STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
THE OHIO TABLE PAD CO., INC.	:	**DETERMINATION** DTA NO. 815122
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 March 1, 1990 through February 28, 1995.	:	

Petitioner, The Ohio Table Pad Co., Inc., 1915 Nebraska Avenue, P.O. Box 2843, Toledo, Ohio 43607-0843, 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 March 1, 1990 through February 28, 1995.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on March 13, 1997 at 10:00 A.M., with all briefs to be submitted by August 12, 1997 which date began the six-month period for the issuance of this determination. Petitioner appeared by Byrne, Costello & Pickard, P.C. (F. Scott Molnar, Esq., of counsel). The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (Robert Tompkins, Esq., of counsel). On September 30, 1997, this matter was assigned to Arthur S. Bray, Administrative Law Judge, for issuance of a determination.

ISSUES

I. Whether there is a sufficient nexus between petitioner and the State of New York such that New York may impose an obligation on petitioner to register as a vendor and collect sales and use taxes from its New York customers.

II. Whether petitioner was a vendor as defined by Tax Law § 1101(b)(8) and 20 NYCRR 526.10(a)(3) or (4) and therefore a person required to collect sales and use taxes under Articles 28 and 29 of the Tax Law on its mail-order sales to customers in New York State.

FINDINGS OF FACT

1. Petitioner, Ohio Table Pad Co., Inc. ("OTPC"), is a manufacturer of furniture protective items including custom built table pads, storage packs for furniture, place mats, and expansions for card tables. OTPC's products are sold through chain stores, department stores and individual businesses in the continental United States and Canada. It also sells directly to customers through a retail division.

2. OTPC's home office and headquarters are located in Toledo, Ohio which is petitioner's only state of incorporation. Petitioner has manufacturing plants in Lagrange, Indiana with 25 employees, Lawrenceville, Georgia with 20 employees and Carson City, Nevada with 5 employees. OTPC also has eight employees in the home office. In each of the foregoing states, petitioner is registered to do business, pays an annual registration fee, and files an annual tax return. No employees of OTPC reside in New York or carry out their duties on behalf of OTPC in New York.

3. In 1991, the Division of Taxation ("Division") mailed to petitioner a form entitled "Northeastern States Tax Questionnaire". The form asked petitioner to answer a series of

questions regarding its activities in seven different jurisdictions including New York. In essence, petitioner replied that it had no activity in New York State and that no one was representing it or selling for it in New York. Upon receipt of the questionnaire, no further action was taken by the Division.

4. About two years after the questionnaire was returned, the Division learned from the Internal Revenue Service that OTPC had issued Form 1099s to individuals with New York addresses.

5. In January 1994, following a telephone conversation with an employee of petitioner, the Division concluded that petitioner had sales representatives who were soliciting sales in New York and therefore it was required to register as a vendor. In accordance with this determination, the Division sent petitioner a sales tax registration application, sales tax returns, and a copy of the Division's regulations.

6. In a letter dated July 15, 1994, the Division advised petitioner that the sales tax registration application and sales tax returns had not been received. Petitioner was told that they should be completed and returned no later than August 1, 1994.

7. In a letter dated January 10, 1995, petitioner was advised that its failure to respond made it necessary to begin formal assessment proceedings. The letter further stated that the failure to respond within 30 days by submitting the requested information would result in the issuance of a statutory assessment followed by warrants and judgments. Thereafter, the Division issued a Notice of Determination, dated April 24, 1995, which assessed a penalty in the amount of $10,000.00. The notice stated:

> "The penalties shown are being imposed pursuant to section 1145 of the New York State Sales and Use Tax Law for failure to register 20 days prior to taking

> possession of, or paying for, business assets and/or for operating a business while unregistered."

8. During the years in issue, OTPC maintained an association with individuals known as referral sources. At the hearing, OTPC presented the testimony of Gordon Webb as representative of individuals who operated as referral sources. Mr. Webb officially took over the account of OTPC during the year prior to the hearing. Before taking over the account, Mr. Webb assisted a Mr. Hourigan who was an OTPC referral source. As a result, Mr. Webb handled the OTPC account for five or six years prior to the hearing.

9. Mr. Webb regards himself as a furniture manufacturers' representative. In this capacity, he works for furniture companies to ensure that their product is properly displayed in stores. Mr. Webb simultaneously represents four different manufacturers: Hammary Furniture Company ("Hammary"), Moosehead Manufacturing Company ("Moosehead"), Woodline Production ("Woodline"), and OTPC. Hammary produces occasional tables, living room tables, entertainment centers and upholstery. Moosehead makes bedroom and dining room furniture and Woodline makes accessories, lazy Susans, and various items out of oak. OTPC ranks third as a source of income to Mr. Webb.

10. Mr. Webb does not consider himself to be an employee of OTPC and is not under a contract to perform on behalf of petitioner. Mr. Webb's function on behalf of OTPC is to locate stores for OTPC to contact. In order to accomplish this task, Mr. Webb first determines whether a particular establishment is a proper store to sell OTPC products. This is dependent on whether the store sells dining room products and whether it sells table pads from another manufacturer. In order to interest a retailer in petitioner's products, Mr. Webb points out: that the company has been in business for a long period of time; that the product is of high quality; that the company

stands behind the product; and that, if there is a problem with the product, it is resolved. Many times a referral source will use a sample of petitioner's product to demonstrate the difference between petitioner's product and a competitor's product. Mr. Webb also tries to find out if the retailer has had any problems with a competitor because the difficulty may provide an opportunity to attract a new customer. When Mr. Webb identifies a potential referral, his next step is to alert petitioner to the store. This is accomplished by putting the retailer's name on a form and sending it to petitioner.

11. Once a store is identified, the additional activity is performed by petitioner. OTPC's national sales manager sends the retail outlet a formal proposal along with materials. The presentation, which OTPC regards as the heart and soul of its program, includes a sample table pad, charts with colors and accessory products and a four-color brochure. The order form has the plant addresses and a toll-free telephone number. None of the order forms or other documentation mention the referral sources. Referral sources are not asked to provide display materials. Nevertheless, on occasion, Mr. Webb delivers samples of OTPC products and some literature which includes a price schedule. The sales literature provided by the referral source is printed and supplied by petitioner. Even when Mr. Webb delivers a sample, petitioner will usually do the same.

12. When Mr. Webb visits a store that carries OTPC products, he checks on the location and condition of the display. In order to promote sales, the displays should be in a location where the sales people can use them. Mr. Webb also determines whether the display is worn. If the display is not in an acceptable condition, the referral source sends a form to OTPC which explains what samples and materials are needed. Mr. Webb discusses the displays on his own

initiative, not because of instructions from OTPC. However, petitioner likes referral sources to bring to its attention problems with displays. Mr. Webb checks on displays with the other product lines, but with furniture it is more complicated because there are floor samples, backup stock and warehouses to examine. During the visits to the retailers who carry petitioner's products, Mr. Webb also asks whether they are encountering any problems.

13. Referral sources are not told to follow a specific program on how to pursue an account. Referral sources are not told to revisit stores, how to arrange displays, or to conduct in-store activities on behalf of OTPC. Referral sources never tell petitioner about unsuccessful calls.

14. The presentation mailed by OTPC must be comprehensive because petitioner's products are ancillary to large furniture programs. Consequently, for a store to "push" a product it has to be able to do it easily and quickly. As a result, OTPC makes its products as easy to use as possible.

15. Mr. Webb is able to identify stores for petitioner because he has been traveling the territory for over 20 years and is familiar with most of the stores. When Mr. Webb is at a store performing duties on behalf of Hammary or Moosehead, he also tries to establish a connection between the retailer and petitioner. It would be rare for Mr. Webb to visit a retail location strictly on behalf of petitioner. Consequently, Mr. Webb's ability to identify referrals and then refer them to OTPC is incidental to his activities as a representative for the other manufacturers. Some percentage of the stores that Mr. Webb visits in the course of a month do not carry petitioner's table pads. At the hearing, Mr. Webb was able to say only that this percentage was less than a majority.

16. After Mr. Webb's identification of a customer and OTPC's introduction of its products to that retailer, Mr. Webb does not: (1) negotiate or conclude price or terms of delivery on behalf of petitioner; (2) assemble purchase orders on behalf of petitioner; (3) distribute or deliver petitioner's products; (4) handle customer service items following the sale; (5) have responsibility for collecting sales revenues for OTPC; (6) have contact with the ultimate purchaser of the product; or (7) have any role in connection with the sale of OTPC products. When OTPC receives an inquiry from a new retailer in New York, referral sources are not asked to follow up on the inquiry.

