STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
MITCHELL M. KROHNENGOLD	:	
for Revision of a Determination or Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period Ended May 1, 2002.	:	DETERMINATION DTA NO. 821884

Petitioner, Mitchell M. Krohnengold, filed a petition for revision of a determination or refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period ended May 1, 2002.

On May 19, 2008 and May 27, 2008, respectively, petitioner, appearing by David L. Auerbach, Esq., and the Division of Taxation, appearing by Daniel Smirlock, Esq. (Osborne K. Jack, Esq., of counsel), waived a hearing and submitted the matter for determination based on documents and briefs to be submitted by September 4, 2008, which date began the six-month period for issuance of this determination. After due consideration of the documents and arguments submitted, Joseph W. Pinto, Jr., Administrative Law Judge, renders the following determination.

ISSUE

Whether petitioner has demonstrated that his failure to pay the tax was due to reasonable cause and not due to willful neglect, thereby justifying the abatement of penalties asserted pursuant to Tax Law § 1145(a)(1)(i).

FINDINGS OF FACT

1. On or about April 29, 2002, Mitchell M. Krohnengold (petitioner), a New York resident living at 201 Briarwood Drive, Somers, New York, purchased a used 2000 Sea Ray Sundancer from a broker, Northeast Yacht Sales, Inc., of Portland, Connecticut, for the sum of $497,800.00. Petitioner paid for the vessel with loan proceeds of $398,000.00 and the trade-in of his current vessel, which had a value of $99,800.00. At the time of purchase, the boat was located in New York State.

2. The bill of sale for the vessel did not recite a purchase price, trade-in or separately state sales tax paid but did set forth a "consideration received" of "one dollar and other valuable considerations."

3. Two years prior to the purchase of the Sea Ray, petitioner purchased a 2000 Chris Craft Express Cruiser from a different Connecticut dealer, Clinton Harborside Marina LLC of Clinton, Connecticut, for a purchase price of $116,800.00. The retail installment contract for that purchase indicated that sales tax was to be paid out of loan proceeds and was separately stated as a discreet charge to be paid by the bank on behalf of petitioner.

4. In April 2005, the State of Connecticut conducted a use tax investigation with regard to petitioner's use of the Sea Ray in Connecticut for an unspecified period. Through submissions of documentation of winter storage and summer slip rentals in New York and a log indicating a presence outside of Connecticut (in New York), the State of Connecticut cancelled its investigation on July 29, 2005.

5. On August 19, 2005, the Division of Taxation notified petitioner by letter that the State of Connecticut had informed it that he had purchased tangible personal property, the Sea Ray, for $398,000.00 on May 1, 2002 and that a review of its records indicated that the proper amount of

sales or use tax had not been paid. The letter also stated that the tax due of $33,830.00 plus penalty and interest should be sent to the Division within 30 days of the letter. The letter requested that petitioner submit proof of previously paid sales or use tax, if any.

6. When it received no payment, the Division of Taxation issued a Statement of Proposed Audit Change, dated December 29, 2005, which asserted tax due in the sum of $33,830.00 plus penalty and interest. This statement was returned to the Division on January 25, 2006 with an explanation of petitioner's disagreement, which said, "Attached correspondence proves we are not liable for this tax." The attachment to the statement consisted of a Taxpayer Services Division memorandum, TSB-M-82(3)S, concerning the taxability of vessels sold by boat dealers.

7. The Division of Taxation issued to petitioner a Notice of Determination, dated June 16, 2006, which asserted sales or use tax in the sum of $33,830.00 plus penalty and interest. The notice set for the following explanation:

> Since you did not submit the information we requested in our previous correspondence regarding the purchase of a vessel, we determined that you owe tax, interest and any applicable penalties, under sections 1138 and 1145 of the Tax Law.

Petitioner timely protested the notice by petition filed on or about September 19, 2007.

8. Following issuance of the Notice of Determination, petitioner's representative, Lee David Auerbach, Esq., contacted the Division on behalf of his client by letter of February 16, 2007 and informed the Division that petitioner was advised by Northeast Yacht Sales, Inc., of Portland, Connecticut, that the contract price included all sales taxes, vessel documentation charges and related expenses and that vessels over 40 feet in length did not need to be registered with the Department of Motor Vehicles in New York. Mr. Auerbach further explained that Mr. Krohnengold did not become aware of a tax issue until the use tax investigation by the State of

Connecticut in 2005, and did not find out the statutory basis for the notice until December of 2006.

9. The Bureau of Conciliation and Mediation Services (BCMS) issued a Conciliation Order, dated June 22, 2007, which recomputed the tax due on the purchase price of the Sea Ray such that the tax determined to be due was $26,865.00, plus applicable penalty for failure to file and failure to pay and interest. Petitioner subsequently agreed to this tax and paid it.

CONCLUSIONS OF LAW

A. Tax Law § 1110(a) provides, in pertinent part:

> 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 . . . [A] of any tangible personal property purchased at retail.

B. It is undisputed that petitioner purchased the used 2000 Sea Ray Sundancer at retail from Northeast Yacht Sales, Inc., of Portland, Connecticut, for the sum of $497,800.00, less trade-in, on April 29, 2002 without payment of sales tax thereon. It is also undisputed that petitioner brought the boat into New York State, his state of residence, and proceeded to maintain, harbor and store it here since.

Tax Law § 1101(b)(7) defines use as the exercise of any power over tangible personal property by the purchaser and includes storage, keeping or retention for any length of time. Petitioner's documentation of winter storage, summer slip rentals and maintenance in New York demonstrated a presence and use in New York (***see*** 20 NYCRR 526.9) which subjected him to use tax on the 2000 Sea Ray vessel. (TSB-M-82[1]S.)

C. Petitioner argues that he was informed by the vendor, a Connecticut boat dealer, that the sales price included all sales taxes, vessel documentation charges and related expenses and relied on this oral representation to his detriment even though these items were not reflected in

the bill of sale, as they had been in petitioner's retail installment contract for his purchase of the 2000 Chris Craft vessel two years earlier. Hence, without any written indicia that sales or use tax had been paid to the State of New York on his purchase of the 2000 Sea Ray, petitioner contends that he was convinced that he had taken all steps necessary to insure that tax had been paid.

Petitioner also contended that the same dealer informed him that vessels over 40 feet in length did not need to register with the New York State Department of Motor Vehicles (DMV) and that he accepted this "urban legend" without any hesitation, inquiry or investigation on his part.

In fact, Vehicle and Traffic Law § 2251(1) provides:

> No person shall operate or permit the operation of a vessel on the navigable waters of the state, or on any other waters within the boundaries of the state, except waters which are privately owned, unless such vessel is registered and numbered and bears a current validation sticker in accordance with the provisions of this article.

Had petitioner tried to register the 2000 Sea Ray with DMV, he would have been required to file, among other documents, a Department of Taxation and Finance form DTF-802, Statement of Transaction – Sale or Gift of Vessel, with the appropriate tax or proof of exemption or tax paid. (20 NYCRR 531.6[f][1].) Because petitioner did not attempt to register the 2000 Sea Ray with DMV, the tax remained unpaid until after the Conciliation Order was issued, even though he was under a duty to file a report of sales and use tax and pay the tax due. (20 NYCRR 531.6[f][2].)

D. Tax Law § 1145(a)(1)(i) provides for the imposition of penalty where a person fails to file a return or pay the tax due within the time required. If it is determined that the failure or delay was due to reasonable cause and not willful neglect, the penalty may be abated. (Tax Law § 1145[a][1][i], [iii]; 20 NYCRR 536.1; 2392.1.)

Petitioner relies heavily upon his prior purchase to justify his reliance on the alleged misrepresentations of Northeast Yacht Sales. He erroneously states that he accepted the representations without question because in his prior purchase the vendor made the same representation that the sales tax was included. However, the documentation belies this claim. The installment contract for the purchase of the Chris Craft Express Cruiser in 2000 distinctly listed a provision for the payment of a precise amount of sales tax, separately stated. No such provision existed in the bill of sale for the Sea Ray in 2002, and petitioner submitted no other documentation to support his contention that there was a provision for the payment of sales or use tax. Therefore, contrary to his argument, petitioner did not act in a manner consistent with his prior purchase. Rather, he acted imprudently given the lack of proof of payment of sales or use tax by Northeast Yacht Sales.

Likewise, petitioner's reliance on Northeast Yacht Sales representation that boats in excess of 40 feet need not register with DMV was unfounded. The representation was contrary to Vehicle and Traffic Law § 2251, requiring registration of the Sea Ray, and petitioner's reliance on the advice of boat dealer amounted to nothing more than ignorance of the law, which is not a valid excuse or defense. (***Genesee Brewing Co. v. Village of Sodus Point,*** 126 Misc2d 827, 834, 482 NYS2d 693, 700 [1984], ***affd*** 115 AD2d 313, 496 NYS2d 720 [1985]; ***accord Matter of Nathel v. Commissioner of Taxation and Fin.***, 232 AD2d 836, 649 NYS2d 196 [1996] [ignorance of the law is no excuse and a taxpayer is charged with knowledge of the law, including subsequent judicial interpretation thereof].)

Further undermining petitioner's argument that he relied on Northeast Yacht Sales' representation that sales tax had been included in the price of the Sea Ray and paid, was his failure to ever mention his payment of New York use tax to the Connecticut Department of

Revenue Services in its use tax investigation. The omission supports the conclusion that petitioner knew the tax had not been paid, since petitioner was being asked by the State of Connecticut to pay a use tax which he now contends he thought had been paid.

E. Petitioner's reliance on ***Matter of Jericho Boats of Smithtown v. State Tax Commission*** (144 AD2d 163, 534 NYS2d 716 [1988]), was in error. There, a New York broker was held liable for sales tax on sales it reported as its own in its records. Here, it was not demonstrated that Northeast Yacht Sales was a New York broker and there was absolutely no proof that it recorded its brokered transactions as sales in its records. Further, petitioner cannot absolve himself of responsibility for paying the sales tax in a New York sales transaction because a purchaser is jointly liable for the sales tax due. (Tax Law § 1133[b]; 20 NYCRR 532.1[e].)

In addition, petitioner's reliance on ***Matter of Sultan*** (Tax Appeals Tribunal, August 10, 2000), in support of its argument for abatement of penalty on the basis that unique circumstances provided a basis for the delay in payment of the tax and demonstrated an absence of willful neglect is misplaced. In ***Sultan***, petitioner's delay in reporting a federal change was due to a protracted federal audit and petitioner's reporting of the results therefrom to the Division of Taxation in a timely manner, albeit not on the proper forms. The Tribunal determined that this was sufficient notice and abated penalties because petitioner had "fulfilled the spirit and purpose of the statute and regulation." As demonstrated in the facts and conclusions above, petitioner's actions in this matter did not fulfill the spirit and purpose of the statute and regulations and so did not warrant an abatement of penalty.

F. The petition of Mitchell M. Krohnengold is denied and the Notice of Deficiency, dated June 16, 2006, as modified by the BCMS Conciliation Order, is sustained.

DATED: Troy, New York
February 26, 2009

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