

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
RANDALL J. KADISH	:	DECISION
AND KAHINA, INC.	:	DTA NO. 801427
	:	
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 December 1, 1979	:	
through February 29, 1980.	:	

Petitioners, Randall J. Kadish and Kahina, Inc., 300 West 72nd Street, New York, New York 10023, filed an exception to the determination of the Administrative Law Judge issued on March 10, 1988 with respect to their 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 December 1, 1979 through February 29, 1980 (File No. 801427). Petitioners appeared by Sam Kadish. The Division of Taxation appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

Petitioners submitted a brief on exception. The Division did not. Petitioners' request for oral argument was denied.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioners purchased and accepted delivery of a boat in New York State and are thus liable for New York State sales tax.

II. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be canceled because it assessed a tax for the period ended February 29, 1980, and the sales transaction which was the subject of that notice actually occurred after September 1980.

FINDINGS OF FACT

We find the facts as stated in the determination of the Administrative Law Judge and such facts are incorporated herein by this reference. They are summarized as follows.

By letter dated April 13, 1982, the Division of Taxation contacted petitioners, Randall J. Kadish and Kahina, Inc., informing them that its review of boat dealer records indicated that petitioners owed New York State and local sales tax on the purchase of a boat on February 14, 1980. The purchase price was stated as \$32,676.00. Petitioners were given the opportunity to concede such tax was due or to explain why it was not due.

Randall J. Kadish responded to the Division by mail, stating that the boat in question had not been purchased for use in New York State. However, he did not deny purchasing such a boat or taking delivery of it in New York State.

The Division sent petitioners a second letter on March 3, 1983. It asserted a tax due of \$2,614.00 plus simple interest on petitioners' purchase of a boat from Schatz Brothers Marine Center, Inc. ("Schatz") of Brooklyn, New York. Petitioners did not respond to this letter. Subsequently, on May 21, 1984, the Division issued to petitioners a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period ending February 29, 1980, assessing sales tax due of \$2,614.00 plus penalty and interest. An explanation of the basis for the assessed tax referred petitioners to the Division's previous correspondence.

The documents relied on by the Division in determining that petitioners had purchased and taken possession of a boat in New York State included the following:

(a) A boat purchase contract between Schatz and Randall J. Kadish as agent for a Delaware corporation. The contract was executed by the parties on September 14, 1980. The subject of the contract was a 42-foot Lazycruz with a purchase price of \$33,777.00. An attached statement of account dated February 1, 1981 indicates that petitioners refused payment on several charges which were part of the contract price, reducing the final purchase price to \$32,676.65.

(b) A schedule of sales tax transactions from Schatz. The schedule lists Randall J. Kadish as the purchaser of a boat at a delivered price of \$32,676.65. The point of delivery is shown as Brooklyn and the place where the boat was moored or stored is shown as “Ft of Weber Ct, Sheepshead Bay.” Kahina, Inc. is listed as a corporation involved in the sale.

Petitioner Randall J. Kadish is the son of Sam Kadish. Both were residents of New York State during the entire period of time discussed in these findings. In 1980, Sam Kadish, a construction worker, decided to buy a boat to serve as his home while he traveled and worked in various parts of the country. In order to implement this plan, Sam and his son formed a Delaware corporation for the sole purpose of purchasing a boat. Sam’s intentions were carried out to the extent that a houseboat was purchased from Schatz in 1980 and moored near Atlantic City, New Jersey, where Sam looked for work in the construction trade. In 1982, Sam returned to New York State for a visit mooring the houseboat in Sheepshead Bay. Although it was not his original intention, family obligations forced Sam to remain in New York State from 1982 through 1987.

A Certificate of Delivery was offered by petitioners as proof that delivery of the houseboat occurred outside of New York State. The certificate was signed by Randall J. Kadish, dated November 14, 1980 and witnessed by a party identified only by his signature. It states: "The undersigned purchaser of 42 foot Lazycruz certifies that I received delivery of the above vessel on blank at Wilmington, Del. The said delivery was made by Schatz Bros. Marine Center, Inc., their agents and employees."

As proof that the houseboat was moored in New Jersey after being delivered, petitioners offered two slip rental agreements. The parties to the agreements were Sam Kadish, whose address is listed as 10 Weber Court, Brooklyn, New York and Hayes Marina, Inc., of Tuckerton, New Jersey. The boat to be moored is identified as a 42-foot houseboat named "Kahina." The periods covered by the agreements are May to October 1980 and May to October 1981. Petitioners alleged that the first rental agreement was entered into while the plan to purchase a boat was being contemplated, but before it was completed.

OPINION

The Administrative Law Judge determined that the petitioners took delivery of the houseboat in New York State and were liable for the sales tax asserted by the Division. Based on this determination, the Administrative Law Judge concluded that the use tax issues were moot and did not have to be dealt with in his determination.

The Administrative Law Judge also determined that while the Notice of Determination and Demand for Payment of Sales and Use Taxes Due did state the wrong period, petitioners did not show that they were prejudiced by the error. Accordingly, the Administrative Law Judge deemed the delivery date to be November 14, 1980, as per the certificate of delivery

offered by the petitioners.

The petitioners assert on exception that they proved delivery of the boat took place outside of New York State and that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due is fatally defective in that the sales transaction which is the subject of the notice occurred months after the period covered by the notice.

We affirm the determination of the Administrative Law Judge.

We deal first with the issue of whether the petitioners took delivery of the houseboat in New York State.

Tax Law section 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property unless otherwise exempt. In determining whether a taxable event occurred, it is appropriate to consider both the location where the transaction was finalized and the point at which possession was transferred from the seller to the buyer (see, Matter of Savemart, Inc. v. State Tax Commn., 105 AD2d 1001; Matter of David Hazan, Inc. f/k/a/ David Fur Couture, Inc. and the Estate of David Hazan, as officer of David Fur Couture, Inc., Tax Appeals Tribunal, April 21, 1988).

The petitioners bear the burden of proving that possession of the houseboat did not take place in New York State (20 NYCRR 3000.10[d][4]).

The Administrative Law Judge evaluated the evidence submitted by the petitioners and the evidence submitted by the Division and concluded that petitioners did not meet their burden of proof. We agree with this conclusion.

The evidence submitted by the Division, the vendor's sales record, clearly indicates the point of delivery as Brooklyn and the place where the boat was moored or stored as "Ft of

Weber Ct, Sheepshead Bay.” This evidence is not effectively contradicted by petitioner.

Without substantiating evidence, petitioners’ Certificate of Delivery, which itself is incomplete, and Sam Kadish’s testimony amount to little more than bare assertions. Nor do the rental agreements go directly to the issue of where possession of the houseboat took place, Therefore, it is concluded that delivery took place within the state and the transaction at issue was subject to sales tax.

We deal next with the error in the Notice and Demand for Payment of Sales and Use Taxes Due. We affirm the determination of the Administrative Law Judge.

We find nothing in the record to indicate that the petitioners were in any way prejudiced by the fact that the notice indicated the wrong taxable period. Accordingly, the assessment is not voided (Matter of Pepsico, Inc. v. Bouchard, 102 AD2d 1000, 1001).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Randall J. Kadish and Kahina, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Randall J. Kadish and Kahina, Inc. is granted to the extent indicated in conclusions of law “D” and “G” of the Administrative Law Judge’s determination and the Division of Taxation is directed to modify the Notice of Determination issued May 21, 1987 accordingly, but except as so granted is in all other respects denied.

DATED: Albany, New York
January 12, 1989

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner