STATE OF NEW YORK

TAX APPEALS TRIBUNAL

| | | |
|---|---|---|
| In the Matter of the Petition | : | |
| of | : | |
| **MITCHELL M. KROHNENGOLD** | : | |
| for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period Ended May 1, 2002. | : | DECISION DTA NO. 821884 |

Petitioner, Mitchell M. Krohnengold, filed an exception to the determination of the Administrative Law Judge issued on February 26, 2009. Petitioner appeared *pro se*. The Division of Taxation appeared by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a letter brief in opposition. Petitioner's request for oral argument was denied.

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

## *ISSUE*

Whether petitioner has demonstrated that his failure to pay sales or use tax on the purchase of a used boat in 2002 was due to reasonable cause and not due to willful neglect, thereby justifying the abatement of penalties asserted pursuant to Tax Law § 1145(a)(1)(i).

## *FINDINGS OF FACT*

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On or about April 29, 2002, Mitchell M. Krohnengold (petitioner), a New York resident living at 201 Briarwood Drive, Somers, New York, purchased a used 2000 Sea Ray Sundancer from a broker, Northeast Yacht Sales, Inc., of Portland, Connecticut, for the sum of $497,800.00. Petitioner paid for the vessel with loan proceeds of $398,000.00 and the trade-in of his current vessel, which had a value of $99,800.00. At the time of purchase, the boat was located in New York State.

The bill of sale for the vessel did not recite a purchase price, trade-in or separately state sales tax paid but did set forth a "consideration received" of "one dollar and other valuable considerations."

Two years prior to the purchase of the Sea Ray, petitioner purchased a 2000 Chris Craft Express Cruiser from a different Connecticut dealer, Clinton Harborside Marina LLC of Clinton, Connecticut, for a purchase price of $116,800.00. The retail installment contract for that purchase indicated that sales tax was to be paid out of loan proceeds and was separately stated as a discreet charge to be paid by the bank on behalf of petitioner.

In April 2005, the State of Connecticut conducted a use tax investigation with regard to petitioner's use of the Sea Ray in Connecticut for an unspecified period. Through submissions of documentation of winter storage and summer slip rentals in New York and a log indicating a presence outside of Connecticut (in New York), the State of Connecticut cancelled its investigation on July 29, 2005.

On August 19, 2005, the Division of Taxation ("Division") notified petitioner by letter that the State of Connecticut had informed it that he had purchased tangible personal property, the Sea Ray, for $398,000.00 on May 1, 2002 and that a review of its records indicated that the proper amount of sales or use tax had not been paid. The letter also stated that the tax due of

$33,830.00 plus penalty and interest should be sent to the Division within 30 days of the letter. The letter requested that petitioner submit proof of previously paid sales or use tax, if any.

When it received no payment, the Division issued a Statement of Proposed Audit Change, dated December 29, 2005, which asserted tax due in the sum of $33,830.00 plus penalty and interest. This statement was returned to the Division on January 25, 2006 with an explanation of petitioner's disagreement, which said, "Attached correspondence proves we are not liable for this tax." The attachment to the statement consisted of a Taxpayer Services Division memorandum, TSB-M-82(3)S, concerning the taxability of vessels sold by boat dealers.

The Division issued to petitioner a Notice of Determination, dated June 16, 2006, which asserted sales or use tax in the sum of $33,830.00 plus penalty and interest. The notice set forth the following explanation:

> Since you did not submit the information we requested in our previous correspondence regarding the purchase of a vessel, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law.

Petitioner timely protested the notice by petition filed on or about September 19, 2007.

Following issuance of the Notice of Determination, petitioner's representative, Lee David Auerbach, Esq., contacted the Division on behalf of his client by letter of February 16, 2007 and informed the Division that petitioner was advised by Northeast Yacht Sales, Inc., of Portland, Connecticut, that the contract price included all sales taxes, vessel documentation charges and related expenses and that vessels over 40 feet in length did not need to be registered with the Department of Motor Vehicles ("DMV") in New York. Mr. Auerbach further explained that Mr. Krohnengold did not become aware of a tax issue until the use tax investigation by the State of Connecticut in 2005, and did not find out the statutory basis for the notice until December of 2006.

The Bureau of Conciliation and Mediation Services ("BCMS") issued a Conciliation Order, dated June 22, 2007, which recomputed the tax due on the purchase price of the Sea Ray such that the tax determined to be due was $26,865.00, plus applicable penalty for failure to file and failure to pay and interest. Petitioner subsequently agreed to this tax and paid it.

***THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE***

In his determination, the Administrative Law Judge concluded that based on petitioner's purchase of the 2000 Sea Ray Sundancer at retail from a Connecticut broker, and petitioner's harboring, storing and maintaining the boat in New York State, petitioner was subject to use tax.

The Administrative Law Judge noted that despite the fact that there was no written indicia that sales or use tax had been paid to the State of New York on his purchase of the 2000 Sea Ray, petitioner contended that he was convinced that he had taken all steps necessary to insure that tax had been paid. Further, petitioner contended that the dealer informed him that vessels over 40 feet in length did not need to be registered with DMV and that he accepted this without any hesitation, inquiry or investigation on his part.

The Administrative Law Judge recited the provisions of Vehicle and Traffic Law § 2251(1), which prohibit the operation of a vessel on non-privately owned waters of the state unless such vessel is registered. The Administrative Law Judge observed that had petitioner tried to register the 2000 Sea Ray with DMV, he would have been required to pay the appropriate tax or provide proof of exemption or that the tax had been paid. Even though petitioner was under a duty to report and pay the tax, the tax remained unpaid until after the conciliation order was issued.

The Administrative Law Judge noted that Tax Law § 1145(a)(1) provides for the imposition of penalty where a person fails to file a return or pay the tax due within the time

required, unless the failure or delay was due to reasonable cause and not willful neglect. The Administrative Law Judge did not accept petitioner's argument that he accepted the representations of Northeast Yacht Sales without question because in his prior purchase the vendor made the same representation that the sales tax was included in the contract price. The Administrative Law Judge held that the documentation belies petitioner's claim because the installment contract for the purchase of the Chris Craft Express Cruiser in 2000 distinctly listed a provision for the payment of a precise amount of sales tax, separately stated, and there was no such provision in the bill of sale for the Sea Ray in 2002.

The Administrative Law Judge considered petitioner's reliance on Northeast Yacht Sales representation that boats in excess of 40 feet need not register with DMV, which was contrary to Vehicle and Traffic Law § 2251, to be "nothing more than ignorance of the law, which is not a valid excuse or defense."

The Administrative Law Judge found support for his conclusion that petitioner knew that the tax had not been paid from petitioner's failure to ever mention his payment of New York use tax to the Connecticut Department of Revenue Services in its use tax investigation. The Administrative Law Judge rejected petitioner's argument that the broker, and not petitioner, was liable for the sales tax as it was not demonstrated that Northeast Yacht Sales was a New York broker and petitioner cannot absolve himself of responsibility for paying the sales tax in a New York sales transaction because the purchaser is also liable for the sales tax due.

The Administrative Law Judge also found that petitioner was not entitled to an abatement of penalty on the basis that unique circumstances resulted in the delay in payment of the tax and demonstrated an absence of willful neglect. The Administrative Law Judge concluded that

petitioner's actions in this matter did not fulfill the spirit and purpose of the statute and regulations and so did not warrant an abatement of penalty.

***ARGUMENTS ON EXCEPTION***

On exception, petitioner argues that his failure to pay the tax was due to reasonable cause and not due to willful neglect. Petitioner maintains, as he did before the Administrative Law Judge, that sales tax was collected on the date of sale by the broker, Northeast Yacht Sales, as it informed petitioner that the purchase price of the vessel, $497,800.00 was an "all-inclusive" price. Petitioner asserts that this purchase price included all applicable sales tax, vessel documentation charges and related expenses. Further, petitioner asserts that the broker informed him that because the vessel was in excess of 40 feet in length, it was not necessary to register it with New York State. Petitioner argues that it was his expectation that this sale would be conducted as was a previous boat purchase made in Connecticut, which also included sales tax in the purchase price.

Petitioner disagrees with the Administrative Law Judge's conclusion that petitioner brought the Sea Ray boat into New York State. Petitioner asserts that delivery took place in New York State, as it was harbored in New York and the trade-in was accepted in New York. Petitioner argues that it was the dealer's responsibility to collect sales tax and the petitioner paid the dealer sales tax at the time of the closing. Petitioner claims that this is consistent with what he told Connecticut taxing authorities when questions arose as to Connecticut's right to collect use tax.

In opposition, the Division argues that the Administrative Law Judge correctly determined that petitioner failed to show that reasonable cause existed for the abatement of penalty in this matter. The Division points out that when the Connecticut Department of Revenue Services attempted to collect sales tax from petitioner for the purchase of the boat, he never claimed that

he had already paid the tax to the broker. Rather, he submitted documents showing that he was a New York State resident and that the boat was permanently docked in New York State. The Division further maintains that petitioner's failure to register the boat with New York State is evidence that reasonable cause does not exist for the abatement of penalties. Petitioner acknowledged that had he registered the boat with New York State, he would have been required to pay sales tax. However, petitioner asserts that he failed to register the boat due to his reliance on the erroneous advice of the broker that registration was not required due to the size of the boat. The Division believes that petitioner deliberately failed to register the boat to avoid the payment of sales tax.

***OPINION***

The only issue in this proceeding is whether petitioner has met his burden to demonstrate that his failure to pay sales or use tax to New York State on his purchase of a used boat in 2002 from Northeast Yacht Sales, a Connecticut broker, was due to reasonable cause and not willful neglect. If petitioner has done so, then the penalty asserted against him may be abated (***see***, Tax Law § 1145[a][1]). We find that petitioner has not met his burden of proof.

Petitioner argues that he paid the appropriate amount of sales tax due on his purchase of the boat to the broker, based on the broker's assurance that the purchase price was an all-inclusive sum. We disagree. There is no indication in the documents presented by petitioner to support the conclusion that sales tax was included within the purchase price. To the contrary, the documents in evidence fully support the conclusion that no sales tax was collected on the purchase by the broker.

Petitioner makes much of the circumstances surrounding his purchase of a prior boat. In that transaction, the sales tax was shown separately from the purchase price on the retail

installment contract. In the 2002 purchase, no sales tax was shown nor was the word "tax" indicated in any manner on the bill of sale or the letter of financing commitment. It is difficult to reconcile petitioner's argument with the documentary disparity he has presented.

Further, petitioner posits that he relied on the broker's representation that because the purchased vessel was in excess of 40 feet in length, it did not need to be registered with New York State. That advice, if it was given, was entirely incorrect (***see***, Vehicle and Traffic Law § 2251[1]). However, petitioner argues that he was aware that if he had registered the boat, he would have had to pay sales tax. By petitioner's logic, since he did not have to register the boat, he did not need to remit sales tax.

When the State of Connecticut Department of Revenue attempted to assess petitioner for Connecticut use tax, petitioner demonstrated to Connecticut taxing authorities that he was a New York State resident and that the boat was kept in New York State. However, as the Administrative Law Judge points out, there is no evidence that petitioner ever asserted that the tax at issue had already been paid to New York State. Had Connecticut taxing authorities not advised the Division of the outcome of its investigation, it is doubtful that petitioner would have come forward on his own and reported his failure to pay this tax to New York State when due.

Petitioner argues that it is the broker, and not petitioner, that should be held liable for the tax at issue. Notably, petitioner did not contest his liability for tax in this proceeding, but only his liability for penalty. Further, petitioner did not demonstrate that Northeast Yacht Sales was a New York sales tax vendor liable for the collection of tax in the first instance. In any case, where the customer has failed to pay the tax, it is the customer's duty to report and pay the appropriate sales and use tax due on a purchase directly to the Division (***see***, Tax Law § 1133[b]; 20 NYCRR 532.1[e]).

We find that the Administrative Law Judge completely and adequately addressed the issue presented to him and correctly applied the relevant law to the facts of this case. Petitioner has offered no evidence below, and no argument on exception, that demonstrates that the Administrative Law Judge's determination is incorrect. As a result, we affirm the determination of the Administrative Law Judge.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Mitchell M. Krohnengold is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petition of Mitchell M. Krohnengold is denied; and

4. The Notice of Deficiency dated June 16, 2006, as modified by the BCMS Conciliation Order, is sustained.

DATED: Troy, New York
January 28, 2010

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner