

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
RANDALL J. KADISH : DETERMINATION
AND KAHINA, INC. :
: :
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 a 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).

A hearing was held before Daniel J. Ranalli, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on December 8, 1987 at 9:30 A.M. Petitioners appeared by Sam Kadish. The Audit Division appeared by William F. Collins, Esq. (Mark Volk, Esq., of counsel).

ISSUES

- I. Whether petitioners are liable for New York State sales tax by virtue of having purchased and accepted delivery of a boat in New York State.
- II. Whether the Notice of Determination and Demand for Payment of Sales and Use Taxes Due should be cancelled 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.
- III. Whether a houseboat may be defined as a mobile home under Tax Law § 1101(b)(10), and if so, whether the purchase of a mobile home was exempt from the operation of the Tax Law in 1980.
- IV. Whether, if petitioners' purchase of a boat is found not to have been subject to sales

tax, a compensating use tax may be imposed based upon the bringing of the boat into New York State.

V. Whether the imposition of a use tax on a person who purchases a vessel at retail, uses the vessel out of state and later brings that vessel into New York State violates the United States Constitution.

FINDINGS OF FACT

1. By letter dated April 13, 1982, the Audit Division 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.

2. Randall J. Kadish responded to the Audit 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.

3. The Audit 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 Audit 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 Audit Division's previous correspondence.

4. The documents relied on by the Audit 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.

5. 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.

6. 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."

7. 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.

SUMMARY OF THE PARTIES' POSITION

8. Based on the facts stated above, the Audit Division reasserted its position that petitioners purchased and took delivery of a boat in New York State on February 14, 1980. In the alternative, the Audit Division argued that a compensating use tax should be imposed on petitioners because Randall J. Kadish was a New York State resident when the boat was purchased and when it was brought into and used in New York State in 1982.

9. Petitioners argue that they are not liable for either sales or use tax, based on several alternative grounds:

(a) that the sales transaction at issue does not come under the operation of the New York State Sales Tax Law because Sam Kadish allegedly took delivery of the houseboat in Delaware and immediately brought the boat to New Jersey where it remained until 1982;

(b) 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;

(c) that the houseboat is a mobile home as defined by Tax Law § 1101(b)(10), and, as such, its purchase is exempt from the imposition of sales tax;

(d) that the imposition of a compensating use tax on a vessel intended for interstate travel would be in violation of the United States Constitution.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax on the receipts from every retail sale of tangible personal property unless otherwise exempt. The tax so imposed is both a transaction tax and a destination tax. That is, 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. Tax Commn., 105

AD2d 1001).

B. In addition to the duties and liabilities placed on persons required to collect tax, the Tax Law imposes a duty directly on the customer to file a return and pay the tax imposed by Tax Law § 1105(a):

"Where any customer has failed to pay a tax imposed by this article to the person required to collect the same, then...such tax shall be payable by the customer directly to the tax commission and it shall be the duty of the customer to file a return with the tax commission and to pay the tax to it within twenty days of the date the tax was required to be paid" (Tax Law § 1133[b]).

C. If a return required by Article 28 of the Tax Law is not filed, the Audit Division is required to determine the amount of tax due from such information as may be available to it (Tax Law § 1138[a][1]). Here, the Audit Division issued an assessment based upon credible information showing that petitioners purchased and took delivery of a boat in New York State. Petitioners' challenge to that assessment rests primarily on the contention that delivery of the boat actually occurred in Delaware. The burden was upon petitioners to prove that contention by clear and convincing evidence (Matter of Licata v. Chu, 64 NY2d 873). Petitioners failed to meet this burden. Without substantiating evidence, petitioners' Certificate of Delivery and Sam Kadish's testimony amount to little more than bare assertions. Weighed against other evidence in the record, they do not provide clear and convincing evidence of out-of-state delivery. Therefore, it is concluded that the transaction at issue was subject to sales tax.

D. Petitioners have also challenged the assessment on the ground that the sales transaction at issue did not occur during the period covered by the Notice of Determination and Demand for Payment of Sales and Use Taxes Due. The notice stated that the tax was due for the period ending February 29, 1980. However, the evidence in the record shows that the boat purchase was completed after September 14, 1980. There is no question that petitioner Randall J. Kadish was fully apprised of the Audit Division's determination that sales tax was due on his purchase of a particular boat, and Randall J. Kadish's letters to the Audit Division and his timely petition demonstrate that he was neither confused nor misled by the misstatement of the taxable period. As the petitioners have not shown that they were prejudiced by the defect in the notice, that

defect did not render the assessment void in its entirety (Matter of Pepsico Inc. v. Bouchard, 102 AD2d 1000, 1001). However, there is no evidence in the record that the boat purchase occurred on February 14, 1980, as asserted by the Audit Division. As the only evidence of delivery date is the Certificate of Delivery offered by petitioners, the date the certificate was signed, November 14, 1980, will be deemed the actual date of delivery, and interest and penalty payable on the sales tax due will be calculated from that date.

E. Tax Law § 1101(b)(10) defines a mobile home, in part, as a structure which is not self-propelled. Petitioners' houseboat does not fall within this definition. Furthermore, petitioners' contention that prior to 1983 all mobile home purchases were exempt from sales tax is simply not supported by any statutory or other authority.

F. In view of Conclusion of Law "C", both issues regarding the imposition of compensating use tax are rendered moot.

G. The petition of Randall J. Kadish and Kahina, Inc. is granted only to the extent indicated in Conclusion of Law "D"; the Audit Division is directed to modify accordingly the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on May 21, 1984; and, in all other respects, the petition is denied.

DATED: Albany, New York
March 10, 1988

ADMINISTRATIVE LAW JUDGE