STATE OF NEW YORK
STATE TAX COMMISSION

ADVISORY OPINION PETITION NO. S830729A

On July 29, 1983, a Petition for Advisory Opinion was received from Levitz Furniture Co. of the Eastern Region, Inc., 212 High Street, Pottstown, Pennsylvania 19464.

The issue raised is whether a corporation created by Petitioner will be required to collect and remit New York State sales or compensating use taxes. In order to make this determination, two issues must be addressed: (1) whether sufficient nexus will exist between such corporation and New York State to satisfy the Due Process and Commerce Clauses of the United States Constitution and (2) if there will be sufficient nexus, whether such corporation will be a "vendor" for purposes of the New York State Sales and Use Tax Law and therefore required to collect New York State sales or use tax on sales made to New York residents.

Petitioner proposes to form a new corporation in New Jersey. The new corporation will be owned by Levitz Furniture Corporation which also owns the Petitioner. Petitioner and Levitz Furniture Corporation presently conduct business in New York and New Jersey.

The new corporation will do business in New Jersey but will not do business in New York. Such business will include the operation of a store in New Jersey. If sales are made in the New Jersey store to New York residents, deliveries will be made by independent trucking companies. For purposes of this Advisory Opinion, it is presumed that those independent trucking companies will be common carriers.

ISSUE 1 - Nexus

A state can require an out-of-state seller to collect the state's sales or use tax only when there is a sufficient nexus between the seller and the taxing state, as required by the Commerce Clause of the United States Constitution (Art. I, 8, cl. 3) and the Due Process Clause of the Fourteenth Amendment to the United States Constitution. National Geographic Society v. California Board of Equalization, 430 US 551.

The test to determine whether a particular state exaction violates the Commerce Clause by invading the exclusive authority of Congress to regulate trade between the states, and the test to determine whether a state has complied with the requirements of due process in this area, are similar. National Bellas Hess, Inc. v. Department of Revenue, 386 US 753. "[T]he relevant constitutional test to establish the requisite nexus for requiring an out-of-state seller to collect and pay the use tax is not whether the duty to collect the use tax relates to the seller's activities carried on within the State, but simply whether the facts demonstrate some definite link, some minimum connection, between [the State and] the person it seeks to tax." National Geographic Society v. California Board of Equalization, 430 US at 561.

Activities in a state that have been found to be constitutionally sufficient to establish nexus to require an out-of-state corporation to collect state taxes include the operation of retail stores of the corporation in the state, Nelson v. Sears, Roebuck and Co., 312 US 359; Nelson v. Montgomery Ward, 312 US 373; the presence of traveling salesmen in the state, General Trading Co. v. Tax Commission, 322 US 335; and the presence of independent contractors or agents of the corporation in the state, Scripto, Inc. v. Carson, 362 US 207. In the most recent United States Supreme Court opinion on the issue of nexus for use tax collection purposes, National Geographic Society v. California Board of Equalization, supra, the corporation, National Geographic, operated two offices in California. Although, the activities in those offices were unrelated to the corporation's mail order activities, the Court held that it was permissible to impose the administrative burden of collecting use taxes on National Geographic. Since the two California offices, regardless of the nature of their activities, had the advantage of the same services, e.g., fire and police protection, as they would have had their activities included assistance to the mail order operations that generated the use taxes, there was a definite link between National Geographic and the State of California.

Activities in a state that have been held insufficient to establish the necessary nexus to impose the duty to collect use taxes include mail order sales where delivery of the goods was made from out-of-state by common carrier or United States mail, National Bellas Hess, Inc. v. Illinois, supra, and over the counter sales made in a bordering state to state residents with only occasional deliveries being made into that state, Miller Brothers Co. v. Maryland, 347 US 340. In both these cases, the Court found that the requisite relationship between the state and the out-of-state seller was lacking.

To determine whether there will be sufficient nexus for New York State to impose a requirement to collect use taxes on the new corporation formed by Petitioner, it is necessary first to determine whether there will be some relationship or minimum connection between the new corporation and New York State. Under the facts presented here, the new corporation will not operate directly in New York State, nor will it have any offices in this state. Its sales will be made in New Jersey with delivery into New York by common carrier. Under the holdings of the National Bellas Hess and Miller Brothers cases cited above, on these facts alone the new corporation will not be required to collect tax. However, Levitz Furniture Corporation, the parent corporation of Petitioner and the new corporation, and Petitioner have nexus with New York State because they conduct business in the state. The question thus becomes whether the presence in New York of a parent or an affiliated corporation, e.g., another corporation such as Petitioner owned by a common parent, will be sufficient to establish nexus for the new corporation with New York.*

*This opinion will assume that no agency relationship exists between the new corporation and Petitioner and any of their affiliated corporations. If an agency relationship did exist, it might establish that there was a definite nexus between the state and the new corporation. Taca International Airline S.A. v. Rolls Royce of England Ltd., 15 NY2d 97; Frummer v. Hilton Hotels, Inc., 19 NY2d 533; see also, McCray, "Overturning Bellas Hess," 1985 Brigham Young Univ. L. Rev. 265, 287.

As a general rule, corporations are treated as separate legal entities, Rapid Transit Subway Const. Co. v. City of New York, 259 NY 472, and the presence of a parent corporation in one state does not require a finding of presence in that state for its wholly-owned subsidiary. However, under certain circumstances in order to prevent fraud or injustice, the corporate structure will be disregarded and the separate entity rule discarded. Astrocom Electronics, Inc. v. Lafayette Radio Electronics Corp, 63 AD2d 765; Giblin v. Murphy 97 AD2d 668; Berkey v. Third Ave. Railway Co., 244 NY 84. In Nelson v. Sears, Roebuck and Co., supra, the Supreme Court held that the departmentalization of the corporation's operations (i.e., the mail order and retail stores operations were separately administered) did not preclude the finding of sufficient nexus. In New York, there has been a "steady movement towards holding that in determining whether a corporation has engaged in activities in the state it is immaterial whether these are conducted through a branch or through a subsidiary corporation," Boryk v. de Haviland Aircraft Co., 341 F2d 666, 668. In certain cases, this concept should be applied to corporate reorganizations. It would be unjust to permit a corporation to use a corporate reorganization as a cloak for the evasion of its tax obligations.

The status of the subsidiary as a separate entity should be ignored in situations where the parent so dominates and controls the affairs of the subsidiary that the subsidiary is an instrumentality of the parent. Coastal States Trading, Inc. v. Zenith Nav. SA, 446 F. Supp. 330; Fiur Co. v. Ataka & Co., 71 AD2d 370. In such situations, the subsidiary should be considered to be the alter ego of the parent. See, Van Valkenburgh, Nooger & Neville, Inc. v. Hayden Publishing Co., Inc., 30 NY2d 34.

While "New York law in this area is hardly as clear as a mountain lake in springtime," Brunswick Corp. v. Waxman, 599 F2d 34, 35, in order to invoke this alter ego doctrine, the parent corporation must dominate the finances, policy and business practices of the controlled corporation. Fisser v. International Bank, 282 F2d 231. Indicia such as common officers and directors, common offices and telephone numbers between corporate entities are relevant but are not sufficient by themselves to show that one corporation is the alter ego of another. Consideration must also be given to factors such as the degree of overlap of personnel, the amount of business discretion displayed by the corporations, whether the entities operate independently of each other, whether the parent corporation owns all or most of the stock of the subsidiary and whether the parent corporation causes the incorporation of the subsidiary. United States Barite Corp. v. M. V. Haris, 534 F. Supp. 328; Ioviero v. CIGA Hotels, Inc., 101 AD2d 852; Lincoln Center v. State Tax Commission, 113 Misc. 2d 329; Worldwide Carriers, Ltd. v. Aris Steamship Co., 301 F Supp 64. Also significant is whether the corporations trade under their own names and whether they hold themselves out to the public as separate and distinct businesses. Mangan v. Terminal Transportation System, Inc., 247 AD 853; Matter of Sbarro Holding, Inc., 111 Misc. 2d 910, aff'd 91 AD2d 613; Matter of Typhoon Industries, Inc., 6 BR 886; see, also, Plainview Realty v. Board of Managers, 86 Misc. 2d 515; Henn and Alexander, Laws of Corporations and Other Business Enterprises 3d Ed. (1983), pp. 354-356. Note that while many of the cases relating to this alter ego doctrine concern parent and subsidiary corporations, this same reasoning should be applicable to affiliated corporations, i.e., corporations owned by a common parent. CIT Fin. Services Consumer Discount Co. v. Director, Div. of Taxation, 4 N.J. Tax 349, CCH 201-026; Frummer v. Hilton Hotels, Inc., 19 NY2d 533; Matter of Bowen Transports, Inc., 551 F2d 171.

