STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MILLBROOK ENTERPRISES, INC. ALBERT E. SCHMITT, PRESIDENT	:	DETERMINATION
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.	:	

Petitioner, Millbrook Enterprises, Inc., Albert E. Schmitt, President, 4407 Verona Drive, Wilmington, Delaware 19804, 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. 806003).

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on January 10, 1990 at 1:15 P.M. Petitioner appeared by J. D. Welsh & Associates (John B. Giuffre, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed either (a) sales tax upon the purchase of a boat by petitioner or (b) use tax upon the subsequent use of such boat within the State of New York by petitioner.

II. Whether, if so, petitioner has nonetheless established reasonable cause for the abatement of penalty assessed by the Division of Taxation.

FINDINGS OF FACT

In or about early 1980, the Division of Taxation commenced an audit program whereunder a survey of New York marinas was conducted. This program sought information

for the purpose of attempting to identify persons and/or corporations who had purchased boats out of state and subsequently either took delivery of or used such boats in New York State thereby incurring potential sales and/or use tax liability. As described in an affidavit submitted at hearing, the Division's audit program also included a review of United States Coast Guard records in Wilmington, Delaware. From this review, the Division obtained information showing that a 46-foot boat known as "The Escape" had been registered on January 27, 1981 to Millbrook Enterprises, Inc., c/o Albert Schmitt, RD #2, Box 83, Millbrook, New York 12545.

Thereafter, on or about October 21, 1981, the Division issued a letter to Albert Schmitt, as president of Millbrook, requesting information concerning possible sales and/or use tax liability in connection with said boat. Petitioner responded to this letter alleging no tax to be due. In turn, the Division rejected this response and, with no information provided as to the specific price paid for the vessel in question, utilized its calculation of average price per foot of overall vessel length to arrive at an estimated purchase price of $138,000.00 for the vessel in question. Tax was computed thereon in the amount of $9,660.00 based upon the seven percent tax rate for the locality of Greenport, New York.

Based upon the above-described audit activities, the Division of Taxation ("Division"), on May 16, 1983, issued to petitioner Millbrook Enterprises, Inc., Albert E. Schmitt, President, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $9,660.00, plus penalty and interest. This notice indicates it is for the period December 1, 1980 through February 28, 1981.

Albert E. Schmitt is, and was during the period in question, a resident of Millbrook, New York. In or about March of 1979 Mr. Schmitt, with the help of a boating association in New York, undertook steps to form a corporation known as Millbrook Enterprises, Inc. ("Millbrook"). Millbrook was incorporated in the State of Delaware on March 14, 1979, and Mr. Schmitt was, and is, its president and only officer and shareholder. Millbrook's address is listed as 4407 Verona Drive, Wilmington, Delaware, which is the same address as Affiliated Corporate Services, Inc. ("ACSI"). ACSI apparently served as Millbrook's registered agent for

service of process in Delaware and also allegedly filed Delaware franchise tax reports for Millbrook.

Millbrook was formed prior to the purchase of the vessel in question (the "Escape"), at a time when a different boat (the "Alphylis") was owned. On May 9, 1980, petitioner traded in the Alphylis and took delivery of the Escape. As substantiated by a delivery receipt letter provided in evidence, delivery was effected by the Portland Boat Works, the Escape's manufacturer, to Mr. Schmitt as Millbrook's president, on May 9, 1980 in May's Landing, New Jersey. Portland Boat Works is located in Portland, Connecticut. Financing for the purchase of the Escape was negotiated by Mr. Schmitt, with the mortgage held by the Fishkill National Bank of Beacon, New York. The full price for the Escape was $212,000.00 which, after credit for an $80,000.00 trade-in allowance on the Alphylis, resulted in a $132,000.00 net purchase price for the Escape.

At hearing, upon petitioner's presentation of documentation, the Division agreed that $132,000.00 was the actual purchase price (after trade-in) for the Escape. Accordingly, the dollar amount of the notice of determination in question is, at least, to be reduced to the tax due on such lesser purchase price (i.e. $132,000.00 x .07 = $9,240.00). In fact, it would appear that the dollar amount of tax itself is not in question, but rather the only issue is whether in fact either sales or use tax is due in connection with the purchase and/or use of the Escape.

After taking delivery of the Escape, Mr. Schmitt navigated the boat to Hull Harbor One located in Old Saybrook, Connecticut. The Escape was summer berthed at a slip mooring in Hull Harbor One for the summer seasons spanning June through October of 1980, 1981, 1982 and 1983. For its first winter season, the Escape was winter berthed (i.e. taken out of the water and "dry docked") at the Portland Boat Works in Portland, Connecticut. This winter berthing spanned the period November 1980 through May 1981, for which a cost of approximately $2,000.00 was incurred.

In October 1981, the end of the 1981 summer season, the Escape was suffering from engine difficulties. The record does not disclose when such engine problems first arose or were

noticed by Mr. Schmitt. Mr. Schmitt navigated the Escape to Portland Boat Works in Portland, Connecticut for repairs. The mechanics in Portland were unable to diagnose or correct the engine problems, and recommended that Mr. Schmitt contact Stirling Harbor Shipyard & Marina, Inc. ("Stirling Harbor") located in Greenport, New York, for engine analysis and possible repair by Stirling's mechanics. Mr. Schmitt contacted Stirling Harbor and navigated the Escape to Stirling's Greenport, New York location. After engine analysis and oil analysis, the problem was diagnosed as involving the Escape's diesel injectors. In turn, the Escape was dry docked and stored at Stirling's Greenport, New York facilities during the winter season of 1981, during which time Stirling's mechanics performed the necessary mechanical services. At the commencement of the summer 1982 season, the Escape was navigated by Mr. Schmitt back to Hull Harbor One in Old Saybrook, Connecticut where it was summer berthed as usual.

At the end of the 1982 summer season, Mr. Schmitt decided to return the Escape to Greenport, New York (to Stirling) for additional service in connection with an oil leakage problem. Again, the record does not specify when such problem first arose or was first noticed by Mr. Schmitt. The Escape was again dry docked at Stirling Harbor for the 1982 winter season where additional work was performed (see Finding of Fact "11", infra).

The distance by car between Mr. Schmitt's Millbrook, New York home and Portland Boat Works is two hours, whereas the distance by car from his home to Stirling Harbor is five hours. Mr. Schmitt testified that although undertaking repairs and storage at Stirling Harbor was inconvenient, his need for qualified mechanics required taking the boat to Stirling Harbor. Although no specific records were introduced, Mr. Schmitt testified that the cost of repairs and storage at Stirling Harbor in the first year approximated $5,000.00, while such charges for the second year approximated $2,000.00. Repair and storage charges were allegedly separately stated on the Stirling Harbor bill. Such bill (or bills) were not submitted in evidence. Subsequent to the winter season of 1982, the Escape was again navigated back to Hull Harbor One where it was moored for the 1983 summer season. Thereafter, the Escape was summer berthed at Hull Harbor One as described and winter berthed at Portland Boat Works as

described (for the winter season of November 1983 through May 1984).

Submitted by petitioner to the Division of Taxation on April 15, 1988 was a document under the letterhead and signature of Stirling Harbor Shipyard & Marina, Inc. This letter provides as follows:

"STIRLING HARBOR SHIPYARD & MARINA, INC.

To Whom It May Concern:

This is to certify that the 46' Post 'Escape', owned by Millbrook Enterprises, Inc., Albert E. Schmitt, President, was winter stored at this marina from November 1981 thru May 1982.

The main purpose for it's [sic] storage at our marina was a) the vessel had mechanical problems with the starboard diesel engine, which required top qualified mechanics in order to make repairs and b) we offer above average, safe and secure storage, maintaining 100% security at all times. It was determined that two diesel injectors in the starboard engine were defective. These injectors were removed, sent out to a repair shop to be rebuilt, and then reinstalled in the engine (a lengthy process.)

Because Mr. Schmitt was very satisfied with the services we rendered, he made arrangements and winter stored the vessel from November 1982 thru May 1983 at Stirling Harbor. During this time of storage, Mr. Schmitt requested that a sample of the engine oil for both the engine and generator be sent out for a complete laboratory analysis. This procedure was completed and after determining that there was no internal damage to the engines, the boat was Spring commissioned (oil and filter change, etc.) and the engines were tuned by adjustment of the racks.

Very Truly Yours,

/s/

Marc Iglesias
Stirling Harbor Shipyard & Marina, Inc."

As is not uncommon, Millbrook's certificate of incorporation lists extremely broad and general corporate purposes. However, Mr. Schmitt testified, and it is undisputed, that Millbrook was formed solely to purchase and hold title to boats and to obtain "proper" liability protection for the individual (Mr. Schmitt) who was to be operating such boats. The Escape was used entirely for fishing and pleasure cruising by Mr. Schmitt and his family. The boat was not a party fishing boat and was not leased or chartered to other individuals or corporations.

Millbrook had no income, no employees, and there is no evidence that a board of directors was ever elected or that any shares of stock were actually issued. Mr. Schmitt testified

that the corporation was formed to limit his personal liability and, specifically, was incorporated in Delaware (i.e., out of New York State) because he was advised that doing so would cause there to be no sales tax due. Mr. Schmitt testified that Millbrook had no bank accounts, and owned no physical property in either Delaware, New York or elsewhere. Other than the certificate of incorporation, the mortgage documents in connection with the Escape, and various bills for berthing and storage, no corporate records, financial or otherwise, were presented in evidence. There is no documentation or evidence as to capital contributions by Mr. Schmitt to the corporation. It would appear that Mr. Schmitt performed all corporate activities himself, and observed no "corporate formalities". Mr. Schmitt indicated that liability insurance is cancelled once the Escape is taken out of the water for winter storage. In this vein, Mr. Schmitt indicated that once the boat was stored at Stirling Harbor, it would have been impractical at best and perhaps unsafe to navigate the boat back to Portland Boat Works.

All documents pertaining to the workings and ownership of the Escape were kept at Mr. Schmitt's home in Millbrook, New York. All funds in connection with operation of the vessel, including payments of expenses for maintenance, diesel fuel, liability insurance and summer berthing and winter storage, as well as payments on the mortgage and for repairs, were made by Mr. Schmitt from his own checking account. Mr. Schmitt testified that he received nothing in return (i.e., no consideration for paying these expenses). The record indicates that all correspondence regarding the Escape was sent to Mr. Schmitt's New York residence. Although no copies of returns were introduced in evidence, petitioner alleged that corporation franchise tax returns for Millbrook were filed with the State of Delaware by Affiliated Corporate Services, Inc. (see Finding of Fact "4").

SUMMARY OF THE PARTIES' POSITIONS

Petitioner alleges that since the vessel in question was delivered to Mr. Schmitt, as president of a nonresident corporation (Millbrook), and not to Mr. Schmitt as an individual, with delivery taking place outside of New York, there is no sales tax liability incurred. In addition, petitioner argues that the repairs in question were emergency repairs, unavoidable and

unable to be performed to petitioner's knowledge other than at Stirling Harbor in New York State. Petitioner alleges that such repairs do not constitute a use of the vessel within New York State, citing Matter of the Petition of Jamco Investments, Inc. (State Tax Commission, January 17, 1986), and, further, that even if such repairs constitute a use subject to tax, petitioner would be entitled to exemption pursuant to Tax Law § 1118(2) as a nonresident corporation using property in New York State. Petitioner argues that it is perfectly legitimate to organize a corporation for the purpose of owning pleasure boats on behalf of its sole shareholder in an effort to insulate said sole shareholder with regard to personal liability, and that an adjunct benefit to such form of ownership where delivery occurs outside of New York State with no subsequent use in New York State is that no sales or use tax liability is incurred.

The Division argues, first that petitioner has failed to establish conclusively that delivery of the Escape was effected outside of New York thus leaving the transaction subject to sales tax. Further, the Division maintains that the corporate existence should be disregarded or pierced thus leaving ownership of the boat with Mr. Schmitt and resulting in use tax liability. The Division alleges that the repairs and storage at Stirling Harbor constituted a taxable use, that Mr. Schmitt is the factual owner of the boat and that interposing corporate existence is insufficient to insulate him from use tax liability.

The Division also argues that the acts undertaken by petitioner's sole shareholder, Mr. Schmitt, were the sole acts carried out in connection with the corporate petitioner's alleged business activity (i.e., the ownership of the boat). The Division maintains that payment of bills, receipt of correspondence, financing and payment of all expenses with personal funds by Mr. Schmitt, under these facts, constitutes the carrying on of "business" by Millbrook in New York State sufficient to deny petitioner exemption under Tax Law § 1118(2). Finally, each party takes opposite (though essentially non-specific) positions with regard to the penalty imposed, petitioner arguing that there existed reasonable cause for the abatement thereof, with the Division arguing that petitioner's method of operation supports imposition of penalty.

CONCLUSIONS OF LAW

A. 20 NYCRR 525.2(a)(3) provides, in pertinent part, as follows:

> "The sales tax is a 'destination tax,' that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

In this case, petitioner has submitted uncontroverted evidence that possession of the boat in question was transferred at May's Landing, New Jersey (i.e. outside of New York State). Therefore, the transaction was not subject to the New York State sales tax imposed pursuant to Tax Law § 1105(a).

B. Tax Law § 1110, which imposes a compensating use tax, provides, in pertinent part, as follows:

> "Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state...except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail...."

Tax Law § 1101(b)(7) defines the term "use" as:

> "[t]he 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...." (Emphasis added.)

C. Tax Law § 1118(2) provides that the following uses of property shall not be subject to the compensating use tax:

> "In respect to the use of property purchased by the user while a nonresident of this state, except in the case of tangible personal property which the user, in the performance of a contract, incorporates into real property located in the state. A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be deemed a nonresident with respect to the use in this state of property in such employment, trade, business or profession."

Analysis of this case as to use tax liability first involves determining whether the repairs and storage at Stirling Harbor constituted a "use" potentially subject to tax.[1] If such repairs and

---

[1]If no "use" has yet occurred in New York, the question of use tax liability is obviously rendered academic. In passing (and assuming a "use" occurred), petitioner also raised argument on the fact that the time period set out in the notice of determination (12/1/80-2/28/81) differed from the actual time of such "use". This argument would appear unavailing in light of Matter of Pepsico, Inc. v. Bouchard (102 AD2d 1000; see also Matter of City Linen and Towel Supply Co., Inc., Tax Appeals Tribunal, March 2, 1989).

storage constitute a "use", the remaining analysis would then focus upon whether Millbrook has established entitlement to the exemption afforded by Tax Law § 1118(2), or,

alternatively, whether Millbrook's existence as a separate entity should be disregarded and the activities in question attributed directly to Mr. Schmitt, a New York resident.

D. The repair services performed at Stirling Harbor as well as the storage there for two successive winters constitutes a use potentially subject to use tax in New York State. It has been held that a temporary mooring at a particular marina within New York State, essentially a "stopover" en route to another out-of-state destination, is not a use subject to tax (see, Sunshine Developers, Inc. v. Tax Commn., 132 AD2d 752). Similarly, it has been held that a two-week return to a New York marina for warranty-covered emergency repairs is not a use subject to tax (see, Matter of Jamco Investments, Inc., State Tax Commission, January 17, 1986). However, in this case, while giving due regard to Mr. Schmitt's testimony that the repairs could not be effected at any marina he was aware of outside of New York State, the activities herein constituted a use potentially subject to tax. This conclusion is supported by the language and tenor of the letter from Stirling Harbor (see Finding of Fact "11"), which indicates that the main purposes for storage at Stirling Harbor in the first year (1981 winter season) were (a) the mechanical problems associated with the vessel's engines and (b) Stirling Harbor's "offer of above average, safe and secure storage, maintaining 100% security at all times." Further eroding petitioner's claim that the storage at Stirling Harbor was only for performance of emergency repairs is the description of the services provided for the second winter of storage at Stirling Harbor as quoted in the letter. While the letter states that storage in the second year (1982 winter season) included engine oil analysis and tuning of the engines, it appears Mr. Schmitt chose to store the boat for the second year at Stirling Harbor mainly because he was "happy with the mechanics" and wanted final tune-ups on their work. The cost comparisons between the two years, as testified to by Mr. Schmitt, to wit, $5,000.00 for the first year and $2,000.00 for the second, would lead to a conclusion the latter involved mainly storage

costs with only minor repair charges. This is further buttressed by the evidence that normal winter storage charges approximate $2,000.00 even when the boat is stored at Portland Boat Works. Finally, it is interesting to note that the "emergency repairs" were undertaken, in both years, at the boating season's end rather than sooner, and that the period of storage time, in both years, covered two full winters as opposed to what could reasonably be considered short-lived for emergency repairs. Hence, while being mindful that the Division bears the burden of establishing that the use is one subject to tax (Matter of Grace v. New York State Tax Commn., 37 NY2d 193, 196), it seems clear the subject repairs and storage undertaken in New York State constituted a use under Tax Law § 1101(b)(7), subject to tax unless entitlement to exemption under Tax Law § 1118(2) is established.

E. In analyzing entitlement to exemption under Tax Law § 1118(2) it is properly noted that the burden of proving such entitlement rests with petitioner (see, Matter of Saratoga Harness Racing v. New York State Tax Commission, 119 AD2d 919). In this case, it must be determined whether the corporation was engaged in any manner in carrying on any employment, trade or business in New York. If Millbrook was so engaged, it would not be deemed a nonresident with respect to the subject use and the section 1118(2) exemption would be unavailable. While the New York State sales and use tax regulations contain no specific definition of the terms "doing business" or "engaged in carrying on any business" as these terms apply to corporations, it is logical to look to the business corporation franchise tax regulations for guidance. In turn, 20 NYCRR 1-3.2(b) provides as follows:

> "(1) The term doing business is used in a comprehensive sense and includes all activities which occupy the time or labor of men for profit. Regardless of the nature of its activities, every corporation organized for profit and carrying out any of the purposes of its organization is deemed to be doing business for the purposes of the tax. In determining whether a corporation is doing business, it is immaterial whether its activities actually result in a profit or a loss.
>
> (2) Whether a corporation is doing business in New York State is determined by the facts in each case. Consideration is given to such factors as:
>
> (i) the nature, continuity, frequency, and regularity of the activities of the corporation in New York State, compared with the nature, continuity, frequency, and regularity of its activities elsewhere;

(ii) the purposes for which the corporation was organized, compared with its activities in New York State;

(iii) the location of its offices and other places of business;

(iv) the income of the corporation and the portion thereof derived from activities in New York State;

(v) the employment in New York State of agents, officers and employees; and

(vi) the location of the actual seat of management or control of the corporation."

F. 20 NYCRR 526.15(b)(1) provides as follows:

"Any corporation incorporated under the laws of New York, and any corporation, association, partnership or other entity doing business in the State or maintaining a place of business in the State, or operating a hotel, place of amusement, or social or athletic club in the State is a resident." (Emphasis added.)

G. It is undisputed that Millbrook was in fact formed solely to own boats in such a manner as to limit the potential personal liability of Albert Schmitt in his operation thereof for personal recreational pleasure. It could be argued, as the Division has, that such formation, purpose and subsequent use of the boat alone is sufficient to require a piercing of the corporate existence and attribution of ownership of the boat to Mr. Schmitt, a resident of New York State.[2] However, on the facts of this case, it is not strictly necessary to take such a step. Rather, the evidence indicates that a substantial part of the corporation's activities (ignoring the admitted lack of profit motive and assuming arguendo said activities constituted a valid business) were carried on by Mr. Schmitt in New York State. Specifically, correspondence was sent to Mr. Schmitt and all bills and expenses relating to the vessel were handled by Mr. Schmitt at his New York home. Since the only corporate purpose engaged in during the

[2]It is beyond dispute that an adjunct benefit, and many times a primary reason, for organizing and operating a business in corporate form is to insulate or at least limit the individuals involved in owning and/or operating such business vis-a-vis their exposure to personal liability. However, such purpose or benefit is not the sole criterion for determining whether the particular activity constitutes a business. Finally, it is irrelevant to this case (and certainly unnecessary) to speculate upon whether, in a civil (or criminal) action a court would give credence to Millbrook's existence for purposes of limiting Mr. Schmitt's exposure to personal liability.

time in question was the ownership of the boat and its operation for pleasure purposes, it is reasonable to conclude that the activities undertaken by Mr. Schmitt in such operation as an officer/agent of the corporation were corporate activities in New York State carried on in furtherance and as a part of the corporation's (business of) ownership of the boat. Accordingly, Millbrook has not established its entitlement to exemption pursuant to Tax Law § 1118(2) as not engaged in carrying on any business in New York State

(see, Matter of Sunshine Developers, Inc. v. Tax Commission of the State of New York, 132 AD2d 752, supra).

H. Alternatively, and assuming arguendo that Millbrook engaged in no business activities in New York State (and thus would facially appear entitled to the section 1118[2] exemption), the question of piercing the corporate existence would still exist. Within the context of the Tax Law, a corporate entity is sometimes disregarded when the functions of the corporation are such that it is essentially no more than the alter ego of its shareholder(s) or when its formation is a sham. A question frequently arises as to whether the corporation was formed for the purpose of carrying on a "business activity". Under this so-called "business purpose" test, a corporation may not be disregarded if a bona fide intention in creating it was that the corporation should have a substantial business function. However, in the absence of such intent or business activitites the corporation may be disregarded with respect to taxation events. The intended or actual business function of the corporation and not the taxpayer's aim to be accomplished by way of the corporation should be the primary focus. (See generally, Mertens Law of Federal Income Taxation § 38.06.) It is true that the formation of a corporation to engage in a legitimate business purpose points toward a respecting of the corporate form for tax purposes (see, Moline Properties v. Commr., 319 US 436; see generally, 6 Fed Tax Coordinator 2d [RIA] ¶ D-1206 et seq.). It is also true that where a sole shareholder so dominates and controls the affairs of the corporation that the corporation is intended to be and, in fact, becomes a mere agent of the shareholder, then it is appropriate to ignore the corporate form and assert

liability against the individual (see, Moline Properties v. Commr., supra; Continental Oil Co. v. Jones, 113 F2d 557; see generally, 13 NY Jur 2d, Business Relationships, § 26; see also, Pollack v. Commr., 45 TCM 12, 20). Absence of corporate formalities such as issuing shares of stock, holding meetings, possessing bank accounts or creating and maintaining books and records militate against recognizing the validity of corporate existence (see generally, 6 Fed Tax Coordinator 2d [RIA] ¶ D-1206, et seq.).

Such is the situation in the instant case. Here, Mr. Schmitt clearly dominated Millbrook such that Millbrook could be said to have "no existence of its own" (see, Brunswick Corp. v. Waxman, 459 F Supp 1222, 1229). Mr. Schmitt's use of Millbrook was essentially limited to his use of the corporate name. The corporation had only one officer, no employees, and apparently issued no stock. Millbrook maintained no bank account, and there is no evidence that corporate books and records were created or maintained or that any corporate formalities were observed. Millbrook was admittedly incorporated outside of New York State in an effort to avoid liability for sales and use taxes. While it is perfectly acceptable to organize one's affairs in such a manner as to minimize or avoid (as opposed to evade) tax liability, the nature of petitioner's existence viewed as a whole tends to cast doubt upon the bona fides of Millbrook's formation for valid business purposes. On balance, it is entirely appropriate to disregard Millbrook and attribute ownership and use of the Escape to Mr. Schmitt.[3]

---

[3]Tax Law § 1111(b)(1) provides special rules for computing use tax in circumstances such as the present, as follows:

> "That where a taxpayer affirmatively shows that the property was used outside such state by him for more than six months prior to its use within this state, such property shall be taxed on the basis of current market value of the property at the time of its first use within this state. The value of such property, for compensating use tax purposes, may not exceed its cost."

While the Escape's first use within New York State occurred more than six months after its use outside of New York State, the record is devoid of and petitioner specifically declined an opportunity to present evidence of current market value at the time of first use within New York State. Hence, alternative calculation of use tax under Tax Law § 1111(b)(1) is not possible herein.

I. Under the facts of this matter, the imposition of penalty was appropriate and is sustained.

J. The petition of Millbrook Enterprises, Inc., Albert E. Schmitt, President, is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated May 16, 1983, as reduced in accordance with Finding of Fact "7", together with penalty and interest lawfully due and owing, is sustained.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE