme Court precedents and the Orvis case, it is concluded that petitioner here was not sufficiently involved in "the conduct of economic activities in [New York] performed by [its] personnel or on its behalf" (Orvis Co. v. Tax Appeals Tribunal, supra at 178, 630 NYS2d at 687), so as to have exceeded a "slightest presence". This conclusion follows from both the quantity and quality of petitioner's contacts with New York which consisted solely of the following:

1.) 20 trips into New York by petitioner's employees during the audit period, which trips may be further specifically described to consist of:

> a.) 1 trip to Irvington-on-Hudson to visit with Nelson and Miller, an independent contractor retained by petitioner to solicit display advertising in petitioner's publication Automotive Executive in New York and elsewhere. As noted it would appear that this firm was replaced by Ms. Stockham approximately halfway through the audit period (see, Findings of Fact "9" and "34");

b.) 1 trip to Cooperstown to visit with Curpier Company, the firm under contract to solicit display advertising in Automotive Executive in the midwest, southwest and Michigan, but not in New York (see, Findings of Fact "7" and "34");

c.) 2 trips to obtain information for articles in petitioner's publication Automotive Executive (see, Finding of Fact "34");

d.) 1 trip by an employee to appear in an honorary judging role (see, Finding of Fact "35"); and

e.) 15 trips by petitioner's employees to New York City to attend educational seminars (Folio) concerning various aspects of publishing and journalism (see, Findings of Fact "34" and "35").

2.) An unspecified number of visits, contractually set as a minimum of once per quarter but described by affidavit as "sporadic visits", by Ms. Stockham who, like the Nelson and Miller firm was retained and functioned as an independent contractor representing petitioner in the solicitation of display advertising in the Automotive Executive.

3.) The maintenance of publication solicitation which is essentially the same as mail-order vendor solicitation, to wit, the inclusion of mail-back subscription/reorder cards in petitioner's publications as mailed to recipients in New York and elsewhere.

O. While the New York contacts described above certainly do not constitute a substantial physical presence, they do represent more than purely mail solicitation and common carrier contact. While such contacts are, as noted, sufficient to meet Due Process requirements, they are in fact so limited that they simply do not rise above the level of "slightest presence" and thus do not satisfy Commerce Clause requirements. The visits to New York made by petitioner's employees, as described above, may be dismissed as inconsequential in effect and/or unrelated to the matter at hand. That is, sending employees to educational seminars cannot be viewed, except in the farthest sense, as representing physical presence in a given jurisdiction for tax nexus purposes. Simply put, the physical location of an independent educational seminar to which employees are sent cannot reasonably be viewed as a basis for finding jurisdiction over the employer. To conclude otherwise would, as petitioner points out by brief, impermissively interfere with interstate commerce. So too, the retention of, and one visit to, a contract advertising solicitor (the Curpier Company) who happened to have its offices located in New

York but whose territory specifically excluded New York does not constitute economic activity by petitioner in the jurisdiction. Finally, two trips to obtain information for future articles to be published, and one trip to appear in an honorary award ceremony are inconsequential.

On the other hand, retaining contract advertising representatives (Nelson and Miller and subsequently Ms. Stockham) who, on petitioner's behalf solicited display advertisements for one of petitioner's publications (which publication was ultimately delivered into New York) comes closer to constituting in-state physical presence for nexus purposes. In fact, the key question in this case becomes whether sporadic drop-ins by independent contractors selling (nontaxable) advertising, without the maintenance of offices or other physical presence in-state, is enough to exceed a "slightest physical presence". The first of these representatives (Nelson and Miller) were located in New York, while their replacement (Ms. Stockham), though located outside of New York, was contractually required to visit New York for the purpose of client contact and solicitation. Thus, some economic activity in the State was clearly performed on petitioner's behalf. However, such activity was limited, and the sale of advertising space (the economic activity performed) is not itself an activity subject to sales tax. Unlike National Geographic, where the taxpayer maintained two sales advertising offices for its representatives in the taxing jurisdiction and thus could be said to have received the benefits of fire and police protection, petitioner here did not maintain any advertising sales offices in New York, but rather simply contracted with outside representatives to sell display advertising in one of its publications. There is no evidence of continuous local solicitation of the product sought to be taxed, as in Scripto. Finally, unlike Orvis, there are no product oriented systematic visits (either for sales or for providing technical support). Thus, while economic activity was performed on petitioner's behalf in New York, the nature of that activity and the totality of petitioner's contacts with New York, while representing a minimal contact sufficient for Due Process purposes, simply was too small and far removed from petitioner and from the transactions upon which the use tax collection obligation is sought to be imposed, to constitute something "demonstrably more" than the "slightest physical presence" in the State. Although at some prior time there may have been

a need to promote petitioner's publications by more direct methods of solicitation than return mail cards (see, National Automobile Dealers Association v. Commissioner, 2 TCM 291 [1943], that time has apparently passed and the publications are essentially self-selling, with no real in-state physical presence necessary to generate such sales.