If the affairs of the subsidiary or affiliated corporation are so dominated and controlled by its parent of affiliate that the dominated and controlled corporation is the alter ego of the other, then the nexus of one with New York State for tax jurisdiction purposes will provide sufficient nexus with New York State for the other. CIT Fin. Services Consumer Discount Co. v. Director, Div. of Taxation, supra; Minnesota Tribune Co. v. Commissioner of Taxation, 37 NW2d 737; Franklin Mint Corp. v. Tully, 94 AD2d 877, aff'd, 61 NY2d 980. (Other cases supporting a finding of nexus premised on a parent/subsidiary relationship include Aldens, Inc. v. Tully, 49 NY2d 525; Reader's Digest Association, Inc. v. Mahin, 44 Ill. 2d 354, 255 NE2d 458, appeal dismissed, 399 US 919; Appeal of Dresser Industries, Inc., California State Board of Equalization, CCH 400-485. See Barber, "Piercing the Corporate Veil," 17 Willamette L. Rev. 371, 397.)

Under the facts presented in this Petition, it is not clear whether the new corporation will be operating as a corporation separate and distinct from its New York affiliate, Petitioner, or its New York parent, Levitz Furniture Corporation. No information has been provided regarding the proposed structure of the transactions between the corporations and the intended degree of dominance and control that Petitioner or its parent will have over the new corporation. However, if its parent or Petitioner exercise such a degree of dominance and control over the new corporation that the new corporation will be in reality the alter ego of its parent or Petitioner, then there will be sufficient nexus with New York to compel the new corporation to collect New York State sales and use taxes.

ISSUE 2 - Status as a Vendor

In addition to establishing the constitutionally required nexus with New York, in order to compel a corporation to collect New York State tax, it must also be determined that such corporation is subject to the provisions of the New York State Sales and Use Tax Law. Section 1131 of the Tax Law requires, in pertinent part, that every vendor of tangible personal property or services is required to collect sales and use taxes imposed under Article 28. Tax Law 1131(1). The term "vendor" is defined under section 1101(b)(8) to include among others

> "(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;" Tax Law, 1101(b)(8)(i)(A) and (B).

The term person includes a corporation or combination of corporations. Tax Law, 1101(a).

If the affairs of a subsidiary or affiliated corporation are dominated and controlled by its parent or other affiliate to such a degree that it will be considered the alter ego of the parent or affiliated corporation and the parent or affiliated corporation qualifies as a "vendor", then the new corporation will also be considered a "vendor". Lincoln Center v State Tax Commission, 113 Misc. 2d 329.

Section 526.10 of the Sales and Use Regulations expounds upon the activities that bring a person within the definition of "vendor". Section 526.10(e)(1) specifically concerns interstate vendors and provides that a person outside New York is required to collect tax on tangible personal property delivered in New York if that person:

(1) makes sales to persons within the state, and

(2) either (a) solicits such sales in New York as defined in Regulation section 526.10(d), or

(b) maintains a place of business in New York as defined in Regulation section 526.10(c). 20 NYCRR 526.10(e)(1)

Section 526.10(c) provides that a vendor shall be considered to maintain a place of business in the state if he, directly or through a subsidiary, has a store, salesroom, sampleroom, showroom, distribution center, warehouse, service center, factory, credit and collection office, administration office or research facility in the state. 20 NYCRR 526.10(c). Petitioner and its parent corporation are maintaining a place of business in New York and clearly qualify as vendors. 20 NYCRR 526.10(a)(2); 526.10(c). Consequently, the new corporation, if determined to be the alter ego of either its parent corporation or Petitioner, will, as a result of that relationship, be considered to be maintaining a place of business in New York and qualify as a vendor under this section of the Regulations. As a vendor, the new corporation will be required to collect and remit tax.

DATED: September 18, 1986

s/FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions are limited to the facts set forth therein.