STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
KARL BRUSSEL D/B/A KALBRUS	:	DETERMINATION
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 June 1, 1984 through May 31, 1987.	:	

Petitioner, Karl Brussel d/b/a Kalbrus, 29 Knapp Street, Stamford, Connecticut 06901, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1984 through May 31, 1987 (File No. 808145).

A hearing was held before Jean Corigliano, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York on December 4, 1990 at 1:15 P.M., with all briefs to be submitted by April 5, 1991. Petitioner appeared by David Michael, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and thereby a person required to collect the taxes imposed under articles 28 and 29 of the Tax Law.

II. Whether, after January 1, 1986, petitioner voluntarily assumed the duties, obligations and liabilities of a vendor by voluntarily filing a certificate of registration with the Division of Taxation.

III. Whether the audit method used to determine taxes due from petitioner was reasonable.

IV. Whether petitioner has shown reasonable cause for any failure to comply with the Tax Law.

FINDINGS OF FACT

On February 17, 1989, the Division of Taxation issued to petitioner, Karl Brussel d/b/a Kalbrus, two notices of determination and demands for payment of sales and use taxes due for the period June 1, 1984 through May 31, 1987. The first notice assessed sales and use taxes in the amount of $37,534.53 plus penalty and interest. The second notice assessed an additional penalty of $5,754.55.

The assessed tax, penalty and interest were determined from an audit of petitioner's business operations and New York sales and use tax liabilities. Petitioner's business was selected for audit as the result of a sales solicitation received by a Division employee in March 1987. The solicitation consisted of a brochure mailed to the employee by a company identified as "Kalbrus". Kalbrus's address is identified as 175 Fifth Ave., New York, New York 10010, and the envelope in which the brochure was received is postmarked New York, New York. The brochure consisted of an offer to sell eight prerecorded videotapes for $58.00.

The Division referenced its computerized records of registered sales tax vendors and discovered that Kalbrus was registered as a sales tax vendor in January 1986 under identification number 077-26-3105SS and had filed only two sales tax returns after that date. A Certificate of Registration completed by petitioner was entered into evidence by the Division. It bears the signature of Karl Brussel as owner of the business operating as Kalbrus. Mr. Brussel's home address is shown as 133 West 3rd Street, New York, New York. According to the certificate, Kalbrus began doing business in New York in January 1986.

An audit appointment letter dated June 29, 1987 was mailed to "Karl Brussel/Kal Brus" at 175 5th Avenue, New York, New York. The letter scheduled an appointment on July 21, 1987 and requested that petitioner have available all books and records pertaining to his sales tax liability for the period June 1, 1984 through May 31, 1987, including journals, ledgers, sales invoices, purchase invoices and Federal income tax returns.

On July 16, 1987, the auditor received a telephone call from David Michael, petitioner's accountant, who informed the auditor that petitioner lived in Connecticut and that the address to which the Division's letter was delivered was merely a maildrop. Mr. Michael was unwilling to

provide the accountant with petitioner's telephone number in Connecticut, and, at first, he was reluctant to meet with the auditor, stating that petitioner was not transacting business in New York.

A meeting was held between the Division and Mr. Michael on August 14, 1987. Mr. Michael continued to maintain the position that petitioner was not transacting business in New York, and, therefore, was not subject to the New York Tax Law. After some discussion, he provided the Division with copies of petitioner's Federal income tax returns for the years 1984 and 1985. At some point, an auditor left the meeting and went to 175 5th Avenue (the Kalbrus address) which turned out to be the business premises of a commercial company that rents mailboxes and provides a limited number of office services to its customers, photocopying for example.

The Division discovered from conversation with Mr. Michael and documents he provided that petitioner was doing business through several business entities, including PAK Ventures, Inc. and an unincorporated company called E.V.O.N. After several requests for books and records, the Division was provided with the following documents in addition to the Federal income tax returns: New York sales tax returns filed by Kalbrus for the periods ended August 31, 1986 and November 30, 1986; bank statements from several banks for accounts in the name of Kalbrus and PAK Ventures; a limited number of purchase invoices for a portion of the audit period; a computer generated schedule, purportedly showing sales in New York State and sales in New York City; and accountant's worksheets showing cash receipts and sales.

The Federal income tax returns provided the Division with the following information. A schedule C attached to petitioner's 1984 return indicates that petitioner was self-employed and identifies his business as "mailing list rentals". Petitioner reported gross receipts of $30,810.60. The only deductions or expenses shown on the schedule C are commissions of $16,110.00.

A schedule C attached to petitioner's 1985 Federal income tax return continues to show his principal business as mailing list rentals. His business name is shown as E.V.O.N., and

gross receipts are shown as $756,540.00. Petitioner calculated a net profit of $104,072.00 by subtracting cost of goods sold ($551,719.00) and business expenses ($100,749.00) from gross receipts. Petitioner calculated an investment tax credit of $2,423.00; however, the nature of the property upon which the credit was claimed is not in the record. Petitioner also reported a capital loss of $38,463.00 from a business identified as Oysters Too Ltd.

An independent firm of certified public accounts prepared a balance sheet for E.V.O.N. for the fiscal year ended December 31, 1985. Apparently, this was submitted with petitioner's 1985 Federal income tax return. Petitioner's assets as shown on the balance sheet included machinery and equipment valued at $27,261.00 and video rights valued at $13,000.00.

Petitioner also provided the Division with the 1985 Federal income tax return of PAK Ventures, P.O. Box 4630, Stamford, Connecticut. Petitioner is identified on that return as the only officer of PAK Ventures. PAK Ventures reported gross receipts of $4,132,858.00 and cost of goods sold of $3,950,744.00, and other deductions of $179,549.00.

The Division was not provided with a record of the total amount of petitioner's New York sales receipts for the audit period. The computer- generated schedule of sales for 1986, referred to in Finding of Fact "7", consists of two columns of numbers headed "Total Sales New York State" and "Total Sales New York City", respectively; however, the figures shown represent the number of orders filled by petitioner rather than the amount of his sales receipts. As shown on this sheet the total number of New York State orders filled was 11,831 and the total number of New York City orders filled was 5,943. This was the only document offered to the Division as a record of petitioner's sales in New York. The auditor asked for source documentation with which to independently verify the figures on this schedule. He was allowed to review computer-generated mailing lists. These listed the names and addresses of customers who had received direct mail solicitations from Kalbrus in 1985 and 1986. A checkmark placed next to a customer's name indicated that the customer had made a purchase from Kalbrus. The auditor manually counted 7,834 New York City customers who had checkmarks next to their name. Although the audit workpapers and reports continually refer to New York State taxable

sales, the auditor only counted New York City sales. Sales to other localities in New York State were ignored. The auditor was told by Mr. Michael that the average amount of each sale was $59.50.

The auditor calculated New York taxable sales for the years 1985 and 1986 of $466,123.00 by multiplying $59.50 times 7,834. Using the Federal income tax returns, bank statements and accountant's worksheets provided to him, the auditor calculated total sales receipts in all localities for the period June 1, 1984 through October 31, 1986 of $4,904,803.00.[1] This amount was divided into audited New York taxable sales of $466,123.00 to compute the percentage of total sales attributable to New York (9.5034%). This percentage was applied to petitioner's total gross sales for the audit period to compute audited New York taxable sales for the entire audit period of $909,970.00, with a tax due on that amount of $75,072.53. Taxes paid were subtracted from audited taxes due to calculate a tax deficiency of $37,534.53.

Petitioner maintained bank accounts in New York City and elsewhere. Petitioner received orders for videotapes at the rented mailbox in New York City. Those orders were then shipped, by common carrier, to petitioner in Connecticut where the orders were filled. Although it is obvious that someone must have prepared the orders for shipment to Connecticut, petitioner's representative denied that petitioner purchased any services from the company from which the mailbox was rented. Purchase invoices establish that petitioner purchased goods and services from

businesses located in New York. The purchase invoices in evidence show the purchaser, variously, as Pak Ventures, Kalbrus, Kalbrus c/o Pak Ventures, Pak Ventures-Karl Brussel and Kalbrus Corporation.

Petitioner reported New York taxable sales for the period June 1, 1986 through

---

[1]Petitioner reported gross receipts in 1984 of $30,810.00. The Division was told that petitioner was running a restaurant in 1984. To account for that portion of gross receipts not attributable to sales of videotapes, the Division included only one-half of petitioner's 1984 gross receipts in its computation of taxable sales.

November 30, 1986 of $466,829.00, almost half the amount calculated by the Division for the entire audit period. The amount reported by petitioner for the period ended August 31, 1986 was intended to include sales made in earlier periods.

Petitioner did not testify or appear at the administrative hearing, and no documentary evidence was offered by his representative.

Petitioner's representative, David Michael, is also employed as Kalbrus's accountant and as a business advisor to Mr. Brussel; however, he was not petitioner's only accountant. The E.V.O.N. balance sheets and the Federal income tax returns for PAK Ventures were prepared by another accounting firm. Mr. Michael is familiar with some of the business operations of Kalbrus, although he denied having detailed information with regard to other businesses operated by Mr. Brussel.

Petitioner did not retain individual sales invoices or order forms. All records of sales were maintained by computer, including records showing the dollar amount of each individual sale made by Kalbrus. These records were used by Mr. Michael to prepare the two sales and use tax returns filed by petitioner. Those records were not made available to the Division on audit. Mr. Michael advised Mr. Brussel that he was not required to register as a vendor in New York or to file sales and use tax returns. The returns which were filed were filed against Mr. Michael's advice.

Mr. Michael testified that the average selling price of a videotape was less than $59.50, but he presented no documentation to show exact prices used by Kalbrus during the audit period.

Under cross-examination, Mr. Michael stated that petitioner's mailing list rental business might have been conducted in New York, but he was unable to provide any details with regard to that business.

SUMMARY OF THE PARTIES' POSITIONS

Petitioner claims that he was not a person required to collect New York State sales or use taxes because he did not maintain a business or solicit sales in New York, except by

interstate mail and common carrier.

Petitioner maintains that in 1984 and most of 1985 he was not in the business of selling videotapes and had no New York sales in those years. His representative testified that before entering the video tape mail-order business petitioner operated a restaurant and earned fees by finding and renting mailing lists. The locations and exact nature of these business operations was not disclosed. It is petitioner's position that the Division's estimate of sales to New York customers is inaccurate in that it includes receipts from these other businesses and overstates the average selling price of a video tape.

In a letter responding to the Division's brief, petitioner's representative stated that Kalbrus's sales represent a small fraction of the sales of PAK Ventures. It is petitioner's contention that the Division's calculation of sales is incorrect because it includes sales by PAK Ventures.

The Division maintains that since petitioner was registered as a vendor during the period January 1, 1986 through May 31, 1987, he was obligated to collect sales or use taxes on all taxable sales made to New York customers during that period. Moreover, the Division argues that the rental of a private mailbox in New York constitutes maintaining a place of business in New York.

The Division argues that petitioner has not carried its burden of proof to show that Kalbrus was not carrying on a business in New York throughout the audit period or to show any error in the audit methods or results.

CONCLUSIONS OF LAW

A. Section 1110 of the Tax Law imposes upon all persons a compensating use tax for use within New York 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]). Pursuant to Tax Law § 1101(b)(8)(i), a vendor includes:

> "(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 catalogues 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". (Emphasis added.)

There is no question that petitioner solicited sales in New York by distribution of advertising matter and made sales of tangible personal property to persons within New York as a result. Accordingly, he was a "vendor" as defined by statute. There is, however, a constitutional limitation upon the state's power to require a mail-order vendor to collect and remit use tax. The Supreme Court case which most directly addressed this issue was National Bellas Hess v. Department of Revenue (386 US 753, 18 L Ed 2d 505). That case involved Illinois's attempt to subject a Missouri seller to a use tax collection duty. The Court stated that the standard to be used in determining whether a state may impose such a duty is whether there exists "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (National Bellas Hess v. Department of Revenue, supra at 756, quoting Miller Bros. Co. v. Maryland, 347 US 340, 98 L Ed 744). The Court then concluded that, because the Missouri seller's only connection with buyers in Illinois was by mail or common carrier, the required link which would permit the state to impose a duty of tax collection was not present.

The Supreme Court's ruling in Bellas Hess is reflected in the Rules and Regulations of the Commissioner of Taxation and Finance. 20 NYCRR former 526.10(e)(2), in effect during the audit years, limits the definition of a "vendor". It states:

"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." (Emphasis added.)

A person is deemed to be soliciting business if he has employees, salesmen, independent contractors or other agents soliciting potential customers in New York (20 NYCRR former

526.10[d][1]). 20 NYCRR former 526.10(c) provides:

> "A vendor shall be considered to maintain a place of business in the State, if he, either directly or through a subsidiary, has a store, salesroom, sample room, showroom, distribution center, warehouse, service center, factory, credit and collection office, administrative office or research facility in the State."

B. Petitioner maintains that his only contact with New York was the solicitation of sales and the delivery of merchandise by mail and common carrier, and, therefore, New York did not have the authority to impose upon him a duty to collect use tax from buyers in New York. The Division puts forward three grounds for finding that petitioner was a person responsible for collection of use tax. First, the Division argues that the rental of a mailbox in New York is an act which goes beyond mere solicitation and delivery and provides the required link between petitioner's activities and New York. In addition, the Division points out that petitioner voluntarily registered as a vendor in January 1986, and it argues that a registered vendor is required to collect use tax on its sales to New York customers, regardless of any other considerations. Finally, the Division asserts that, in determining whether petitioner's connection to New York is sufficient to require him to collect the use tax, the inquiry must include all of petitioner's business activities in New York and not merely the sale of video tapes.

C. To some extent, this case rests upon the proper allocation of burden of proof. From the outset of the audit, petitioner maintained that he was not obligated to collect the use tax on behalf of New York because his only connection with New York was by common carrier and mail. Consequently, petitioner provided the Division with only the barest of information. At hearing, petitioner continued to maintain the same stance. His representative categorically testified that petitioner had no employees in New York and did not solicit business in New York, except through direct mail. He consistently maintained that petitioner's only link to New York was the rental of a mailbox. Petitioner did not offer detailed testimony or documentation to support these categorical statements. For its part the Division was unable to present the kind of evidence which would establish a concrete and unequivocal connection between New York and petitioner's sale of video tapes. Except for the rental of the mailbox, it was unable to show

that petitioner maintained a place of business in New York (20 NYCRR former 526.10[c]) or solicited business other than by mail (20 NYCRR former 526.10[d][1]). While there was evidence tending to show that petitioner transacted business in New York, that evidence was sparse.

D. The caselaw discussing the allocation of evidentiary burdens of proof where audit results are challenged is extensive and well settled. Where a taxpayer's records are inadequate to verify reported taxable sales, the Division is authorized to estimate the tax liability on the basis of whatever information is available to it, including external indices if necessary (see, e.g., Matter of Club Marakesh v. State Tax Commission, 151 AD2d 908, 542 NYS2d 881, lv denied 74 NY2d 616). The audit method selected by the Division must be reasonably calculated to reflect the taxes due (Matter of W.T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, 157 cert denied 355 US 869, 2 L Ed 2d 75). At the administrative proceeding, the Division bears the burden of going forward to establish those facts which are necessary to enable an independent decision-maker to determine whether there is a rational basis for the Division's calculations (Matter of Grecian Square v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221). Such information is necessary in order to provide taxpayers with an opportunity to meet their burden of proving that the determination is in error. (Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991; Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). The burden then rests with the taxpayer to show by clear and convincing evidence that the audit methodology was unreasonable or that the amount of tax assessed was incorrect (see, e.g., Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 452).

E. Applying similar principles to the issue raised here, I find that the Division demonstrated that there was a rational basis for its conclusion that petitioner was a person required to collect sales and use taxes on behalf of New York and that petitioner was then required to show by clear and convincing evidence that Kalbrus lacked the requisite nexus which would make it liable for collection of New York taxes. Petitioner failed to meet his

burden.

20 NYCRR former 526.10(e)(2) excludes from the definition of a vendor one who solicits sales "by the interstate distribution" of advertising material and who then delivers merchandise to a New York customer by mail or common carrier. The mail solicitation received by a Division employee shows a New York address for Kalbrus and bears a New York postmark, indicating that it was mailed in New York. Petitioner claimed that its only connection with New York was the rental of a mailbox from a private company, but the mailing of the solicitation in New York indicates a degree of business activity that goes beyond the mere rental of a mailbox. Furthermore, the record shows that petitioner conducted some of its business in New York. Petitioner, or related companies, maintained bank accounts in New York and purchased goods and services in New York. Finally, petitioner registered as a New York vendor, giving his home address as 133 West 3rd Street, New York, New York. While each of these facts establishes only a tenuous link between petitioner's business and New York, taken together they show a pattern of activity in New York. Under these circumstances, it was incumbent upon petitioner to offer something more than categorical denials. Inasmuch as petitioner offered no description of its business practices to explain that evidence in the record which indicates it was conducting some business in New York, petitioner failed to carry its burden of proof to show that he was not a person required to collect use tax on behalf of New York.

This determination does not consider whether the rental of a mailbox in New York is in itself a sufficient link with New York to subject a taxpayer to the duties and obligations of a vendor (see, 20 NYCRR 526.10[a][4][ii][e], effective September 1, 1989; Matter of Clark Color Laboratories, State Tax Commission, March 28, 1980). Inasmuch as the record indicates that petitioner's business activities in New York exceeded the mere rental of a mailbox, this determination need not rest on that basis alone.

F. A person who voluntarily obtains authority to collect use tax by registering with the Division becomes a "vendor" and, therefore, is responsible for collection of use tax on behalf of

New York (Matter of Franklin Mint Corp. v. Tully, 94 AD2d 877, 463 NYS2d 566, 568, affd 61 NY2d 980, 475 NYS2d 280). Petitioner's registration as a vendor in or about February 1986, indicating that he began doing business in New York in January 1986, provides a separate ground for finding him liable for collection of use tax for the period January 1, 1986 through May 31, 1987.

G. The evidence in the record does not support a conclusion that petitioner was conducting business in New York in 1984. Petitioner's Federal income tax returns for 1984 do not evidence any New York activity. Furthermore, the returns do not contain any indication that petitioner was engaged in selling video tapes in 1984. For instance, there are no deductions for video rights or claims of equipment depreciation as there were in 1985 and 1986. Consequently, tax assessed for the period June 1, 1984 through November 30, 1984 will be canceled.

H. Petitioner failed to prove any other error in the audit method or results. Petitioner offered no evidence of his sales in New York (although testimony established that records of individual sales were maintained and were used by petitioner's representative to prepare the two sales tax returns filed by petitioner). His representative claimed that the average selling price of video tapes was less than $59.50, but he offered no documentary evidence to prove that fact. In a letter, petitioner's representative claimed that the Division's calculations included the sales of PAK Ventures, a separate entity. However, petitioner offered neither documents nor testimony to explain the relationship between Kalbrus and PAK Ventures, nor did he attempt in any manner to prove the actual sales of Kalbrus through its own records.

I. The petition of Karl Brussel d/b/a Kalbrus is granted to the extent indicated in Conclusion of Law "H"; the notices of determination and demands for payment of sales and use taxes issued on February 17, 1989 will be modified accordingly; and in all other respects, the petitions are denied.

DATED: Troy, New York

_____
ADMINISTRATIVE LAW JUDGE