P. Finally, the Division maintains that the required nexus in this case may be found through petitioner's parent, NADA, arguing that while petitioner is a legally separate entity, it is in fact so intertwined with and controlled by NADA that it is nothing more than NADA'a alter ego. Petitioner in response does not challenge the premise of finding nexus through related entities where the facts support a conclusion that a) one entity is entirely controlled by another, b) the formalities of separate entity existence are not respected by the entities, and c) there is some fraud being undertaken via the creation or maintenance of separate entities. However, petitioner maintains that the facts of this case do not support looking through petitioner's own corporate existence and attributing to it the New York contacts of its parent so as to find nexus between New York and petitioner.

Q. Under the facts of this case it is not appropriate to invoke alter ego theory, ignore petitioner's separate existence and hold petitioner to be required to collect tax because of the New York activities of its parent. This is not to say that petitioner was completely separate from NADA and derived no benefit from name recognition (for the use of which petitioner paid a licensing fee), or from certain in-house cost sharing efficiencies (e.g., "shared" administrative employees, receptionist, etc.). However, it is clear that petitioner and NADA had different operational aims and goals, different means of carrying out those aims and goals, and that petitioner had a much larger and more diverse market of customers than did NADA. So too, while petitioner's board of directors was comprised of members of NADA's board of directors, petitioner observed the formalities of its separate existence and the same must be respected. To the extent that NADA exercised control over petitioner the same reflects simply the normal consequences of complete common stock ownership. Without more, however, such ownership and control is not sufficient to override petitioner's separate existence. Further, given the

separate aims and operational methods carried out by the two entities, it cannot be said that the parent (NADA) so controlled the finances, business policy and practices of the subsidiary (petitioner) that the subsidiary had no existence of its own. Credible testimony in this regard established that petitioner exercised its own discretion and was essentially free to carry out its business purposes as it saw fit, yet remained accountable for the results of its activities as would be expected in any parent/subsidiary relationship. While the Division notes that certain committee meetings were held on the same day and in some instances appeared to overlap, the general picture is that these entities followed the requisite formalities of separate entity existence without at the same time being needlessly inefficient (e.g., holding separate meetings on separate dates at separate sites for the sake of avoiding the appearance of control). The Division notes that both entities approved the creation and funding of three management information job positions, with the costs therefor to be split between the entities. Given the administrative nature of such positions, such an agreement would only be expected and itself shows independence--that is both entities would have to formally approve of the positions because both would be charged a share of the costs of the positions. In addition, the formal sharing of costs is fully consistent with the detailed cost allocation efforts carried out by these entities with respect to all shared services. In sum, neither side carried the other, but rather each entity was charged and paid its own costs incurred in carrying out its own goals and objectives. It is also not surprising or particularly significant to find that NADA provided information for inclusion in petitioner's publication Automotive Executive. It is only logical to expect that information from and about an organization would be included in the official publication of that organization--whether or not that organization and the publishing organization are related. A publisher operating otherwise would run the obvious risk of printing a magazine the content of which was of no use, relevance or interest to the group at which the publication was aimed. Finally, the Division has raised no argument that there was some fraud or evasive purpose engaged in through the creation and operation of separate entities, but rather only charges that the entities failed to sufficiently follow the formalities of separate existence.

As above, this assertion is not borne out by the evidence in the record. In fact, separate entities were created nearly 50 years ago in response to IRS pressure (see, Finding of Fact "3"), and these entities have, perhaps to a greater extent than most companies, respected and observed the formalities of separate organizations. Their cost allocation methods and results have been subjected to numerous IRS audits and have not been changed. To expect more separation, especially in the area of administrative functions, would not only run fully counter to reasonable cost efficiencies and foster and impose entirely unnecessary and unreasonable duplication, but would unduly elevate specific small failures in form over substance and fact. In sum, the two entities had separate though overlapping markets, separate main business functions, purposes and goals, and went about executing those purposes on separate operational planes. Accordingly, it would be unwarranted to cast aside their separate legal existences for purposes of sustaining the imposition of tax collection obligations against one entity (petitioner) based on the acts and contacts with New York of the other (NADA). Petitioner here was not merely a "device" -- it was a viable business enterprise conducting its own activities, carrying out its own purposes, and paying its expenses to unrelated creditors as well as its carefully determined portion of administrative expenses for services shared with its parent. Given that there is no evidence of any fraudulent purposes being engaged in by petitioner via its separate corporate existence, and noting that petitioner observed with only minor exceptions all of the formalities of separate existence, it follows that petitioner may not properly be held the alter ego of NADA or be subjected to vendor obligations as a result thereof.

R. The petition of NADA Services is hereby granted and the Notice of Determination dated November 19, 1990 is cancelled.

DATED: Troy, New York
February 1, 1996

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE