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

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Sales Tax
May 15, 1992

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION PETITION NO. S920309A

On March 9, 1992, a Petitioner for Advisory Opinion was received from HDI Sylvan Pools, Inc., Route 611, PO Box 1449, Doylestown, PA 18901.

The issue raised by Petitioner, HDI Sylvan Pools, Inc., is whether merchandise sold from Georgia and shipped from Georgia and/or Pennsylvania warehouses by common carrier to customers in New York, where Petitioner maintains offices and retail stores in New York, is subject to New York State and local sales and use taxes.

Petitioner has a multi-state operation for various products it sells. Petitioner maintains offices and retail stores in various states, including Pennsylvania, New Jersey, New York, Connecticut, Georgia, Texas, Nevada, Virginia and North Carolina.

Petitioner plans to introduce a new product to be sold strictly from its Georgia sales office. In addition, collections will be made by its Georgia sales office.

The new product will be stored at Petitioner's Georgia and Pennsylvania warehouses, and shipped from these locations to customers in various states based on instructions received from the Georgia sales office. The New York offices and retail stores will not be involved in anyway with this new product.

Section 1101(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;.

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 Commissioner of Taxation and Finance a Certificate of Registration, in a form prescribed by him, 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); 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 provides 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 grown tremendously and to enjoy a competitive advantage over local businesses. Although technically a use tax is owned by the customers on mail order purchases,under National Bellas Hess the mail order companies have not been compelled tocollect that tax, while local companies selling similar goods to similarlysituated 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 customer's, 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 US 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 suite 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 like, 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 reasonable 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 contacts can 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 p a y 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 32-33)

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 matter Ardens, Inc. v. Tully, 49 NY2d 525, the Court held that an Illinois corporation engaged principally in a mail-order merchandise sales business, with its main offices and warehouse in the State of Illinois, where orders were accepted and filled, either by direct mail or common carrier from its Illinois office, was required to collect New York State and local sales and use taxes on merchandise shipped into New York since the corporation's wholly owned subsidiary maintained four offices in different localities in the State. Sales tax was required to be collected on all goods sold and delivered by it to purchasers at every locality within the State despite the fact that the corporation's only contact with the localities in which it does not maintain offices is by mail and common carrier.

In the instant case Petitioner sells and ships merchandise from its Georgia and/or Pennsylvania warehouses to customers in New York and also maintains offices and retail stores in New York. Accordingly, since Petitioner has a nexus with New York it is required to collect sales and use taxes on all goods sold and delivered to purchasers in any locality within the State, despite the fact that Petitioner's only contact with the localities in which it does not maintain offices and retail stores is by mail or common carrier. The tax should be collected at the applicable rate for the locality in which delivery or possession is transferred to the customer.

DATED: May 15, 1992

s/PAUL B. COBURN
Deputy Director
Taxpayer Services Division

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