17. There are times when a problem will develop between OTPC and one of the furniture stores. When this occurs, the store will usually contact the factory. If the store contacts Mr. Webb about a problem, he will refer them to the factory. Mr. Webb does not follow up on whether the problem has been resolved because he knows that OTPC takes care of problems.

18. On one occasion, OTPC contacted Mr. Webb regarding the failure of a retailer to make a payment. In response, Mr. Webb asked the furniture dealer if there was a problem and then reminded the store that it should pay its bill. Usually, when an account does not pay, petitioner utilizes the services of a collection agency located in Columbus, Ohio.

19. Mr. Webb visits larger stores once a month and smaller stores two or three times a year. There are 30 to 40 stores that Mr. Webb sees once or twice a year. At least one-half of the larger stores carry OTPC products. Less than one-half of the retailers that Mr. Webb visits once or twice a year sell petitioner's products.

20. OTPC established the boundaries of Mr. Webb's territory. Outside of that territory there are other referral sources. Mr. Webb does not confer or coordinate his activities with

referral sources in other territories. If contact with a retailer shows that there is a need for supplies, Mr. Webb advises OTPC. Otherwise, he does not tell OTPC which stores he visited. Mr. Webb's contacts with OTPC are by mail, electronic transmission, or telephone.

21. Mr. Webb receives a monthly commission on the sale of OTPC products at an average rate of six percent.[1] Petitioner sends Mr. Webb a monthly report that shows petitioner's sales and the commission due on the sales. As a result, Mr. Webb knows the amount of commission that he is owed. The commissions constitute approximately 3 percent to 5 percent of Mr. Webb's gross revenues for a year. Prior to taking over the account, Mr. Webb was compensated by the person he was helping. Mr. Webb's commission rate from Hammary is from 3 to 6 percent depending on the type of product sold. The commission rate from Moosehead is 6.6 percent.

22. It is OTPC's practice to provide commissions on all sales to furniture retailers in a referral source's territory including those from telemarketing companies. Therefore, the monthly statements which Mr. Webb receives from OTPC do not reflect the number of stores referred by Mr. Webb because it shows sales to furniture retailers whether or not Mr. Webb identified that furniture retailer as a referral in the first instance. If a retail customer orders a table pad directly, the sale is not included in the calculation of the referral source's compensation. A direct sale to a customer would result from a magazine mail order program. Mr. Webb accepts the monthly reports as accurate.

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[1] Referral sources receive a seven percent commission on some accounts while they receive a commission of four percent on other accounts.

23. Mr. Webb's relationship with OTPC is based on a verbal understanding. If petitioner stopped paying a commission to Mr. Webb, he would probably sue it.

24. Petitioner's retail customers are homeowners. These customers learn of OTPC through advertising in national publications. Petitioner does not print and distribute catalogues through a bulk mailing to prospective customers. It does not send employees or agents into the State of New York to solicit retail sales or conduct telephone solicitations to identify retail clients.

25. The principal magazines that OTPC advertises in are Good Housekeeping, Better Homes and Gardens and Southern Living. Petitioner also advertises in Colonial Homes, Country Homes, Country Living, Traditional Homes, Woman's Day, and Sunset Magazine. Petitioner does not advertise in any magazines or newspapers that are local to New York only.

26. If a retail customer in New York makes an inquiry, OTPC sends him or her a product information kit through the United States mail. The product information kit explains how to measure the customer's table and has information on pricing and colors. It may also have a promotional flyer which will modify the price structure during the promotional period.

27. OTPC processes orders when they are submitted by a customer. If needed, OTPC calls customers to check on dimensions. Petitioner's personnel do not enter New York to measure a customer's table or to provide customer service. Usually, customers make payment on credit cards. Once payment is made, the product is built and shipped to the customer by United Parcel Service.

28. In 1990 OTPC supplied 305 retail accounts in New York and in 1995 it supplied 278 retail accounts. The reason for the decline is that furniture stores are under an economic strain. Larger stores are dominating the market and the furniture market as a whole is declining.

