

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
CARL NOOR	:	DETERMINATION
	:	DTA NO. 823008
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 Ended May 1, 2005.	:	

Petitioner, Carl Noor, 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 ended May 1, 2005.

A hearing was held before Arthur S. Bray, Administrative Law Judge, at the offices of the Division of Tax Appeals, One Center Street, New York, New York, on December 15, 2009 at 10:30 A.M., with all briefs to be submitted by May 1, 2010, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Daniel Smirlock, Esq. (Michael J. Hall).

ISSUE

Whether the Division of Taxation correctly determined that sales and use taxes were due on petitioner's purchase of a boat.

FINDINGS OF FACT

1. In 1981, petitioner was engaged in the business of creating television commercials. In May of 1981, he purchased a 36-foot C and C sailboat with the intent of renting the boat to people interested in a place to stay or to use it as a prop. At the time, petitioner had a lawyer and an accountant advising him on how to arrange his business affairs. Upon acquiring the sailboat, it

was documented with the Coast Guard, and a corporation, known as Fjord Enterprises, Ltd., was created to hold title to the boat. The sailboat was never registered with the New York State Department of Motor Vehicles and sales tax was not paid at the time of its purchase.

2. After about a year and a half, it became evident that the new business would not be profitable. Petitioner dissolved the corporation, took ownership of the sailboat and began making payments on its cost.

3. In or about 1983, petitioner received a notice from the Division of Taxation (Division) asking whether he had paid taxes on the sailboat. Petitioner checked his records and, when he realized that he had not paid the sales tax, he paid the taxes and a penalty. He did not receive any additional correspondence from the Division.

4. After acquiring the boat and prior to the period in issue, petitioner's marriage ended by divorce. In 1988, the name of the boat was changed from the Rita-Anne to Free at Last.

5. In June 2007, representatives of the Division visited the Town of Shelter Island Marina located in Shelter Island, New York, and requested records regarding the vessels that were moored at the marina during the years 2005 through 2007. The Division learned that one of the vessels was owned by petitioner.

6. On May 16, 2008, the Division mailed a letter to petitioner inquiring whether sales and use tax was paid on the vessel. Mr. Norr responded that he paid tax on the vessel but no longer had the bill of sale. Having no proof of payment, the Division issued a Statement of Proposed Audit Change for Sales and Use Tax to petitioner asserting that sales and use tax was due in the amount of \$3,351.51 plus interest in the amount of \$1,960.55 and penalty in the amount of \$1,005.35 for a balance due of \$6,317.41. In order to calculate the amount of sales and use taxes

due, the Division estimated the value of the sailboat based on the cost of similar vessels for sale on a certain website.

7. The Division of Taxation (Division) issued a Notice of Determination to petitioner, Carl Norr, dated September 19, 2008, which assessed sales and use tax due for the period ended May 1, 2005 in the amount of \$3,351.51 plus interest in the amount of \$1,991.20 and penalty in the amount of \$1,005.35 for a balance due of \$6,348.06.

8. Petitioner can no longer locate the cancelled check for payment of the sales tax, and the bank upon which the check was drafted has changed its name several times. He attempted to have the bank locate its record of the check, but the current bank has no record of the cancelled check or the payment of the tax. The lawyer whom petitioner relied upon has since passed away and the accountant is retired.

9. At the hearing petitioner offered a series of documents that are consistent with his testimony. The documents show that a corporation acquired the sailboat in 1981 and that it has been moored at a marina in Shelter Islands Heights, New York, since May 1, 1983.

SUMMARY OF THE PARTIES' POSITIONS

10. At the hearing, the Division argued that the burden of proof is on petitioner to show by clear and convincing evidence that he filed a report and paid the tax due. The Division submits that petitioner failed to meet this burden. Further, the Division issued the assessment based on credible information that petitioner purchased the boat in New York and did not pay the tax.

11. Petitioner contends that he paid the taxes in 1983 but cannot find a record of his payment. Petitioner maintains that no one keeps records from 1983 and that this is a gross misunderstanding.

CONCLUSIONS OF LAW

A. Tax Law § 1105(a) imposes sales tax on the retail sale of tangible personal property except as otherwise provided. Tax Law § 1110(a) states that, except to the extent that property has been subject to the sales tax, a use tax is imposed on every person for use within the state of tangible personal property purchased at retail.

B. A use is defined by the Tax Law as the exercise of any power over tangible personal property by the purchaser and includes storage, keeping or retention for any length of time (Tax Law § 1101[b][7]). Here, the maintenance of the sailboat in New York constituted a use in New York, which rendered the sailboat subject to tax (*see* 20 NYCRR 526.[9][a]).

C. In this matter, petitioner does not deny that sales tax was not paid on the initial purchase of the sailboat in 1981. Rather, petitioner submits that, following an examination of the mooring records where the sailboat was kept, he was assessed sales and use tax in 1983 and the same was paid. Petitioner posits that, because of the lapse of time, he no longer has records showing the payment of the tax and that it is impossible obtain copies of those records.

D. It has been recognized that a substantial delay when coupled with actual prejudice may warrant granting relief to the party that has been prejudiced (*see Matter of Corning Glass Works v. Ovsanik*, 84 NY2d 619 [1994]; *Matter of Heller v. Chu*, 111 AD2d 1007 [3d Dept 1985] *appeal dismissed* 66 NY2d 696 [1985]). Here, petitioner has shown substantial prejudice. As a result of the lapse of time, he is unable to provide documentary evidence that he paid the sales tax. As explained in *Heller*, taxpayers should be able to plan for their future with some idea of their tax liability. This cannot occur if the Division is permitted to inquire about the payment of sales tax more than 25 years after the purchase. Under these circumstances, the private interest asserted clearly outweighs the public interest in collecting taxes.

E. The petition of Carl Norr is granted and the Notice of Determination, dated September 19, 2008, is cancelled.

DATED: Troy, New York
October 28, 2010

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE