New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau

TSB-A-89 (43)S
Sales Tax
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STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S890503B

On May 3, 1989, a Petition for Advisory Opinion was received from Geran Mailing Inc., 706 Executive Boulevard, Valley Cottage, New York 10989.

The issue raised is whether the performance of lettershop (direct mail) services, including the storage of materials in New York, performed by Petitioner, Geran Mailing, Inc., a New York corporation for an out of state corporation requires the out of state corporation to register as a vendor for New York State sales tax purposes and to collect sales tax on its mail order sales to New York residents.

Petitioner has its headquarters and production facilities located within New York State. A prospective customer of Petitioner which is a mail-order company located outside of New York has recently approached them concerning Petitioner's performance of direct mail letter shop services. Petitioner's prospective customer plans to send mailing materials to Petitioner's facility located in New York. Materials will include mailers, inserts, business reply envelopes, etc. Petitioner will perform lettershop (direct mail) services for its prospective customer and will deliver the final mail pieces to a local post office in New York State for mailing. At the present time Petitioner's prospective customer does not maintain a place of business in New York State. Furthermore, it does not solicit business by employees, independent contractors, agents or other representatives. It however does regularly and systematically solicit business in New York State by distribution of catalogs and other advertising materials.

Under Article 28 of the Tax Law every person who makes retail sales of tangible personal property in New York (which includes sales where the property ,is delivered to the customer in New York) is required to register with the Tax Commission and to collect the sales tax due with respect to such sales.

Section l101(b)(8) of the Tax Law provides in part:

> (i) The term "vendor" includes:
>
> (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;
>
> (C) A person who solicits business either:

(C) A person who solicits business either:

(I) by employees, independent contractors, agents or other representatives; or

(II) by distribution of catalogs 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;

* * *

(E) A person who regularly or systematically solicits business in this state by the distribution, without regard to the location from which such distribution originated, of catalogs, advertising flyers or letters, or by any other means of solicitation of business, to persons in this state and by reason thereof makes sales to persons within the state of tangible personal property, the use of which is taxed by this article, if such solicitation satisfies the nexus requirement of the United State constitution;

Section 1101(b)(8)(iv) of the Tax Law provides: "For purposes of clause (E) of subparagraph (i) of this paragraph, a person shall be presumed to be regularly or systematically soliciting business in this state if, for the immediately preceding four quarterly periods ending on the last day of February, May, August and November, the cumulative total of such person's gross receipts from sales of property delivered in this state exceeds three hundred thousand dollars and such person made more than one hundred sales of property delivered in this state, unless such person can demonstrate, to the satisfaction of the commissioner, that he cannot reasonably be expected to have gross receipts in excess of three hundred thousand dollars or more than one hundred sales of property delivered in this state for the next succeeding four quarterly periods ending on the last day of February, May, August and November."

Section 1131 (1) of the Tax Law provides in part that "person required to collect any tax imposed by this article" shall include: every vendor of tangible personal property or services;

Section 1131(4) of the Tax Law provides in part that "Property and services the use of which is subject to tax" shall include: (a) all property sold to a person within the state, whether or not the sale is made within the state, . ."

Section 1134(a)(1) of the Tax Law further provides in part that "Every person required to collect any tax imposed by this article commencing business, or opening a new place of business,

. . . shall file with the Tax Commission a Certificate of Registration, in a form prescribed by it, at least twenty days prior to commencing business .... "

In 1967, the U.S. Supreme Court held in National Bellas Hess v. Department of Revenue (386 US 753), that a mail order company whose only contacts with Illinois were the mailing into the State of its biannual catalogs and its occasional advertising flyers, and the delivery into the State of its goods by mail or common carrier, did not have sufficient nexus with the State to allow Illinois to require the mail order company to collect the use tax owed on the use of its goods by customers in Illinois.

Prior to the National Bellas Hess decision, the Supreme Court had found nexus for use tax purposes where the out-of-state company had in the state both agents and offices for soliciting sales (Felt and Tarrant Manufacturing Co. v. Gallagher, (292 US 86, 1934); where the company had a division operating in the state which was separate from the mail order division (Nelson v. Sears, Roebuck & Co., (312 US 359, 1941)i where the company had traveling salesmen present in the state (General Trading Co. v. State Tax Commission, (322 US 335, 1944); and where the company used independent contractors or jobbers to solicit sales in the state (Scripto, Inc. v. Carson, (362 US 207, 1960). There was one case decided earlier than National Bellas Hess where the Court found an absence of nexus. In that case, Miller Bros. v. Maryland (347 US 340, 1954), the Court held that the infrequent delivery into Maryland by a Delaware company in its own trucks and the incidental effects of general advertising in Delaware newspapers that had circulation in Maryland were not sufficient to provide nexus with Maryland.

As part of the fall-out of the National Bellas Hess decision, the mail order industry has been able, in the past 20 years, to grow tremendously and to enjoy a competitive advantage over local businesses. Although technically a use tax is owed by the customers on mail order purchases, under National Bellas Hess the mail order companies have not been compelled to collect that tax, while local companies selling similar goods to similarly situated customers have been compelled to collect the sales tax. Further, since the rate of voluntary compliance by individuals with the use tax is very low and the tax is difficult to enforce against individual customers, mail order purchases are commonly viewed as tax free transactions.

In recent years, however, while the direct marketing industry has grown markedly, the U.S. Supreme Court has given indications that if a situation similar to that presented in National Bellas Hess came before it again, it would find sufficient nexus to compel the collection of tax. The Court in the years since National Bellas Hess was decided has expanded its interpretation of nexus for both tax and civil jurisdiction purposes. Pursuant to the U.S. Supreme Court's decision in International Shoe Co. v. Washington, (356 U.S. 310, 1955), the standards for nexus for judicial jurisdiction purposes and tax jurisdiction purposes should be considered to be the same. In that case the Court was called upon to decide whether International Shoe had sufficient contacts with Washington to allow the State to subject it to personal jurisdiction in a suit to recover unpaid unemployment

insurance taxes and subject the corporation to the unemployment insurance tax. In finding nexus, the Court stated: "The activities which establish [International Shoe's] 'presence' subject it alike to taxation by the state and to suit to recover the tax" (326 US at 321).

In National Geographic Society v. California Board of Equalization (430 US 551), decided in 1977, the Supreme Court expanded its interpretation of nexus for use tax purposes. This case involved California's efforts to require National Geographic to collect use tax on its mail order sales. The mail order business was conducted entirely outside of California. However, National Geographic had offices in the State which solicited advertising for its magazine. The Court found that National Geographic's California offices provided sufficient contacts with California for the State to compel it to collect use tax, noting that

> "the 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 ..." require to collect the tax. (430 US at 561).

In Tyler Pipe Industries v. Washington Department of Revenue (483 US 232, 107 S Ct 2810, 1987), the Supreme Court noted the importance played by a company's activities related to establishing a market for its goods in determining whether that company has nexus with a state, when it quoted the following language from the Washington Supreme Court's decision in this case:

> "...'the crucial factor governing nexus is whether the activities performed in this state on behalf of the taxpayer are significantly associated with the taxpayer's ability to establish and maintain a market in this state for the sales'" (107 S Ct at 2821)

Further, the Court has expanded the concept of nexus for civil jurisdiction purposes to cover instances where the defendant, although not physically present in the State, has purposefully directed his activities toward persons in the State. In World-Wide Volkswagen Corp. v. Woodson (444 US 286, 1980), the Court denied Oklahoma personal jurisdiction over a nonresident defendant, noting a total absence of "affiliating circumstances" that were required for an exercise of state court jurisdiction. Included in its list of such affiliating circumstances was the solicitation of business either through salespersons or through advertising reasonably calculated to reach the State (444 US at 295). The Court stated that the

> "forum state does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they

> will be purchased by consumers in the forum state" (444 US at 297-298).

The Court reaffirmed these principles in another judicial jurisdiction case, Burger King v. Rudzewicz (471 US 462, 1985). Here the Court noted that

> "... it is an inescapable fact of modern commercial life that a substantial amount of business is transacted solely by mail and wire communications across state lines, thus obviating the need for physical presence within a state in which business is conducted. So long as a commercial actor's efforts are 'purposefully directed' toward residents of another state, we have consistently rejected the notion that an absence of physical contact scan defeat personal jurisdiction there" (471 US at 476).

Finally, the Supreme Court gave a strong indication that National Bellas Hess may fall in the most recently decided tax jurisdiction case, D.H. Holmes Company, Ltd. v. McNamara (486 US 24, 100 LEd2d 21, 1988). The issue in that case was whether the Holmes Company had to pay Louisiana use tax on catalogs printed outside the State and directly mailed to customers within the State. In discussing the significance of the catalogs and their distribution by the Holmes Company, the Supreme Court used the following language:

> "Finally, we believe that Holmes' distribution of its catalogs reflects a substantial nexus with Louisiana .... The distribution of catalogs to approximately 400,000 Louisiana customers was directly aimed at expanding and enhancing its Louisiana business. There is 'nexus' aplenty here." (100 LEd2d at 28-29)

It should be noted that because of Holmes' significant economic presence in the State (i.e., it had stores located in Louisiana), the Court distinguished this case from National Bellas Hess rather than overruling it. However. this does not diminish the significance of the Court's dictum quoted above. It appears that the U.S. Supreme Court is ready to recognize that a company making sales in a state through the distribution of catalogs has sufficient contacts with the state to allow the state, through legislation, to require a mail order company to collect its use tax. To date, other than New York, at least eighteen states, including California, Florida and Massachusetts, have enacted such legislation.

In the instant case the retaining of the Petitioner by the prospective customer to perform letter shop services would not constitute the maintenance of a place of business in New York State by the customer in accordance with the meaning and intent of Section ll01(b)(8)(i)(B) of the Tax Law. Furthermore, the rendition of these services in New York State by the Petitioner on behalf of the prospective customer would not constitute the solicitation of business in New York State by employees, independent contractors, agents or other representatives of the customer in accordance

with the meaning and intent of Section 1101(b)(8)(i)(C)(I) of the Tax Law.

However, if the prospective customer of the Petitioner is regularly or systematically soliciting business in New York by distributing catalogs, advertising flyers, letters, etc. and as a result thereof is making sales of tangible personal property to persons in New York State then the prospective customer would be a "vendor" pursuant to Sections 1101(b)(8)(i)(C)(II) and ll01(b)(8)(i)(E). The location from which the distribution of said advertising materials originated, whether within or without New York State, is irrelevant for the purposes of Section 1101(b)(8)(i)(E). Therefore the prospective customer if a "vendor" pursuant to Sections 1101(b)(8)(i)(C)(II) and 1101(b)(8)(i)(E) would be required to register as a vendor for New York State sales tax purposes and to collect sales and use taxes on its mail order sales to New York residents in accordance with the provisions of Sections l101(b)(8), 1131(1) and 1134(a)(1) of the Tax Law.

In conclusion, the obligation of the prospective customer to collect sales tax on sales made to New York residents does not depend on the geographical location of the letter shop which assembles and mails the catalogs and other advertising and soliciting materials or the geographic location from which the materials are mailed by the letter shop. Its liability to collect sales tax as the result of the activities making it a "vendor" pursuant to Sections 1101(b)(8)(i)(C)(II) and ll01(b)(8)(i)(E) arises from the activities set forth in said sections. Thus the retention by the prospective customer of the Petitioner to perform the letter shop services described above would not be a factor to be considered in determining whether the prospective customer is required to register as a vendor for New York sales tax purposes and to collect sales tax on its mail order sales to New York residents.

DATED: November 20, 1989

s/FRANK J. PUCCIA
Director
Technical Services Bureau

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