STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ROBERT MANN D/B/A BOB MANN CONSTRUCTION EQUIPMENT	:	DETERMINATION DTA NO. 810777
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period December 1, 1984 through February 28, 1990.	:	

Petitioner, Robert Mann d/b/a Bob Mann Construction Equipment, 1020 Main Street, Shrub Oak, New York 10588, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1984 through February 28, 1990.

A hearing was held before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on April 26, 1993 at 9:15 A.M. Petitioner filed a brief on June 10, 1993. The Division of Taxation's brief was due on July 9, 1993. The Division of Taxation requested and was granted an extension, to July 26, 1993, to file its brief, but did not do so. Petitioner appeared by Solomon Abrahams, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether petitioner's request for a conciliation conference was timely filed with respect to three of the four notices of determination at issue herein.

II. Whether the Division of Taxation properly determined that, with respect to the period at issue, petitioner was a "vendor" as defined by Tax Law § 1101(b)(8).

III. Whether the Division of Taxation's determination of additional taxable sales herein was proper.

FINDINGS OF FACT

On August 23, 1991, following an audit, the Division of Taxation ("Division") issued to petitioner, Robert Mann d/b/a Bob Mann Construction Equipment, four notices of determination and demands for payment of sales and use taxes due which assessed tax, penalty and interest for the period December 1, 1984 through February 28, 1990. Specifically, notices bearing numbers S910823100C and S910823101C assessed a total tax due of $261,232.44, plus statutory penalty and interest pursuant to Tax Law § 1145(a)(1)(i) and (ii) for the audit period. Notices bearing numbers S910823102C and S910823103C assessed omnibus penalty totaling $35,603.69 pursuant to Tax Law § 1145(a)(1)(vi) for the period June 1, 1985 through February 28, 1990.

Petitioner is in the business of construction equipment sales. The nature of petitioner's involvement in this business, i.e., whether petitioner is a vendor for sales tax purposes, and the location of such sales are the central issues of this case. Facts related to these issues are more fully developed hereinafter.

The Division's audit found tax due in four areas in amounts as follows:

Area	Tax Due
Additional Taxable Sales	$236,796.71
Tax Accrued Not Paid	22,398.00
Fixed Asset Acquisitions	1,603.73
Expenses	434.00
	$261,232.44

Petitioner specifically contested tax assessed in the area of additional taxable sales. Petitioner did not specifically contest the tax assessed in the other areas listed above and did not present any evidence in respect of those areas.

On audit, the Division requested that petitioner make available for review essentially all records pertaining to his business operations from its inception through February 28, 1990.[1] With respect to its audit of petitioner's taxable sales, the Division reviewed petitioner's Federal

[1]The Division listed specific records to be made available in letters to petitioner dated January 13, 1989 and March 5, 1990.

income tax returns schedule C, general ledger and invoices for the period at issue. For the years 1985 through 1988, the Division relied on its review of petitioner's invoices to determine additional taxable sales. Along with petitioner's former representative, the Division reviewed such invoices in detail and compiled handwritten summary sheets listing the date, invoice number, customer name and address, equipment sold, selling price, and location of the sale. These summary sheets were then reviewed to determine which sales were subject to sales tax. The Division's determination as to whether a sale was subject to sales tax was based upon the Division's determination of the location of the sale. Where the Division determined that a sale occurred in New York, it was deemed subject to sales tax. With respect to such deemed New York sales, the Division did not assess tax on sales for which petitioner produced a properly completed exemption certificate or on sales where the purchaser paid the tax directly

to the Division.[2] The Division then assessed tax on all deemed New York sales for the 1985 through 1988 period where no exemption certificate was produced and where the purchaser had not paid the tax directly to the Division.

The Division determined the location of a sale from the invoice. The record is not entirely clear, however, as to whether the Division relied on the purchaser's address as listed on the invoice or whether the invoice specifically listed a delivery address. The record contains conflicting evidence on this point. It is clear, however, that the Division used information on the invoices to make its determination of the location of the sale.

The handwritten summary sheets prepared by the auditor and petitioner's former representative detailed 93 total sales made by petitioner during the 1985 through 1988 period.[3]

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[2]The audit herein was triggered by the appearance of petitioner's sales invoices in the records of contractors who were then under audit by the Division. The Division was thus aware that certain of petitioner's purchasers had paid tax directly to the Division.

[3]It should be noted that while the notices of determination indicate an audit period running from December 1, 1984 through February 28, 1990, the actual period audited with respect to additional taxable sales was January 1, 1985 through December 31, 1989.

The Division assessed tax herein on 37 of these sales. Information regarding these 37 sales was then entered on a set of computerized summary sheets. This information was identical to that listed on the handwritten summary sheets with respect to these 37 sales except that for 7 of the sales the location of the sale as listed on the handwritten sheets was different from that listed on the computerized sheets. Specifically, on the handwritten sheets,

6 of these sales listed "Port Newark" or "F.O.B. Port Newark" as the location of the sale, while one did not list a location on the handwritten sheets. On the computerized sheets, 6 of these 7 sales listed the purchaser's (New York) address as the location of the sale. The remaining sale listed petitioner's New York address as the location of the sale. (This sale did not list an address for the purchaser.) There was no discussion or explanation in the record regarding the above-noted discrepancies between the handwritten summary sheets and the computerized summary sheets.

For 1989, the invoices made available on audit indicated sales of about $1,000,000.00 less than that indicated by petitioner's general ledger. The Division concluded, therefore, that such invoices were incomplete. Consequently, petitioner's former representative compiled a summary sheet using (apparently) available information in an effort to reconcile petitioner's sales to the general ledger. The Division used petitioner's former representative's analysis together with the invoices which were made available to determine additional taxable sales for 1989. The former representative's analysis accounted for all but $114,700.00 of total sales as indicated by the general ledger. This unaccounted for $114,700.00 was deemed by the Division to constitute additional taxable sales.

In the area of "Tax Accrued Not Paid", the Division reviewed petitioner's general ledger sales tax accrual account, his invoices and his filed sales tax return for the quarter ended November 30, 1989. The Division found that, with respect to this period, petitioner had accrued $22,398.00 in tax in excess of the amount reported and paid. With respect to the area

of "Fixed Asset Acquisitions", the Division reviewed petitioner's general ledger and, for pre-1987 acquisitions,[4] the depreciation schedules on petitioner's Federal income tax returns. This review determined $27,890.81 in acquisitions for which petitioner could produce no invoices or other proof that taxes had been paid. This resulted in an assessment of $1,603.73 in additional tax due. In the area of "Expenses", the Division reviewed all expense invoices made available and determined the percentage on which no tax was paid. This percentage was calculated to be 2.1834%. The Division then applied this percentage to deductions and cost of goods sold per petitioner's Federal schedule C's. Additional tax due in the area of expenses was thus determined to be $434.00.

As noted, petitioner was involved in the sale of construction equipment. In his testimony, petitioner described his business as a "brokerage business". Petitioner has been in this business since 1985. Petitioner did not register as a vendor for sales tax purposes until June 1989. Petitioner began filing sales tax returns with the quarter ended May 31, 1989.

Prior to commencing business as "Bob Mann Construction Equipment", petitioner had been in the construction business as an equipment operator and had made contacts and formed relationships with various contractors, many of whom thus became potential customers when he started his business.

Petitioner relied heavily on word-of-mouth to generate business. Additionally, petitioner advertised his business by placing signs at contractor friends' places of business. Such signs bore the name of

petitioner's business and his home telephone number. Petitioner had at least three such signs in place during the period at issue.

Petitioner transacted business from his home in Shrub Oak, New York. Petitioner contacted and was contacted by potential customers by telephone at his home. Petitioner kept

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[4]Petitioner did not utilize a general ledger in his recordkeeping until 1987.

his records at his home and also claimed a home office deduction on his Federal schedule C's for the years at issue. Additionally, petitioner used a lot, which contained construction equipment and a trailer, located off of Route 202 in Yorktown Heights, New York in connection with his business.[5] Petitioner also had a small office in New Jersey which was provided by his supplier.

Most of petitioner's business transactions involved equipment located at Port Newark, New Jersey. The supplier of this equipment was an entity referred to by petitioner as "Mountain Service". Regarding such transactions, petitioner would typically advise a potential customer that he had a particular piece of equipment in a yard at Port Newark and then he and the customer would meet at Port Newark to inspect the equipment. Petitioner and the potential customer would then negotiate a selling price, petitioner having previously been advised of the equipment supplier's selling price. (At hearing, petitioner referred to the equipment supplier's price as a

"wholesale" price.) Petitioner sought to sell the equipment to the potential customer at the highest possible price. Petitioner's gain on a transaction was the difference between the supplier's selling price and the customer's ultimate purchase price. Petitioner characterized this gain as "commission".

The customer paid petitioner the full purchase price by check which petitioner then deposited into his checking account in Shrub Oak, New York. Petitioner then paid the equipment supplier his selling price thereby clearing the way for the customer to take

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[5]Petitioner denied that he used the lot located off of Route 202 in Yorktown Heights, New York for his business. This denial is outweighed by other evidence in the record which supports the fact set forth above. Specifically, petitioner's former representative submitted a completed questionnaire to the Division, which was entered into the record herein as part of the Division's audit report. This questionnaire indicated that petitioner maintained an office in Yorktown Heights, New York. Additionally, the Division's auditor testified that petitioner's first representative in this matter, a Mr. Schipf, drove the auditor to the Yorktown Heights site and advised her that petitioner used the location in connection with his business.

possession of the equipment. Petitioner gave his customer an invoice listing the full amount paid. Petitioner did not charge or collect sales tax. Petitioner's receipt listed petitioner's name (i.e., Bob Mann Construction Equipment) and Shrub Oak address and the customer's name and address.

Certain of the invoices also indicated thereon "F.O.B. Port Newark". With respect to such invoices, the customer arranged delivery. This was accomplished either by the customer personally taking possession at Port Newark or by the customer arranging delivery, usually through a common carrier. For the invoices that did not indicate "F.O.B. Port Newark", petitioner arranged delivery, again usually through a common carrier. Where petitioner arranged delivery, he would either arrange to have the customer billed directly by the common carrier or he would pass the bill along to the customer.

Although petitioner provided his customers with invoices and although such invoices were available to the Division on audit, petitioner submitted no such invoices into the record herein.

Petitioner submitted no written agreement, contract or documentation of any kind regarding his relationship with "Mountain Service".

The notices at issue were mailed by the Division, via certified mail, on August 23, 1991. Such notices were addressed to petitioner at Old Route 6, P.O. Box 352, Shrub Oak, New York 10588.

The Division introduced certain documentation into the record to establish the date and manner of such mailing. Specifically, the Division introduced the affidavit of William Riddervold, program manager for sales tax field audits in the Division's District Office Audit Bureau. This affidavit set forth a standard procedure for the preparation for mailing of notices of determination and further indicated that such procedure was followed with respect to the subject notices. The Division also introduced into evidence the affidavit of Daniel D. LaFar, a supervisor in the Division's mail and supply section. This affidavit described the Division's standard procedure for the mailing of notices of determination and further stated that such

procedures were followed in the instant matter.

Attached to the Riddervold and LaFar affidavits were documents related to the mailing of the subject notices of determination. Specifically, attached thereto was a U.S. Postal Service Form 3877 which listed thereon the four subject notices addressed to petitioner. The Form 3877 bore a U.S. Postal Service stamp date of August 23, 1991. The Form 3877 also listed the name and address of petitioner's former representative, Francis O'Reilly, thereby indicating that copies of the four subject notices were mailed to said individual. Also attached to the affidavits was a Division document encaptioned "Mailing Record - Notice of Determination" dated August 23, 1991 which listed thereon the four subject notices. On the reverse side of the mailing record were two statements made by Division employees, dated August 23, 1991, which stated, respectively, that the notices listed on the reverse side had been delivered to the Division's mail and supply section and sealed in stamped envelopes and delivered to the U.S. Postal Service.

Following his receipt of the subject notices of determination, petitioner, by his former representative, filed a Request for Conciliation Conference (Form TA-9.1) on September 23, 1991. The request so filed identified notice/assessment number S910823100C as the notice being protested. The request stated the basis of petitioner's claim as follows:

> "1) The tax assessed was improperly assessed as the taxpayer was a broker of heavy construction equipment and not a person required to collect tax as defined under tax law section 1131.
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> "2) The burden of paying tax on the heavy construction equipment brokered by the taxpayer falls on the purchaser of the goods or the seller, and not on the taxpayer.
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> "3) Penalties assessed against the taxpayer were improperly assessed as the taxpayer reasonably relied upon the advice of his accountants, who advised him that he was not responsible to collect sales tax."

