STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
ORVIS, INC.	:	DECISION DTA No. 805391
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period September 1, 1977 through August 31, 1980.	:	

Petitioner Orvis, Inc.,[1] 10 River Road, Manchester, Vermont 05254 filed an exception to the determination of the Administrative Law Judge issued on October 17, 1991 with respect to its petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1977 through August 31, 1980. Petitioner appeared by Hodgson, Russ, Andrews, Woods & Goodyear, Esqs. (Paul R. Comeau, Esq. and Robert D. Plattner, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq., (James Della Porta, Esq., of counsel).

Petitioner submitted a brief in support of its exception and the Division of Taxation submitted a brief in response. Petitioner then submitted a reply brief and the Division of Taxation submitted a reply to petitioner's reply. Oral argument, requested by petitioner, was held on May 28, 1992. After the oral argument, each party submitted written comments on the decision in Quill v. North Dakota (___US___, 112 S Ct 1904).

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether it is impossible for petitioner to obtain a fair hearing by an impartial Administrative Law Judge in the Division of Tax Appeals because Andrew Marchese, the

[1] During the period at issue, petitioner, which operates a mail order business, was known as The Orvis Company, Inc.

Supervising Administrative Law Judge, was involved in the issuance of an advisory opinion adverse to petitioner and John P. Dugan, the President of the Tax Appeals Tribunal, and Francis R. Koenig, a Commissioner on the Tribunal, in their former positions of Deputy Commissioner and Counsel of the Department of Taxation and Finance and of Commissioner on the State Tax Commission, respectively, may have unfavorable opinions concerning the relief sought by petitioner because of prior involvement in the issuance of the adverse advisory opinion and/or settlement negotiations.

II. Whether the Division of Tax Appeals lacks jurisdiction to consider the underlying issues because the statutory notice utilized an incorrect street address for petitioner, an incorrect name for the mail order business, and an incorrect Federal employer identification number.

III. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby a person required to collect sales and use taxes imposed under Articles 28 and 29 of the Tax Law on its mail-order sales to customers in New York State.

IV. Whether the statutory and regulatory requirements regarding out-of-state mail order vendors are so vague as to violate petitioner's due process rights under the United States Constitution.

V. Whether Due Process and Commerce Clause limitations under the United States Constitution require the Division of Taxation to shoulder the burden of proving that petitioner, an out-of-state mail order company, maintained a significant presence or nexus in New York State so that the Division of Taxation may impose (i) sales and use tax and (ii) collection responsibilities upon petitioner, or whether the Division of Taxation must establish merely a rational basis for the issuance of the statutory notice and the burden of proving the lack of an adequate nexus or of a significant presence in New York State must be carried by petitioner.

VI. Whether, assuming the activities in New York State of petitioner's wholesale employees established the link between petitioner and New York State permitting the State to impose a duty of tax collection, petitioner must collect and pay over sales and use taxes on mail-order sales

during sales tax quarters when petitioner's wholesale employees did not conduct any activities within New York State.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "8" and "25" which have been modified. The Administrative Law Judge's findings of fact and the modified findings of fact are set forth below.

A desk audit of petitioner, Orvis, Inc., was commenced by a letter dated February 23, 1981 of John Hulse, an auditor in the Central Sales Tax Section, to petitioner, who was named in the letter as "Oruis [sic], 10 River Road, Manchester, Vermont." This letter provided as follows:

> "It has been brought to my attention that your company's products are sold through locations in New York State.
>
> Based on available information, I am unable to find your company registered for sales and use tax purposes.
>
> So that I may verify that proper reporting procedures are being followed, please supply the following information relating to your sales into New York:
>
> (1) A description of the products or services sold.
> (2) How are sales solicited from locations in the State?
> (3) Names of salesmen, independent agents or manufacturer's representatives who visit your dealers.
> (4) How are your products distributed?
> (5) A list of your company's retail locations.
> (6) Do you consign products to retailers?
>
> If your company is registered, please provide the name and identification number in your reply."

Approximately one month later, by a letter dated March 27, 1981, Thomas Vaccaro, described as treasurer of petitioner, responded to Mr. Hulse's letter on a letterhead that showed the name "Orvis" in one-inch high bold letters and in a smaller typeface underneath, "The Orvis Company, Inc." The address shown on the letterhead did not include a street address, just Manchester, Vermont. Mr. Vaccaro wrote as follows:[2]

> "In response to your questionnaire dated February 23, 1981, this letter is to describe the extent of The Orvis Company's activities in the State of New York. The Orvis Company is a catalogue mail order house located in Manchester, Vermont.

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[2]In his affidavit dated November 19, 1990, Mr. Vaccaro distanced himself from this response asserting that it was prepared by petitioner's accountants, who prepared it "without engaging in a detailed investigation of the facts."

> Customers in New York order sporting goods through the catalogue. The Orvis Company maintains no offices or stores in the State of New York; The Orvis Company has no salesmen who reside in the State of New York.
>
> Some salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores. The salesmen in no way bind the Orvis Company; all orders are approved in Vermont.
>
> Due to the fact that The Orvis Company, Inc. is doing no business in the State of New York, please refrain from sending the company questionnaires and notices."

In his letter, dated May 8, 1981 to Mr. Vaccaro, Mr. Hulse requested that petitioner complete and return a "registration kit". It appears that the auditor concluded after reviewing Mr. Vaccaro's letter that petitioner was required "to register for sales and use tax" because of petitioner's "use of salesmen to solicit business in New York." Mr. Hulse also requested by his letter the following information from petitioner for 1978 through 1980: petitioner's total sales volume, amount of sales shipped or delivered into New York State, amount of sales to dealers or stores in New York State, and amount of mail order sales to customers located in New York State.

Hewitt B. Shaw, Jr., an attorney with the Cleveland, Ohio law firm of Baker & Hostetler, Esqs., responded on behalf of petitioner in a letter dated December 10, 1981 to the auditor's request for further information. Mr. Shaw's letter, which referenced petitioner as "The Orvis Company, Inc." provided the following response concerning petitioner's sales:

"The following chart responds to the four questions set forth in your May 8, 1981 letter.

		Fiscal Year Ending		
Question No.	Description	September 1978	September 1979	September 1980
1	Total Sales Volume	$13,370,073	$15,449,284	$19,144,478
2	Amount of Sales shipped or delivered into New York State	$ 1,024,139	$ 1,127,153	$ 1,453,149
3	Amount of Sales to dealers or stores in New York State	$ 138,276	$ 160,187	$ 178,489
4	Amount of Mail			

Order Sales to Customers located in New York State	$ 885,863	$ 966,966	$ 1,274,660"

Mr. Shaw also stated that "it is the position of the taxpayer that Orvis is not doing business in New York and is therefore not required to collect and remit New York sales tax with respect to mail order sales made to customers located in New York." Mr. Shaw noted that:

> "Orvis' connection or 'nexus' with New York is substantially less than that described in the United States Supreme Court cases cited in your May 22, 1981 letter to Orvis' accountants - Alexander Grant."[3]

Auditor Hulse was unpersuaded and in a letter dated December 28, 1981, he responded to Mr. Shaw's letter as follows:

> "I received your letter of December 10, 1981 with a chart of Orvis Company sales within New York State.
>
> Based on this information, I have calculated tax and interest due, as shown on the enclosed statement. The interest computed is the minimum charge for late payment of tax, which is mandated by the tax law.
>
> You indicated in our phone conversation, you would like to meet before any formal action is taken. I shall hold up on issuing a Notice of Determination and Demand for Sales Tax due [sic], until we can arrange a conference at a mutually convenient time.
>
> Please contact me to arrange the meeting."

Attached to Mr. Hulse's letter of December 28, 1981 was a copy of a Statement of Proposed Audit Adjustment, also dated December 28, 1981, against "The Orvis Company, Inc., Manchester, Vermont 05254." The Statement of Proposed Audit Adjustment noted that it was based on "correspondence" and showed total sales and use taxes due of $223,559.20 plus interest as follows:

[3]This letter was not introduced into evidence.

Period Ended	Tax	Interest	Total
Nov. 1977	$ 15,830.82	$ 5,060.96	$ 20,891.78
Feb. 1978	15,830.82	4,776.00	20,606.82
May 1978	15,830.82	4,484.72	20,315.54
Aug. 1978	15,830.82	4,193.43	20,024.25
Nov. 1978	17,280.17	4,262.85	21,543.02
Feb. 1979	17,280.17	3,951.81	21,231.98
May 1979	17,280.17	3,633.85	20,914.02
Aug. 1979	17,280.17	3,315.90	20,596.07
Nov. 1979	22,778.81	3,956.46	26,735.27
Feb. 1980	22,778.81	3,550.99	26,329.80
May 1980	22,778.81	3,131.86	25,910.67
Aug. 1980	22,778.81	2,712.73	25,491.54
Total	$223,559.20	$47,031.56	$270,590.76

It was not until approximately four and one-half years later that a Notice of Determination and Demand for Payment of Sales and Use Taxes Due was issued against petitioner. The notice, dated April 22, 1986,[4] asserted as tax due the same amounts as noted in the Statement of Proposed Audit Adjustment detailed in Finding of Fact "5", supra. However, interest was recomputed as of the date of the notice. No penalty was asserted against petitioner. The notice was issued against "The Orvis Company, Inc." with an incorrect street address of 10 Riverside Road. The notice also utilized an identification number, 133166609, which was the identification number for the corporation known as Orvis New York, Inc.

PETITIONER'S RESTRUCTURING

On January 3, 1983, The Orvis Company, Inc. changed its name to Orvis, Inc. One day later, on January 4, 1983, Orvis, Inc. (the parent corporation) created a new subsidiary which used the parent's former name of The Orvis Company, Inc. The newly-created The Orvis Company, Inc. obtained a new Federal employer identification number of 03-0285804 since Orvis, Inc. assumed the Federal employer identification number of the former The Orvis Company, Inc., which was 03-0215459. The newly-created The Orvis Company, Inc. was formed to separate petitioner's catalog mail-order sales from its wholesale sales. A second new subsidiary, Orvis Services, Inc., was formed at the same time. Orvis Services, Inc. was created to carry on the wholesale business activities formerly conducted by petitioner. In addition, on

[4]In the space labelled "Date of Notice," April 22, 1986 was shown. However, the notice has a date of April 29, 1986 stamped in red on the upper left hand corner. This later date was unexplained.

June 1, 1983, a separate wholly-owned subsidiary of Orvis, Inc. named Orvis New York, Inc. was formed to operate a retail store in New York City. According to a letter dated June 5, 1986 of petitioner's attorney Shaw this restructuring was done for the following reason:

> "As a result of the March, 1981 inquiry of the Department of Taxation [auditor Hulse's initial letter dated February 23, 1981 described in detail in Finding of Fact "1", supra] that resulted in that Notice of Determination [dated April 22, 1986 described in Finding of Fact "6", supra], Orvis ceased sending employees into the State of New York for any purpose. An employee of The Orvis Company, Inc. last entered the State of New York on May 1, 1981.
>
> ...In other words, since January of 1983 the retail mail order activities and the wholesale activities have been conducted in separate wholly-owned subsidiaries of Orvis, Inc. [the new The Orvis Company, Inc. and Orvis Services, Inc., respectively], which functions essentially as a holding company. No employees of [the new] The Orvis Company, Inc.--the corporation conducting the mail order business--have entered the State of New York.
>
> ...Orvis undertook this corporate restructuring based on a ruling obtained from the New York Sales Tax Instructions and Interpretations Unit dated November 24, 1981.... The Instructions and Interpretations Unit ruling concludes that an out-of-state mail order company will not be required to collect New York sales and use tax on mail order sales to New York residents where that company has a wholly-owned subsidiary that is engaged in a separate wholesale business involving independent New York dealers. Based on this ruling, the wholesale activities of Orvis Services, Inc. and the retail activities of Orvis New York, Inc. will not require [the new] The Orvis Company, Inc., their brother-sister corporation, to collect New York sales and use tax on mail order sales to New York."

We modify the first paragraph of finding of fact "8" of the Administrative Law Judge's determination to read as follows:

> During the four and one-half years between the issuance of the Statement of Proposed Audit Adjustment dated December 28, 1981 and the issuance of the notice of determination dated April 22, 1986, the parties attempted to settle this matter by negotiations. Petitioner submitted a request dated January 4, 1983 for an advisory opinion using its identification number 03-0215459. Petitioner's request listed its address as: 10 Riverside Road, Manchester, Vermont 05254. Although the record does not disclose whether the parties agreed that a notice of determination would be delayed until the issuance of an advisory opinion, the Division of Taxation did not issue a notice of determination until the advisory opinion process was exhausted. In fact, an advisory opinion first issued to The Orvis Company, dated October 8, 1985, was modified by a subsequent so-called "Modified Advisory

> Opinion" dated February 20, 1986 that was also issued to The Orvis Company, Inc. [5]

It appears that petitioner was dissatisfied with the advisory opinion dated October 8, 1985 and attempted to negotiate a modification of the opinion. On December 20, 1985, Robert E. Helm, petitioner's prior representative met with John Dugan, then Deputy Commissioner and Counsel for the Department of Taxation and Finance.[6] Mr. Helm, by a letter dated January 2, 1986 to Mr. Dugan, argued petitioner's position that the definition of vendor in Tax Law § 1101(b)(8)(i)(c) did not apply to it because "the employee's activities in New York really did not rise to the level of solicitation", and "even assuming that the employees were soliciting business from the retail stores...such solicition would not make Orvis a vendor, since the sales were not of property 'the use of which is taxed'." Mr. Helm also asserted that the advisory opinion dated October 8, 1985 took "a position [with regard to nexus] which goes significantly beyond the current Supreme Court decisions." Finally, Mr. Helm noted that he and Mr. Dugan had reached an agreement that "the Department would reexamine the decision [advisory opinion] to specifically identify the activities which were relied upon as a basis for nexus." Subsequently, the Modified Advisory Opinion dated February 20, 1986 was issued. The issues addressed in the Modified Advisory Opinion were described as follows:

> "(1) whether a sufficient nexus exists between Petitioner and New York State to satisfy the due process and commerce clauses of the U.S. Constitution and (2) whether Petitioner is a 'vendor' for purposes of the New York State Sales and Use Tax and therefore required to collect New York State Sales and Use Tax on retail mail order sales made to New York customers."

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[5]We modified the first paragraph of the Administrative Law Judge's finding of fact "8" by adding the third sentence to reflect the address on petitioner's request for an advisory opinion.

[6]20 NYCRR 901.3(d), as in effect during the years in which the advisory opinion process herein was going forward, provided that "The Technical Services Bureau may request legal advice from the Law Bureau of the Department of Taxation and Finance with respect to the proper disposition of a petition for advisory opinion," which would explain Mr. Dugan's involvement in the process.

This advisory opinion was based upon the following facts:[7]

> "Petitioner is a Vermont corporation in the business of selling fishing and hunting equipment, fashion and outdoor clothing, and various gift items. Petitioner sells its various products on a retail basis through a mail order catalog business and on a wholesale basis to independent retailers.
>
> Petitioner's mail order sales are generated by catalogs distributed via the United States mails. Three basic catalogs are distributed per year. All mail order merchandise sold by Petitioner is shipped to the customers via the United States mail or common carrier.
>
> Petitioner receives orders from and ships merchandise to customers in New York State. However, Petitioner has no property or permanent employees in New York, does not advertise in New York with the exception of the previously mentioned catalogs, does not solicit sales over the phone and does not have a telephone listing in the state....
>
> Petitioner is also engaged in the business of wholesale sales of merchandise. Petitioner's mail order business and wholesale business are not separate corporate entities but simply different divisions within the same corporation.
>
> The wholesale business sells to retail establishments located in several states, including New York. Virtually all of the wholesale orders placed with Petitioner are made by mail or by telephone. Wholesale orders are shipped to the retailers via mail or common carrier.
>
> There are located in the State of New York several retailers which purchase merchandise from Petitioner on a wholesale basis for the purpose of resale. As of December 1977, Petitioner sold merchandise to approximately nine retailers in New York. The number of Petitioner's New York retailers increased to sixteen by December, 1981.
>
> Historically, employees of Petitioner have visited each of their New York retailers at least once a year, although sometimes less. Petitioner contends the purpose of the visits was to communicate with the retailers about problems, not to solicit business.
>
> Employees of Petitioner come into New York State on other occasions for various business related reasons. They do, at times,

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[7] Tax Law § 171.24 requires a taxpayer's petition for an advisory opinion to "contain a specific set of facts." 20 NYCRR 901.2(a) provides that the taxpayer's petition for an advisory opinion "should set forth the specific set of facts to which the request for the advisory opinion relates, the exact issue sought to be resolved and the petitioner's reasons for requesting the advisory opinion." Although a copy of petitioner's petition for an advisory opinion was not introduced into the administrative record herein, it is reasonable to presume that the facts set forth above correspond to the facts set forth by petitioner in its petition for an advisory opinion.

> come to make visual inspections of their retailers' establishments. While in New York, Petitioner's employees have assisted retailers in preparing their opening orders with Petitioner. Also, on occasion, employees of Petitioner accompany retailers to sportsmen's shows in New York State. Petitioner contends that the only purpose of these shows was to promote the business and sales of the retailers."

The modified advisory opinion, dated February 20, 1986, adverse to petitioner was prepared by the Technical Services Bureau within the Division of Taxation and signed by Frank J. Puccia, the Director of the Technical Services Bureau. This opinion was transmitted by a cover letter signed by Andrew F. Marchese, then Chief of Advisory Opinions, to Robert E. Helm, Esq., petitioner's former representative. Mr. Marchese's letter did not merely transmit the opinion but also commented on the opinion and indicated that he had had a prior discussion with Mr. Helm concerning the issues raised. In short, the letter reflects Mr. Marchese's personal involvement in the analysis adverse to petitioner.

This advisory opinion represented the "expression of the views of the State Tax Commission as to the application of law, regulations and other precedential material to the set of facts specified in the petition for advisory opinion" (20 NYCRR 901.4, as in effect during the years that the advisory opinion process herein was going forward). Francis R. Koenig, currently a Commissioner on the Tax Appeals Tribunal, was a Commissioner on the State Tax Commission at the time this opinion was issued.

Approximately two months after the issuance of the modified advisory opinion dated February 20, 1986, the notice of determination dated April 22, 1986 was issued against The Orvis Company, Inc., as noted in Finding of Fact "6", supra.

In the interval between the issuance of the advisory opinion dated October 8, 1985 and the modified advisory opinion dated February 20, 1986, the Division of Taxation continued its audit of Orvis related entities. By a letter dated December 10, 1985, James J. Carney, an auditor in the Central Sales Tax Section, requested additional information concerning the sales volume of The Orvis Company, Inc., including total sales volume, amount of sales delivered into New York State, and amount of mail-order sales to customers located in New York State. It appears that

Mr. Carney was unaware that the former The Orvis Company, Inc. had become Orvis, Inc., which had then created two subsidiaries, a newly-created The Orvis Company, Inc. to carry on the catalog mail-order business and Orvis Services, Inc. to conduct the wholesale business, as noted in Finding of Fact "7", supra, since Mr. Carney's request for additional information was directed to The Orvis Company, Inc., only. Mr. Carney's letter does show that he was aware of the entity known as Orvis New York, Inc., because he requested information concerning its tax return. Mr. Carney received a letter dated February 5, 1986 from Holly DeFries, an associate in the law firm of Helm, Shapiro, Anito & Aldrich, that formerly represented petitioner. Ms. DeFries responded as follows:

> "In response to your December 10 letter to The Orvis Company, Inc., requesting further information regarding Orvis New York, Inc. activities, please be advised that the Company is gathering the information which you have requested.
>
> In response to your request for information to aid in continuation of the Orvis Company, Inc. audit, I again draw your attention to the fact that the advisory opinion which was issued October 8, 1985, and upon which the deficiency pertaining to the Orvis Company, Inc. is based, is currently under review by the Department. Thus we feel it inappropriate to begin assembling this data until the Department comes to a final decision on the matter."

No mention was made by Ms. DeFries of petitioner's restructuring. The letter of Ms. DeFries also indicates that copies were sent to Messrs. John Dugan, Thomas Vaccaro, and Hewitt B. Shaw, Jr.

After the issuance of the modified advisory opinion dated February 20, 1986, auditor Carney renewed his request for additional information "to continue our audit of your [The Orvis Company, Inc.] sales activities in New York State" by a letter dated March 3, 1986 to petitioner at the incorrect street address of 10 Riverside Road (instead of 10 River Road) in Manchester, Vermont. It appears that petitioner's response to Mr. Carney's letter was not immediate. Attorney Hewitt B. Shaw, Jr., in a letter dated May 21, 1986 to Mr. Carney, wrote as follows:

> "This letter will confirm our telephone conversation of today wherein I indicated to you that I will be meeting with our client on May 28, 1986 regarding your request for additional information and that we will respond to your request by June 6, 1986."

Mr. Shaw's letter indicates that a copy was sent to Mr. Thomas Vaccaro, Robert E. Helm, Esq., and J. Richard Hamilton, Esq.

Subsequently, Mr. Shaw, by a letter dated June 5, 1986, provided the additional sales information and also explained to Mr. Carney the corporate restructuring of petitioner, as noted in Finding of Fact "7", supra.

On July 18, 1986, petitioner filed its petition with the former Tax Appeals Bureau protesting the notice of determination dated April 22, 1986. In its petition, petitioner referred to the taxpayer as "The Orvis Company, Inc." with an employer identification number of 13-3166609, which was the identification number shown on the statutory notice which, as noted in Finding of Fact "6", supra, was, in fact, the number for Orvis New York, Inc. However, a review of this petition discloses that petitioner understood that the entity, against which the Division had asserted tax due, was "Orvis", a Vermont corporation which had maintained "a mail order division and a wholesale division selling to independent retail stores" during the period at issue. The petition included five grounds upon which relief was claimed: (1) Orvis was not a vendor under the statutory definition of vendor, (2) activities of Orvis' wholesale division did not make it a vendor under the statutory definition of vendor, (3) activities of Orvis' mail order division did not make it a vendor because of a specific regulatory exemption for persons making sales to customers in New York State by the interstate distribution of catalogs by mail, (4) even if activities of the wholesale division were considered solicitation, Orvis was not a vendor because such activities were "unrelated to the sales of the mail order division" and taxable sales did not result from any acts of solicitation by wholesale division employees, and (5) imposition of tax on Orvis was unconstitutional because of an insufficient nexus with New York. This petition was filed on behalf of petitioner by its former representative, Robert E. Helm, Esq. The power of attorney, dated December 13, 1985, attached to the petition appointing Mr. Helm[8] was executed by Thomas Vaccaro, as treasurer of The Orvis Company, Inc.

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[8]The power of attorney also names Hewitt B. Shaw, Jr., Esq., and Richard Hamilton, Esq., of the Cleveland law firm of Baker & Hostetler in the space for appointed representative.

A conciliation order dated February 19, 1988, sustaining the statutory notice was issued subsequent to the holding of a conciliation conference on October 21, 1987 wherein petitioner appeared by its former representative, attorney Robert E. Helm.

Petitioner then filed a petition with the Division of Tax Appeals on March 23, 1988 which asserted the same facts and grounds for relief, which had been asserted in its earlier petition dated July 17, 1986, as noted in Finding of Fact "12", supra.

The answer of the Division of Taxation to the petition was dated July 27, 1988, and assuming that it was mailed on such date was apparently two months late.[9] Attorney Della Porta's letter transmitting the answer noted that "(b)ecause the parties are still engaged in settlement discussions, no request will be made to the Division of Tax Appeals to schedule this matter for hearing."

The answer of the Division of Taxation included 12 paragraphs of affirmative statements which made clear that the Division was targeting the Orvis entity which made mail order retail sales to New York residents and wholesale sales of goods to retailers located in New York.

It appears that, even as late as April 26, 1989, the parties by the Helm, Shapiro, Anito & Aldrich, P.C. law firm and by Deputy Commissioner and Counsel William F. Collins were negotiating the possible settlement of this matter. It is also observed that a letter dated April 26, 1989 on the letterhead of the Helm Shapiro law firm referenced petitioner as "Orvis, Inc."

On November 5, 1990, the Division of Tax Appeals received copies of motion papers dated October 31, 1990 from petitioner's new representatives, Paul R. Comeau, Esq., Mark S. Klein, Esq., and Robert D. Plattner, Esq., of the Hodgson, Russ, Andrews, Woods & Goodyear law firm, which sought to dismiss the notice of determination dated April 22, 1986 on constitutional and jurisdictional grounds. The administrative law judge by a letter dated November 5, 1990 noted that the hearing scheduled for November 20, 1990 would go forward because it had been adjourned twice before, and that "petitioner should be prepared to present its complete case on the merits" as well as raising the jurisdictional and constitutional issues set

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[9]20 NYCRR 3000.4 requires the Law Bureau to serve an answer within 60 days from the date the Supervising Administrative Law Judge acknowledges receipt of a petition in proper form.

forth in the motion papers. By a letter dated November 14, 1990, attorney Comeau requested that a ruling be made "at the outset of the November 20 hearing in accordance with the requests for relief contained in our letter and motion." He also requested that at the outset of the hearing if petitioner's motion was denied that the administrative law judge issue a ruling "which would identify the taxpayer." Mr. Comeau asserted that "the identity of the taxpayer covered by the alleged Notice remains unknown" because of the errors set forth in Issue "II", supra.

In response, by a letter dated November 15, 1990 to attorney Comeau, the administrative law judge responded as follows:

> "At the formal hearing scheduled for November 20, 1990, I intend to initially ask Mr. Della Porta, the attorney representing the Division of Taxation, to introduce into evidence the petition, the answer and the statutory notice at issue. I will then ask him to state the issue or issues from the State's point of view. I can ensure you that Mr. Della Porta will note who it is that the State contends owes additional tax. At that point, you will be given the opportunity to restate the issue and/or make a brief opening statement. The State will then be required to establish a rational basis for the issuance of the statutory notice against the particular taxpayer. The usual custom is for the State to present the testimony of an auditor and introduce into evidence relevant portions of the audit file. You will then be given an opportunity to cross-examine the auditor and will be able to probe the issue you have raised concerning what entity the Division of Taxation intended and/or did, in fact, audit and assess.
>
> If you are, in fact, taken by surprise by the Division's presentation, I will consider a request to continue the hearing to conclusion at a later date. But in light of the fact that this matter has been scheduled for hearing on two earlier dates, May 31, 1990 and September 26, 1990, I will not permit the further delay of the formal hearing by use of motion practice. I would also like to note that all motions at this late stage will be taken under advisement and ruled upon after completion of the formal hearing as part of my decision."

Petitioner introduced two affidavits into evidence in support of its petition. Leigh H. Perkins stated in his affidavit dated November 16, 1990 that he is "the President of The Orvis Company, Inc. (between January, 1983 and January, 1990 [to date], known as Orvis, Inc.)". He described petitioner's activities and its New York State contacts during the audit period in his affidavit as follows:

"a. Orvis, Inc. was engaged in the business of selling camping, fishing and hunting equipment, casual and outdoor clothing, food, and various gift items.

b. Orvis, Inc. sold its various products on a retail basis through mail order catalogs. Mail order customers included individuals, businesses and 'exempt' organizations.

c. Orvis, Inc.'s mail order sales were generated by catalogs distributed throughout the United States via the United States mail. Mail order and telephone orders from New York customers were received and accepted by Orvis, Inc. at its offices in Manchester, Vermont.

d. Orvis, Inc.'s Manchester, Vermont offices received catalog orders from customers in New York State via mail and telephone.

e. All orders were subject to acceptance by Orvis, Inc. at its Manchester, Vermont offices, and all mail and telephone order merchandise sold by Orvis, Inc. was shipped to customers in New York via United States mail or common carrier.

f. Orvis, Inc. did not own or lease any real estate or tangible personal property in New York, nor did it maintain any physical facilities in New York. To the best of my recollection, Orvis, Inc. did not have any bank accounts, investment accounts or professional advisors in New York or have any employees stationed in New York. Orvis, Inc. did not own or operate any retail or wholesale locations in New York.

g. To the best of my knowledge, Orvis, Inc. did not engage in any radio, television, billboard or local magazine or newspaper advertising in New York.

h. Orvis, Inc. did not solicit sales to New York residents via the telephone.

i. Orvis, Inc. did not have a telephone listing in New York.

j. To the best of my knowledge, Orvis, Inc. did not commence any actions in the courts of New York, avail itself of any police or fire protection or other state, county or municipal services in New York, or obtain any advances, loans or subsidies from any New York source.

k. Orvis, Inc. also engaged in the business of wholesale sales of merchandise to retail establishments located throughout the United States and owned by persons completely unrelated to Orvis, Inc. From time to time, New York retailers contacted Orvis, Inc. to request Orvis, Inc. products for resale to customers. Orvis, Inc. mailed a questionnaire to each of these retailers and based upon responses to the questions it either supplied the requested product or refused the request. Retail establishments approved by Orvis, Inc. purchased merchandise from Orvis, Inc. and other suppliers for resale to their customers.[10]

l. Orvis, Inc.'s mail order business and wholesale business were carried out by different divisions within the corporation.

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[10]Petitioner introduced into evidence a form letter which it apparently used to transmit a credit application to retail establishments, which were considering purchasing merchandise from it for resale. The form letter indicated that a "minimum stocking order of $3,000.00" was required and future orders "will be accepted in compliance with Dealer Price List and the Dealer Terms in effect at the time of said orders." The form letter shows the name of Donald E. Owens as Dealer Sales Manager.

m. Retailers placed wholesale orders with the wholesale division of Orvis, Inc. by mail or telephone.

n. Products shipped in fulfillment of wholesale orders were shipped by the wholesale division of Orvis, Inc. to retailers via mail or common carrier.

o. Employees of Orvis, Inc.'s wholesale division visited New York retailers and retailers in other states on a sporadic, irregular basis. One wholesale division employee handled most of the visits, but two other wholesale division employees also visited the retailers on some occasions.

p. The purpose of the visits was to communicate with the retailers about problems, such as problems in shipments to the retailers, questions concerning the proper way to display or demonstrate products, and to inspect the establishments of retailers who sold products bearing the "Orvis" trademark. The purpose of these visits was not to solicit sales to retailers nor to obtain purchase orders from the retailers. The wholesale division employees did not receive any commission compensation.

q. Orvis, Inc. wholesale division employees who visited retailers generally traveled in a loop originating in Manchester, Vermont and passing through New York, Pennsylvania and other states.

r. Based upon findings during these visits, Orvis, Inc. made decisions whether to continue or terminate supplying products to particular retailers."

The affidavit of Thomas S. Vaccaro also dated November 19, 1990 repeated many of the same facts noted in Mr. Perkins affidavit. He also attached to his affidavit the following "allocation of the sales and use tax assessed...among those quarters [quarters when no wholesale division employees travelled to New York State and in which, therefore, petitioner contends no tax would be due] based on mail order sales occurring during each of those quarters, rather than evenly, as set forth on the assessment":

Quarter Ended	Number of Dealer Visits	Sales Tax	Interest through 10/20/90	Total	"0" Visits Sales Tax
November 30, 1977	0	$ -	$ -	$ -	$ 30,740.00
February 28, 1978	1	12,705.00	23,990.73	26,695.73	
May 31, 1978	2	8,764.00	16,198.15	24,962.15	
August 31, 1978	1	11,115.00	20,098.71	31,213.71	
November 30, 1978	0	-	-	-	$ 34,015.00
February 28, 1979	2	14,409.00	24,920.78	39,329.78	
May 31, 1979	1	9,348.00	15,797.75	25,145.75	
August 31, 1979	0	-	-	-	$ 11,351.00
November 30, 1979	0	-	-	-	$ 43,761.00
February 29, 1980	1	17,729.00	27,840.44	45,569.44	
May 31, 1980	3	12,833.00	19,638.44	32,471.44	
August 31, 1980	1	16,791.00	25,023.58	41,814.58	
		$103,694.00	173,508.58	277,202.58	$119,867.00
"0" visits sales tax		119,867.00			
		$223,561.00			

Mr. Vaccaro also noted in his affidavit that "[i]f Orvis, Inc. had been obligated to collect the tax, this would have imposed an additional significant economic burden on Orvis, Inc." Orvis' data processing system then in place did not have the capability of accounting "for sales and use tax collection obligations to reflect use tax rates in the 82 separate local tax jurisdictions in New York State. The time and cost involved in developing that capability...would have been prohibitive."

Furthermore, Mr. Vaccaro claimed in his affidavit that "Now that we are engaged in preparation for a hearing before the Division of Tax Appeals, a genuine question has arisen in my mind as to which corporate entity was the target of the April 22, 1986 Notice."

Petitioner in further support of its contention that it was "genuinely confused" concerning the entity assessed by the statutory notice at issue herein points out that an Accounts Receivable Statement dated June 18, 1986 issued against Orvis New York Inc. by the Tax Compliance Bureau asserted tax due of $223,559.20, the same amount assessed by the statutory notice. Further, the identification number on the Accounts Receivable Statement was 13-3166609, the same number on the statutory notice.[11] Petitioner also argues that a chronological report prepared

[11]Collection activity was stopped according to a letter dated August 8, 1986 of Carol Brennan, the head clerk of the Tax Compliance Division to the Helm, Shapiro law firm. According to Ms. Brennan, "your client should not receive any further collection notices until the appeals process has been completed." Petitioner contends this adds (continued...)

for use by the Division of Taxation's Law Bureau supports its position that the statutory notice was defective. The chronological report included the following rhetorical (and unanswered) question as an entry, after an entry for September 5, 1986:

> "Does the use of Orvis New York Inc.'s NYS sales tax ID #13-3166609 on the notice issued against the parent corporation jeopardize the validity of the assessment?"

Further, petitioner points out that its Petition for Advisory Opinion dated December 29, 1982 names petitioner as "The Orvis Company, Inc." with an identification number of 03-0215459.

The parties by their representatives executed a Stipulation dated November 20, 1990. The following facts stated by Leigh H. Perkins in his affidavit dated November 16, 1990, as detailed in Finding of Fact "18", supra,[12] were stipulated to by the parties: a, c, d, e, f, g, h, i, j and r. The Division of Taxation specifically refused to stipulate to the factual assertions lettered k, o, and p (which pertained to activities of petitioner's wholesale operations). The parties also stipulated that "on an infrequent basis, ads appeared in national publications such as Field and Stream, Outdoor Life, and Rod and Reel" for petitioner's products.

Furthermore, the parties stipulated to the following "retail sales to New York customers during the period beginning September 1, 1977 and ending August 31, 1980":

	1977	1978	1979	1980
Jan		$ 65,616	$ 60,502	$105,792
Feb		48,721	60,593	62,526
Mar		43,587	46,127	64,201
Apr		46,317	50,039	67,178
May		32,663	34,572	48,104
June		38,234	41,942	54,803
July		70,824	83,793	95,278
Aug		46,389	33,025	84,764

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[11](...continued)
to its confusion since the collection activity was against Orvis New York, Inc., and the Division of Taxation contends this proceeding is against Orvis, Inc., the successor entity to the former The Orvis Company, Inc.

[12]Finding of fact "18," supra, incorporates an excerpt from Mr. Perkins' affidavit and the lettering of paragraphs was taken from his affidavit.

Sept	114,192	87,614	202,186	
Oct	149,221	180,868	196,324	
Nov	166,517	207,252	213,537	
Dec	63,359	80,426	79,646	
TOTAL	$493,289	$948,511	$1,102,286	$582,646

The sales tax on these sales (at a 7.15% composite rate) is approximately $223,559.00, the figure used in the notice.

Furthermore, other relevant portions of the Stipulation have been incorporated into the Findings of Fact, supra.

Included as an exhibit attached to the Stipulation is a photocopy of "Orvis Dealers Wholesale Terms" dated Spring 1982. According to the Stipulation, "Orvis offered its merchandise to independent retailers in New York and other States according to the same price lists, and did not give special discounts to any dealers" and this document was referenced in support. A close review of this document raises certain unanswered questions concerning petitioner's wholesale activities. Pursuant to these "wholesale terms", an "authorized Orvis dealer" could order merchandise to be "shipped directly to the retail customer...." Furthermore, there is also a paragraph entitled "Dealers Referrals" which would seem to indicate that the retailers also acted as middlemen and did not merely resell items purchased wholesale from petitioner:

> "In the cases where dealers refer their customers to us and merchandise is to be selected by the customers at the Orvis Showroom in Manchester, a letter of authorization to us from the dealer must accompany the customer and a maximum discount of 20% will apply only, in as much as the merchandise is coming out of The Orvis Company warehouse and the customer is being serviced by Orvis retail personnel."

Petitioner did not offer the oral testimony of any witnesses. The Division of Taxation offered the oral testimony of an auditor, Robert Pilatzke, who had no direct involvement in the audit at the time it was conducted by the Central Office Audit Bureau through correspondence. However, he was aware of the audit of petitioner at such time because he was then involved in a special project concerning an unrelated mail order vendor and had spoken to the auditors, Messrs. Ireland and Carney, who had been involved in petitioner's audit. Mr. Pilatzke noted that

he knew of "no company with similar circumstances as Orvis where the Department has not pursued a tax assessment against it." Mr. Pilatzke also testified that Orvis was rejected as a test case because of the uniqueness of the facts herein.

The Division of Taxation introduced into evidence an affidavit dated December 3, 1990 of James Featherstone, a senior audit clerk in charge of the clerical section of Central Office Audit Bureau, whose regular duties include the mailing of notices of determination. Attached to Mr. Featherstone's affidavit was a copy of the certified mail record dated April 22, 1986 of the notices of determination to be mailed on April 22, 1986. In his affidavit, Mr. Featherstone described the general practice for the issuance of notices of determination. After a clerk under his supervision (in this instance, Ms. Francis Exposito[13]) has "proof read [sic] all notices before they are mailed...they are deposited in envelopes...the envelopes are compared with the mailing record", and Mr. Featherstone then personally repeats this task before initialling the mailing record. The mailing record and envelopes are then transferred to the outgoing mailing unit for delivery to the United States Postal Service. A post office stamp is affixed to the certified mail record.

A review of the certified mail record attached to the affidavit bears out Mr. Featherstone's general practice. The notice of determination issued to The Orvis Company, Inc. at 10 Riverside Road, Manchester, Vermont with an assessment number of S860415400C was assigned certified number 499947. The last page of the certified mail record dated April 22, 1986 shows the April 22, 1986 stamp of the Albany, New York, Roessleville Branch of the United States Postal Service. Mr. Featherstone noted that the general practice was not to request or retain return receipts.

We modify finding of fact "25" of the Administrative Law Judge's determination to read as follows:

> Petitioner submitted 23 proposed findings of fact. Proposed findings of fact "1", "4", "6", "7", "8", "20", and "22" are accepted and incorporated into this decision.

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[13]This is the spelling of the name in the affidavit.

The following proposed findings of fact are not accepted because they are based upon the Perkins and Vaccaro affidavits described earlier, which do not adequately establish such facts for the reasons discussed in the opinion: "3", "5", "9", "10", "11", "13", "14", "15", "16", "17", "18", "19" and "23".

Proposed findings of fact "2" and "21" are accepted in part. The accepted parts are incorporated into this decision. The rejected parts are as follows:

(i) Proposed finding of fact "2" includes the inexact statement that retail establishments which made wholesale purchases from Orvis, Inc. were "located throughout the United States." Details concerning the number and location of such establishments were not provided to support such generalization which minimizes the fact that, as noted earlier, petitioner sold merchandise to approximately nine retailers in New York as of December 1977 and to sixteen by December 1981.

(ii) Proposed finding of fact "21" includes an implication, that is not supported by the record, that the Division of Taxation was aware that The Orvis Company changed its name to Orvis, Inc. on or about the date such event transpired (January 3, 1983) when, in fact, it would appear that attorney Shaw's letter of June 5, 1986 as described earlier, may have been the initial notification by petitioner of such change.

Proposed finding of fact "12" is not accepted because it is an ultimate finding of fact, more in the nature of a Conclusion of Law.[14]

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[14]The Administrative Law Judge's finding of fact "25" read as follows:

"Petitioner submitted 23 proposed findings of fact. Proposed findings of fact "1", "4", "6", "7", "8", "20", and "22" are accepted and incorporated into this determination.

"The following proposed findings of fact are not accepted because they are based upon the affidavits described in Finding of Fact "18", which do not adequately establish such facts for the reasons discussed in Conclusion of Law "H", infra: "3", "5", "9", "10", "11", "13", "14", "15", "16", "17", "18", "19" and "23".

"Proposed findings of fact "2" and "21" are accepted in part. The accepted parts are incorporated into this determination. The rejected parts are as follows:

"(i) Proposed finding of fact "2" includes the inexact statement that retail establishments which made wholesale purchases from Orvis, Inc. were "located throughout the United States." Details concerning the number and location of such establishments were not provided to support such generalization which minimizes the fact that, as noted in Finding of Fact "8", supra, petitioner sold merchandise to approximately nine retailers in New York as of December 1977 and to sixteen by December 1981.

(continued...)

OPINION

The Administrative Law Judge determined that it was possible for petitioner to obtain a fair hearing by an impartial Administrative Law Judge in the Division of Tax Appeals because the Administrative Law Judge wrote and issued the determination in this case without the involvement of Mr. Marchese and prior to any review by the Tax Appeals Tribunal (hereinafter the "Tribunal"). The Administrative Law Judge noted that it was for the members of the Tribunal to decide whether they must remove themselves from the case. Next, the Administrative Law Judge concluded that the notice of determination was properly mailed and that the errors made by the Division of Taxation on the face of the notice did not frustrate petitioner's right to protest the notice. The Administrative Law Judge also concluded that petitioner was not substantially prejudiced by the lateness of the Division of Taxation's answer and refused to grant petitioner's motion to default the Division of Taxation. The Administrative Law Judge also determined that the issue of whether petitioner could be required to collect and remit the use tax depended on whether petitioner solicited business in New York within the meaning of 20 NYCRR 526.10(d). Further, the Administrative Law Judge found that the Division of Taxation had a rational basis to conclude that petitioner was soliciting business in the

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[14](...continued)

> "(ii) Proposed finding of fact "21" includes an implication, that is not supported by the record, that the Division of Taxation was aware that The Orvis Company changed its name to Orvis, Inc. on or about the date such event transpired (January 3, 1983) when, in fact, it would appear that attorney Shaw's letter of June 5, 1986 as described in Finding of Fact "7", supra, may have been the initial notification by petitioner of such change.
>
> "Proposed finding of fact "12" is not accepted because it is an ultimate finding of fact, more in the nature of a Conclusion of Law.
>
> "Petitioner has also proposed 25 conclusions of law which will be addressed, as necessary, in the Conclusions of Law, infra. However, there is no requirement in the law or regulations to rule on them per se. (State Administrative Procedure Act § 307[1] requires a ruling upon each proposed finding of fact. 20 NYCRR 3000.10 permits the parties to submit proposed findings of fact and conclusions of law, but does not require that each one be ruled upon.)

We modified this fact to reflect the Tax Appeals Tribunal's adoption of the Administrative Law Judge's action on the proposed findings of fact.

State and, thus, properly issued the assessment and that petitioner had not sustained its burden of proving, by clear and convincing evidence, that the assessment was erroneous. Petitioner's contention that the regulations were unconstitutionally vague was rejected by the Administrative Law Judge. In response to petitioner's assertion that no court has been willing to find nexus and impose use tax collection based on contacts as minor and sporadic as those present here, the Administrative Law Judge cited to and discussed the Supreme Court of North Dakota's decision in Heitkamp v. Quill Corp. (470 NW2d 203), which was pending before the United States Supreme Court at the time of the Administrative Law Judge's determination. With respect to petitioner's claim of selective enforcement on the part of the Division of Taxation, the Administrative Law Judge held that the Division of Taxation had adequately explained why an assessment was issued to petitioner. The Administrative Law Judge rejected petitioner's assertion that if it could be required to remit tax, this could only be in the sales tax quarters that its wholesale division employees traveled to New York on the ground that petitioner had not proved when its employees were not in the State. Finally, the Administrative Law Judge rejected petitioner's attempt to raise an estoppel argument in its post-hearing brief, holding that it was unfair to raise this additional issue at this point. The Administrative Law Judge also rejected this claim on the merits, concluding that petitioner had not shown that it relied to its detriment on the Division of Taxation's delay in issuing the advisory opinion to petitioner.

On exception, petitioner argues that it could not be required to collect and remit New York State use taxes for the period September 1, 1977 through August 31, 1980 because petitioner lacked nexus with the State under both the Commerce Clause and the Due Process Clause of the Fourteenth Amendment and that the Division of Taxation's application of the term "vendor" as defined at section 1101(b)(8)(i) of the Tax Law is unconstitutional. In the alternative, petitioner asserts that it lacked nexus with the State and that the application of section 1101(b)(8)(i) to it is unconstitutional for those sales tax quarters in which no visits were made by Orvis employees to New York retailers. In addition, petitioner contends that the application of the definition of "vendor" at 20 NYCRR 526.10 is unconstitutional for the entire period at issue and, in the

alternative, for those quarters in which petitioner's employees made no visits to New York retailers. Further, petitioner asserts that the State's statutory and regulatory framework regarding out-of-state mail order vendors is so vague as to violate constitutional due process rights. Petitioner also argues that it was not a vendor as that term is defined by statute and by regulation and that petitioner did not solicit business in New York as that term is defined at 20 NYCRR 526.10(d) at any time during the period at issue, and, in the alternative, during the quarters in which its employees made no visits to New York retailers. Next, petitioner argues that the Division of Taxation did not issue a valid notice of determination to petitioner, as the notice was a notice to The Orvis Company, Inc., #03-285804, a company that did not exist during the period in issue. Petitioner asserts that the Division of Taxation had the burden of proof, in asserting nexus to exercise jurisdiction over petitioner, to demonstrate that petitioner is a vendor, and to establish the validity of the notice of determination, and that the Division of Taxation has failed to satisfy any of these burdens. On the other hand, petitioner contends that it has carried its burden to prove the assessment erroneous. Lastly, petitioner contends that it is unable to obtain a fair hearing in this matter before the Division of Tax Appeals because of the prior involvement of Division of Tax Appeals personnel in this matter while serving with the Division of Taxation and, therefore, that the petition must be granted.

In response, the Division of Taxation asserts that the Administrative Law Judge's determination was written and issued without the involvement of Mr. Marchese; therefore, Mr. Marchese's involvement in the prior advisory opinion is irrelevant. Further, the Division of Taxation argues that petitioner did not make a motion to recuse members of the Tribunal, as provided for by 20 NYCRR 3000.5(e) and, thus, has not properly raised an objection to any member's participation in this case. With respect to Commissioner Koenig's participation in this matter, the Division of Taxation contends that Matter of Willet v. Dugan (161 AD2d 900, 557 NYS2d 465, lv denied 76 NY2d 708, 560 NYS2d 990) establishes that the issuance of the advisory opinion by the former State Tax Commission, during Commissioner Koenig's tenure, does not preclude Commissioner Koenig's participation in deciding this case.

Next, the Division of Taxation argues that the Division of Tax Appeals does not have jurisdiction to review the merits of petitioner's constitutional challenge because the Division of Tax Appeals does not have the authority to review the facial constitutionality of the statutes or regulations. If the Division of Tax Appeals does have the authority to review the constitutional challenge, the Division of Taxation argues that petitioner bore the burden of proof and that petitioner has not sustained this burden. The Division of Taxation states that nexus is based on the totality of an entity's activities in a state and that petitioner has not provided a description of its total activities in New York. The Division of Taxation also asserts that petitioner had a definite presence in the State, through the activity of the wholesale employees, and that the instant case is unlike that of National Bellas Hess v. Department of Rev. of State of Illinois (386 US 753), where the vendor's sole activity in the state was the interstate solicitation of sales. The Division of Taxation argues that petitioner was a vendor, as defined by statute and regulation, because petitioner was soliciting business through the activities of its wholesale employees selling property subject to sales tax, i.e., not excluded from sales tax, in New York. Further, the Division of Taxation contends that petitioner did not prove that its wholesale employees were inactive during any particular quarter and even if petitioner had proven such inactivity, such inactivity would not be the cessation of business activity; therefore, the tax reporting and remitting responsibilities would continue. Next, the Division of Taxation asserts that the law and regulations are not unconstitutionally vague. The Division of Taxation asserts that any errors on the face of the notice of determination were not prejudicial to petitioner and, therefore, should be disregarded.

In a letter submitted after oral argument, commenting on the Supreme Court decision in Quill Corp. v. North Dakota (___ US ___, 112 S Ct 1904), petitioner argues that the Court discarded the weaker "minimum connection" theory of nexus established in National Bellas Hess v. Department of Rev. of State of Illinois (supra) and established a new, stricter substantial nexus requirement. Petitioner argues that this test requires a substantial physical presence in the State and that petitioner's presence in New York fell far short of this.

The Division of Taxation, in its comments on Quill, argues that Quill and Bellas Hess are not dispositive of the instant case because those cases involved vendors with no physical presence in the state. Further, the Division of Taxation argues that the phrase "substantial nexus" articulated in Quill must be understood in its context. The Division of Taxation asserts that substantial nexus is not a new standard but only a new phrase to describe the requirement of physical presence. The Division of Taxation contends that the new phrase was used by the Court in Quill to distinguish the physical presence requirement of the Commerce Clause from that of the minimum contacts standard of the Due Process Clause which, under Quill, could be satisfied if a business purposefully avails itself of the benefits of an economic market in the state.

Turning first to petitioner's procedural claims, we conclude that the Administrative Law Judge adequately and correctly addressed petitioner's contention that it could not receive a fair hearing before the Administrative Law Judge. Since petitioner advanced no new arguments on exception with respect to this point, we affirm the Administrative Law Judge on this issue based on the Administrative Law Judge's opinion.

With respect to petitioner's assertion that it cannot receive a fair review before this Tribunal, because of the prior involvement of two of its commissioners in the matter while serving in the Division of Taxation, we note that petitioner raised this issue before the Administrative Law Judge and included it in its exception. Therefore, the issue is properly before us even though petitioner did not make a motion to the Tribunal to recuse any member of the Tribunal.

In response to this issue, John P. Dugan, President of the Tax Appeals Tribunal, has not participated in the resolution of this matter.

Petitioner suggests that Francis R. Koenig cannot fairly review this matter because he was serving as a Commissioner of the State Tax Commission at the time the Commission issued advisory opinions adverse to petitioner related to the liability at issue. Advisory opinions were written opinions issued under the authority of the former State Tax Commission applying the Tax Law to the facts set forth in the request for the advisory opinion (former Tax Law § 171[24]).

We see no merit to petitioner's assertion that the issuance of such a quasi-judicial type decision constitutes any basis for disqualifying a member of the body that issued the decision from participating in a subsequent quasi-judicial proceeding with respect to a similar issue[15] (see, Matter of Willet v. Dugan, supra; cf., Matter of 1616 Second Ave. Rest. v. New York State Liq. Auth., 75 NY2d 158, 551 NYS2d 461 [where a commissioner made public statements that indicated he had a personal bias with respect to the outcome of a pending matter] and Matter of Beer Garden v. New York State Liq. Auth., 79 NY2d 266, 582 NYS2d 65 [where a commissioner was first the agency's advocate in a proceeding against the petitioner and was subsequently a member of the quasi-judicial body that would decide the same proceeding]). Therefore, Commissioner Koenig will participate in deciding this case.

Next, we address petitioner's contention that the notice of determination issued by the Division of Taxation is fatally defective because it incorrectly identified the person to be assessed by name, address and identification number.

First, we do not agree with petitioner that the name on the notice of determination was incorrect. As set forth in the facts, the notice was issued to The Orvis Company, Inc. and covered the period September 1, 1977 through August 30, 1980. Until January 3, 1983 petitioner's name was The Orvis Company, Inc. Petitioner has directed us to no case law or other authority, and our own investigation has yielded none, that indicates any reason to conclude that it is erroneous to issue a notice to a taxpayer in the name that the taxpayer used during the period of the assessment. Therefore, we decline to find that the name on the notice was in error.

Further, we do not agree that the Division of Taxation erred when it addressed the notice to 10 Riverside Road, rather than to 10 River Road. On its petition for an advisory opinion, dated December 29, 1992, petitioner listed its address as 10 Riverside Road (Exhibit "F" of Petitioner's Notice of Motion to Cancel and Annul Notice of Deficiency). We see nothing in the record by

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[15]The essence of petitioner's disqualification claim with respect to Commissioner Koenig appears to be that Commissioner Koenig has a known legal opinion on this matter, as expressed in the advisory opinions and, therefore, cannot review this case impartially (see, Petitioner's exception, p. 16). This contention runs against the grain of our whole system of jurisprudence, for it suggests that once an individual in a judicial or quasi-judicial capacity has issued a decision on a legal issue, that person cannot impartially review a subsequent case involving the same legal issue because the person already has a known legal opinion on the matter.

which petitioner informed the Division of Taxation, prior to the issuance of the notice of determination, that this address was incorrect. Since section 1147(a)(1) of the Tax Law requires the Division of Taxation to issue a notice of determination to a person "at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable," it appears that the Division of Taxation properly issued the notice to petitioner at the address listed in the request for an advisory opinion.

Assuming, however, that the name and address were errors, these coupled with the mistake in the taxpayer identification number still would not render the notice jurisdictionally defective. The law in New York is clear, defects on the face of the notice will not invalidate the notice, absent evidence of harm or prejudice to the petitioner (Matter of Agosto v. Tax Commn., 68 NY2d 891, 508 NYS2d 934; Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 477 NYS2d 892; Matter of Mon Paris Operating Corp. v. Commissioner of Taxation & Fin., Sup Ct, Albany County, March 16, 1988, affd on other grounds 151 AD2d 822, 542 NYS2d 61; Matter of A & J Parking Corp., Tax Appeals Tribunal, April 9, 1992; Matter of Tops, Inc., Tax Appeals Tribunal, November 22, 1989; Matter of City Linen & Towel Supply Co., Tax Appeals Tribunal, March 2, 1989). This is also the rule in the Federal courts with respect to notices of deficiency (see, Estate of Yaeger v. Commissioner, 889 F2d 29, 89-2 USTC ¶ 9633, cert denied 495 US 946; Olsen v. Helvering, 88 F2d 650, 37 USTC ¶ 9167). Here, we can find absolutely no evidence that petitioner was prejudiced by the information on the face of the notice.

Most importantly, petitioner's petitions, filed in response to the notice of determination (Exhibit "D") and in response to the conciliation order (Exhibit "E"), make it perfectly clear that petitioner was not confused or misled by the notice. Both petitions describe the organization of petitioner prior to January 3, 1983 and assert that petitioner was not a vendor and had insufficient nexus with the State to impose the use tax through either of petitioner's two divisions (wholesale and mail order). Thus, it appears that the notice served its purpose: petitioner knew that it was

being assessed, petitioner knew the reason for the assessment and that it was petitioner's duty to respond (see, Olsen v. Helvering, supra).

In addition, the other correspondence in the file from petitioner to the Division of Taxation reveals no confusion on petitioner's part with respect to the assessment. For example, in a letter dated June 5, 1986 to the Division of Taxation, petitioner explains, apparently for the first time, its corporate restructuring (Exhibit "P") and argues that, due to the corporate restructuring, the Division of Taxation's rationale for the notice issued April 22, 1986 will not apply to future quarters. Although petitioner's treasurer states in his affidavit that "a genuine question has arisen in my mind as to which corporate entity was the target of the April 22, 1986 Notice" (Exhibit "5"), we find no such confusion elsewhere in the record on petitioner's part. The issuance of the notice and demand to Orvis New York, Inc. does seem to express some confusion on the Division of Taxation's part, but we do not see that this act adversely affected petitioner's ability to respond to the instant notice of determination.

For all of the above reasons, we conclude that the notice of determination was valid.

Turning to petitioner's contention that the Division of Taxation had the burden to prove its jurisdiction over petitioner and that petitioner was a vendor, we respond that the Division of Taxation does not have the burden of proving the propriety of its assessment (Matter of Leogrande v. Tax Appeals Tribunal, ___AD2d___ [1992]; Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536, appeal dismissed 69 NY2d 822, 513 NYS2d 1027). The cases relied on by petitioner, i.e., Birmingham Fire Ins. Co. of Pennsylvania v. KOA Fire & Marine Ins. Co. (572 F Supp 962), Lamarr v. Klein (35 AD2d 248, 315 NYS2d 695, affd 30 NY2d 757, 333 NYS2d 421), Unicon Mgt. Corp. v. Koppers Co. (250 F Supp. 850), for the principle that the party asserting jurisdiction has the burden to prove it, are cases involving a state's jurisdiction to adjudicate, not the jurisdiction to tax. A more relevant rule is that "a taxpayer claiming immunity from a tax has the burden of establishing his exemption" (Norton Co. v. Department of Rev. of State of Illinois, 340 US 534, 537; see also, General Motors Corp. v. Washington, 377 US 436, 441, reh denied 379 US 875). This rule is applied where a taxpayer

claims that a portion of its income has no nexus with a state and seems equally applicable where, as here, the taxpayer is asserting that it has no nexus with the State and that the Commerce Clause prohibits the State from imposing any tax.

Although we reject the principle that the Division of Taxation had the burden of proof on any of the issues raised in this matter, our cases do establish that: (1) in response to a petitioner's inquiry the Division of Taxation is obligated to describe the methodology underlying the assessment; and (2) this methodology must be rational (see, Matter of Atlantic & Hudson Ltd. Partnership, Tax Appeals Tribunal, January 30, 1992). Under this principle, we agree with the Administrative Law Judge that the Division of Taxation had the obligation in this case to describe a rational foundation for its conclusion that an assessment should be issued to petitioner for the taxes at issue (see, Matter of Brussel, Tax Appeals Tribunal, June 25, 1992).

The Division of Taxation's decision that petitioner was responsible for the use tax was clearly premised upon the letter of Mr. Vaccaro, dated March 27, 1981. The Vaccaro letter stated that petitioner was a mail order business which sold merchandise to New York customers through catalog orders. However, the letter described activities beyond mail order sales by stating, "[s]ome salesmen who reside in Vermont travel into New York to call on non-Orvis owned stores. The salesmen in no way bind the Orvis Company; all orders are approved in Vermont" (Exhibit "H"). As the Administrative Law Judge noted, this statement strongly suggests that the salesmen took nonbinding orders in New York. Accordingly, this statement indicates that petitioner's connection to its customers in the State was not only by common carrier or the United States mail (see, Quill Corp. v. North Dakota, supra; National Bellas Hess v. Department of Rev. of State of Illinois, supra) but, in addition, petitioner had a physical presence in the State. Further, there is nothing in the letter that suggests that its description of Orvis' activities was applicable to a limited period of time. Therefore, we conclude that the Vaccaro letter itself provided a proper basis for the Division of Taxation's conclusion that petitioner had a

constitutionally sufficient nexus to justify imposition of the tax and for the issuance of the assessment (see, Matter of Brussel, supra).[16]

With respect to petitioner's status as a vendor, during the period in question a vendor was defined by statute to include:

> "(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; and" (Tax Law § 1101[b][8][i][C]).

Again, based on the information in the March 27, 1981 Vaccaro letter, the Division of Taxation was aware that petitioner solicited sales in New York by the distribution of catalogs and made sales of tangible personal property to persons within New York as a result. Accordingly, the Division of Taxation rationally concluded that petitioner was a vendor as that term was defined by statute.

During the period in question, the Division of Taxation's regulations restricted the statutory definition of vendor, in the case of interstate vendors, to mail order vendors who solicit business in the State or who maintain a place of business in the State.[17] Soliciting business was

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[16]Since we conclude that the Vaccaro letter in itself demonstrates a proper basis for the Division of Taxation's assessment, we need not address petitioner's argument that the Administrative Law Judge erred in deciding that statements in petitioner's request for an advisory opinion and in the document entitled, "Orvis Dealers Wholesale Terms" also indicated the rational basis for the issuance of the assessment.

[17]Former 20 NYCRR 526.10(e) provided, in pertinent part, that:

> "(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, who solicits the sales in New York, as defined in subdivision (d) of this section, or who maintains a place of business as defined in subdivision (c) of this section, is required to collect the sales tax on the tangible personal property delivered in New York or the services performed in New York.
>
> "(2) A person making sales to his customers within the State, who has solicited such sales by the interstate distribution of catalogs or other advertising material by mail and who delivers the merchandise through the mail or by common carrier, and who neither maintains a place of business as defined in subdivision (c) of this section, nor solicits business as defined in subdivision (d) of this section, is not required to register as a vendor. However, if such person registers voluntarily, he is under the same obligations as any other vendor."

defined, in part, as follows:

> "(d) Soliciting business. (1) A person is deemed to be soliciting business if he has employees, salesmen, independent contractors, promotion men, missionary men, service representatives or agents soliciting potential customers in the State" (former 20 NYCRR 526.10[d][1]).

We conclude that the Division of Taxation rationally concluded that petitioner was soliciting business, within the meaning of the regulation, based on the information in the Vaccaro letter that petitioner sent salesmen into the State.

Having concluded that the Administrative Law Judge correctly decided that the Division of Taxation had a proper basis for issuing the assessment, the issue is then whether petitioner sustained its burden to prove that it did not have sufficient nexus with the State to warrant the imposition of tax and that it was not a vendor. Assuming, without deciding, that petitioner is correct in contending that it bore the burden to prove its claims only by a preponderance of the evidence, rather than by clear and convincing evidence as suggested by the Administrative Law Judge, we still conclude that petitioner has not sustained its burden of proof.[18]

Our review of the record indicates that from the beginning of this proceeding the dispute between the parties has centered on the factual issue of what were the activities of petitioner's wholesale employees in New York and, then, on whether these activities provided a legal basis for imposing the tax liability. In its answer to petitioner's petition, the Division of Taxation made it very clear that it disputed the factual, as well as the legal description, offered by petitioner of the wholesale employees' activities in New York (Exhibit "F," ¶¶ "6," "7," "8" and "10"). Consistent with this position, the Division of Taxation agreed to a stipulation of facts that

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[18]Petitioner states that the clear and convincing standard of proof is only appropriate in sales tax methodology cases and income tax domicile cases; however, our research indicates that the clear and convincing standard has been been frequently articulated in income tax audit methodology cases (see, Matter of Leogrande v. Tax Appeals Tribunal, supra; Matter of Zubawicz v. State Tax Commn., 154 AD2d 735, 546 NYS2d 178; Matter of Gun Hill Plumbing Supply Co. v. Chu, 145 AD2d 769, 535 NYS2d 497; Matter of Giuliano v. Chu, 135 AD2d 893, 521 NYS2d 883, Matter of Jacobson v. State Tax Commn., 129 AD2d 880, 514 NYS2d 145 and Matter of Scarpulla v. State Tax Commn., 120 AD2d 842, 502 NYS2d 113), in one highway use tax audit methodology case (Matter of Lionel Leasing Indus. Co. v. State Tax Commn., 105 AD2d 581, 481 NYS2d 520) and in a franchise tax case where the issue was one of statutory interpretation (Matter of Landauer Assoc. v. Tax Appeals Tribunal, ___AD2d___, 583 NYS2d 568). Since we conclude that petitioner has not satisfied even the lesser standard of a preponderance of the evidence, it is unnecessary for us to decide which standard does apply.

described the activities of petitioner's mail order division in some detail, but refused to stipulate to facts concerning the activities of the wholesale employees (Exhibit "I," ¶¶ "10.10," "10.13," "10.15" and "10.16"). In the face of the Division of Taxation's challenge to the facts about the wholesale employees' activities in New York State, petitioner did not present any witnesses at the hearing to describe these activities. Instead, petitioner elected to describe these activities through affidavits of its president and vice president. The statements in the affidavits about the wholesale employees' activities follow very closely the portions of the stipulation proposed by petitioner to which the Division of Taxation refused to stipulate (see, Exhibit "I," ¶¶ "10.10," "10.13" and "10.15"; Exhibit "4," ¶¶ "k," "m," "o" and "p"). The Administrative Law Judge accorded these statements no weight on the grounds that he was not able to evaluate the credibility of the affiants, the Division of Taxation did not have the opportunity to cross-examine the affiants and the statements in the affidavits about the wholesale employees' activities were contradicted by other evidence in the record, most notably, in our opinion, the Vaccaro letter of March 27, 1981. Petitioner argues that this was an error and that the Administrative Law Judge was required to find facts based on the unrebutted affidavit testimony (Petitioner's brief on exception, pp. 32-33). Given the circumstances of this case, we agree with the Administrative Law Judge's weighing of the affidavits.

In our view, petitioner seeks to have unilateral power, through the use of the affidavits, to determine the facts. This result is untenable because it would absolutely negate the role of the adversary and the fact finder in this proceeding. The cases cited by petitioner do not support its position. Both Matter of Gray v. Adduci (73 NY2d 741, 536 NYS2d 40) and Matter of Kucherov v. Chu (147 AD2d 877, 538 NYS2d 339) hold that statements in an affidavit may, in themselves, support an administrative determination. Matter of Mobley v. Tax Appeals Tribunal (177 AD2d 797, 576 NYS2d 412, appeal dismissed 79 NY2d 978, 583 NYS2d 195) held that it was irrational to credit evidence for one purpose and discredit it for another purpose. None of these cases hold that the finder of fact is required to find the facts based on statements in affidavits.

Rejecting the affidavits as a basis to find facts about the extent of the wholesale employees' activities in New York State means that there is nothing in the record to describe the exact nature of these activities. All that is known from the remainder of the record is that the wholesale employees came into New York, but the frequency and scope of their visits is unknown.

In Quill Corp. v. North Dakota (supra), the Supreme Court has reaffirmed that the Commerce Clause of the Constitution requires that a vendor have a physical presence in a state before the state can impose the obligation to collect use taxes and that contact with the state only through interstate mailings to the vendor's customers is not sufficient nexus. We do not agree with petitioner that Quill establishes a new, stricter standard than that articulated in Bellas Hess. Petitioner's proposition is negated by the lengthy discussion in the majority opinion in Quill stating why the bright line test established by Bellas Hess should be maintained (see, Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1914-1917) and by the concurring opinion of Justices Scalia, Kennedy and Thomas stating that the Commerce Clause holding of Bellas Hess should simply be affirmed on the basis of stare decisis without revisiting the merits of the holding, as the majority opinion does (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1923).

We also do not agree with petitioner's statement that Quill establishes that the physical presence required by the Commerce Clause requires continuous solicitation by a vendor. Petitioner states "[a]ccording to the majority in Quill, 'the furthest extension of [a state's taxing] power' under the Commerce Clause 'was recognized in Scripto, Inc. v. Carson, 362 U.S. 207 (1970)'" (Petitioner's letter dated July 6, 1992). The statement quoted by petitioner is from the Court's consideration of the Due Process Clause, which was clearly separated from its discussion of the Commerce Clause (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1910). Further, the portion of the sentence not quoted by petitioner, i.e, "in which the Court upheld a use tax despite the fact that all of the seller's in-state solicitation was performed by independent contractors" (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1910), indicates that the court was commenting on the fact that the salesmen in Scripto were independent contractors, not on the extent of the independent contractors' activities in the state. Thus, we do not see that Quill

establishes that continuous solicitation is necessary to satisfy the Commerce Clause, or that any other substantial physical presence is, as asserted by petitioner, required. In our view, Quill reaffirms that the Commerce Clause requires a physical presence and that this presence must be more than the slightest presence represented by holding title to the contents of a few floppy diskettes (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1915, footnote 8).

The issue raised by petitioner's circumstances obviously is, as it always has been, whether the physical presence of the wholesale division employees provides sufficient nexus with the State. We think it clear that under National Geographic Socy. v. California Bd. of Equalization (430 US 551) the activities of these wholesale employees, although not directly connected to the retail sales upon which the Division of Taxation is seeking to impose liability, may provide a sufficient nexus to impose the use tax liability. The question is whether the wholesale employees' activities in New York constituted only a "slightest presence" by Orvis in the State (see, National Geographic Socy. v. California Bd. of Equalization (supra, at 556) or whether these activities were within the reach of the physical presence test established by Bellas Hess and reaffirmed by Quill. The point that separates the two types of activities is not clearly defined, and, as acknowledged by Quill, is artificial, i.e., the vendor's liability may turn on the presence of a small sales force, plant or office (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1916, emphasis added). To determine on which side of this artificial point a vendor's activities fall requires a careful evaluation of the vendor's specific factual situation, for "[t]he test is simply the nature and extent of the activities of the [vendor] in the [state]" (Scripto, Inc. v. Carson, supra, at 212; see also, General Trading Co. v. State Tax Commn. of Iowa, 322 US 335; Felt & Tarrant Mfg. Co. v. Gallagher, 306 US 62 [where, as in Scripto, the Court examined the activities of the vendor's salesmen and found them to establish a sufficient nexus to justify imposition of use tax liability]; Standard Pressed Steel Co. v. Washington Dept. of Rev., 419 US 560 [where the Court found the activities of the vendor's employee in facilitating the contractual relationship between the vendor and a customer to create a sufficient nexus to support imposition of a gross receipts tax]; Miller Bros. Co. v. State of Maryland, 347 US 340, reh denied 347 US 964 [where the

Court found the vendor's advertising and occasional delivery of merchandise in the state did not establish sufficient nexus, for due process purposes, to justify the imposition of use tax liability]).[19] Since petitioner has not established the specific facts regarding its wholesale employees' activities in New York, we must conclude that petitioner has not sustained its burden to prove that under the Commerce Clause it did not have sufficient nexus with New York State to justify imposition of the use tax liability.

Petitioner's failure to establish the facts about its activities in New York State also means that we must decide that petitioner has not sustained its burden to prove that it was not a vendor within the meaning of the statute (Tax Law § 1101[b][8][i][C]) and regulations (20 NYCRR 526.10) for any part of the period at issue. Further, we agree with the Administrative Law Judge that it is not necessary to reach the merits of petitioner's argument that vendor status is to be determined on a quarterly basis, because, like the Administrative Law Judge, we find that petitioner has not proven the extent of the wholesale employees' activities in New York during the whole, or any part, of the period at issue.

Finally, with respect to petitioner's claim that the statutory and regulatory definition of vendor is unconstitutionally vague, we have no jurisdiction to rule on the constitutionality of the law as written (Matter of Fourth Day Enters., Tax Appeals Tribunal, October 27, 1988). We do, however, have authority to determine whether the Division of Taxation's regulations are unconstitutional as written, and have established that the proper test is whether the regulation provides a reasonable degree of certainty as to its meaning (Matter of J.C. Penney Co., Tax Appeals Tribunal, April 27, 1989).

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[19] The Quill decision raises questions about the direct application of either the Standard Steel or the Miller Bros. decision to the instant case. Standard Steel involved a gross receipts tax and in Quill the Court appears to suggest that the nexus standard for evaluating use tax may be different than that applied to other taxes (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1914). Miller Bros. was decided under the Due Process Clause; discussion of the Commerce Clause was explicitly withheld (Miller Bros. Co. v. State of Maryland, supra, at 347). Quill reversed the Court's earlier rulings to the extent they held that the Due Process Clause required a physical presence in the State (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1910). However, our reliance on these cases is simply for the principle that the present issue requires a careful scrutiny of the specific facts.

In the regulatory definition of vendor, the Division of Taxation, apparently in an effort to harmonize the definition with constitutional restrictions, limited the definition of vendor, in the case of interstate vendors, to a vendor who either solicited business in the State or maintained a place of business in the State (20 NYCRR 526.10[c], [d] and [e]). The meaning of soliciting business and maintaining a place of business are illustrated through examples. We believe that these regulations provide a reasonable degree of certainty as to their meaning. To suggest that the regulations should attempt to specify every possible nuance of meaning for soliciting business, so that petitioner could have definitely known what the Division of Taxation's position was on petitioner's activities, is requiring too much from the regulation (see, Wisconsin Dept. of Rev. v. Wrigley Co., ___US___, 112 S Ct 2447 [where the Supreme Court was called on to decide whether a range of very specific vendor activities, e.g., replacing stale gum, were part of the solicitation of orders as that term was used in 15 USC § 381]). The type of specificity petitioner appears to seek is available, and is more appropriate, in a petition for an advisory opinion (see, Tax Law § 171[24]).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Orvis, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Orvis, Inc. is denied; and
4. The Notice of Determination dated April 22, 1986 is sustained.

DATED: Troy, New York
January 14, 1993

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner