STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
VERMONT INFORMATION PROCESSING, INC.	:	DECISION DTA No. 806207
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, 1983 through November 30, 1986.	: : :	

Petitioner Vermont Information Processing, Inc., P.O. Box 470, Hercules Drive, Colchester, Vermont 05446 filed an exception to the determination of the Administrative Law Judge issued on February 27, 1992 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 December 1, 1983 through November 30, 1986. Petitioner appeared by James H. Tully, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

Petitioner and the Division of Taxation each filed a memorandum of law. Oral argument, at the request of petitioner, was heard on July 23, 1992.

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

ISSUES

I. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby required to collect the taxes imposed under Article 28 of the Tax Law.

II. Whether, if petitioner was a vendor pursuant to the Tax Law, the Commerce Clause of the United States Constitution prevents New York from requiring petitioner to collect the use tax imposed by Tax Law § 1110.

III. Whether petitioner has established reasonable cause for its failure to collect and remit the use tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and make additional findings of fact. The Administrative Law Judge's findings of fact and the additional findings of fact are set forth below.

On November 27, 1987, the Division of Taxation ("Division") issued to petitioner, Vermont Information Processing, Inc. ("VIP"), a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period December 1, 1983 through November 30, 1986, assessing tax of $513,112.11 plus penalty and interest.

VIP is a Vermont corporation which produces and sells computer software to beverage distributors throughout the United States. During an audit of a beverage distributor located in Troy, New York, an auditor discovered a letter on VIP letterhead which indicated that VIP was making sales in New York State. As a result, the Division commenced an audit of VIP.

VIP was not registered to collect sales and use taxes on behalf of New York State. At the time of the audit, VIP contended that it was not required to register and had no duty to collect New York taxes. On that basis, it refused the Division access to its records. The Division obtained copies of VIP's Federal and Vermont income tax returns and used information from those returns to estimate New York taxable sales for the audit period of $7,330,173.00, with a use tax due on that amount of $513,112.11.

Following a conciliation conference, VIP agreed to allow the auditors to examine its records for the period December 1, 1983 through November 30, 1986. The VIP sales invoices inspected by the Division showed charges for computer hardware, charges for maintenance and installation of that hardware, charges for "site days" (days spent on the customer's business premises), travel expenses, charges for software systems and charges for the installation and maintenance of the software. The Division determined that receipts from the sale and

maintenance of the software were not subject to sales or use tax. Charges associated with the sale, maintenance and installation of computer hardware were deemed to be subject to tax. Reimbursements for travel expenses incurred by VIP in connection with service provided to New York customers and charges for site days (days spent at the customer's location) were not deemed taxable by New York. The Division's review of the invoices resulted in a determination of taxable sales of $1,216,744.00. In accordance with this determination, the Division issued a conciliation order, dated September 30, 1988, reducing the tax due to $85,172.08 and sustaining the imposition of penalty. Before hearing, the Division agreed to reduce the amount of tax asserted to $73,275.04.

It is VIP's position that it had no duty to collect and remit New York State sales or use tax, and it challenges the assessment on that basis alone. It concedes that if it is finally determined that VIP was under a duty to collect the tax the amount of tax due for the audit period is $73,275.04.

VIP operates its business from its headquarters in Colchester, Vermont. It does not maintain a place of business in New York. During the audit period, it employed between 20 to 30 workers. Two or three employees were engaged in accounting and bookkeeping operations. Harold Aiken, the president of VIP, and another employee were involved in sales. Approximately four employees were identified as installers. Workers in these positions gathered information from customers regarding the customer's computer system, recordkeeping and business operations. The installers (essentially computer programmers) then adapted VIP computer software to the needs of the customer. The installers also were involved in training the customers to operate the VIP programs. VIP also employed two trainers and approximately four people to answer questions from customers by telephone.

VIP had no employees in New York and did not employ salesmen to travel into New York to solicit sales, nor did it advertise in New York newspapers or periodicals or engage in direct mail solicitation. Most of its potential customers heard about VIP through word of mouth and contacted VIP to learn more about its product. VIP representatives spoke to potential

customers over the telephone and mailed them brochures describing VIP's products and services. Interested parties were invited to Vermont for a demonstration or encouraged to view an operating VIP system at the workplace of an existing VIP customer in New York.

If a beverage distributor decided to purchase VIP's services, the distributor was sent a contract by United Parcel Service ("UPS"). After execution of the contract, the customer was asked to complete a variety of forms which provided VIP with information regarding the customer's business operations and recordkeeping systems. The information supplied by the customer was used by VIP to create software suitable for that customer's particular business operations.

If a customer already possessed a viable computer system, VIP sold only the software programs and VIP's services. If a customer did not already own a computer, VIP would attempt to sell it computer hardware as well. VIP was an industry marketer, authorized by IBM to sell IBM computers to beverage distributors. Mr. Aiken described VIP's relationship with IBM as follows:

> Mr. Aiken: "They [IBM] ship equipment to me, they allow me to have 10 or 15 days credit on the equipment, and then I resell it, but I can only resell it to beverage distributors. They do all installation shippings as if it were sold by their regular representative who might be in Los Angeles. They maintain it by their own maintenance people, and the only thing I'm really doing is adding value to it, and I'm putting my software on it, setting the customer on it, training them, providing him on a hotline service afterward and an ongoing thing for years and years."
> Administrative law judge: "Does your customer have any separate contract with IBM for maintenance, for guarantees or warranties?"
> Mr. Aiken: "He would have. The agreement we would have him sign is an IBM agreement, it is not a VIP agreement.... We submit the paperwork so it doesn't get lost or messed up, and he is covered under maintenance by IBM."
> Administrative law judge: "And would you separately charge on your invoice for any of that?"
> Mr. Aiken: "No." (Hearing Tr., pp. 76-77.)

VIP also sold computer hardware manufactured by a company named MSI and a third company. Its relationship with those companies was similar to its relationship with IBM.

If a VIP transaction included the purchase of computer hardware, the computer was mailed directly to VIP where the software was loaded, and the computer was then shipped by

VIP to the customer, via common carrier. If the customer purchased only software, the program was placed on a disk which was shipped to the customer via common carrier.

We make the following additional finding of fact:

> Petitioner's president testified that petitioner purchased the computer hardware from the computer manufacturers (IBM, MSI, or the third company) and resold it to petitioner's customers at prices established by petitioner. Petitioner also billed its customers for the installation and initial maintenance of the hardware. Petitioner also sold the computer manufacturer's noncustomized software which petitioner installed on the computer prior to shipping the computer to the customer.

VIP's customers were usually trained to use the programs developed for them at VIP's headquarters in Vermont. As part of its services, VIP personnel were available to VIP customers by telephone to answer questions and resolve any problems the customer might be having with the VIP computer program. In addition, VIP installers were able to directly access a customer's computer from VIP's own computer system in Vermont through the use of a modem. A customer's computer program could be modified or corrected in this fashion, without the VIP employee leaving Vermont.

VIP personnel did not routinely travel to their customers' locales to answer questions or service customer needs. In fact, it was VIP's policy to discourage travel as much as possible. However, VIP did travel to the customer's place of business if absolutely necessary to install or maintain software or handle problems the customer was having with the software. Mr. Aiken estimated that approximately five percent of its customer accounts required some travel.

We make the following additional finding of fact:

> In a small percentage of cases, petitioner's employees visited New York State to hold training sessions for customers on the use of the software programs.

VIP sold its customers on-going services, such as updating the computer programs, for which it charged a monthly fee. VIP used the terms "maintenance" and "installation" to refer to services connected with the software programs; however, VIP did not install or maintain computer hardware or send its employees to its customer's facilities for the purpose of maintaining or installing such hardware. As Mr. Aiken stated in his testimony: "When we call

it installation time, that's like you and I talking, it is hours, it is not-- I don't have a guy that uses a screwdriver. I don't have that" (Hearing Tr., p. 64). Any computer hardware sold by VIP was installed, serviced and maintained at the customer's business location by employees of the hardware manufacturer.

During the course of the audit, the Division obtained a variety of information which led it to believe that VIP was entering New York to install both hardware and software at its customers' business locations and that VIP entered New York to conduct training sessions. That information consisted of a letter on VIP letterhead, VIP sales invoices, and conversations with VIP customers. Since VIP vigorously disputes the meaning and importance attributed by the Division to this information, it is necessary to review it in some detail.

(a) The Division introduced a letter dated February 13, 1985 from VIP to a Troy, New York customer. As material here, the letter summarizes computer hardware and software purchased by the customer and contains the following statements:

> "PAYMENT SCHEDULE:
> Due with this letter (hardware deposit 10%) (received) 3,447.90
> Due at installation (hardware 90% + software) 36,481.00
>
> You should budget one to two days at $60.00 per hour for training and installation on the computer and software, as well as actual per diem expenses. Any applicable sales, use, or excise taxes are your responsibility and should be paid to the proper authorities. All VIP charges will be billed when performed.
>
> If John J. Bolond Dist. and VIP determine that an installer is needed on-site for additional data prep within 60 days of installation, VIP will provide that person at no charge to John J. Boland Dist."

