STATE OF NEW YORK

TAX APPEALS TRIBUNAL

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

Petitioner Robert Mann d/b/a Bob Mann Construction Equipment, 1020 Main Street, Shrub Oak, New York 10588, filed an exception to the determination of the Administrative Law Judge issued on January 13, 1994. Petitioner appeared by Solomon Abrahams, Esq. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq. of counsel).

Petitioner filed a brief in support of his exception and the Division of Taxation filed a brief in opposition. Petitioner filed a reply brief which was received on May 2, 1994 and began the six-month period for the issuance of this decision. Petitioner's request for oral argument was denied.

The Tax Appeals Tribunal renders the following decision per curiam.

***ISSUES***

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

II. Whether petitioner had sufficient nexus with New York State so that imposition of the taxes at issue does not violate the Commerce Clause.

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

IV. Whether penalty should be abated.

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

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

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

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

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

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

On audit, the Division requested that petitioner make available for review essentially all records pertaining to his business operations from its inception through February 28, 1990.[1] With respect to its audit of petitioner's taxable sales, the Division reviewed petitioner's Federal income tax returns schedule C, general ledger and invoices for the period at issue. For the years 1985 through 1988, the Division relied on its review of petitioner's invoices to determine additional taxable sales. Along with petitioner's former representative, the Division reviewed such invoices in detail and compiled handwritten summary sheets listing the date, invoice number, customer name and address, equipment sold, selling price, and location of the sale. These summary sheets were then reviewed to determine which sales were subject to sales tax. The Division's determination as to whether a sale was subject to sales tax was based upon the Division's determination of the location of the sale. Where the Division determined that a sale occurred in New York, it was deemed subject to sales tax. With respect to such deemed New York sales, the Division did not assess tax on sales for which petitioner produced a properly completed exemption certificate or on sales where the purchaser paid the tax directly to the Division.[2] The Division then assessed tax on all deemed New York sales for the 1985 through 1988 period where no exemption certificate was produced and where the purchaser had not paid the tax directly to the Division.

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

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

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

The handwritten summary sheets prepared by the auditor and petitioner's former representative detailed 93 total sales made by petitioner during the 1985 through 1988 period.[3] The Division assessed tax herein on 37 of these sales. Information regarding these 37 sales was then entered on a set of computerized summary sheets. This information was identical to that listed on the handwritten summary sheets with respect to these 37 sales except that for 7 of the sales the location of the sale as listed on the handwritten sheets was different from that listed on the computerized sheets. Specifically, on the handwritten sheets, 6 of these sales listed "Port Newark" or "F.O.B. Port Newark" as the location of the sale, while one did not list a location on the handwritten sheets. On the computerized sheets, 6 of these 7 sales listed the purchaser's (New York) address as the location of the sale. The remaining sale listed petitioner's New York address as the location of the sale. (This sale did not list an address for the purchaser.) There was no discussion or explanation in the record regarding the above-noted discrepancies between the handwritten summary sheets and the computerized summary sheets.

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

In the area of "Tax Accrued Not Paid", the Division reviewed petitioner's general ledger sales tax accrual account, his invoices and his filed sales tax return for the quarter ended

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

November 30, 1989. The Division found that, with respect to this period, petitioner had accrued $22,398.00 in tax in excess of the amount reported and paid. With respect to the area of "Fixed Asset Acquisitions", the Division reviewed petitioner's general ledger and, for pre-1987 acquisitions,[4] the depreciation schedules on petitioner's Federal income tax returns. This review determined $27,890.81 in acquisitions for which petitioner could produce no invoices or other proof that taxes had been paid. This resulted in an assessment of $1,603.73 in additional tax due. In the area of "Expenses", the Division reviewed all expense invoices made available and determined the percentage on which no tax was paid. This percentage was calculated to be 2.1834%. The Division then applied this percentage to deductions and cost of goods sold per petitioner's Federal schedule C's. Additional tax due in the area of expenses was thus determined to be $434.00.

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

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

Petitioner relied heavily on word-of-mouth to generate business. Additionally, petitioner advertised his business by placing signs at contractor friends' places of business. Such signs bore the name of petitioner's business and his home telephone number. Petitioner had at least three such signs in place during the period at issue.

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

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

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

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

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

paid. Petitioner did not charge or collect sales tax. Petitioner's receipt listed petitioner's name (i.e., Bob Mann Construction Equipment) and Shrub Oak address and the customer's name and address.

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

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

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

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

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

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

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

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

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

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

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

***OPINION***

The Administrative Law Judge determined that petitioner had timely requested a conciliation conference for all four notices of determination issued to him on August 23, 1991. The parties have not taken exception to this aspect of the Administrative Law Judge's determination.

Turning to the merits of the matter, during the period in issue, Tax Law § 1101(b)(8)(i) defined vendor, in part, as:

> "(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article;
>
> "(B) A person maintaining a place of business in the state and making sales, whether at such place of business or elsewhere, to persons within the state of tangible personal property or services, the use of which is taxed by this article."

The Administrative Law Judge determined that petitioner was a vendor within this definition because he maintained two places of business within the State (his home and the lot on Route 202) and because he failed to prove that he did not make sales of tangible personal property. On exception, petitioner disputes the latter conclusion stating:

> "Petitioner has testified before the Administrative Law Judge that Petitioner did not convey any title to anyone (Tr 48, 51) and could not do so because he did not own the equipment. Petitioner contends that his testimony before the Administrative Law Judge complies with its burden of proof upon the issue of whether Petitioner became a vendor for transactions which involved the Taxing Authority of the State of New York" (Petitioner's reply brief, p. 5).

The Administrative Law Judge's determination reflects a careful weighing of the evidence to reach the conclusion that petitioner failed to prove that he did not make sales of equipment. The Administrative Law Judge noted that: petitioner conceded "that he negotiated the sales price with the purchaser, collected and deposited in his bank account the full price from the purchaser, issued the purchaser a receipt and paid the supplier its selling price"; petitioner described the price set by Mountain Service as a wholesale price; and petitioner's so-called commission could just as accurately be described as gross profit (Determination, conclusion of law "K"). These facts coupled with the fact that petitioner failed to introduce any documentary evidence to support his testimony that he was a broker for Mountain Service and that Mountain Service provided "bills of sale" to petitioner's customer led the Administrative Law Judge to conclude that petitioner failed to prove that he did not sell the construction equipment. Underlying the Administrative Law Judge's conclusion, is his finding that petitioner's testimony was not credible to establish that he did not sell the construction equipment. We defer to the Administrative Law Judge's evaluation of the credibility of the witness (Matter of Spallina, Tax Appeals Tribunal, February 27, 1992). Given this principle and the fact that we believe the Administrative Law Judge correctly weighed the evidence, we agree with the Administrative Law Judge that the evidence supports the conclusion that petitioner did make sales of construction equipment and that petitioner did not sustain his burden of proof to show that he did not make such sales.

The Administrative Law Judge also sustained the amount of sales tax determined by the Division. On exception, petitioner claims that the Division's assessment did not have a rational basis.

On this issue, the Administrative Law Judge found that the Division made a determination as to which sales took place in New York based on the information on petitioner's invoices, i.e., either the customer's address or a specifically designated place of delivery, and, in addition, for the year 1989, relied on a summary of sales made by petitioner's former representative. The Administrative Law Judge stated that petitioner presented no evidence, not

even the invoices, other than general assertions, to refute the assertion of tax due with respect to any specific sale. In the absence of such evidence, the Administrative Law Judge concluded that the Division's determination of the amount of sales made by petitioner that were subject to sales tax must be sustained. We affirm the Administrative Law Judge's conclusion on this issue for the reasons stated in the determination.

Because we agree with the Administrative Law Judge's conclusions that petitioner failed to prove that he did not sell equipment in New York State, it follows that we agree with the Administrative Law Judge's conclusion that petitioner was a vendor within the definition of section 1101(b)(8) of the Tax Law.

Next, the Administrative Law Judge concluded that petitioner had sufficient nexus with New York to be held liable for the tax at issue. The Administrative Law Judge relied on our decision in Matter of Orvis Co. (Tax Appeals Tribunal, January 14, 1993). Since the Administrative Law Judge's determination, the Appellate Division, Third Department, reversed our decision in Orvis (Matter of Orvis Co. v. Tax Appeals Tribunal, ___AD2d___, 612 NYS2d 503). Nonetheless, we believe that the Administrative Law Judge correctly concluded that petitioner had sufficient nexus with New York to justify the imposition of the tax at issue.

In Orvis and in Matter of Vermont Information Processing v. Tax Appeals Tribunal (___ AD2d ___ [July 28, 1994]) the Appellate Division had the opportunity to apply the Supreme Court decision of Quill Corp. v. North Dakota (___ US ___, 112 S Ct 1904). In Orvis, the Court stated that:

> "Quill holds that, under the Commerce Clause, the imposition of a state use tax obligation requires, inter alia, a 'substantial nexus' between the taxing state and the activity taxed to ensure that state taxation does not unduly burden interstate commerce [Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1913]. In the mail order context, 'substantial nexus' requires an in-state physical presence, and thus, the question of 'whether or not a State may compel a vendor to collect a sales or use tax may turn on the presence in the taxing State of a small sales force, plant or office' [Quill Corp. v. North Dakota, supra, 112 S Ct 1904, 1914] . . . the effect of Quill is that it increased the requisite threshold of in-state physical presence from any measurable amount of in-state people or property to substantial amounts of in-state people or property" (Matter of Orvis Co. v. Tax Appeals Tribunal, supra, 612 NYS2d 503, 506).

We believe petitioner meets this higher threshold.

Petitioner had an office at his home in this State. The business transacted by petitioner at this New York office included contacting potential customers. Therefore, petitioner had both an office and a sales force in New York. Unlike the petitioners in Orvis and Vermont Information Processing, petitioner had a constant physical presence in New York, this presence served his primary business purpose, i.e. selling equipment, and petitioner solicited sales through this New York presence (cf., Matter of New Milford Tractor Co., Tax Appeals Tribunal, September 1, 1994) [where we found the petitioner's presence in New York to be sporadic, incidental to its primary business and not for the purpose of soliciting sales]). We believe that this physical presence is substantial, given the scope of petitioner's overall business, and that the imposition of this tax does not contravene the Commerce Clause.

Finally, petitioner argues that penalty should be abated. The Administrative Law Judge did not address this issue because petitioner did not explicitly ask him to. Petitioner also failed to offer any testimony or other evidence indicating that his failure to pay tax was based on reasonable cause and was not due to willful neglect. Therefore, we have no basis for abating penalty under section 1145(a)(1)(ii) of the Tax Law.

Accordingly it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Robert Mann d/b/a Bob Mann Construction Equipment is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Robert Mann d/b/a Bob Mann Construction Equipment is denied; and

4. The notices of determination dated August 23, 1991 are sustained.

DATED: Troy, New York
September 15, 1994

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

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