STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
STAINLESS, INC.	:	DECISION DTA No. 807415
for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period March 1, 1983 through February 28, 1987.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge issued on March 12, 1992 with respect to the petition of Stainless, Inc., 310 Piquette Street, Detroit, Michigan 48202-3598, for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1983 through February 28, 1987. Petitioner appeared by Sullivan, Ward, Bone, Tyler and Asher (Marc A. Letvin, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel).

The Division of Taxation and petitioner each filed a brief and a supplemental brief. In addition, petitioner filed a reply brief to the Division of Taxation's supplemental brief. The Division of Taxation withdrew its request for oral argument.

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

ISSUES

I. Whether there existed sufficient connection or nexus between petitioner and the State of New York such that petitioner was required to register as a vendor and collect sales and use taxes from its New York customers.

II. Whether petitioner was required to collect tax specifically with respect to two walk-in coolers sold to its customers in New York State.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for finding of fact "10" which has been modified. The Administrative Law Judge's findings of fact and the modified finding of fact are set forth below.

During 1987 the Division of Taxation conducted and completed a field audit of the potential sales and use tax liability of petitioner, Stainless, Inc. ("Stainless"), for the period March 1, 1983 through February 28, 1987. This audit was undertaken as a result of information gleaned from audits of certain of petitioner's customers located in New York State. During the period of time covered by the audit, petitioner was engaged in the business of manufacturing and selling restaurant equipment, consisting primarily of kitchen equipment such as fryolators, stoves, food shelving and stacking units, coolers, etc. Petitioner maintains facilities, including manufacturing facilities, in Detroit, Michigan and in Deerfield Beach, Florida. Petitioner has never maintained any facilities in New York State.

Petitioner sells its equipment on a nationwide basis, with its principal customers being Big Boy Restaurants ("Big Boy"), Carrolls Restaurants ("Carrolls"), and Burger King Restaurants ("Burger King").[1] Burger King is headquartered in Florida. Petitioner's equipment is sold both to Burger King company-owned outlets as well as Burger King franchised outlets. Petitioner's sales to Burger King outlets are processed through petitioner's company headquarters in Deerfield Beach, Florida.

At the commencement of the audit, the auditor requested that petitioner submit its books and records for examination. Petitioner in turn made its books and records available, the same were examined by the auditor, and constitute the basis upon which the audit results and the tax determined to be due were calculated.

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[1]There is no significant evidence in the record relating to Big Boy or Carrolls. In fact, nearly all of the sales examined upon audit and at issue herein were made to Burger King and/or its franchisees. Accordingly, the evidence specific to petitioner's methods of operation pertains solely to its activities related to Burger King and/or Burger King franchisees.

During the period under audit, petitioner was not registered as a vendor with the State of New York for sales and use tax purposes. As a result of the auditor's participation in prior audits of restaurants in New York State, he learned that petitioner employed a representative who had contact with petitioner's customers in New York. In this connection, a questionnaire given to petitioner as part of the audit and completed by petitioner's controller, one Russell N. Smith, was introduced in evidence. This document, referred to as a "nexus questionnaire", provided, in relevant part, as follows:

> "Question 12 - Do you have any employees, commission agents or sales representatives, whether assigned to New York State or outside New York State, who solicit customers for your company in New York State?
>
> Answer - Yes, see Item number 34."

In turn, "Item number 34" required petitioner to provide a "[b]rief description of [the] company's business activities and products sold". In response to this question, petitioner indicated "[c]ompany has one sales person resident in New York who covers N.E. U.S. region. All orders are administered by home office in Florida. Sales person visits customer's location to inventory final shipments and assure completeness of order and absence of freight damage."

Based largely on the foregoing, the auditor determined that there was a sufficient nexus to hold petitioner subject to sales and use taxes on its sales to customers located in New York. Accordingly, two notices of determination and demands for payment of sales and use taxes due, each dated October 27, 1987, were issued to petitioner assessing sales and use taxes due for the period March 1, 1983 through February 28, 1987 in the aggregate amount of $108,933.08, plus interest. Penalty was not assessed.

