

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition :  
of :  
THE ABSOLUTE DIFFERENCE, INC. : DETERMINATION  
for Revision of a Determination or for Refund : DTA NO. 809686  
of Sales and Use Taxes under Articles 28 and 29 :  
of the Tax Law for the Period September 1, 1988 :  
through November 30, 1988. :

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Petitioner The Absolute Difference, Inc., P.O. Box 628, Freeport, New York 11520 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 September 1, 1988 through November 30, 1988.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on May 15, 1992 at 1:15 P.M., with all briefs to be submitted by September 7, 1992. Petitioner submitted a brief on July 22, 1992. The Division of Taxation submitted its brief on August 28, 1992. Petitioner did not file a reply brief. Petitioner appeared by its president, Henry Grubel. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed either (a) sales tax on 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 and an absence of willfulness thereby allowing abatement of penalty imposed by the Division of Taxation.

FINDINGS OF FACT

In or about mid-1990, through the use of information provided by the United States Coast Guard, the Division of Taxation sought 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 more completely hereinafter, a desk audit review of Coast Guard boat documentation records contained on computerized tape revealed that a 44-foot vessel known as Just for Fun had been registered to petitioner, The Absolute Difference, Inc., in New York State.

After review of the Coast Guard information, the Division of Taxation issued a letter to petitioner seeking information relative to the vessel Just for Fun. The address to which this letter was sent, while not specified in the record, allegedly matched the address contained in the Coast Guard information. The auditor who caused issuance of the letter testified that said initial letter was returned as undeliverable, after which she remailed the same letter to The Absolute Difference, 72 Guy Lombardo Avenue, Freeport, New York 11520.

Offered in evidence as Exhibit "1" was a document containing handwritten notes of a telephone conversation between the auditor and petitioner's former accountant, one James McGurran. These notes, dated August 14, 1990, summarize information regarding the vessel Just for Fun as provided by petitioner's former accountant. The notes reflect, *inter alia*, the name of the vessel (Just for Fun), the name of the officer and sole shareholder of the corporate petitioner (Henry Grubel), and the assertion that the vessel was purchased in Florida, brought to New York allegedly for use as a charter boat and then returned to Florida. The auditor's notes of the telephone conversation describe the claim by petitioner's former accountant that the vessel was not manufactured in the United States and that the Coast Guard therefore would not register the vessel as a charter boat. Mr. McGurran also advised that petitioner "tried to pay sales tax but MVD [Motor Vehicles Department] [sic] told him no tax was due." The auditor also noted her request for documentary information, as follows:

"I asked CPA for Bill of Sale, all facts, all incorporation papers, proof of checking account in corporate name, mooring and/or storage contracts for all out of state use".

The notes also include reference to the number "D912534".

A subsequent letter was issued by the Division's auditor to petitioner regarding the vessel Just for Fun. This letter, dated October 11, 1990, and referencing the number

"D912536", provides as follows:

"This is regarding a telephone call on 8/15/90 received from you regarding the above mentioned vessel.

"To date no response has been received with required documentation. Please comply with our request to avoid further collection action."

This letter carries the 72 Guy Lombardo Avenue, Freeport, New York address for petitioner.

On March 20, 1991, the Division of Taxation issued to petitioner, The Absolute Difference, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing tax for the quarter ended November 30, 1988 in the amount of \$13,031.04, plus penalty and interest. The auditor indicated by testimony that this notice was issued due to petitioner's failure to offer any documentation in response to the October 11, 1990 letter. The auditor further testified that the notice was based on information on the Coast Guard computer tape. This tape included a listing of all vessels documented in New York as "pleasure" boats as of November 30, 1988. The auditor testified that the amount of sales tax assessed was calculated upon the purchase price of the vessel, which in turn was computed based upon the length of the vessel (per the Coast Guard information tape) multiplied by a price-per-foot factor taken from a Division of Taxation value of vessels chart. Neither the Coast Guard tape (or a printout thereof) nor the value-per-foot chart utilized by the auditor to compute the purchase price of the vessel was offered in evidence.

In response to the notice of determination, a timely petition was filed wherein petitioner claimed exemption from tax because the vessel "is a commercial vessel primarily engaged in interstate or foreign commerce." The petition also noted that the tax had been estimated and that "[i]f any tax is due, the actual amount will be less than the estimated amount."

Offered in evidence, inter alia, was a Certificate of Documentation for the vessel Just for Fun, dated April 7, 1987 and issued by the Coast Guard. This document lists the vessel's registration number as D912536 and reveals its length, breadth and depth, respectively, to be 43.8 feet, 15 feet and 8.8 feet. The Certificate of Documentation lists the vessel's home port as New York, New York, its place of manufacture as Taiwan, Republic of China, and its owner as

the corporate petitioner, The Absolute Difference, Inc. The owner's address is listed as 72 Guy Lombardo Avenue, Freeport, New York 11520. The vessel is documented for "pleasure" use, and includes the following restrictions: "No coast wise or great lakes license - 1; No fishery license - 1; No registry - 4". The Certificate of Documentation also lists a mortgage on the vessel in the amount of \$141,414.64 (plus interest and POMC), with a maturity date of March 5, 2002.

Henry Grubel, president, treasurer and sole shareholder of the corporate petitioner, appeared and testified at hearing.<sup>1</sup> By his testimony, Mr. Grubel explained that in or about late 1986 he desired to enter into a new business venture involving operation of a charter boat in the U.S. Virgin Islands. The 72 Guy Lombardo Avenue address mentioned hereinabove was petitioner's business address until the latter part of 1988, at which time such address was changed to 352 Atlantic Avenue, Freeport, New York. Mr. Grubel's home address is 37 Prospect Street, Freeport, New York, and includes a canal located directly behind the home. Over the years, Mr. Grubel has owned several boats including 20 to 24-foot runabouts, a 36-foot whaler and a 47-foot Chriscraft. In order to commence business, Mr. Grubel formed the corporate petitioner on December 16, 1986 with himself as president, treasurer and sole shareholder. Thereafter, on March 5, 1987, the corporation purchased Just for Fun, a 44-foot DeFever off-shore cruiser, from Z. K. Marine International Yacht Distributors, Inc. located in Dania, Florida. The bill of sale lists a purchase price of \$170,000.00 for the vessel. Prior to purchasing the vessel, Mr. Grubel enlisted the assistance of a boat captain known to him, one John Barret, to evaluate the type of boat to be purchased.

After purchase, Mr. Grubel engaged the services of another boat captain known to him, one John Schriefer, to take delivery of Just for Fun in Florida, and pilot the boat from Florida to Mr. Grubel's home in Freeport, New York. The trip from Florida to New York took approximately 2½

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<sup>1</sup>Offered in evidence was a Certificate of Dissolution indicating that the corporate petitioner was dissolved in June of 1989.

weeks via the intercoastal waterways. This route was required because the boat had not yet been refitted for off-shore cruising. Mr. Grubel testified that he did not sail with or accompany the boat on any part of its journey from Florida to Freeport, New York.

The vessel was docked behind Mr. Grubel's home in Freeport as of approximately early April 1987, and the work of refitting the vessel for purposes of off-shore cruising commenced shortly thereafter. The refitting involved various additions and modifications to the boat, the largest of which was the installation of a "watermaker", a device by which seawater is desalinated and made potable. Mr. Grubel explained that such a device is necessary for off-shore cruising for any extended periods, and is particularly necessary for cruising in the Caribbean where potable water is a scarce and expensive commodity. During the entire time of its refitting, the vessel was docked behind Mr. Grubel's home.

Insurance was taken on the vessel at or about the time of purchase through a New York insurer. However, policy restrictions were initially listed against cruising or charter use due to the fact that John Schriefer, whom petitioner had intended to employ as captain, was not a licensed charter captain for Coast Guard purposes. Petitioner, in turn, paid for Mr. Schriefer to attend Coast Guard schooling and obtain a charter captain's license.

Mr. Grubel testified that he contacted the New York State Department of Motor Vehicles and attempted to pay sales tax on the vessel. However, he was allegedly advised that since the boat was to be used for charter purposes, no sales tax was due. Mr. Grubel explained that the reason the vessel was brought to New York for refitting, and in particular was docked behind his home, was so that he could avoid "boatyard" charges and also could be personally available to supervise and review the work being performed on the vessel.

In or about late December 1987, petitioner engaged the services of John Barret to pilot the vessel from New York back to Florida. The vessel was to stop in Florida to have hull stabilizers added, and thereafter Mr. Barret was to pilot the vessel to the U.S. Virgin Islands for use as a charter boat, carrying passengers for sightseeing or overnight trips.

John Barret piloted the vessel to Florida, taking approximately seven or eight days for

the trip. This return trip to Florida was quicker than the initial trip from Florida to New York because, as refitted, the boat was capable of off-shore cruising.

The vessel was docked behind Mr. Barret's home in Fort Lauderdale, Florida and a contract was allegedly entered into for adding stabilizers. However, Mr. Grubel testified that in January or February of 1988 he first learned that, pursuant to Coast Guard rules, a vessel manufactured outside of the United States will not be registered by the Coast Guard for use as a charter boat (the Coast Guard will not lift a "coast-wise" restriction; see 46 CFR 67.17-5[b][1]). Mr. Grubel explained that such restriction precluding charter use frustrated his entire purpose in purchasing the vessel. In response, the vessel was offered for sale and, eventually, was sold on October 11, 1988 to Woods and Evaat Marina in Fort Lauderdale, Florida. The selling price for the vessel was not specified in the record. Mr. Grubel noted that he never used the boat for pleasure cruising during the entire time of its ownership by petitioner. Shortly after learning that the vessel could not be licensed for commercial (charter) use, Mr. Grubel "took all of [his] personal belongings off that boat and had them shipped up to New York . . . ." The "personal belongings" removed and shipped were not more particularly described in the record.

#### SUMMARY OF THE PARTIES' POSITIONS

Petitioner argues first that sales tax is not due because the vessel was purchased in and delivered to petitioner's designee in Florida. In turn, petitioner also argues that use tax should not be due. In this regard, petitioner points out that the sole purpose for purchasing the vessel was for use as a charter boat in the U.S. Virgin Islands. Petitioner maintains that, consistent with this intent, the vessel was piloted to New York for refitting for its intended purpose, was repiloted to Florida for additional work, and was to be moved on to the U.S. Virgin Islands. Petitioner claims that upon learning that the vessel could never be used for its intended purpose it was thereafter sold, and that the corporation's sole shareholder never utilized the vessel for pleasure purposes, thereby negating use tax liability. Petitioner raises no specific challenge to the Division's calculation of purchase price and, in turn, tax liability based upon average price per foot of overall vessel length as described. The Division notes, in this latter regard, that its

method of calculating purchase price (determined based on price per foot) was necessitated by petitioner's failure to have supplied requested information and in fact resulted in a price lower than that shown by petitioner's own documentation (\$170,000.00 per the bill of sale). In this regard, the Division seeks no increase to the amount of deficiency.

Finally, petitioner argues that even if tax is found to be due, penalties should be abated based on reasonable cause, frustration of purpose and absence of willfulness. The Division asserts, by contrast, that when petitioner first learned the vessel could never be used for charter purposes, petitioner should have filed a sales and use tax return and paid the tax due, maintaining that petitioner's failure to have done so provides sufficient basis to uphold penalty.

Submitted with petitioner's brief were proposed findings of fact numbered "1" through "22". Each such proposed finding of fact is accepted and is incorporated herein, except for proposed finding of fact "15". Proposed finding of fact "15" is rejected insofar as it states "[t]he vessel was not used during its refit in New York nor was it used while it was awaiting the installation of stabilizers in Florida" (emphasis supplied), and ". . . local regulations [in Fort Lauderdale, Florida] prohibited the boat from being lived on." The first quoted portion of proposed finding of fact "15" is rejected because the issue of "use" of the vessel is one of the ultimate issues presented for determination herein. The second quoted portion of proposed finding of fact "15" is rejected because the record contains no reference (cite) or other evidence as to the specific "local regulation" which allegedly applies. The balance of proposed finding of fact "15" is accepted and is incorporated herein.

#### 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, the evidence submitted supports a conclusion that purchase occurred and possession of the vessel in question was transferred to petitioner's designee in Florida.

Therefore, the transaction was not subject to 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 § 1115(a)(8) provides exemption from sales and use taxes for "[c]ommercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship)". It is well established that the burden of proving entitlement to a tax exemption rests with the taxpayer (Matter of Saratoga Harness Racing v. State Tax Commn., 119 AD2d 919, 501 NYS2d 200, lv denied 68 NY2d 610, 508 NYS2d 1027).

D. Petitioner's own presentation admits that the vessel in question was never licensed for use as a commercial vessel, was never so used and, due to its foreign manufacture, could not have become so licensed. Therefore, despite petitioner's avowed intent at the time of acquisition to use the vessel solely in a manner which would qualify for exemption, the impossibility of licensing such vessel for such use itself precludes entitlement to the described exemption (cf., Matter of DJH Constr. v. Chu, 145 AD2d 716, 535 NYS2d 249). In turn, use tax would be due unless the acts undertaken by petitioner during the time it owned the vessel did not constitute "use" within New York State.

E. In this case, the evidence supports the conclusion that the piloting of the vessel to New York and its approximate nine-month stay thereafter in New York, during which period it was refitted as described, clearly constituted "use" within the language of Tax Law § 1101(b)(7). While it has been held that a temporary mooring at a particular marina within



New York State, essentially constituting a "stopover" en route to another out-of-state destination, is not a use subject to tax (see, Sunshine Developers v. Tax Commission, 132 AD2d 752, 517 NYS2d 317), and 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, State Tax Commission, January 7, 1986), the storage and refitting of this vessel which occurred in Freeport, New York at the direction of the corporation's sole shareholder and behind such individual's home is far more extensive and clearly falls within the statutory definition of "use" subject to tax. Further, notwithstanding the testimony that the vessel was never used for pleasure purposes or otherwise by petitioner's sole shareholder, Mr. Grubel, it remains unexplained why Mr. Grubel kept personal belongings on the vessel, what types of personal belongings were so kept, and why such items remained on the vessel when it was returned to Florida only to be removed and shipped back to New York when the vessel was offered for sale in Florida. Similarly, notwithstanding the testimony that the installation of a watermaker and other refitting steps were to outfit the vessel for charter use, there is no evidence that the described modifications would not provide the same benefits when used for pleasure cruising as well as charter cruising. These points cast some question on the claim that petitioner's sole aim in purchasing was to use the vessel for commercial purposes and the claim that the vessel was never "used" (for pleasure purposes or otherwise) while in New York. Hence, the Division properly imposed tax with respect to the vessel Just for Fun.<sup>2</sup>

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<sup>2</sup>A purchase price of \$157,952.00 would be required in order to yield a tax due, as assessed herein, in the amount of \$13,031.04 (given a tax rate of 8.25%). Such purchase price is less than the \$170,000.00 purchase price reflected on the bill of sale offered in evidence by petitioner. However, there is no argument raised by the Division that the amount of tax due should be increased and such issue, hence, is not addressed herein.

In passing, petitioner also raised an argument that the time period set out in the notice of determination (the quarterly period ended November 30, 1988) may have differed from the actual time of "use". The Division countered by noting that petitioner provided, as of the time of issuance of the notice, no documentary evidence surrounding the vessel and that all of the Division's information was taken from Coast Guard information furnished to the Division (such information allegedly listed vessels documented as pleasure craft up to the period ended November 30, 1988). In any event, petitioner's argument would appear unavailing in light of the holdings in Matter of Pepsico, Inc. v. Bouchard (102 AD2d 1000, 477 NYS2d 892) and Matter of

F. With respect to penalty, petitioner has not established reasonable basis for abatement thereof. As the Division points out, petitioner did not file a sales and use tax return and pay use tax even when it became aware of the fact that the vessel could never qualify for commercial licensing. Further, there is, as described, some question as to the bona fides of petitioner's claimed sole intent to purchase the vessel and equip, outfit and operate the same as a charter vessel in the U.S. Virgin Islands, and the claim that the vessel was never used by Mr. Grubel for pleasure (or other) purposes (see Finding of Fact "15" and Conclusion of Law "E").

G. The petition of The Absolute Difference, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 20, 1991 is sustained.

DATED: Troy, New York  
September 24, 1992

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE