

STATE OF NEW YORK
DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
PHILIP CIMINO	:	DETERMINATION
for Revision of a Determination or for Refund of Sales	:	DTA NO. 823748
and Use Taxes under Articles 28 and 29 of the Tax Law	:	
for the Year 2007.	:	

Petitioner, Philip Cimino, 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 Year 2007.

A hearing was held before Donna M. Gardiner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on October 3, 2011 at 1:00 P.M., with all briefs to be submitted by February 3, 2012, which date began the six-month period for the issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Mark F. Volk, Esq. (Robert A. Maslyn, Esq., of counsel).

ISSUE

Whether petitioner is liable for payment of compensating use tax on the purchase of a boat in the State of Florida.

FINDINGS OF FACT

1. In July 2003, petitioner, Philip Cimino, a resident of New York, purchased a boat in the State of Florida for \$267,000.00. The boat was a 1990, 45-foot Viking boat with a Coast Guard official number 963243. At the time of purchase, petitioner paid \$16,020.00 in sales tax to the State of Florida.

2. In 2007, petitioner brought this boat into New York State and moored it in South Huntington, Long Island. Petitioner did not report or remit any use tax on the possession and use of the boat in New York State.

3. In April 2009, the Division of Taxation (Division) received information from the United States Coast Guard that the boat in issue was moored in New York State waters. The information received by the Division included the year, make, model and footage of the boat, as well as the owner's name.

4. On April 27, 2009, the Division mailed a letter to petitioner informing him that it had obtained information regarding his possession and use of the boat in New York State. The Division requested certain information from petitioner, specifically, a bill of sale and proof of payment of sales tax. Petitioner provided a bill of sale, a buyer's closing statement and a dealer's tax statement.

5. As petitioner did not report any tax due upon bringing the boat into New York State, The auditor used the National Automobile Dealers Association (NADA) guidelines to determine a fair market value for the boat. The auditor used an online version of the NADA guidelines and inserted information regarding the vessel, year, make, model and footage of the boat, which resulted in a fair market value of \$130,250.00. Although the boat was brought into New York in 2007, the auditor used the NADA guidelines for 2009. The insurance policy for the boat reflects a value of \$267,000.00, although invoices submitted by petitioner reflect repairs made to the boat.

6. The auditor explained how he determined whether there was any use tax due and owing by petitioner. Using the fair market value of the boat, the auditor multiplied \$130,250.00 by the tax rate, 8.625%, which amounted to \$11,234.06. In order to provide a credit to petitioner for sales tax paid to Florida, the auditor multiplied \$130,250.00 by the 6% Florida tax rate which amounted to \$7,815.00. Allowing a credit of \$7,815.00, the auditor subtracted this amount from the amount of tax due at the New York State and local tax rate (8.625%), which resulted in a difference of \$3,419.06.

7. The Division issued a Notice of Determination (L-032477708) to petitioner dated September 8, 2009 assessing compensating use tax due for the period ended May 1, 2007 in the amount of \$3,419.06 plus interest and penalties.

CONCLUSIONS OF LAW

A. The compensating use tax is imposed by Tax Law § 1110(a), which, as pertinent, states:

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 on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail

Pursuant to Tax Law § 1133(b), tax was due and payable by petitioner on the use of tangible personal property in the State of New York unless otherwise exempt. The duty to report and pay compensating use tax on tangible personal property, including vessels, is set forth in 20 NYCRR 531.6, in pertinent part, as:

(a) Any person who is not required to file periodic returns under section 533.3(a) of this Title and who purchases or uses property or services subject to the sales or compensating use tax must file a report of sales and use tax with the Department of Taxation and Finance and pay the taxes that are due.

(b) Except as otherwise provided in this section, the report of sales and use tax must be filed and the tax paid within 20 days from the date that:

* * *

(2) tangible personal property or services subject to tax, which were purchased outside the state by a New York resident without payment of the New York tax, are first brought or delivered into New York State

* * *

(f) *Purchases and uses of motor vehicles, snowmobiles, vessels and all terrain vehicles.* (1) Before any motor vehicle, snowmobile, vessel or all terrain vehicle may be registered or any application for a certificate of title of a motor vehicle or vessel may be accepted, the appropriate State and local sales or use taxes due on its purchase or use . . . must be paid.

B. When petitioner purchased his boat in 2003, he paid sales tax to Florida in the amount of \$16,020.00. Since petitioner is a New York State resident, he was required to pay use tax when he brought his boat into New York State in 2007. The issue herein involves the calculation of the use tax required to be paid by petitioner on his use of the boat in New York State.

C. Tax Law § 1118(7)(a) provides an exemption from the compensating use tax to the extent that a tax on the sale or use of the same property was legally due and paid to another state, provided that the other state "allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon which such a sales tax or compensating use tax was paid to this state." The sales and use tax regulation at 20 NYCRR 531.4 provides, in pertinent part, that:

(a) *General rule.* When tangible personal property is purchased outside of the State by a resident of the State, for use outside of the State, and is subsequently used in the State, the compensating use tax is due on the purchase price.

(b) *Use outside the State in excess of six months.* Where a resident affirmatively shows that he used such property outside the State for more than six months prior to its first use in New York, the use tax is based on the current market value of the property, not to exceed its cost, at the time of first use within New York.

Therefore, since petitioner used his boat in Florida for more than six months preceding his use of the boat in New York, the use tax is due on the fair market value of the boat in 2007.

D. The auditor determined a fair market value for the boat at \$130,250.00 by utilizing the NADA guidelines for 2009 rather than 2007. Using the later year was in petitioner's favor, as the value of a boat would depreciate over time. However, petitioner argues that this value is still too high due to significant water damage suffered by his boat. Petitioner emphasizes that a boat that sank in salt water is not considered an average boat under the NADA guidelines.

A presumption of correctness attaches to a Notice of Determination issued by the Division and the burden is upon petitioner to overcome this presumption (*see Matter of Suburban Carting Corp.*, Tax Appeals Tribunal, May 7, 1998, *confirmed* 263 AD2d 793 [1999]). Petitioner has not provided any documentation to support a lower fair market value. Petitioner's mere assertions that a water-damaged boat has a lower than average value is not enough to sustain his burden of proof that the auditor erred in determining the fair market value. As pointed out by the Division, the insurance policy for the boat reflects a value of \$267,000.00. Although petitioner has submitted a folder of invoices that reflects repairs made to the boat, this alone does not warrant an adjustment to the fair market value established by the auditor in this case.

E. Petitioner states that, assuming the fair market value was \$130,250.00, there can be no use tax liability due in New York State. Petitioner argues that the credit formula is flawed. Petitioner states that the auditor should have used the sales tax amount that he actually paid in Florida, rather than to use the 6% tax rate on the fair market value of the boat in 2009. Petitioner points out that he should receive a credit in the amount of \$16,020.00 that he has already paid to Florida, which exceeds the \$11,234.06 due in use tax calculated pursuant to the regulations. Petitioner asserts that since he paid more tax in Florida than is due in New York, any tax liability to New York State would result in his paying more than his fair share. This position is without merit. The auditor properly calculated the amount of tax liability in accordance with Tax Law § 1118(7)(a) and the regulation. There is no provision in the statute or case law that allows the credit to be calculated in the manner suggested by petitioner herein.

F. Penalty was assessed in this case under Tax Law § 1145(a)(1)(I) for failure to timely file a sales tax return. Penalties may be abated upon the showing of reasonable cause or a lack of willful neglect (*see* Tax Law § 1145[a][1][iii]). Petitioner argues that he believed that he was entitled to a dollar-for-dollar credit. As set forth in Conclusion of Law E, this position is without merit based upon the clear language of the statute. Therefore, penalty is sustained.

G. The petition of Philip Cimino is denied and the Notice of Determination issued September 8, 2009 is sustained.

DATED: Albany, New York
July 19, 2012

/s/ Donna M. Gardiner
ADMINISTRATIVE LAW JUDGE