Petitioner requested a prehearing conciliation conference. The conference was held on January 27, 1989, and resulted in the issuance of a Conciliation Order, dated July 7, 1989, reducing the amount of sales and use taxes assessed against petitioner to $55,879.78. The basis for this reduction was recognition of a computational error in the amount of tax assessed

($4,342.86), together with a finding, based upon substantiation furnished by petitioner, that $48,710.44 in use tax had been paid by petitioner's customers on equipment they had purchased. Accordingly, revised notices of determination were issued reflecting the reduced total of $55,879.78 as due and owing. In addition, evidence submitted at hearing reveals that an additional amount of $36,172.37 in tax has been paid on the transactions at issue, thereby leaving the amount of tax assessed and outstanding as of the date of these proceedings to be $19,707.41, plus interest.

At hearing, the parties stipulated to the admission of an affidavit made by one Robert L. Kassab, petitioner's president. By this affidavit, Mr. Kassab alleges, inter alia, that petitioner had no representative, employee or agent who solicited business in New York State during the period in question, but rather that petitioner did have one employee, described as a "field representative", who entered New York State on petitioner's behalf during the period in question. This individual, one Richard Jeffery, resided in New York State and was in petitioner's employ until October 17, 1986, after which date one Mark Haughie, a New Jersey resident, became petitioner's representative handling its New York business. These representatives covered a territory described as the "northeast United States". These representatives were, in some instances, present at the customer's site during delivery of the merchandise, allegedly for the sole purpose of taking an inventory of the products being delivered to assure completeness of the order and lack of damage during shipment. These representatives did not assist petitioner's customers in installation of the products sold by petitioner.

Attached to and made a part of Mr. Kassab's affidavit was a statement describing the facts of petitioner's operation. Petitioner's sales, such as those that are at issue herein, and specifically those to Burger King, are described as "going through" petitioner's headquarters in Deerfield Beach, Florida. Petitioner's sales were generated as the result of petitioner's being on an "approved vendor list" at Burger King's corporate headquarters. Petitioner provided Burger King with a description of its product line and its prices, which list was in turn disseminated by Burger

King to its franchisees. In some instances, a sale by petitioner occurred through direct contact initiated by a potential customer who had reviewed the Burger King approved vendor list. In such an instance, no contact was initiated with the potential customer by any Stainless personnel. These instances apparently involved Burger King franchisees with knowledge of the equipment needed to set up a new restaurant (presumably franchisees already operating one or more Burger King outlets). In other instances, Stainless would be notified by Burger King that a franchise site had been approved. Stainless would then contact the franchisee to provide information as to its products. This contact was undertaken from an office outside of New York, usually by telephone. In most instances, the franchisee would then visit Stainless's manufacturing plant in Florida to review Stainless's products.

After the first contacts described above, sales were carried out on two basic variations. First, a "more sophisticated" Burger King operator would order what that operator wanted, knowing the prices and the products by review of the aforementioned approved vendor list and/or on-site visits to petitioner's Florida facility. In contrast, a "less sophisticated" customer/operator would lack the necessary background to know exactly what would be required for his installation. In these instances, Stainless would provide a representative (the above-described field representative) to coordinate the customer's purchases. This field representative essentially assisted the customer in determining the customer's needs. Equipment purchased was always shipped to the customer by common carrier FOB Florida (or Michigan).

We modify finding of fact "10" of the Administrative Law Judge's determination to read as follows:

> No contracts, standard or otherwise, or any invoices relative to the transactions upon which the tax at issue is based were offered in evidence. The auditor noted that on certain invoices installation charges were included. Petitioner's representative at hearing alleged that a customer would sometimes request Stainless to arrange for installation of the equipment. Such arrangements were made with outside parties (contractors) who actually installed the equipment, with Stainless merely acting to arrange for the installation. The auditor agreed in this regard that he believed

> installation was not in fact carried out by petitioner's employees, but by other persons hired or contracted to do the installations. There is no evidence upon which to determine whether the installation charges allegedly appearing on certain invoices represented in fact a pass-through of the actual installation charges, or included some margin or markup to allow for a profit on the service of obtaining an installer.[2]

Petitioner's field representative did not "take" or "write-up" purchase orders. Rather, equipment orders were generally completed when the customer sent its order to Detroit or Florida to be approved by petitioner. The exact method of ordering was not further specified on the record.

There is no evidence that petitioner ever advertised in any publication or other media in New York, or mailed or otherwise distributed any catalogues, flyers, or other materials save for the approved vendor equipment and price list supplied via Burger King or upon request by a potential customer. In addition, petitioner did not own or maintain any office, facility or property in New York.

A portion of the tax at issue herein is based upon petitioner's sale of two walk-in coolers installed at Burger King outlets. The Division of Taxation (hereinafter the "Division") stipulated at hearing that such walk-in coolers, when installed, constituted capital improvements thereby leaving no sales tax due from the customer on installation charges. By its brief, the Division agreed to rescind so much of the unpaid balance of the assessment as is attributable to either or both of the two walk-in coolers at issue which were sold to New York customers and "which were installed by the petitioner or by contractors retained by the petitioner for that purpose." The Division's abatement pertains to any tax assessed on the cost of such coolers, as well as any tax assessed on the installation cost allocable to the coolers (computed by dividing the cost of the walk-in coolers by the total cost of equipment purchased, and multiplying the result by the installation charge to the customer). The Division, however, would not concede to abate tax

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[2]The Administrative Law Judge's finding of fact "10" was modified to delete the words "as an agent" from between the words "acting" and "to" in the fourth sentence of the paragraph. This change was made because the record does not indicate the specific nature of petitioner's relationship to the installation.

assessed on either of such coolers not installed by petitioner or by contractors retained by petitioner for that purpose. No other evidence was submitted at hearing with regard to the coolers.

OPINION

The Administrative Law Judge determined that petitioner was not a vendor within the meaning of the statute and regulations and did not have the "constitutionally required minimal connection with New York State requisite for imposition of the duty to collect the tax in question" (Determination, p. 12). This conclusion was based on the Administrative Law Judge's finding that petitioner did not solicit customers through its service representatives in New York because these representatives only visited customers at the request of the potential customer. Other factors relied on by the Administrative Law Judge were that petitioner did not advertise in New York State, all of the equipment was shipped FOB Florida, petitioner owned no property or facilities in New York, petitioner did not install its equipment or service the same and that petitioner's customers purchased equipment from petitioner as an approved vendor on the Burger King approved vendor list. Because the Administrative Law Judge concluded that petitioner was not a vendor, he held that petitioner was not liable for use tax on sales to New York customers. Finally, the Administrative Law Judge concluded that the taxability of the sale by petitioner of two walk-in coolers was rendered moot, given her determination that petitioner was not a vendor required to collect the use tax.

On exception, the Division argues that petitioner's activities of providing services to customers, namely assisting the customer in ordering, and either supervising or arranging for the installation of the products sold by petitioner, provided a sufficient nexus with New York to impose use tax liability on petitioner. Citing National Geographic Socy. v. California Bd. of Equalization (430 US 551), the Division argues that all of petitioner's activities should be considered in determining whether it had sufficient nexus with New York. The Division also argues that the recent Supreme Court decision in Quill Corp. v. North Dakota (___US___, 112 S

Ct 1904) does not change the Division's conclusion that petitioner had a sufficient nexus with New York State. With respect to the walk-in coolers, the Division argues that when not installed by petitioners, the coolers were sold as tangible personal property by petitioner, and not as capital improvements, and were subject to tax.

In response, petitioner argues that it is not a vendor under New York law and regulations because all of its work in New York is in reaction to other parties and, therefore, it does not solicit business. Petitioner also argues that the arranging of installation does not make petitioner a vendor because the definition of vendor in the law and regulations requires either solicitation or the servicing of property. If it were a vendor under State law, petitioner argues that the imposition of tax liability would violate the Federal Constitution. Petitioner states that under Quill Corp. v. North Dakota (supra) the activities of the taxpayer in the State must be weighed against the impediment that the tax would impose and that petitioner's activities in New York do not justify imposition of the tax. Petitioner stresses that because petitioner only responds to requests from its potential customers it does not even control the jurisdiction in which its sales occur.

We reverse the determination of the Administrative Law Judge.

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" (former Tax Law § 1101[b][8][i][C]).

The Division's regulations, applicable to the period at issue, defined soliciting business, 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]).

As petitioner had a field representative in the State during the period in question, the critical question under both the statute and regulation is whether this representative was soliciting customers for petitioner.

In a decision issued subsequent to the Administrative Law Judge's determination in this case, we have already determined that solicitation as used in the law and regulations includes both proactive and reactive solicitation (see, Matter of Vermont Information Processing, Tax Appeals Tribunal, January 21, 1993). Therefore, the fact that petitioner's representative only contacted potential customers in response to the customers' requests does not preclude the representative's activities from being considered solicitation. The question that remains is whether the activity of assisting the customers in selecting purchases is within the meaning of solicitation.

In Wisconsin Dept. of Rev. v. Wrigley Co. (___US___, 112 S Ct 2447), the Supreme Court was called upon to define the meaning of "solicitation of orders" as that phrase is used in section 381(a)(1) of Public Law 86-272 (15 USC § 381[a][1]). The Court began its analysis by stating that:

> "'[s]olicitation,' commonly understood, means '[a]sking' for, or 'enticing' to, something, see Black's Law Dictionary 1393 (6th ed. 1990); Webster's Third New International Dictionary 2169 (1981) ('solicit' means 'to approach with a request or plea (as in selling or begging)'). We think it evident that in this statute the term includes, not just explicit verbal requests for orders, but also any speech or conduct that implicitly invites an order. Thus, for example, a salesman who extols the virtues of his company's product to the retailer of a competitive brand is engaged in 'solicitation' even if he does not come right out and ask the retailer to buy some" (Wisconsin Dept. of Rev. v. Wrigley Co., supra, 112 S Ct 2447, 2453-2454).[3]

[3]Ultimately, the Court decided that solicitation as used in the Federal statute was intended to encompass more than this basic definition and included the entire process associated with the invitation of orders. The entire process was held to include all activities ancillary to requesting purchases, so long as the activities served no independent business function apart from their connection to the solicitation of orders.

Although this definition was stated by the Supreme Court in a different statutory context, we believe it is appropriate here because it gives solicitation a practical, flexible meaning adapted to the varieties of modern business practices.

Under this definition, we conclude that petitioner's activities of assisting customers in selecting equipment to fit the customer's needs was conduct that implicitly invited a purchase. Therefore, we conclude that petitioner was soliciting customers in New York and was a vendor as defined by statute and regulation during the period at issue.

The next question before us is whether the imposition of the use tax liability on petitioner would violate the Federal Constitution. In Quill Corp. v. North Dakota (supra), the Supreme Court has recently reaffirmed that the Commerce Clause of the Federal Constitution requires that a vendor have a physical presence in the state before the state can impose the obligation to collect use taxes (see also, National Bellas Hess v. Department of Rev. of State of Illinois, 386 US 753). The amount of physical presence that is required to establish nexus has not been quantified by the Supreme Court, but the Court has stated that the presence must be more than a slightest presence (Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1915, footnote 8; see also, National Geographic Socy. v. California Bd. of Equalization, supra, at 556). It is also clear that all of the activities of the taxpayer in the state may be taken into account to determine if the taxpayer has sufficient nexus with the state (National Geographic Socy. v. California Bd. of Equalization, supra, at 560).

Petitioner was physically present in New York through the physical presence of its service representative performing two types of activities. First, as noted above, this representative assisted some of petitioner's customers in determining the customers' equipment needs. Second, this representative was present in New York during the delivery of some customer orders. The fact of this physical presence distinguishes the instant case from the facts of Quill and National Bellas Hess, where the vendor's contact with the state was limited to the solicitation of sales and the delivery of merchandise by mail or common carrier (Quill Corp. v. North Dakota, supra;

National Bellas Hess v. Department of Rev. of State of Illinois, supra). Further, we conclude that the presence of the service representative performing these activities is substantially more than a slightest presence (cf., Quill Corp. v. North Dakota, supra [where title to the contents of a few floppy diskettes was identified as being an insufficient basis for nexus] and does provide a sufficient ground upon which to base nexus. This conclusion is in accord with the Supreme Court's decisions in Scripto, Inc. v. Carson (362 US 207), General Trading Co. v. State Tax Commn. of Iowa (322 US 335) and Felt & Tarrant Mfg. Co. v. Gallagher (306 US 62), where nexus was found based on the presence of local agents or independent contractors soliciting sales. We note that petitioner has not quantified the amount of time its representatives spent in New York performing activities. Because petitioner bore the burden of proof with respect to the nexus issue (see, Matter of Orvis, Inc., Tax Appeals Tribunal, January 14, 1993), its failure means that it has abandoned any argument that it might have been able to make about the quantity of time being insignificant or functioning as a basis to distinguish these facts from those in Scripto, General Trading Co. or Felt & Tarrant Mfg. Co.

Another activity of petitioner that can be considered as a basis for nexus is its arranging for equipment installation. Petitioner has not established how it arranged for these installations, the relationship between it and the installer, nor the number of installations that took place during the audit period. The only definite information in the record is that petitioner charged for installations on some invoices and that the installations were not made by employees of petitioner. Because the presence of agents or independent contractors performing activities on petitioner's behalf could be attributed to petitioner (see, Scripto, Inc. v. Carson, supra.; General Trading Co. v. State Tax Commn. of Iowa., supra), this installation activity must be considered an additional basis for finding that petitioner had a sufficient nexus with New York State. Petitioner cannot benefit from having failed to fully describe this aspect of its activities in New York (see, Matter of Orvis, Inc., supra).

Petitioner has argued that the decision in Miller Bros. Co. v. State of Maryland (347 US 34O, reh denied 347 US 964) requires the conclusion that petitioner does not have sufficient nexus with New York State. We reject petitioner's argument on two grounds. First, Miller Bros. was explicitly decided only under the Due Process Clause and not under the Commerce Clause (Miller Bros. Co. v. State of Maryland, supra, at 345, 347). The Quill decision identified the tests under the two clauses as being distinct and overruled prior decisions to the extent they held that the Due Process Clause required a physical presence (Quill Corp. v. North Dakota, supra). Accordingly, it is not clear to us that Miller Bros. is relevant to determining nexus under the Commerce Clause. If Miller Bros. were relevant, we would still find it distinguishable from the instant case for, as petitioner notes, the Court in Miller Bros. found that the vendor engaged in no solicitation in the state other than general advertising and was only present in the state to make occasional deliveries (Miller Bros. Co. v. State of Maryland, supra, at 347). In the instant case, we have concluded that petitioner's activity in New York included solicitation. In response to petitioner's contention that it did not even control the jurisdiction into which its sales were made, we note that because petitioner shipped the equipment to its customers, petitioner both knew and controlled the destination of its sales, unlike the vendor in Miller Bros. who made some sales that were carried away by the customers.

Because we have concluded that petitioner had a sufficient physical presence in New York to satisfy the substantial nexus test required by the Commerce Clause, we need not address whether petitioner also satisfied the minimum connection test required by the Due Process Clause (see, Quill Corp. v. North Dakota, supra).

Given our conclusion that petitioner may be liable for the use tax imposed by New York, we must now decide whether the two walk-in coolers at issue were subject to tax. As stated in the facts, the Division agreed that tax was not due on coolers installed by petitioner or by contractors retained by petitioner. The Division refused to abate tax on the two coolers remaining at issue because petitioner did not establish that it installed them or arranged for their

installation. Petitioner argues that these coolers are exempt from tax, under section 1105(c)(3) of the Tax Law, because they are capital improvements. Petitioner relies on Matter of Dairy Barn Stores (Tax Appeals Tribunal, October 5, 1989) for this conclusion.

Because there is no evidence that petitioner installed these coolers, tax was imposed on petitioner with respect to them under section 1105(a) of the Tax Law for the retail sale of tangible personal property, not under section 1105(c)(3) of the Tax Law for the service of installing tangible personal property. Matter of Dairy Barn Stores (supra) involved tax imposed under section 1105(c)(3) of the Tax Law. Therefore, petitioner's argument that the sale of the coolers was exempt from the section 1105(c)(3) tax, based on Dairy Barn, is irrelevant. As petitioner has advanced no argument that would exempt it from the tax imposed by section 1105(a) on the sale of the coolers as tangible personal property, we sustain this portion of the assessment.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of Stainless, Inc. is denied; and

4. The notices of determinations and demand, dated October 27, 1987, are sustained.

DATED: Troy, New York
April 1, 1993

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

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