STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition of PETER J. NAPOLI, AS OFFICER OF NAPOLI MARINE SERVICE, INC. for Revision of Determinations or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 1, 1983 through August 31, 1986.	:	DETERMINATION DTA NO. 808694

Petitioner, Peter J. Napoli, as officer of Napoli Marine Service, Inc., Echo Hill Farm, Route 45, Pomona, New York 10970, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period June 1, 1983 through August 31, 1986.

A hearing was commenced before Thomas C. Sacca, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on August 1, 1991 at 1:15 P.M., was continued before the same Administrative Law Judge and at the same location on May 14, 1992 at 1:15 P.M. and on September 30, 1992 at 9:15 A.M., and was concluded on October 1, 1992 at 9:15 A.M. Petitioner filed his brief on May 17, 1993. The Division of Taxation's brief was due on June 14, 1993. Following two requests for extensions, the due date for the Division of Taxation's brief was September 17, 1993, with petitioner's reply brief being due on October 1, 1993. The Division of Taxation did not file a brief. Petitioner appeared by Steven M. Coren, P.C. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether the sales tax field audit conducted by the Division of Taxation utilized an audit method reasonably calculated to reflect the taxes due.

II. Whether petitioner, Peter Napoli, is liable for the sales and use taxes due on behalf of

Napoli Marine Service, Inc. as a person responsible for the collection and payment of sales tax pursuant to Tax Law §§ 1131 and 1133.

FINDINGS OF FACT

Findings of Fact "1" through "7" are based in large part upon the consistent and credible testimony of Peter J. Napoli, petitioner; Susan Shurtleff, Office Manager of Napoli Marine Service, Inc.; Thomas Simonton, Sea Captain; Lyle V. Hillman, Director of Dealer Finance for Bayliner Marine Corp. and National Operations Manager for Borg-Warner Acceptance Corporation; and Stephen Savodsky, preparer of National Marine Service, Inc.'s boats for delivery.

Napoli Marine Service, Inc. ("NMS") was in the business of the sale and service of boats and accessories. The Sales and Marketing Divisions of NMS were situated in one building while the Service and Accounting Divisions were situated in another building. The buildings were located approximately one-half mile from each other. NMS was situated close to the New Jersey border and maintained satellite sites in New Jersey and Connecticut for customer inspection, closing of titles, rigging and delivery.

NMS maintained an inventory of boats and financed the purchase of its inventory pursuant to a floor plan finance agreement. The floor plan finance company paid the boat manufacturer on behalf of the purchaser (NMS) and received a security interest in the unsold boat, represented by a trust receipt. As payment was received from the purchaser of the boat, NMS was required by its floor plan finance agreement to pay the finance company until the trust receipt was paid off. At that time, the finance company would release the lien on the boat. During the years at issue, NMS purchased its inventory from Bayliner Marine Corporation ("Bayliner") and employed Borg-Warner Acceptance Corporation ("Borg-Warner") as its floor plan finance company.

The purchase of a boat generally began with the customer placing a deposit upon the execution of the sales agreement. The remainder of the purchase price was usually financed by obtaining a loan through a lending institution. When the loan proceeds were released by the

institution, they were paid to NMS which was then required to pay the security interest held by Borg-Warner, the floor plan financing company. At the time that the boat was delivered to the customer, the balance of the purchase price was paid by the customer.

The boats that were small enough to ride on boat trailers were delivered to NMS customers in three ways: (1) the boats were delivered by service employees to the customers; (2) the customers picked up the boats at the marina; or (3) an independent contractor delivered the boats to the customers.

Boats that were too large to be carried on boat carriers were also delivered to NMS customers in three ways: (1) the boats were hauled on flat-bed semitrailers to the customers; (2) the customers picked the boat up at the marina and sailed it away; or (3) NMS would hire a captain to deliver the boats by water to the customers.

Arrangements for the delivery of boats were handled by Stephen Savodsky, an independent contractor who also prepared the boats for delivery. When boats were delivered to the customers, the customers signed a document entitled "customer delivery sheet". This document was stamped with the delivery date. A "customer check-off sheet" was signed by those customers picking up their boat at the marina.

It was the policy of NMS during most of the audit period, and specifically during the month of March 1986, to deem a transaction as a completed sale upon delivery of the boat to the customer. When the sale was completed upon delivery, NMS recognized the sales for purposes of reporting and remitting the sales tax. Completed boat sales were recorded by NMS in the cash receipts journal.

For recordkeeping purposes, NMS recorded sales on an inventory (accrual) basis. When a customer paid the bulk of the purchase price, the sale was noted in the sales journal and the general ledger as a removal from inventory. This was done for inventory control purposes and by agreement with Bayliner and Borg-Warner to insure the payment of the security interests of the floor plan company. Sales tax was noted as accrued until the sale was completed by delivery to the customer. Delivery sheets, which were created on a monthly basis indicated the

delivery dates for those boats delivered in that month. Monthly inventory sheets were prepared to develop a sales report for Bayliner, which had guaranteed the floor plan financing. These reports were based upon the point in time when the boats were removed from the floor plan, not when the boats were delivered to the customer.

The sales tax returns were based upon the monthly delivery sheets. A bookkeeper employed by NMS would gather the information relating to a month's deliveries, compile delivery sheets and give the information to the business' accountants. The accountants would determine what boats had been delivered in a particular month and would then provide to Susan Shurtleff, the office manager, the sales tax return data. Ms. Shurtleff would complete the return, issue a check and either sign the return or have petitioner sign it.

Petitioner, Peter J. Napoli, started his boat business in 1969 and later incorporated it in 1970 as the entity known as Napoli Marine Service, Inc. Prior to 1982, he was the sole officer and shareholder. In late 1981 or early 1982, Borg-Warner discovered that NMS had sold boats "out of trust"; that is, boats were sold and taken out of inventory upon receipt of funds, generally from financial institutions, without payment to Borg-Warner as part of the floor plan financing agreement. Borg-Warner became concerned about both the financial condition of NMS as well as how NMS was being operated. In order to satisfy its concerns and to maintain its continued financial support, Borg-Warner wanted additional capital invested into the business and petitioner removed from the financial aspects of the business. As a result of Borg-Warner's concerns, Edward Glatz became chief financial officer of NMS, overseeing the financial management of the company. Mr. Glatz brought in his own accounting firm to assist him in the financial management of NMS. In addition, Mr. Glatz became a 50% shareholder on October 27, 1982, a personal guarantor, an officer of NMS and the head of the accounting department of NMS.

Petitioner's responsibilities changed upon the arrival of Mr. Glatz at NMS. Mr. Napoli was explicitly restricted to marketing, sales and customer relations. He supervised the salesmen, made sure service was performing well, checked the boats, did general

troubleshooting and addressed engine problems.

Petitioner was barred by the agreement between Borg-Warner, Mr. Glatz and himself from the day-to-day financial management of NMS. He had no operational role with respect to the finances, tax payments or financial management of the company. Petitioner did not receive reports from the accounting department indicating tax payments and accounting procedures.

During the audit period, petitioner signed some sale tax returns, but only at the direction of Edward Glatz or Susan Shurtleff. Mr. Napoli was not provided with any information concerning their contents or how the amounts were calculated. Petitioner did not assist in the preparation of the returns and was not responsible for the operation of the accounting department or payment of sales tax.

The sales tax was computed by NMS' accounting staff, supervised by the business' (Mr. Glatz's) accountants under the supervision of Mr. Glatz. Petitioner had no financial background and no knowledge of how the returns were prepared. Accounting and financial issues were not discussed with Mr. Napoli; such discussions involved only Mr. Glatz, the accountants or Borg-Warner.

Petitioner had no authority in connection with the maintenance of the corporate books and records. In fact, he was precluded from any involvement with corporate finances and was denied access to corporate financial records. He was not permitted to make financial commitments without the approval of Mr. Glatz. Petitioner had no authority to determine which bills should be paid and no authority to pay corporate bills with cash or checks. His hiring authority was limited to sales personnel and he could not hire or fire employees in the accounting department.

Petitioner's lack of involvement in the financial affairs of NMS was a condition of Borg-Warner remaining a financial backer of the business. Had Mr. Napoli become involved in the financial affairs, Borg-Warner would have ceased to back NMS and would have repossessed the inventory.

During the later part of 1985, Edward Glatz decided to leave NMS. In order to protect

their financial interests, Borg-Warner, and later the purchaser of Borg-Warner, Transamerica Financial Services, Inc. ("Transamerica"), placed their own people, including Lyle V. Hillman, National Operations Manager, in NMS to handle its financial management. Borg-Warner, and later Transamerica, were concerned about their trust receipts and wished to insure that NMS was not sold out of trust. In early 1986, Bayliner invested money into the business and guaranteed the floor plan to Borg-Warner. To protect its interest in NMS, Bayliner placed a supervisor over the accountant who was involved in the decisions as to what was to be paid and not paid. At this point in time, Borg-Warner or Transamerica and Bayliner were handling the financial management of NMS, with all transactions subject to their approval.

Petitioner's role remained the same when Borg-Warner, Transamerica and Bayliner managed the financial affairs of NMS. He was precluded from the day-to-day financial management of the company. Mr. Napoli's activities were restricted to marketing, sales and customer relations. Alone, he could not bind the corporation as to ordering and paying for inventory. His check-signing authority was subject to Transamerica's approval. Sales tax returns were computed as before, with petitioner having no involvement in their preparation. He continued to have no corporate authority in connection with the maintenance of corporate books and records. Mr. Napoli continued to be precluded from any involvement with corporate finances and was denied access to corporate financial records.

In late 1986, Donald Cohen and Alan Epstein entered into an agreement with petitioner and NMS whereby they became shareholders and officers of NMS, with each possessing, along with petitioner, a one-third interest in NMS. Although the agreement was dated December 22, 1986, by late spring-early summer of 1986 Cohen and Epstein exercised managerial and financial control of NMS. Petitioner continued to be barred from involvement in the financial affairs of the company.

During the course of the audit, NMS executed five consents extending the period of limitation for assessment of sales and use taxes under Articles 28 and 29 of the Tax Law. The consents are dated from September 8, 1986 to June 6, 1988 and extend, in total, the period of

assessment for the taxable period June 1, 1983 through August 31, 1985 to December 20, 1988.

The records available on audit included sales tax returns, Federal and State income tax returns, sales journal, cash receipts journal, sales invoices, purchases journal, check disbursements journal, purchase invoices, general ledger, monthly bank statements and cash register tapes. The auditor determined that the purchase and sales records were adequate and requested that NMS sign an Audit Method Election Form. NMS executed, on December 13, 1986 and May 26, 1987, two Audit Method Election Forms relating to the Division of Taxation's ("Division") audit of recurring expense purchases and sales. The election forms provide that the Division:

> "has advised that the records available for audit are adequate and sufficient to warrant an audit method that utilizes all records within the audit period. In lieu of such an audit, I elect utilization of a representative test period audit method to determine any sales or use tax liability."

The election forms were signed by Mr. Napoli as president of NMS.

The auditor began the audit by reviewing boat sales as shown on the inventory boat sale sheets and the general ledger for the month of March 1986. For those boats that were shown as nontaxable sales, the auditor requested that documentation substantiating such claim be produced. If, as determined by the auditor, insufficient documentation was produced, the sale would be deemed taxable. The test resulted in a disallowance of nontaxable sales at the rate of 32.08%. This error rate was applied to nontaxable sales of $2,175,380.49 for the period June 1, 1983 through February 28, 1984, resulting in a disallowance of $697,862.06 in nontaxable sales. The tax rate of .0425 was applied, resulting in tax due of $29,659.14. In addition, the error rate was applied to nontaxable sales of $22,221,962.22 for the period March 1, 1984 through August 31, 1986, resulting in a disallowance of $7,128,805.48 in nontaxable sales. The tax rate of .0625 was applied, resulting in tax due of $445,550.34. NMS had leasing income of $2,400.00 on which no tax was collected. The tax rate of .0425 was applied, resulting in tax due of $102.00. Total tax due based upon the disallowance of nontaxable sales and the leasing income was $475,311.47.

During the auditor's review, it was determined that NMS was charging the wrong tax rate.

The auditor determined a jurisdictional error rate and applied it to the sales tax accrued for the audit period, resulting in additional tax due of $29,107.44.

The auditor tested NMS' recurring expenses by reviewing the purchase invoices for the year 1985. Error rates were determined and applied to each account, resulting in tax assessed of $1,272.07. The auditor reviewed the fixed assets accounts in detail and determined that tax had not been paid on certain equipment, furniture, fixtures and leasehold improvements totalling $129,341.61, with tax due of $7,741.84. Finally, the sales tax accrual account was reviewed for the entire audit period. The review determined that NMS had collected but not paid to the State $269,575.64.

In sum, the additional taxable sales and additional tax due as determined on audit are as follows:

	Additional Taxable Sales	Additional Tax Due
Sales	$ 7,829,067.45	$475,311.47
Purchases (expenses)	22,314.94	1,272.07
Assets	129,341.61	7,741.84
Tax Accrual	4,293,333.67	269,575.64
Jurisdictional Errors		29,107.44
Total	$12,274,057.67	$783,008.46

Petitioner signed the sales and use tax returns of NMS for the quarters ended February 29, 1984, May 31, 1984, August 31, 1984, August 31, 1986 and November 30, 1986 as president. He signed the corporation franchise tax reports, Form CT-3, of NMS as president for the years 1982, 1983, 1984 and 1985. In 1986, Alan Epstein signed as secretary-treasurer. The U.S. corporation income tax returns, Form 1120, for 1983 and 1985 were signed by Mr. Napoli. All the Form CT-3's and 1120's listed petitioner as the sole officer of NMS.

Petitioner also signed a tax amnesty application, two applications for three-month extensions, Form CT-5, for the years 1984 and 1985, a return of tax withheld, Form IT-2101, for April 1983, and a reconciliation of tax withheld, Form IT-2103, for the year 1985. All these documents were signed by petitioner as president of NMS.

The minutes of the first meeting of the board of directors of NMS, held on March 18, 1981, indicated that the board elected petitioner as its president. The minutes of the

organization meeting of NMS, held on March 18, 1981, indicated that petitioner was named a director of NMS.

On December 16, 1988, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against NMS covering the period June 1, 1983 through August 31, 1986 for taxes due of $783,008.46, plus penalties and interest. On the same date, a separate notice was issued to NMS assessing additional penalties of $45,231.10 under Tax Law § 1145(a)(1)(vi) for omitting more than 25% of the sales tax found due in the quarters ended August 31, 1985, November 30, 1985 and May 31, 1986.

Notices identical to those issued to NMS were issued to Peter J. Napoli, as president of Napoli Marine Service, Inc., under Tax Law §§ 1131(1) and 1133(a).

Among the documents petitioner introduced into the record of this matter were: 40 sales agreements[1] between NMS and its customers with addresses outside New York State to establish that these transactions were nontaxable sales; inventory boat sale sheets for March 1986 containing the transactions reviewed by the auditor; and files relating to the approximately 159 transactions listed on the inventory sheets. Each file contained some, but not necessarily all, of the following documents: invoice to customer, owner warranty registration form, customer check-off sheet, registration statements, customer delivery receipt, customer checklists, boat registration, statement of final payment and check form notice. Some of the documents contain the date of delivery (customer delivery receipt, customer check-off sheet, boat registration, statement of final payment and owner warranty registration form) and some of the documents, in conjunction with the sales agreements, indicate place of delivery (customer delivery receipt and customer check-off sheet).

A review of the approximately 159 transactions comprising the March 1986 test analyzed by the auditor indicates that petitioner presented files on 136 of these transactions. The files presented indicate that the customers accepted delivery of their boats in March 1986 on 21

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[1]Exhibits "1" through "40".

occasions,

that the date of delivery could not be verified in the 23 transactions for which there were no files, and that there is no date of delivery in the files for 8 transactions. The remaining 107 transactions involved delivery in the months after March 1986.

Petitioner established, through the credible testimony of Thomas Simonton, a sea captain employed by NMS to deliver boats by water, that he or another sea captain delivered the following four boats to customers at out-of-state locations:

Exhibit	Customer	File #
8	Hammons, James	147
11	Fleishman, Harris	142
28	Wichart, Wayne	39
38	Wilson, Woody	22

A review of the remaining files indicated that, based upon the sales agreements, the customer delivery receipts and the customer check-off sheets, the following transactions involved the delivery of the boat to the customer outside of New York State:

Exhibit	Customer	File #
2	Brown, Sharon	100
5	Byrd, William	101
9	Dinsdale, Emily	106
10	Phillips, William	134
16	Cerka, Peter	122
18	Craft, Timothy	34
19	Silbereisen, Roy	36
21	Scalione, Joseph	53
23	Schuck, Jan	26
26	DeMarco, Sal/Victor	19
29	Redden, Douglas	83
31	Lindner, Harold	96
32	Moeller, Charles	78
34	Baran, Steven	61
36	Gronquist, Paul	3
37	Acciardi, Peter	25
39	Melgar, Edward	20
40	Schembri, Joseph	60

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes a sales tax upon "the receipts from every retail sale of

tangible personal property . . . ." A "sale" is defined as:

> "[a]ny transfer of title or possession or both, exchange or barter, rental, lease or license to use or consume, . . . conditional or otherwise, in any manner or by any means whatsoever for a consideration, or any agreement therefor, including the rendering of any service, taxable under this article, for a consideration or any agreement therefor" (Tax Law § 1101[b][5]).

The sales tax is a "destination tax" and the point of delivery or point at which possession is transferred by the vendor to the purchaser or his designee controls both the tax incident and the tax rate (Matter of Bloomingdale Bros. v. Chu, 70 NY2d 218, 519 NYS2d 347; 20 NYCRR 525.2[a][3]). Sales and use tax regulation 20 NYCRR 526.7(e) states:

> "(1) . . . a sale is taxable at the place where the tangible personal property or service is delivered, or the point at which possession is transferred by the vendor to the purchaser or his designee.
>
> * * *
>
> "(2) . . . a sale of tangible personal property, in which the title to the property passes in New York State, but in which delivery occurs outside of New York State, is not subject to tax."

Thus, transactions involving a boat dealer that delivers the boat to the customer outside of New York State and a boat dealer that hires a captain to deliver the boat to the customer outside of New York State are not subject to sales tax.

B. Under Tax Law § 1135(a)(1), "[e]very person required to collect tax shall keep records of every sale . . . in such form as the commissioner of taxation and finance may by regulation require." These records must be kept in a manner suitable to determine the correct amount of tax due and must be available for the Division's inspection upon request (Tax Law § 1135[e]; 20 NYCRR 533.2[a][2]). The regulations provide that, among the sales records required to be maintained, are true copies of each "sales slip, invoice, receipt, contract, statement or other memorandum of sale . . . cash register tape and any other original sales document" (20 NYCRR 533.2[b][1][i], [iii]).

When the taxpayer's records are incomplete and unreliable for determining accurate sales, the Division may resort to a test-period audit using external indices such as purchases in determining percentage markups throughout the audit period (Matter of Skiadas v. State Tax

Commn., 95 AD2d 971, 464 NYS2d 304, 305; Matter of Urban Liqs. v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138, 139; Matter of Hanratty's/732 Amsterdam Tavern v. New York State Tax Commn., 88 AD2d 1028, 451 NYS2d 900, 902, lv denied 57 NY2d 608, 455 NYS2d 1028; Matter of Korba v. New York State Tax Commn., 84 AD2d 655, 444 NYS2d 312, 314, lv denied 56 NY2d 502, 450 NYS2d 1023). In determining the adequacy of the records, the Division must first request the records (Matter of Christ Cella v. State Tax Commn., 102 AD2d 352, 477 NYS2d 858, 859) and thoroughly examine the records presented (Matter of King Crab Restaurant v. Chu, 134 AD2d 51, 522 NYS2d 978, 979-80) for the audit period in question (Matter of Adamides v. Chu, 134 AD2d 776, 521 NYS2d 826, 828, lv denied 71 NY2d 806, 530 NYS2d 109). However, there is no presumption of correctness that attaches to the audit unless there is an initial showing that the methodology selected was reasonably calculated to reflect the tax due (Matter of Fashana, Tax Appeals Tribunal, September 21, 1989). "[C]onsiderable latitude is given an auditor's method of estimating sales under such circumstances as exist" in each case; however, certain limitations have been placed on this principle (Matter of Basileo, Tax Appeals Tribunal, May 9, 1991, quoting Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 501 NYS2d 219, 221). Although exactness in the outcome of the audit method is not required (Matter of Markowitz v. State Tax Commn., 54 AD2d 1023, 388 NYS2d 176, 177, affd 44 NY2d 684, 405 NYS2d 454; Matter of Lefkowitz, Tax Appeals Tribunal, May 3, 1990; see, Matter of Pizza Works, Tax Appeals Tribunal, March 21, 1991), the record nonetheless must contain sufficient evidence to allow the trier of fact to determine whether the audit had a rational basis (Matter of Basileo, supra, citing Matter of Grecian Sq. v. New York State Tax Commn., 119 AD2d 948, 510 NYS2d 219, 221; see, Matter of Fokos Lounge, Tax Appeals Tribunal, March 7, 1991; Matter of Fortunato, Tax Appeals Tribunal, February 22, 1990); that is, the record must contain certain specific information identifying the external index employed by the Division in estimating the taxpayer's liability (Matter of Fashana, supra; Matter of Fokos Lounge, supra).

Once this threshold determination is made, the burden then rests upon petitioner to show

by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (Matter of Meskouris Bros. v. Chu, 139 AD2d 813, 526 NYS2d 679, 681; Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451, 453). However, if the Division, through witnesses or documents, is unable to respond meaningfully to inquiries concerning the nature of the audit performed, it may be found that a taxpayer has been deprived of his or her opportunity to meet its burden of proving that the audit methodology is unreasonable (Matter of Basileo, supra, citing Matter of Fokos Lounge, supra).

C. Here, NMS' records were complete and reliable for determining accurate sales, and the business elected to have the Division utilize a representative test period audit method to determine any sales or use tax liability. However, the audit conducted by the Division must involve a method reasonably calculated to reflect the tax due as well as being subject to the taxpayer's challenge to show by clear and convincing evidence that the methodology was unreasonable or that the amount assessed was erroneous (Matter of Meskouris Bros. v. Chu, supra).

D. Here, petitioner claims that the audit conducted did not involve a method reasonably calculated to reflect the tax due. According to petitioner, the audit of NMS' sales is flawed because the Division did not accurately determine that the sales tested were indeed delivered in the test month. It was established that approximately two-thirds of the sales tested were delivered in later months. Thus, as a result of this error, petitioner contends that the results of the audit of nontaxable sales is in error and does not reasonably reflect the tax due.

The method of testing NMS' nontaxable sales did involve a method reasonably calculated to reflect the tax due. The auditor chose the Inventory Sale Month of March 1986 from which to establish an error rate to apply to the claimed nontaxable sales of the audit period. However, the fact that the sales occurred throughout several months does not, in and of itself, invalidate the test method. The method of audit was performed to determine an error rate which was to be applied to claimed nontaxable sales for the entire audit period, not to determine taxable sales for the month of March 1986. The error rate was correctly determined by applying unsubstantiated

nontaxable sales for the transactions in the test group to total nontaxable sales in that same group, and petitioner has not proved by clear and convincing evidence that the audit method was unreasonable (Matter of Meskouris Bros. v. Chu, supra).

Petitioner has established, however, that certain transactions did involve delivery of boats to customers located outside of New York State, making such transactions exempt from the imposition of sales and use tax (see, 20 NYCRR 525.2[a][3]; 526.7[e][2]; see also, TSB-M-82[3]S; TSB-M-82[3.1]S). Therefore, those transactions listed in Finding of Fact "14" involving out-of-state deliveries are not subject to sales and use tax and the results of the sales method of audit are to be adjusted accordingly.

E. The sales tax accrual account was a bookkeeping method used to account for transactions in progress. Entries to the tax account were made pending completion of the sale upon delivery. No tax was collected until the sale was completed and the boat was delivered to the customer. The account did not contain, as the Division assumed, sales tax collected but not remitted to the State. It was merely a bookkeeping entry used to protect the State's potential interests during the course of pending transactions. Therefore, that portion of the assessment based upon a review of the sales tax accrual account is cancelled.

F. Whether a person is a "responsible officer" under the Tax Law is determined by Tax Law §§ 1131(1) and 1133(a). Tax Law § 1133(a) provides that every person required to collect tax imposed by Article 28 shall be personally liable for the tax imposed, collected or required to be collected under said article. Tax Law § 1131(1) defines "persons required to collect tax" as every vendor of tangible personal property or services including any officer or employee of a corporation who as such officer or employee is under a duty to act for such corporation. Therefore, the critical question presented in this case is whether petitioner was an officer of NMS who was "under a duty to act for such corporation".

Case law makes clear that the mere holding of a corporate office does not, in and of itself, impose tax liability on a person (see, Vogel v. New York State Dept. of Taxation & Fin., 98 Misc 2d 222, 413 NYS2d 862, 864; Chevlowe v. Koerner, 95 Misc 2d 388, 407 NYS2d 427,

430; Matter of Constantino, Tax Appeals Tribunal, September 27, 1990). Rather, whether a person is a "responsible officer" required to collect sales and use taxes is a factual determination (see, Matter of Cohen v. State Tax Commn., 128 AD2d 1022, 513 NYS2d 564, 565; Stacy v. State, 82 Misc 2d 181, 368 NYS2d 448, 451; Chevlowe v. Koerner, supra, 407 NYS2d at 429; Matter of Hall, Tax Appeals Tribunal, March 22, 1990, confirmed 176 AD2d 1006, 574 NYS2d 862; Matter of Martin, Tax Appeals Tribunal, July 20, 1989, confirmed 162 AD2d 890, 558 NYS2d 239; Matter of Autex Corp., Tax Appeals Tribunal, November 23, 1988). This factual determination, according to the Division's regulations, generally depends upon whether the person is authorized to sign the corporation's tax returns, is in charge of maintaining corporate records, or is responsible for managing the corporation (20 NYCRR 526.11[b][2]). The Tax Appeals Tribunal's review of the relevant case law in the Matter of Taylor (Tax Appeals Tribunal, October 24, 1991) suggests consideration of the following indicia of responsibility in a "responsible officer" determination: status as an officer, director, or stockholder (Matter of Cohen v. State Tax Commn., supra, 513 NYS2d at 565); the derivation of substantial income from the corporation or stock ownership (Matter of Blodnick v. New York State Tax Commn., 124 AD2d 437, 507 NYS2d 536); day-to-day responsibilities, involvement with and knowledge of the financial affairs and management of the corporation, as well as the individual's duties and functions set forth in the certificate of incorporation and bylaws (Vogel v. New York State Dept. of Taxation & Fin., supra, 413 NYS2d at 865); ability to hire and fire employees (Chevlowe v. Koerner, supra, 407 NYS2d at 429); and authorization to sign the corporate tax returns and checks (Matter of Cohen v. State Tax Commn., supra; Chevlowe v. Koerner, supra, 407 NYS2d at 429). The Supreme Court in Chevlowe also addressed the concept of the responsible person from another viewpoint:

> "The courts have defined the 'person' responsible for the payment of tax as that individual who 'had the final word as to what bills should or should not be paid, and when.' (Citation omitted.) The teaching of the cases is that 'a responsible person' is one who has or shares 'final word' as to what bills or creditors should or should not be paid, the word 'final' meaning significant rather than exclusive control." (Citation omitted.) (Chevlowe v. Koerner, supra, 407 NYS2d at 430.)

G. The evidence in this matter supports the conclusion that petitioner did not have

sufficient authority and control over the corporation's affairs to be held a responsible officer, liable for the sales and use taxes in issue.

For most of the years prior to those at issue, petitioner was sole officer and shareholder of NMS. However, beginning with the year 1982, his role with NMS was reduced and limited as a result of financial difficulties encountered by NMS, the influence exerted by other individuals and organizations over NMS and the business' financial affairs.

In 1982, NMS began experiencing financial difficulties, partially exhibited by the selling of boats out of trust; that is, boats sold without payment to Borg-Warner (floor plan financing company) as required by the floor plan financing agreement. As a result, Borg-Warner, in order to improve the financial condition of NMS and as a condition of its continued financial support, demanded that additional capital be invested in NMS and that petitioner be removed from the financial aspects of the business. Mr. Edward Glatz was brought in, with the approval of Borg-Warner, as chief financial officer to oversee the financial management of the company. To assist him, Mr. Glatz brought in his own accounting firm. In addition, he became a 50% shareholder, personal guarantor and officer of NMS.

At the same time, petitioner was explicitly restricted to marketing, sales and customer relations. He was restricted by the agreement between Borg-Warner, Mr. Glatz and himself from the day-to-day financial management of NMS. He had no operational role or responsibilities with respect to the finances, tax payments or financial management of the company. Accounting department reports indicating tax payments and accounting procedures were not sent to petitioner.

During the audit period, petitioner did sign sales tax returns, but only at the direction of Edward Glatz or the office manager. Petitioner was unaware as to how the amounts were calculated. He did not assist in the preparation of the returns and was not responsible for the operation of the accounting department or payment of the sales tax.

The sales tax was computed by the accounting staff of NMS, supervised by the business' accountants under the supervision of Mr. Glatz. Petitioner was not involved in the discussions

concerning accounting and financial issues; such discussions involved only Mr. Glatz, the accountants and/or Borg-Warner.

Petitioner had no responsibility or authority in connection with the maintenance of the corporate books and records; he was denied access to corporate financial records; he was not permitted to make financial commitments without the approval of Mr. Glatz; he had no authority to determine which bills should be paid; he had no authority to pay corporate bills; his hiring authority was limited to sales personnel; and he could not hire or fire employees in the accounting department.

In order for Borg-Warner to remain a financial backer of the business, petitioner was required to avoid involvement in NMS' financial affairs. Had petitioner become so involved, Borg-Warner was prepared to repossess the inventory which would have effectively put NMS out of business.

During the later part of 1985, Edward Glatz left NMS. To protect their financial interests, Borg-Warner, Transamerica and later Bayliner placed their own individuals in NMS to supervise and run the business, to the point where they were handling the financial management of NMS, with all transactions subject to their approval. Petitioner's role remained the same. He was precluded from the day-to-day financial management of the company, including the preparation of the sales tax returns, decisions as to which creditors were to be paid and the ability to write checks or bind the corporation, except with the approval of others.

In December 1986, Donald Cohen and Alan Epstein entered into an agreement with petitioner and NMS, at the urging of Transamerica and Bayliner, whereby they each became one-third shareholders and officers of NMS. Beginning in the spring of 1986, Cohen and Epstein exercised managerial and financial control of NMS. Petitioner continued to be barred from involvement in the financial affairs of the company.

H. The holding of corporate office is not in and of itself a sufficient basis upon which to impose personal liability for sales taxes found owing by a corporation (Chevlowe v. Koerner, supra). Likewise, the existence of some of the other factors enumerated above does not

definitively resolve the issue of liability for sales taxes. Rather, the various factors provide a framework for deciding the ultimate question, whether an individual had a "duty to act" for a particular corporation in complying with Article 28 of the Tax Law (Tax Law § 1131[1]). In most instances, a corporate officer with an economic stake in the corporation will be found to be under such a duty to act (see, e.g., Matter of Martin v. Commr. of Taxation & Fin., 162 AD2d 890, 558 NYS2d 239, supra; Matter of D & W Auto Serv. Center, Tax Appeals Tribunal, April 20, 1989). Exceptions have been found where the facts establish that the corporate officer had been precluded from acting on behalf of the corporation with regard to payment of sales taxes (e.g., Matter of Constantino, supra [where a majority stockholder prevented the petitioner from acting with regard to the financial and management activities of the corporation]).

Such an exception exists here. The analysis of the duties performed by an alleged responsible officer considers whether the acts were ministerial rather than evidence of actual authority (Matter of Taylor, supra). This is not a case where petitioner had the authority to control the business but failed to exercise that authority by delegating it to another (compare, Matter of Blodnick v. New York State Tax Commn., supra; Matter of Ragonesi v. State Tax Commn., 88 AD2d 707, 451 NYS2d 301, 303; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991); rather, he was prevented from having any real authority to exercise. Although it is true that petitioner held corporate office and represented the corporation as its president in certain circumstances, mainly the signing of certain tax documents, including some of the corporation's sales tax returns, his activities were done under the supervision and control of other individuals such as Mr. Glatz, Mr. Cohen, Mr. Epstein and people from Borg-Warner, Transamerica and Bayliner. It is clear, therefore, that petitioner did not have the requisite responsibility for management decisions, nor did he have control over the financial affairs of NMS so as to conclude that he had the duty to act on behalf of the business in complying with the requirements of Article 28 of the Tax Law.

I. The petition of Peter J. Napoli, as officer of Napoli Marine Service, Inc., is granted and the notices of determination and demands for payment of sales and use taxes due issued to

petitioner on December 16, 1988 are cancelled.

DATED: Troy, New York
April 1, 1994

/s/ Thomas C. Sacca
ADMINISTRATIVE LAW JUDGE