

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
FRED SCHILDKRAUT	:	DETERMINATION
AND MAGIC ENTERPRISES, 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, 1980	:	
through February 28, 1981.	:	

Petitioners, Fred Schildkraut and Magic Enterprises, Inc., 123-32 82nd Road, Kew Gardens, New York 11415, 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, 1980 through February 28, 1981 (File No. 801605).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on March 29, 1989 at 1:15 P.M. Petitioner appeared by Steven Pasvankias, P.A. The Division of Taxation appeared by William F. Collins, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUE

Whether petitioners are liable for compensating use tax for use of the vessel Magic within New York State.

FINDINGS OF FACT

On November 25, 1980, Magic Enterprises, Inc. ("Magic Enterprises") of Wilmington, Delaware, entered into an agreement to purchase a 35-foot sailboat with various accessories for the sum of \$72,000.00 from Smith Yacht, Inc. ("Smith Yacht"), a Delaware corporation with an office at 4407 Verona Drive, Wilmington, Delaware. Smith Yacht also had a location at 203 Main Street, Port Washington, New York.

Magic Enterprises was a Delaware corporation with two shareholders, to wit, Fred Schildkraut, who owned 500 shares of the corporation and Rhoda Pine, who also owned 500 shares of the corporation. Both Mr. Schildkraut and Ms. Pine were directors of the corporation, with Mr. Schildkraut holding the office of president and Ms. Pine the offices of secretary and treasurer. The Certificate of Incorporation of Magic Enterprises was filed in the office of the Delaware Secretary of State on November 19, 1980, and was signed by the sole incorporator, Mr. Steven J. Pasvankias, also the representative for the petitioners herein. Mr. Schildkraut and Ms. Pine became shareholders of the corporation at the first meeting of the board of directors of Magic Enterprises held on January 1, 1981. At said meeting, the secretary presented a written proposal from the directors which approved the acquisition of financing for the yacht, Magic.

On January 30, 1981, a bill of sale of an undocumented yacht was executed between Smith Yacht and Magic Enterprises, which transferred the 35-foot sailboat from Smith Yacht to Magic Enterprises. Said bill of sale was recorded with the United States Department of Transportation, United States Coast Guard, on October 27, 1981.

On November 2, 1981, Magic Enterprises, by Fred Schildkraut, granted a mortgage to Citibank, N.A., 100 Baylis Road, Huntington Station, New York, in the sum of \$45,000.00, which sum was secured by the vessel Magic.

For the fiscal year ending January 30, 1982, Magic Enterprises filed a United States Small Business Corporation Income Tax Return, Form 1120S, which indicated that the business activity of the corporation was "boat rental", and that the gross receipts of said enterprise were \$7,000.00. Total deductions for the fiscal year ended January 30, 1982 were \$10,497.34, yielding a loss of \$3,497.34. On the attached depreciation schedule, Form 4562, petitioner Magic Enterprises, Inc. listed the vessel as its only depreciable asset under the accelerated cost recovery system, five year property, with a value of \$68,184.30.

The purchase agreement between Magic Enterprises and Smith Yacht, dated November 25, 1980, set forth a selling price of \$72,000.00, less an allowance for Smith Yacht's agreement to purchase Oasis National, Inc. for \$11,283.00 which included among its assets a 28-foot 1978 Pearson, presumably a vessel.

Sometime prior to September 20, 1983, the Division of Taxation sent Fred Schildkraut and Magic Enterprises, Inc. a letter which stated that "[i]nformation available to this office identifies you as the owner of the vessel described above [Magic]." The letter also stated in pertinent part, as follows:

"Accordingly, it appears a sales and use tax is due, and we have no record of any state or local tax having been paid on your purchase. If the sales tax has been paid, please return a copy of the bill of sale (invoice) and cancelled check or other evidence to substantiate payment of the tax. If, for any reason, you believe no tax is due, please submit a full explanation on the back of this letter."

Taxpayer returned the letter to the Division on September 20, 1983, setting forth the following explanation:

"Inasmuch as the above-referenced boat was not delivered or kept in New York, I do not believe I owe either a sales or use tax. While the boat may have been in New York waters for short periods of time since it was purchased, it has never been so for any period of time that would make it subject to the taxes described on the reverse side. Sincerely, Fred Schildkraut [signature].

On July 18, 1984, the Division sent a second letter to Mr. Schildkraut and Magic Enterprises, Inc., in response to his September 23, 1983 letter stating that "once the vessel enters New York State, you as a New York State resident are liable for the compensating Use Tax. Length of time used in the State does not have an effect on the transaction."

However, nothing in the record indicates why the Division believed the vessel Magic was ever used in the State of New York or how it calculated the purchase price. The Division did submit an unidentified form purportedly issued by the United States Coast Guard which indicated that the vessel was located in New York State. The document was submitted into evidence without a foundation and over objection of petitioners' representative.

On September 26, 1984, the Division of Taxation issued to Fred Schildkraut and Magic Enterprises, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the quarter ended February 28, 1981, setting forth total tax due of \$9,900.00, penalty of \$2,475.00 and interest of \$4,653.00 for a total amount due of \$17,028.00. The notice set forth the following explanation:

"Since you did not submit information requested in this Bureau's letters in connection with the purchase of a vessel, the following tax is determined to be due in accordance with the provisions of section 1138 of the Tax Law."

Other than this explanation, the notice did not explain the computation of the total tax due.

Petitioner submitted various receipts for insurance from the Marine Underwriters Agency, Inc., of Red Bank, New Jersey for the year 1985 and receipts from the Essex Island Marina of Essex, Connecticut for storage and other services for the years 1984 and 1985 to indicate that business was conducted outside of the State of New York. An undated ad from a newspaper (allegedly Connecticut-based) was submitted indicating that a 35-foot sailboat, presumably Magic, was available for daily charter with a licensed captain at the rate of \$300.00 including lunch. The phone number given was that of Mr. Schildkraut in New York City.

SUMMARY OF THE PARTIES' POSITIONS

Petitioners contend that the instant action should be decided in accordance with the New York State Tax Commission decision in Jamco Investments, Inc. (State Tax Commission, January 17, 1986) in which it was determined that personal property removed from the State of New York, although returned for necessary attendance to the State, but without compelling evidence of intent to use the property primarily within the State, shall not be subject to New York State Use Tax.

Petitioners also argue that the vessel was purchased and held out for charter and that the tax should be limited to the amount of charter income derived from New York State.

The Division, on the other hand, argues that once the vessel Magic entered New York State, petitioners became liable for the compensating use tax, regardless of the length of time the vessel was used within New York State.

Neither of the parties chose to have any witnesses testify with regard to the facts of this matter.

CONCLUSIONS OF LAW

A. Tax Law § 1110 imposes a compensating use tax on every person for the use within the State of any tangible personal property purchased at retail. (See also 20 NYCRR 531.1[a]). Tax Law § 1101(b)(7) defines the term "use" as the "exercise of any right or power over tangible personal property by the purchaser thereof and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time". (See also 20 NYCRR 526.9.)

An exemption for the use of property by a nonresident of this State is provided for by the statute, but provides that any person engaged in carrying on any employment, trade, business or profession in New York shall not be deemed a nonresident for purposes of this exemption (Tax

Law § 1118[2]; 20 NYCRR 526.15[b][2]).

B. It is clear from the records submitted by petitioners that Magic Enterprises, Inc. was formed for the sole purpose of owning and operating the vessel Magic. From the advertisement submitted by petitioners at hearing it is apparent that they intended to carry on business within the State with respect to chartering the vessel Magic.

Petitioners' admission in the September 20, 1983 letter to the Division of Taxation that the boat "may have been in New York State waters for short periods of time" and its analogy of its situation to that of the vessel in Jamco Investments, wherein a vessel was returned to New York State for necessary repairs, imply that the boat was used by petitioners in New York State. Because there was no testimony elaborating on petitioners' usage of the vessel in New York, petitioners have not carried their burden of showing that their situation was identical to that of the vessel in Jamco Investments, Inc., (*supra*). In Jamco, the only time the vessel entered New York was for an approximate two-week period when it returned for emergency repairs. In the instant matter the evidence leads to the conclusion that the vessel Magic entered New York but fails to show for what length of time or for what purpose. Hence, it is determined the vessel was used in New York State and is subject to use tax pursuant to Tax Law § 1110.

By petitioners' failure to elaborate on the vessel's usage and the obvious inference of carrying on business in New York, they have also failed to establish their right to an exemption from use tax pursuant to Tax Law § 1118(2) and 20 NYCRR 526.15(b)(2). (See, Matter of Sunshine Developers, Inc. v. State Tax Commn., 132 AD2d 752.)

C. For whatever reason, the Division of Taxation did not calculate the amount of additional compensating use tax due based upon the purchase price as set forth in the agreement of purchase submitted at hearing. Therefore, the Division of Taxation is directed to recompute the compensating use tax due on the demonstrated selling price of \$72,000.00 as set forth in the agreement of purchase dated November 25, 1980, applying the applicable tax rate thereto. The Division of Taxation is also directed not to allow a credit for tangible personal property accepted in part payment consistent with Tax Law § 1110, since the agreement for purchase indicates that the seller was purchasing a corporation and not accepting a vessel in trade.

D. Petitioners' argument that the boat was held for charter and therefore the tax should be limited to tax on the charter income derived from New York State is meritless.

Without reaching the charter issue, if the boat were held for charter in New York, then it was being used in the State and petitioners would not qualify for the exemption from the use tax for nonresidents pursuant to Tax Law § 1118(2) because of carrying on a business in New York.

E. The petition of Fred Schildkraut and Magic Enterprises, Inc. is granted to the extent set forth in Conclusion of Law "C" but in all other respects said petition is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated September 26, 1984, is sustained together with such additional penalty and interest as may be lawfully owing.

DATED: Troy, New York
November 2, 1989

/s/ Joseph W. Pinto, Jr.
ADMINISTRATIVE LAW JUDGE