The letter also states separate charges for the maintenance of the hardware and software.

An auditor spoke with a representative of the Troy beverage distributor. When asked the substance of that conversation the auditor stated: "They said that the representative installed the computer and trained them and that they had a seminar in Albany in March of 1987." (Hearing Tr., p. 33.)

The auditor believed that the letter provided evidence that VIP entered New York for installation and maintenance of computer hardware and training.

(b) The second document relied on by the Division was a VIP sales invoice to a customer in Athens, New York. The customer was charged for VIP travel time and expenses and for training. The invoice does not indicate where the training took place.

(c) Two other invoices to separate New York customers show charges for software, hardware, hardware maintenance, and "PC/Set Up/Test."[1]

(d) Three invoices to a Plattsburgh customer show miscellaneous travel and transportation expenses and charges for "installation." An auditor spoke with an employee of the Plattsburgh customer and was told that a VIP employee went to the business offices in Plattsburgh to "install system and train him" in its use (Exhibit "M," notation made by auditor).

(e) An invoice to an Ithaca, New York company shows the sale of hardware and software by VIP.

When reviewing the VIP invoices, the auditor made a listing of each invoice which she believed demonstrated VIP's presence in New York in connection with its sales of computer hardware and software in New York. The listing provides the following information for each such invoice: the customer name, the invoice date, the invoice number, the total invoice amount, the amount taxable by New York State, and comments. The comments section identifies those items on the invoice which the auditor construed as evidencing VIP's presence in New York. These items can be separated into two general categories: (1) items of travel expense or charges for site visits and (2) items connected with the installation or maintenance of either computer hardware or software. Approximately 41 invoices contain items in the first category. The remaining 40 invoices show charges for items related to installation and maintenance of computer hardware or software. There is no correlation between the hardware installation charges and the travel or site visit charges. For example, invoice number 121188 showed a $480.00 charge for installation of hardware. The auditor included the invoice in the listing of invoices showing a New York presence, presumably because she believed that a VIP

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[1] In his testimony, Mr. Aiken explained this as a charge "to set up a diskette" (Hearing Tr., p. 59).

employee traveled into New York to install the hardware. The comments section does not indicate that there was a charge for travel expenses, and there is not a separate invoice for travel expenses which can be correlated to the installation found on invoice number 121188. There are some instances where a charge for installation of software is found on the same invoice as a travel expense charge. Invoice number 730 showed an invoice amount of $149.01 for transportation, room, meals and PC installation. None of this was deemed taxable. The invoices do not undermine the credibility of Mr. Aiken's testimony that VIP did not travel to New York to install, service or maintain computer hardware.

After receiving access to VIP's records, the auditor listed all invoices showing sales of property or services subject to sales or use taxes. Her worksheets list approximately 154 such invoices for the audit period.

Mr. Aiken attended a seminar in New York. The subject of the seminar was New York's bottle bill. Mr. Aiken participated as a presenter at the invitation of the seminar's sponsors. The seminar was not conducted for the purpose of training VIP customers or to solicit business in New York, and it occurred after the expiration of the audit period.

VIP registered to do business in New York with the Department of State over 10 years ago. On advice from an attorney, VIP ended its registration. VIP also consulted an accountant about 10 years ago who advised VIP that it had no duty to register as a vendor in New York State or to collect New York State use tax.

OPINION

In the determination below, the Administrative Law Judge concluded that: (1) petitioner was a vendor required to collect the use tax on its sales of computer hardware because it solicited business in the State, and by reason of such solicitation made sales of tangible personal property; (2) petitioner failed to meet its burden to show that it did not sell tangible personal property or perform services in New York State taxable under Article 28; (3) petitioner's presence in New York through employee business trips in combination with its other business activity in New York created a sufficient nexus between New York and petitioner to subject

petitioner to the obligation to collect use tax; and (4) petitioner did not meet its burden of establishing that its failure to file sales and use tax returns for the period under audit was due to reasonable cause.

On exception, petitioner asserts that: (1) petitioner was not a vendor required to collect sales and use taxes because it did not solicit business in New York; (2) petitioner lacked sufficient nexus with New York State to require it to collect use taxes for its sales in the State as petitioner's activities in the State related solely to the sale of non-taxable products and services; and (3) no penalties should be imposed for petitioner's failure to file sales and use tax returns or to pay taxes due because petitioner relied on Technical Services Bulletin, 1978-1(S), which exempts sellers of customized software from the obligation to collect sales tax on their sales to New York customers, and because petitioner relied on the advice of a third-party accountant.

In response to petitioner's exception, the Division asserts that petitioner's sales in New York of tangible personal property taken together with petitioner's New York presence in connection with its non-taxable sales of intangible personal property and non-taxable services created sufficient nexus under the Due Process and Commerce Clauses of the United States Constitution to require petitioner to collect use tax on its sales of computer hardware to customers in New York.

We affirm the determination of the Administrative Law Judge for the reasons set forth below.

Tax Law § 1110 imposes upon all persons a compensating use tax for use within New York State of any tangible personal property purchased at retail, except to the extent that such property has already been subject to sales tax. The obligation to collect the use tax is imposed upon every vendor of tangible personal property (Tax Law §§ 1131[1] and 1132[a]).

In determining whether petitioner was required to collect the taxes imposed under Tax Law § 1110, we must first determine whether petitioner was a vendor as defined by Tax Law § 1101. If it is determined that petitioner was such a vendor, we must then determine whether, under the Commerce Clause of the United States Constitution (US Const art I), sufficient nexus

exists between New York and petitioner to allow the imposition of the use tax collection obligation.

Former Tax Law § 1101(b)(8)(i), which was in effect during the audit period,[2] defined a vendor as including:

> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by [Article 28];
>
> (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 [Article 28];
>
> (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. . . ."

During the audit period, the Division's regulations defining a vendor, in the case of interstate vendors, provided in pertinent part:

> "(e) Interstate vendors. (1) A person outside of this State making sales to persons within the State, <u>who solicits the sales in New York, as defined in subdivision (d) of this section</u>, 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.
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> "(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
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> maintains a place of business as defined in subdivision (c) of this section, <u>nor solicits business as defined in subdivision (d) of this section</u>, is not required to register as a

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[2] Effective September 1, 1989, the statutory definition of vendor was modified. Tax Law § 1101(b)(8)(i)(C) now defines a vendor, in pertinent part, as:

> "A person who solicits business . . .
>
> * * *
>
> (II) by distribution of catalogs or other advertising matter, without regard to whether such distribution is the result of regular or systematic solicitation, if such person has some additional connection with the state which satisfies the nexus requirement of the United States constitution; 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."

> vendor. However, if such person registers voluntarily, he is under the same obligations as any other vendor.
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> * * *
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> "Example 3: A person makes sales entirely by catalog in this State from a point outside the State. In addition, he periodically sends repairmen, consultants and others, to maintain the merchandise he sold. He is required to register as a vendor" (former 20 NYCRR 526.10[e], emphasis added).

Soliciting business was defined in former 20 NYCRR 526.10(d) 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.
>
> "(2) A person is deemed to be soliciting business in New York if he distributes catalogs or other advertising material, in any manner in the State."

We conclude that under former Tax Law § 1101(b)(8)(i)(C) petitioner was a vendor obligated to collect the use tax imposed by Tax Law § 1131(1) on every vendor of tangible personal property. Former Tax Law § 1101(b)(8)(i)(C) requires that to be considered a vendor in New York State a person must solicit business within the State and, as a result of such solicitation, make sales to persons within the State of tangible personal property (see also, former 20 NYCRR 526.10[e][1]). Petitioner did both and was, therefore, a vendor required to collect the use tax on items taxed by Article 28.

Petitioner's mailing of brochures and other advertising materials to potential customers in New York State meets the definition of soliciting business under Tax Law § 1101(b)(8)(i)(C) and former sales tax regulation 20 NYCRR 526.10(d)(2). Petitioner asserts that its activities did not constitute "solicitation" of business in the State because its brochures were mailed into the State only in response to specific requests for information. In petitioner's view, these mailings should not be considered "solicitation." We disagree. Former Tax Law § 1101(b)(8)(i)(C) does not distinguish between proactive or reactive solicitation.[3] Further, we cannot see how this would be a meaningful distinction. Regardless of how the potential customers were identified, the purpose of petitioner's mailings was clearly to obtain new

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[3]The statute states that solicitation includes the "distribution of catalogs or other advertising matter" (former Tax Law § 1101[b][8][i][C]). In addition, former sales tax regulation 20 NYCRR 526.10(d)(2) states that solicitation includes the distribution of advertising materials "in any manner."

customers in the State. It is, therefore, our conclusion that petitioner was soliciting business as defined by the Tax Law.

The case cited by petitioner does not support its view that petitioner's activities did not constitute "solicitation." Petitioner cites Matter of Koffler v. Joint Bar Assoc. (51 NY2d 140, 432 NYS2d 872, cert denied 450 US 1026) to demonstrate that its activities do not constitute solicitation (Petitioner's memorandum of law, p. 6). In this case, the Court of Appeals defined "solicit" to mean "to move to action, to endeavor to obtain by asking, and implies personal petition to a particular individual to do a particular thing" (Matter of Koffler v. Joint Bar Assoc., supra, 432 NYS2d 872, 875, citing Webster's Third New Intl. Dictionary 2169 and Black's Law Dictionary 1248-1249 [5th Ed]). The Court in the same opinion contrasted this definition of "solicitation" with that for "advertising," which it defined as "the calling of information to the attention of the public by whatever means" (Matter of Koffler v. Joint Bar Assoc., supra, 432 NYS2d 872, 875, citing Webster's Third New Intl. Dictionary 31 and Black's Law Dictionary 50 [5th Ed]). Petitioner has repeatedly stated that it did not advertise. However, petitioner's activities fall directly within the Court's definition of "solicitation." Petitioner's directed mailings to potential customers were certainly intended to move particular New York entities to become VIP's customers. Thus, this case further supports our determination that petitioner's activities constituted "solicitation."

The Administrative Law Judge concluded that, as a result of petitioner's solicitation activities within New York, petitioner made sales of tangible personal property consisting of the computer hardware. We agree. Petitioner asserts, however, that even if it was engaged in solicitation activities, it did not make sales in New York of tangible personal property but, rather, its sales were limited to sales of customized computer software and the maintenance thereof, both non-taxable activities under the Tax Law. Petitioner's claim appears to be that petitioner did not sell the computer hardware but, rather, the computer hardware was purchased by petitioner's customers from the computer manufacturer. The record below does not support this conclusion. Petitioner solicited the sales of computer hardware from its potential software

customers. As part of its sales of customized software, petitioner supplied its customers, when appropriate, with the computer equipment to run the customized software. Petitioner's president testified that petitioner purchased computer hardware from IBM and other manufacturers, added the customized software and then resold the hardware with the customized software to its customers. As the Administrative Law Judge noted, petitioner's witnesses consistently spoke of these transactions as purchases by VIP and resales to its customers. While employees of the computer manufacturers installed the equipment on the customer's premises, petitioner set the price for the equipment, and billed its customers for the equipment and the costs of installation. These billing procedures further establish that these were petitioner's sales and not sales by the computer manufacturer. Thus, the Administrative Law Judge correctly concluded that petitioner sold tangible personal property in the State and that such sales were a result of petitioner's solicitation making petitioner a vendor under former Tax Law § 1101(b)(8)(i)(C).

Having determined that petitioner met the State's statutory definition of a vendor required to collect the use tax on items taxed by Article 28, we must now determine whether petitioner's activities satisfied the nexus requirement of the Commerce Clause of the United States Constitution.[4] Petitioner asserts that its contacts with New York State are insufficient to warrant the imposition of tax collection responsibilities.

Where a vendor's activities in the State consist solely of solicitation of customer sales and shipment of goods by mail or common carrier, the vendor's contacts with the state are insufficient to constitute nexus and an obligation to collect a state's use tax cannot be imposed on the vendor by the state (Quill Corp. v. North Dakota, ___ US ___, 112 S Ct 1904; National Bellas Hess v. Department of Rev. of State of Illinois, 386 US 753). A vendor must have a physical presence in a state before the state can impose the obligation to collect use taxes (Quill Corp. v. North Dakota, supra; National Geographic Socy. v. California Bd. of Equalization, 430

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[4]A state may have authority to tax under the Due Process clause of the Constitution as only a minimal connection with the state is required; however, the imposition of the tax may still violate the Commerce Clause because the potential taxpayer's contacts with the state are insufficient to establish nexus (Quill Corp. v. North Dakota, ___ US ___, 112 S Ct 1904). Since we find that in this case, the Commerce Clause requirements have been met, it is unnecessary for us to separately discuss the application of the Due Process Clause.

US 551; National Bellas Hess v. Department of Rev. of State of Illinois, supra). To date, the Court has not quantified the extent of the physical presence needed to impose such an obligation. The Court has stated, however, that the existence of a "slightest presence" within the state is not enough (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1915, footnote 8; National Geographic Socy. v. California Bd. of Equalization, supra, at 556).

In Quill, the Court acknowledged that the point at which nexus is found to exist is an artificial point (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1914). To determine if this artificial point has been reached, a careful evaluation of the vendor's activities is required, for "[t]he test is simply the nature and extent of the activities of the [vendor] in [the state]" (Scripto, Inc. v. Carson, 362 US 207, 211-212; see also, 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 sufficient nexus to justify imposition of use tax liability]; Matter of Orvis, Inc., Tax Appeals Tribunal, January 14, 1993).

The Court's decision in National Geographic is instructive as to what activities or factors should be considered in determining whether a taxpayer's presence surpasses that of a "slight physical presence." The National Geographic Society conducted an out-of-state mail order business and at the same time maintained two small offices in California that solicited advertisements for National Geographic Magazine. California sought to impose use tax obligations on the Society for its mail order sales based upon the presence of the California offices. The Society argued that the business activities of these offices were totally unrelated to the mail order sales that California sought to tax and, therefore, the Court should not take the activities of the in-state offices into account in determining whether sufficient nexus existed. This argument was specifically rejected by the Court (National Geographic Socy. v. California Bd. of Equalization, supra, at 562). The Court stated that for nexus to exist there is no requirement that, in addition to a relationship between the taxing state and the taxpayer, there be a direct correlation between the activity sought to be taxed and the taxpayer's activity in the state (National Geographic Socy. v. California Bd. of Equalization, supra, at 560). In

determining whether nexus exists, the Court indicated that it is the seller's activities of whatever nature in the state which must be examined (National Geographic Socy. v. California Bd. of Equalization, supra, at 560). While the Court did not define at what point the Society's activities surpassed a "slightest presence," it did hold "that [National Geographic's] maintenance of the two offices in California and activities there adequately establish[ed] a relationship or 'nexus' between the Society and the State that render[ed] constitutional the obligations imposed upon [National Geographic] pursuant to §§ 6203 and 6204 [of the California Tax Law]" (National Geographic Socy. v. California Bd. of Equalization, supra, at 556). The Court found that the Society was subject to the California use tax because sufficient nexus existed and the Society met the statutory definition of a "retailer engaged in business in [the] state" (National Geographic Socy. v. California Bd. of Equalization, supra, at 556).

Petitioner makes the same argument made by the Society asserting that, in determining if sufficient nexus exists, only in-state activities associated with taxable sales are to be examined and that, since its physical presence in the State was only related to its nontaxable sales of computer software, insufficient nexus exists. We agree with the Administrative Law Judge that, based upon the decision in National Geographic, "all of [petitioner's] activities in New York may properly be considered in determining whether [the petitioner] had a sufficient connection with New York to warrant imposition of the burden to collect the use tax" (Determination, Conclusion of Law "D").

In our view, petitioner's activities represent more than a "slight physical presence" in this State. While petitioner's activities in the State may be less substantial than those in National Geographic, we think that the "nature and extent of the activities" (Scripto, Inc. v. Carson, supra, at 211) of petitioner's employees in New York created a sufficient nexus to impose a use tax liability for the sale of the computer hardware. Petitioner's employees periodically entered New York to install or to provide maintenance for the customized computer software it sold.[5] The computer equipment on which the customized software was installed was either previously

[5]Petitioner's employees also made occasional visits into the State to hold training sessions on the use of its software programs.

owned by petitioner's customers or newly purchased from petitioner in order to make use of petitioner's customized software packages. We have previously discussed that petitioner's sales of the computer hardware and software resulted from petitioner's solicitation in the State. Petitioner is, therefore, subject to the requirements of Article 28 of the Tax Law as its solicitation of customers and sales of tangible personal property qualified petitioner as a vendor under Tax Law § 1101(b)(8)(i)(C), and petitioner's physical presence by its employees installing and maintaining the computer software sold to New York customers created sufficient nexus.

On the issue of penalties, petitioner has made the same arguments on exception that it made before the Administrative Law Judge. We find no reason to alter the Administrative Law Judge's determination and, therefore, for the reasons stated in that determination, we uphold the Administrative Law Judge's determination that petitioner has not established reasonable cause for the abatement of penalties.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner Vermont Information Processing, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Vermont Information Processing, Inc. is denied; and

4. The Notice of Determination issued to petitioner Vermont Information Processing, Inc. on November 27, 1987 is sustained.

DATED: Troy, New York
January 21, 1993

/s/John P. Dugan
John P. Dugan
President

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

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