Attached to the request was a power of attorney form appointing Francis J. O'Reilly as petitioner's representative "in connection with a proceeding involving: sales tax 2/28/85 through 2/28/90." Additionally, the power of attorney referenced notice number S910823100C.

Following a conciliation conference, the Bureau of Conciliation and Mediation Services

issued to petitioner a Conciliation Order, dated April 24, 1992. The Conciliation Order referenced the four notices of determination issued to petitioner herein and indicated that such notices were sustained.

Petitioner subsequently filed a petition with the Division of Tax Appeals in respect of the Conciliation Order. This petition listed thereon the four notices of determination issued to petitioner herein.

CONCLUSIONS OF LAW

A. With respect to the timeliness issue, petitioner notes correctly that the Conciliation Order dated April 24, 1992 referenced all four of the notices at issue and that the Bureau of Conciliation and Mediation Services asserted jurisdiction over all four notices. Petitioner thus contends that the Division waived its right to raise the jurisdictional issue herein.

This contention is rejected. The Division of Tax Appeals may obtain subject matter jurisdiction over taxpayers only upon the timely and proper filing of a request for a conciliation conference and/or a petition (see, Tax Law §§ 170[3-a]; 1138[a][1]). Subject matter jurisdiction cannot be conferred by consent or stipulation of the parties and a defect in subject matter jurisdiction cannot be waived (see, Robinson v. Oceanic Steam Nav. Co., 112 NY 315; Strina v. Troiano, 119 AD2d 566, 500 NYS2d 736). This issue was therefore properly before the Administrative Law Judge herein.

B. Tax Law § 1138(a)(1) provides, in pertinent part, that whenever a notice of determination of tax due is issued, it:

> "shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the division of tax appeals for a hearing, or unless the commissioner of taxation and finance of his own motion shall redetermine the same."

C. Tax Law § 1147(a)(1) provides, in pertinent part, that:

> "A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

D. Subdivision (a) of Tax Law § 170(3-a) gives the taxpayer receiving a notice of

determination or similar document the option of requesting a conciliation conference in the Bureau of Conciliation and Mediation Services of the Division. Subdivision (b) of said section provides that the request for conciliation conference "shall suspend the running of the period of limitations for the filing of a petition protesting such notice and requesting a hearing."

E. Accordingly, a taxpayer must file either a petition or request for conciliation conference within 90 days from the issuance of a notice of determination.

F. In cases involving the timeliness of a petition or a request for a conciliation conference, the Division bears the burden of demonstrating proper mailing of the subject notice or notices (Matter of Air Flex Custom Furniture, Tax Appeals Tribunal, November 25, 1992). In the instant matter, the Division established, by the introduction of the Riddervold and LaFar affidavits, that it had a standard procedure for the mailing of notices of determination and, by the U.S. Postal Service Form 3877 and the statements of the Division employees who actually processed the subject notices for mailing, the Division established that such standard procedures were followed in this case. Accordingly, the Division has shown that the subject notices were mailed to petitioner on August 23, 1991 pursuant to the requirements of Tax Law § 1147(a)(1).

G. The Division concedes that petitioner timely filed the Request for Conciliation Conference on September 23, 1991. The Division further concedes that such request constituted a timely protest of notice number S910823100C. The Division contends, however, that such request did not constitute a protest of notice numbers S910823101C, S910823102C and S910823103C since the request did not specifically identify such notices. The Division contended that such notices were therefore irrevocably fixed pursuant to Tax Law § 1138(a)(1).

H. Tax Law § 170(3-a)(a) states that the Division shall provide conciliation conferences at the taxpayer's option, where the taxpayer has received, inter alia, notice of a determination of tax due. As noted on the Division's Form TA-9.1 (upon which petitioner filed his request), a conciliation conference is a:

> "rapid and inexpensive way to resolve protests without a formal hearing [and] . . . is conducted informally by a conciliation conferee who will review all of the evidence presented to determine a fair result." (See also, Tax Law § 170[3-a][c].)

Additionally, it is noted that the Bureau of Conciliation and Mediation Services was created by the Legislature along with the Division of Tax Appeals (L 1986, ch 282). Consistent with the purpose and intent of the Bureau of Conciliation and Mediation Services, the Rules of Practice and Procedure promulgated by the Tax Appeals Tribunal state that the intent of such rules is, in part:

> "to afford the public both due process of law and the legal tools necessary to facilitate the rapid resolution of controversies, while at the same time avoiding undue formality and complexity" (20 NYCRR 3000.0[a]).

In light of the foregoing principles, it is appropriate to liberally construe requests for a conciliation conference and to ignore defects therein unless such defects affect a substantial right of a party (compare, CPLR 3026). An adequate request for a conciliation conference is one which gives the Division fair notice of the matters in controversy and the facts which serve as the basis for the requester's position.

I. Here, the Form TA-9.1 by which petitioner made his request listed only one of the four notice numbers in respect of the notices issued to him. Attached to the Form TA-9.1, however, was a power of attorney form by which petitioner appointed his representative "in connection with a proceeding involving: sales tax 2/28/85 through 2/28/90."

A liberal construction of the documents submitted in connection with petitioner's request compels the conclusion that such documents, together, constitute an adequate request for a conciliation conference with respect to all four of the notices issued to petitioner. Indeed, that the documents submitted in connection with petitioner's request for a conciliation conference gave the Division fair notice of petitioner's protest is best evidenced by the fact that all four notices were at issue before the conciliation conferee and the Conciliation Order referenced all four notices.

Accordingly, petitioner's Request for Conciliation Conference was timely filed for all notices at issue herein and his subsequent filing of a petition in respect of all four notices with the Division of Tax Appeals was likewise timely and valid.

J. Turning next to the substantive issues, the first question to be resolved is whether,

during the period at issue, petitioner was a person required to collect tax pursuant to Tax Law § 1131(1) and was therefore obligated, pursuant to Tax Law § 1132(a), to collect tax from his customers in respect of retail sales of tangible personal property which are subject to tax under Tax Law § 1105(a).

Insofar as is relevant herein, a "person required to collect tax" is defined as "every vendor of tangible personal property or services" (Tax Law § 1131[1]; emphasis supplied). During the period at issue,[6] Tax Law § 1101(b)(8) defined "vendor", in pertinent part, as follows:

> "(i) The term 'vendor' includes:
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> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
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> "(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article;
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> * * *
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> "(ii) In addition, when in the opinion of the tax commission it is necessary for the efficient administration of this article to treat any salesman, representative, peddler or canvasser as the agent of the vendor, distributor, supervisor or employer under whom he operates or from whom he obtains tangible personal property sold by him or for whom he solicits business, the tax commission may, in its discretion, treat such agent as the vendor jointly responsible with his principal, distributor, supervisor or employer for the collection and payment over of the tax."

K. The record herein clearly shows that petitioner "maintained" two places of business in New York: his home in Shrub Oak, New York and the lot located on Route 202 in Yorktown Heights, New York (see, 20 NYCRR former 526.10[c]). Accordingly, the only issue regarding petitioner's status as a vendor is whether he made "sales" of tangible personal property. With

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[6]Tax Law § 1101(b)(8)(i) was amended by Laws of 1989 (ch 61, eff September 1, 1989). Since petitioner registered as a vendor in June 1989, he became responsible to collect tax at that point (Tax Law § 1101[b][8][i][D]; see, Matter of Franklin Mint Corp. v. Tully, 94 AD2d 877, 463 NYS2d 566, affd 61 NY2d 980, 475 NYS2d 280). There is, therefore, no issue regarding his status as a vendor under the amended definition. Accordingly, the amended provisions are not set forth herein.

respect to this question, petitioner concedes that he negotiated the sales price with the purchaser, collected and deposited in his bank account the full price from the purchaser, issued the purchaser a receipt and paid the supplier its selling price. Further, although petitioner described his relationship with Mountain Service as that of a "broker", no documentation regarding this relationship was offered into evidence. Petitioner also contended that Mountain Service provided "bills of sale" to petitioner's customers and that such customers used such bills of sale to register their vehicular equipment where necessary. Petitioner offered no such bills of sale (or copies thereof) into the record herein. It is noteworthy that petitioner described the price set by Mountain Service as a "wholesale" price from which he would negotiate his selling price. It is also noteworthy that petitioner's so-called "commission", i.e., the difference between the selling price of petitioner's supplier and the selling price to petitioner's customer could just as easily be called gross profit, i.e., the difference between gross or retail sales and the cost of goods sold.

In sum, based upon the foregoing facts, the Division could reasonably conclude that petitioner did, in fact, sell construction equipment during the period at issue. Further, given the lack of documentation to support petitioner's contentions and the facts set forth above, it is concluded that petitioner has failed to show that he was not a vendor under Tax Law § 1101(b)(8) (see, 20 NYCRR 3000.10[d][4]). The Division's determination that petitioner was a vendor is therefore sustained.[7]

L. Petitioner also argued that his nexus to New York was insufficient to determine him to be a vendor for sales tax purposes. This argument is rejected. Petitioner was a New York resident who maintained an office in New York within the meaning of 20 NYCRR former

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[7]It is noted that an additional basis for finding petitioner to be a "vendor" would appear to have been available to the Division under Tax Law § 1101(b)(8)(i)(C) (see, Jericho Boats of Smithtown v. State Tax Commn., 144 AD2d 163, 534 NYS2d 716). The Division, however, did not assert liability under this provision; therefore, the Commissioner of Taxation did not exercise his discretion pursuant to this provision. Accordingly, this determination does not consider petitioner's liability under Tax Law § 1101(b)(8)(i)(C).

526.10(c) and who made sales (see, Conclusion of Law "K") to New York residents the receipts from which were subject to New York sales tax (see, Conclusion of Law "N"). Petitioner clearly had sufficient ties to New York to be considered a vendor

for sales tax purposes (see, Matter of Orvis, Tax Appeals Tribunal, January 14, 1993).

M. Turning next to the issue of whether the Division properly determined additional taxable sales herein, pursuant to Tax Law § 1132(c), all such sales are presumed taxable and petitioner bears the burden of proving otherwise. It is further noted that:

> "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]; see also, 20 NYCRR 526.7[e][1]).

N. The record herein indicates that the Division reviewed petitioner's invoices and made a determination as to the location of each sale based upon either the customer's address or a specifically designated place of delivery. Such a determination is consistent with the Division's above-referenced regulations. Additionally, for 1989 the Division relied on a summary of sales made by petitioner's former representative. In response, petitioner contends that it was his general practice to collect the sales price at the site of the equipment in New Jersey and that such equipment was either transferred to the purchaser in New Jersey or was shipped by common carrier to a location designed by the purchaser.

Petitioner's contentions are rejected for, his general assertions notwithstanding, he has presented no evidence whatever to refute the Division's assertions of tax due with respect to any specific sale. If, as petitioner asserted, the Division assessed tax herein on transactions where the purchaser took possession or delivery outside of New York or which were not subject to tax for any other reason, it was incumbent upon petitioner to present evidence in support of his contentions with respect to such specific transactions. Petitioner presented no such evidence. Indeed, notable by their absence are the invoices upon which much of the Division's assessment was based. In the absence of the invoices or any other evidence of specific sales, the Division's determination of additional taxable sales must be sustained.

O. Furthermore, even if petitioner's customers paid petitioner in New Jersey for each of the transactions at issue, such a finding does not result in a conclusion in petitioner's favor for, as noted previously, the point of delivery or the point at which possession is transferred determines taxability (see, 20 NYCRR 525.2[a][3]; 526.7[e][1]). Additionally, the fact that delivery may have been made, in certain cases, by common carrier does not result in a finding in petitioner's favor. Again, the point of delivery controls the incident of taxation (see, 20 NYCRR 526.7[e][1], example 3).

P. Petitioner raised no objection with respect to the components of the assessment other than additional taxable sales. These portions of the assessment are thus sustained.

Q. The petition of Robert Mann d/b/a Bob Mann Construction Equipment is in all respects denied and the notices of determination dated August 23, 1991 are sustained.

DATED: Troy, New York

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ADMINISTRATIVE LAW JUDGE