29. Not all of OTPC's wholesale sales in New York stem from referral sources. Stores learn of OTPC's products by word of mouth or referrals. Some stores have had long-standing relationships. Because of its concern with the declining market, in 1994 petitioner utilized the services of a firm located in Toledo, Ohio, known as MGD Marketing, to conduct an extensive telemarketing campaign. As a result of the efforts of the telemarketing firm, the number of accounts increased from 232 in 1993 to 278 in 1995. Petitioner's continued ability to have its products carried by retailers is due in large part to its telemarketing campaign.

30. During the course of his association with petitioner, Mr. Webb was able to refer approximately 12 to 18 stores to OTPC. During the period March 1, 1990 through February 28, 1995, Mr. McCartin, whose territory was the New York City metropolitan area, referred 12 stores to OTPC.

31. Both a retail and wholesale sale result from a purchase order being submitted to an out-of-state office. Orders are processed, billed and shipped from out-of-state offices. Orders are shipped by United Parcel Service, Roadway Package System, Inc., or United States Mail. Even in the case of wholesale sales, 70 percent of the sales are shipped directly to the consumer.

32. Mr. Webb does not work for companies that are related to petitioner.

33. Petitioner does not mail catalogues into New York. It does not deploy full-time personnel into New York to facilitate sales. Petitioner does not have a retail location in New York and does not direct employees to install products. It does not direct employees to travel to

New York to provide post-sale customer service in New York. Petitioner does not need to send personnel into New York for any reason.

34. During the years in issue, petitioner's retail and wholesale sales in New York were as follows:

	Wholesale	Retail	Total
1990	$264,792.00	$61,059.00[2]	$325,851.00
1991	226,438.00	81,589.00	308,027.00
1992	236,384.00	81,589.00	317,973.00
1993	187,836.00	78,151.00	265,987.00
1994	173,617.00	77,949.00	251,566.00
1995	204,133.00	72,642.00	276,775.00

35. During the year 1995, the amount of wholesale sales in New York and the corresponding sales commissions paid were as follows:

Referral Source	Wholesale Sales	Commission Paid
Versalie	$46,563.00	$2,700.00
Hourigan	69,200.00	4,844.00
McCartin	84,285.00	5,900.00

36. Petitioner submitted unnumbered Proposed Findings of Fact. As a result, it would be very cumbersome to rule on each statement in the Proposed Findings of Fact. However it is noted that to the extent that the proposed Findings of Fact are not irrelevant, immaterial, or

[2] The amount of retail sales for 1990 and 1991 were obtained from petitioner's exhibit "10". Petitioner's exhibit "8" shows retail sales of $34,279.00 for 1990 and $62,771.00 for 1991. There is no explanation for the discrepancy in the record.

argumentative in nature and have a basis in the record, they have been included in the Findings of Fact. Additional Findings of Fact were also made.

SUMMARY OF THE PARTIES' POSITIONS

37. Petitioner maintains that it is not required to register as a vendor in New York because it does not "solicit" sales by means of "employees, independent contractors, agents or other representatives" in the State of New York within the meaning of 20 NYCRR 526.10(a)(3). According to petitioner, the referral sources are not employees, agents or representatives of OTPC. Assuming *ad arguendo* that the referral sources are representatives for the purposes of 20 NYCRR 526.10(a)(3), petitioner maintains that it has been established that the referral sources are not "soliciting" sales on behalf of OTPC in New York. Petitioner submits that the record shows that OTPC neither employs nor independently contracts with its referral sources to solicit sales in New York in accordance with 20 NYCRR 526.10(a)(3). Petitioner further submits that it "accomplishes all solicitations by means of its presentation, mailed to New York furniture stores from OTPC's home jurisdiction, and is therefore immune from registration as a 'vendor', pursuant to the language set forth in § 526.10(a)(3), and contrary to the Department's determination." (Petitioner's brief, p. 10.)

38. Petitioner's second argument is that it is immune from registration as a "vendor", notwithstanding its advertising in New York by means of national magazines, on the basis that OTPC's total activity in New York does not establish a connection with New York which is demonstrably greater than the "slightest presence" standard for a constitutionally valid imposition of sales and use tax citing *Matter of Orvis Co. v. Tax Appeals Tribunal* (86 NY2d 165, 630 NYS2d 680, *cert denied* ___ US ___ , 133 L Ed 2d 426). It submits that it has

established that its use of referral sources is not the kind of physical presence or activity which triggers News York's right to impose tax.

39. In its brief, the Division first argues that the independent sales representatives performed solicitation in New York on behalf of OTPC thereby making petitioner a vendor, pursuant to Tax Law § 1101(b)(8)(i)(C), which is required to file a certificate of registration and to collect sales tax pursuant to Tax Law § 1134(a)(1)(i). The Division states that a penalty has been assessed against petitioner under Tax Law § 1145(a)(3)(i) as a vendor that failed to obtain a certificate of authority while having sales of tangible personal property the use of which is subject to tax. Relying upon *Matter of Stainless, Inc*. (Tax Appeals Tribunal, April 1, 1993) and *Wisconsin Dept. of Rev. v. Wrigley Co.* (505 US 214, 120 L Ed 2d 174), it is maintained that petitioner solicited business in New York through independent furniture manufacturers' sales representatives who functioned in New York on behalf of petitioner.

40. The Division also argues that OTPC had a sufficient presence in New York to provide the requisite constitutional nexus to permit New York to require petitioner to collect sales tax on its sales sent to New York and to impose a penalty for failing to register as a vendor.

41. In its reply brief, petitioner argues that it is constitutionally entitled to conduct interstate commercial activities which result in the sales of its products in the State of New York without being required to register as a vendor because its in-state economic activity is not demonstrably greater than the slightest presence.

CONCLUSIONS OF LAW

A. The first question presented is whether New York is proscribed from requiring petitioner to register as a vendor and remit tax. In support of their respective positions, each of

the parties have relied on the same case, *Matter of Orvis Co.* (Tax Appeals Tribunal, January 14, 1993, *annulled* 204 AD2d 916, 612 NYS2d 503, *modified* 86 NY2d 165, 630 NYS2d 680, *cert denied* ___ US ___, 133 L Ed 2d 426). Therefore, a careful examination of the Orvis decision will be instructive.

B. Orvis was a catalogue mail-order business located in Vermont. It sold, among other things, camping, hunting, and fishing equipment at both the wholesale and retail level. Almost all of Orvis's retail sales were entirely through mail-order catalog purchases which were shipped from Vermont by common carrier or the United States mail. In addition, Orvis sold merchandise at wholesale to retail establishments located in New York. Orvis employees visited the retailers located in New York to whom it sold merchandise.

In a companion case, *Vermont Information Processing v. Tax Appeals Tribunal* (86 NY2d 165, 630 NYS2d 680, *cert denied* ___ US ___, 133 L Ed 2d 426), the petitioner, Vermont Information Processing, Inc. ("VIP"), marketed computer software and hardware to beverage distributors in New York and elsewhere in the United States. Usually, the orders of VIP's customers were filled by VIP by common carrier or United States mail. Employees of VIP visited New York customers to resolve problems, provide additional instructions concerning the use of VIP software programs, and, on occasion, to install software.

In each instance, the Tax Appeals Tribunal sustained an assessment of sales and use taxes. Following the commencement of an Article 78 proceeding, the Appellate Division determined, on the basis of *Quill Corp. v. North Dakota* (504 US 298, 119 L Ed 2d 91), that the activities of the respective petitioners were insufficient to constitute the requisite substantial physical presence in New York. Therefore, the Appellate Division annulled the determinations of the Tax

Appeals Tribunal and held that the petitioners were not under a duty to collect tax from their New York customers.

On appeal, the Court of Appeals determined that *Quill* did not "make a 'substantial' physical presence of an out-of-State vendor in New York a prerequisite to imposing the duty upon the vendor to collect the use tax from its New York clientele." (*Id*. at 630 NYS2d 682.) Therefore, the Court held that the Appellate Division applied the wrong standard in annulling the determinations of the Tax Appeals Tribunal.

In reaching the foregoing conclusion, the Court of Appeals began by considering the *Quill* decision in the context of the evolution of the principle limiting the authority of a State to impose a duty to collect taxes on a foreign business conducting business in interstate commerce. The Court noted that until *Quill* the required nexus between the taxing State and the subject of the tax was the same for both Due Process and Commerce Clause analysis. In each instance, "a definite link or minimum connection was required" (*id*. at 630 NYS2d 682). A physical presence of the vendor in the taxing State was a factor permitting the imposition of the obligation to collect tax. The Court then pointed out that in *National Bellas Hess v. Department of Revenue* (386 US 753, 18 L Ed 2d 505) the Supreme Court expressly held for the first time that in order to charge a vendor with the obligation to collect a tax on the mail-order purchases by the residents of a State the vendor must be present in the taxing State. Three reasons were given for this requirement:

> " (1) without some physical presence, there would be no fair basis for making interstate commerce bear a share of the cost of local government; (2) a contrary rule would require the Court 'to repudiate *totally* the *sharp* distinction', relied upon by State taxing authorities, between mail-order sellers with local outlets or solicitors and '*those who do no more* than communicate with customers in the State by mail or common carrier as part

> of a general interstate business' (386 US, at 758, 87 S Ct, at 1392 [emphasis supplied]); and (3) permitting imposition of the duty of collection of the tax in that case would subject national mail-order businesses to oppressive administrative and record-keeping burdens 'in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose 'a fair share of the cost of the local government'"(*id*., at 759-760, 87 S Ct, at 1392-1393). (*Matter of Orvis Company v. Tax Appeals Tribunal*, *supra*, at 630 NYS2d 683.)

In the next section of its opinion, the Court turned its attention to *Quill Corp. v. North Dakota* (504 US 298, 119 L Ed 2d 91, *supra*) which, like *Bellas Hess*, concerned a vendor who engaged in a substantial mail-order business in the taxing state, but whose only physical connection with customers in the taxing state was by common carrier or by United States mail. The Supreme Court of North Dakota held that a physical presence was no longer needed in the case of a mail-order vendor who made a practice of directing its efforts at the taxing state. Therefore, the Supreme Court of North Dakota held that the Commerce Clause should not prevent Quill from paying tax for the benefits and protections it received from North Dakota. The Court of Appeals explained that the United States Supreme Court proceeded to adopt a middle course between the competing demands of *stare decisis* and evaluating a State tax for commerce clause purposes by examining the economic realities and practical effects by overruling that portion of *Bellas Hess* that required some physical presence of the vendor to support the jurisdiction to tax under the Due Process clause. However, the Supreme Court reluctantly decided to adhere to *Bellas Hess* to the extent that it required some physical presence of an interstate mail-order vendor in the taxing State for the tax to be valid under the Commerce Clause. It reached this conclusion for a different reason than that set forth in *Bellas Hess*. Namely, the Supreme Court agreed with the Supreme Court of North Dakota that:

> "the *quid pro quo* for State taxation could be found in the benefits and protections the State confers in providing for a stable and secure legal-economic environment for a mail-order vendor's substantial marketing efforts aimed at the taxing State." (*Orvis Co. v. Tax Appeals Tribunal*, *supra*, 630 NYS2d 680, 685.)

However, the justification for continuing to require the physical presence of the vendor in the taxing State was based on two different grounds: it provided a "bright-line test" and it satisfied the demands of *stare decisis*.

On the basis of the foregoing, the Court of Appeals concluded that *Quill* cannot be read as increasing the requisite threshold for the right to impose a duty to collect tax from any measurable amount of in-state people or property to a substantial amount of in-state people or property (*Orvis Co. v. Tax Appeals Tribunal*, *supra*, 630 NYS2d at 685). This conclusion was supported by three factors: (1) neither *Bellas Hess* nor the cases before or after it required that the physical presence of the vendor be substantial; (2) acceptance of a substantial physical presence requirement would eliminate the bright-line rule that the Supreme Court sought to preserve in *Quill*; and, (3) the substantiality of the physical presence was not even considered in the recent case of *Oklahoma Tax Commn. v. Jefferson Lines* (514 US 175, 131 L Ed 2d 261).

The Court of Appeals concluded that its survey established that:

> "While a physical presence of the vendor is required, it need not be substantial. Rather, it must be more than a 'slightest presence' (citation omitted). And it may be manifested by the presence in the taxing State of the vendor's property or the conduct of economic activities in the taxing State performed by the vendor's personnel or on its behalf." *(Orvis Co. v. Tax Appeals Tribunal*, *supra*, 630 NYS2d 680, 686.)

On the basis of the foregoing, the Court determined that there was substantial evidence to support the determination of the Tax Appeals Tribunal that the activity of Orvis and VIP in New York were sufficient to impose the obligation to collect tax. With respect to Orvis, the nexus to

impose a use tax collection responsibility was found in the conclusion that the substantial wholesale business was the result of Orvis's sales personnel's direct solicitation of retailers through visits to their stores in New York, conditioned upon approval of the orders in Vermont. The Court also found that the "slightest presence" standard was demonstrably exceeded by the trips of Orvis personnel to as many as 19 wholesale customers on the average of 4 times a year. The slightest presence standard of VIP was satisfied by the finding that VIP's trouble-shooting visits to New York customers at the customer's premises and VIP's promises to prospective customers that it would make trouble-shooting visits improved sales and was a major contribution to VIP's ability to create and maintain a market for the items it sold in New York.

C. It is petitioner's position that the totality of OTPC's activities is not comparable to Orvis's activities. Petitioner's brief states:

> "OTPC urges the Court to recognize that, even viewing OTPC facts in a light most favorable to the Department, OTPC activity in New York consists of its advertising in national magazines on the retail side, and its use of referral sources to identify furniture stores on the wholesale side. OTPC does not, unequivocally, bulk-mail unsolicited catalogues like Orvis, maintain retail centers like Orvis, deploy employees with a specific agenda into New York to improve its sales, and does not expect, instruct or allow OTPC referrals to participate with respect to solicitation of a wholesale sale." (Petitioner's brief, p. 12.)

In its reply brief, petitioner submitted that "OTPC does not engage its sources to do anything except 'bird-dog' potential accounts, and thereafter notify OTPC of these potential accounts." (Petitioner's reply brief, p. 3.)

D. Contrary to petitioner's argument, the record shows that the referral sources were commissioned manufacturers' representatives whose activities in New York demonstrably exceeded the "slightest presence" test as explained by the Court in *Orvis* . In the course of

identifying a store for OTPC to contact, a referral source would actively try to interest the retailer in OTPC's products by pointing out that the company has been in business for a long period of time, that the product is of high quality, that the company stands behind its product, and that the company will resolve any problems a consumer has with the product. Many times a referral source would use a sample of petitioner's product to demonstrate the difference between petitioner's product and a competitor's product. On occasion, Mr. Webb delivered a sample of OTPC products and some literature which included a price schedule. The sales literature provided by the referral source was printed and supplied by petitioner. When a retailer did not carry petitioner's products, the referral source tried to keep petitioner's name in front of the retailer and would suggest that the retailer take another look at petitioner. Mr. Webb also tried to find out if the retailer had had any problems with a competitor because it might provide an opportunity to attract a new customer.

After a store agreed to carry petitioner's products, a referral source would visit the site and check on the location and condition of the display. Specifically, the referral source would discern whether the display was in the correct location to promote sales. The referral source also checked on whether the display was worn. If the display was not in the desired condition, the referral source sent a form to OTPC which explained what samples and materials were needed. During the visits to the retailers who carried petitioner's products, the referral source also asked whether they were encountering any problems.

E. It is noted that petitioner's point that the referral sources were not employees is of no consequence. The Court in *Orvis* clearly explained that the "slightest presence" may be manifested by "the conduct of economic activities in the taxing State performed by the vendor's

personnel *or on its behalf*." (*Matter of Orvis Co. v. Tax Appeals Tribunal, supra,* 630 NYS2d at 687; emphasis supplied). Although the referral sources represented other manufacturers, it is clear that they were also acting on petitioner's behalf.

A second ground for concluding that the "slightest presence" standard has been satisfied may be found in the visits that a referral source makes. Mr. Webb explained that he visits the larger stores once a month and the smaller stores two or three times a year. There are 30 or 40 stores that Mr. Webb sees once or twice a year. Although a number of these stores did not carry petitioner's products, it is clear that there were routine visits to many stores that carried petitioner's products. The systematic visitation to retailers that sold petitioner's products created the nexus which gave New York the prerogative to impose the obligation to collect and remit tax. (*see*, *Matter of Orvis, Co. v. Tax Appeals Tribunal*, *supra*, 86 NYS2d at 688.)

F. The question remains whether petitioner is obligated to collect and remit tax pursuant to the New York Tax Law and regulations. During the years in issue, the term "vendor" was defined by Tax Law § 1101(b)(8)(i)(C) to include:

> "(C) A person who solicits business either:
> (I) by employees, independent contractors, agents or other representatives; or
> (II) by distribution of catalogues 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. . . ."

The Regulations of the Commissioner of Taxation at 20 NYCRR 526.10(a)(3) provide:

> "A person who solicits business by employees, independent contractors, agents or other representatives and by reason thereof makes sales to persons within the State of tangible personal property or services, the use of which is subject to tax, is a vendor."

G. It is petitioner's position that the referral sources are not employees, independent contractors, agents or representatives of OTPC. Petitioner notes that the referral sources are not instructed or allowed to participate in a sale. According to petitioner, even if its referral sources may be considered representatives for purposes of 20 NYCRR 526.10(a)(3), they are not soliciting sales within the meaning of 20 NYCRR 526.10(a)(3). Petitioner maintains that it has met its burden of showing that it is not soliciting sales by demonstrating that:

> "its referral sources have never been assigned accounts, nor instructed to visit any furniture store as part of an agenda to promote sales, nor have referral sources been given instructions, or authority, to make solicitation calls upon furniture stores, on behalf of OTPC, even if OTPC merely provides one page printed handouts and price lists to referral sources, for informational purposes." (Petitioner's brief, p. 9.)

Petitioner maintains that it relies exclusively upon its comprehensive presentation package to the stores which are referred to it. According to petitioner, its presentation package is the "heart and soul" of its sales platform regarding the solicitation of the furniture store to carry its product and its ability to complete all sales transactions. Petitioner submits that it performs its own solicitation from its home office and by using the U.S. Mail. Therefore, petitioner posits "that OTPC neither relies upon its referral sources to solicit its sales, nor expects a source to solicit its sales, as indicated by the comprehensive nature of its presentation package." (Petitioner's brief, p. 10.)

H. Initially, it is noted that petitioner's referral sources, which were paid a commission, were "independent contractors, agents or representatives" of petitioner within the meaning of Tax Law § 1101(b)(8)(i)(c) and 20 NYCRR 526.10(c)(3). Although their duties and authority may have been limited, they were clearly acting as a representative of petitioner.

I. The Division's brief accurately points out that in *Matter of Stainless, Inc*. (Tax Appeals Tribunal, April 1, 1993) the Tribunal adopted the definition of solicitation utilized by the Supreme Court in *Wisconsin Dept. of Rev. v. Wrigley Co*. (505 US 214, 120 L Ed 2d 174) to define the meaning "solicitation of orders" as that phrase is used in section 381(a)(1) of Public Law 86-272 (15 USC § 381[a][1]). The analysis adopted by the Tribunal provided as follows:

> "'[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)."

The Court subsequently concluded that solicitation included the entire process associated with invitation of orders. The entire process included all activities ancillary to requesting purchases, provided that the activities did not serve an independent business function distinct from their connection to the solicitation of orders.

J. Here, the record shows that the referral sources were instrumental in finding new stores to carry petitioner's products. In the process, the referral sources extolled the virtues of petitioner's products. This activity expressly falls within the concept of solicitation within the meaning of *Wrigley*. Moreover, the referral sources' conduct in maintaining existing accounts by inquiring whether there were any problems or checking on the condition of displays also constituted solicitation within the meaning of *Wrigley*. Accordingly, it is concluded that the activities of petitioner's referral sources constituted solicitation and petitioner was a vendor within the meaning of 20 NYCRR 526.10(a)(3).

K. In reaching the foregoing conclusion, petitioner's argument that *Stainless* is inapposite has been considered and rejected. The question is not, as petitioner suggests, whether OTPC performs duties which are similar to those of Stainless. Rather, *Stainless* was cited for the question of what standard should be employed to determine what conduct constitutes solicitation. Moreover, petitioner's contention that referral sources were not engaged to do anything except to "bird-dog" potential accounts and then notify OTPC of these potential accounts overlooks the fact that the referral sources were instrumental in promoting petitioner's products to new stores and served an important function in maintaining existing accounts. By establishing a compensation system based on the payment of commissions which are dependent on the level of sales, the referral sources are encouraged by petitioner to promote its products to retail stores. Under these circumstances, petitioner's contention that it only engages its referral sources to "bird-dog" new accounts is rejected.

L. In view of the foregoing, consideration of whether petitioner is a vendor within the meaning of 20 NYCRR 526.10(a)(4) is academic and will not be addressed.

M. The petition of The Ohio Table Pad Co., Inc. is denied.

DATED: Troy, New York
February 5, 1998

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE