

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JERICO BOATS, INC.	:	DECISION
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 March 1, 1979	:	
through November 30, 1981.	:	

Petitioner, Jericho Boats, Inc., 865 West Jericho Turnpike, Smithtown, New York 11787, 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 March 1, 1979 through November 30, 1981 (File No. 39890).

A hearing was held before Jean Corigliano, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on May 21, 1986 at 2:30 P.M. Petitioner appeared by Nathan Eichner, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (Joseph W. Pinto, Jr., Esq., of counsel).

ISSUES

I. Whether the Audit Division properly disallowed certain boat sales which petitioner claimed to be exempt from sales tax.

II. Whether the Audit Division correctly determined sales tax due in each quarterly sales tax period under consideration by accumulating all sales upon which it asserted a tax due and prorating the total across the entire audit period.

FINDINGS OF FACT

1. Petitioner, Jericho Boats, Inc., is a New York corporation which operated a retail boat store during the audit period under consideration.

2. Upon audit, the Audit Division determined that petitioner's books and records were in fair condition and adequate for the purpose of verifying reported sales. Petitioner's reported gross sales of \$2,201,653.00 were accepted as correct, and it was determined that petitioner had paid all taxes due on its own purchases.

3. The auditor disallowed certain sales totaling \$1,109,996.00 which petitioner claimed to be exempt from sales tax on three alternate grounds: that the boat sold was delivered out of state; that petitioner had acted only as a broker to the sale and thus had no duty to collect the sales tax due from the buyer; that the sale was made for resale.

4. By its president, petitioner executed a Consent to Fixing of Tax Not Previously Determined and Assessed in the amount of \$17,220.16 for the period March 1, 1979 through November 30, 1981. Accordingly, on August 20, 1982, the Audit Division issued against petitioner a Notice and Demand for Payment of Sales and Use Taxes Due in the amount of \$17,220.16 plus minimum statutory interest for the period March 1, 1979 through November 30, 1981. That assessment is not at issue.

5. Petitioner denied that tax was due on the remainder of the sales disallowed by the Audit Division, totaling \$864,790.00 with a tax due on that amount of \$60,731.85.

6. The auditor disallowed the following sales, claimed to be exempt by virtue of out-of-state delivery, on the ground that the sales invoice for each showed delivery in New York State:

<u>Boat</u>	<u>Sales Inv. Date</u>	<u>Sales Price</u>
1981 - Regal	2/28/81	\$23,869.00
1981 - Regal	1/31/81	16,775.00
1981 - Regal	1/24/81	15,689.00
1980 - Regal	8/15/80	15,736.00
1980 - Regal	1/26/80	18,878.00
		<u>\$90,947.00</u>

7. To support its contention that two of the above boats were delivered out of state, petitioner offered two boat registration forms showing that the boats were eventually registered in the states of New Jersey and Florida, respectively. No evidence was presented regarding actual delivery.

8. The auditor also determined that petitioner had failed to collect and pay over sales tax on boat sales totalling \$773,843.00 and referred to as brokerage sales.

9. In a typical brokerage sale, owners contacted petitioner to seek its help in selling their used boats. Fifty to sixty percent of the time, the boat was left on petitioner's premises where prospective buyers could view it. Other boats were listed by petitioner which kept a photograph and a file of pertinent information for each boat. Petitioner's salesmen would exhibit the boats or photographs to buyers. In some instances a person wishing to purchase a boat would make an offer which petitioner conveyed to the seller. In other instances, petitioner and the seller would agree beforehand to a fixed selling price. In either case, petitioner would take a deposit from the buyer to hold the boat until financing could be obtained. In many instances, petitioner itself provided such financing. When a sale culminated, petitioner collected the sale price from the buyer, deducted its own commission and remitted the balance to the seller. In most instances, buyer and seller were never in personal contact. Petitioner did not collect sales tax on these transactions because it believed that it was not required to collect tax where it did not actually own or hold title to the boat sold. Furthermore, petitioner believed that the requirement that taxes be paid when a boat is registered with the

Department of Motor Vehicles relieved it of the duty to collect tax at the time of the sale.

10. Petitioner's recordkeeping procedures treated brokerage sales and sales of boats it owned in the same manner. The selling price of the boat was recorded as a sale and the remittance to the seller was recorded as the cost of goods sold.

11. Total unsubstantiated exempt sales amounted to \$864,790.00. The auditor treated these as additional taxable sales and determined sales tax due on this amount by prorating the total additional taxable sales over the entire audit period.

12. On August 20, 1982, the Audit Division issued against petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through November 30, 1981 asserting tax and interest due as follows:

<u>Period Ending</u>	<u>Tax Due</u>	<u>Simple Interest Due</u>
05/31/79 - 479	\$ 5,503.19	\$ 1,777.75
08/31/79 - 180	5,503.19	1,659.87
11/30/79 - 280	5,503.19	1,543.20
02/29/80 - 380	5,503.19	1,427.91
05/31/80 - 480	5,503.19	1,309.97
08/31/80 - 181	5,503.19	1,192.10
11/30/80 - 281	5,503.19	1,075.43
02/28/81 - 381	5,503.19	960.14
05/31/81 - 481	5,503.19	842.20
08/31/81 - 182	5,503.19	691.97
11/30/81 - 282	<u>5,699.95</u>	<u>517.78</u>
Totals	\$60,731.85	\$12,998.32

13. The auditor's workpapers include a transcription of petitioner's sales invoices showing the following additional taxable (brokerage) sales in each sales tax quarter under consideration:

<u>Period Ended</u>	<u>Total Sales</u>
5/31/79 - 479	\$ 5,237.00
8/31/79 - 180	75,511.00
11/30/79 - 280	20,144.00
2/29/80 - 380	9,500.00
5/31/80 - 480	101,572.00
8/31/80 - 181	124,530.00
11/30/80 - 281	35,076.00
2/28/81 - 381	16,700.00
5/31/81 - 481	172,429.00
8/31/81 - 182	180,144.00
11/30/81 - 282	<u>8,000.00</u>
Subtotal	748,843.00
8/31/81 - 182	<u>25,000.00</u>
(from customer deposits)	
TOTAL	\$773,843.00

CONCLUSIONS OF LAW

A. That the sales tax is imposed on the receipts, unless specifically exempted, of every retail sale of tangible personal property (Tax Law §1105[a]). There is a presumption in the law that all receipts are subject to tax, and the burden of proving otherwise is placed upon the person required to collect the tax (Tax Law §1132[c]).

B. That the sales tax is both a "transactions tax" and a "destination tax"; that is, liability for the tax arises at the point of delivery or the point at which title or possession transfers from the vendor to the purchaser (20 NYCRR 525.2[a][2],[3]). Petitioner has not presented credible evidence that the five boat sales at issue were excluded from operation of the sales tax by virtue of having been delivered outside of New York State. The boat registration forms offered merely demonstrate that two of the boats sold were eventually brought out of state. They do not speak at all to the question of where delivery occurred.

C. That section 1133(a) of the Tax Law provides, in part, that "every person required to collect any tax imposed by [Article 28] shall be personally

liable for the tax imposed, collected or required to be collected under this article." Section 1131(1) of the Tax Law includes within the term "person required to collect tax", "every vendor of tangible personal property or services". Section 1101(b)(8)(i)(A) of the Tax Law defines the term vendor, in part, as "[a] person making sales of tangible personal property or services, the receipts from which are taxed by this article".

D. That petitioner was a person required to collect tax pursuant to Tax Law §1131(1). In its role as a broker of used boats, it solicited sales, demonstrated the boats and collected the final sales price. Accordingly, petitioner was responsible for the collection and payment over of the tax on the so-called brokerage sales.

E. That section 1132(f) of the Tax Law, which provides that a purchaser may not register a vehicle in New York State until it is proven that the sales tax was paid, did not relieve the petitioner of its duty to collect the tax when collecting the price to which it applied (Matter of Mendon Leasing Corporation, State Tax Commission, June 24, 1985). This is true whether or not the boat sold by petitioner was eventually registered in New York or any other state.

F. That quarterly sales tax returns are due within 20 days following the quarterly periods ending the last day of February, May, August and November of each year (Tax Law §1136[b]). Any tax imposed by Articles 28 and 29 of the Tax Law is due and owing to the Tax Commission on or before the date set for filing of the return for the reporting period, without regard to whether the filed return is correct or complete. The amount of tax so payable is due and payable whether or not it has been collected by the vendor from the purchaser (Tax Law §1137; 20 NYCRR 533.4[a][1]). Accordingly, sales tax due on the boats described in Finding of Fact "6" and the so-called brokerage sales described in Finding


of Fact "13" did not become due and owing until 20 days following the quarterly period in which the sale actually occurred. By accumulating all sales upon which tax was due and prorating the total across the entire audit period, the auditor incorrectly stated the tax and interest due in each quarter. The Audit Division is directed to recalculate petitioner's tax liability and interest in accordance with this conclusion.

G. That the petition of Jericho Boats, Inc. is granted to the extent indicated in Conclusion of Law "F"; that the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued on August 20, 1982 shall be modified accordingly; that in all other respects, the petition is denied.


DATED: Albany, New York

STATE TAX COMMISSION

NOV 14 1986


PRESIDENT


COMMISSIONER


COMMISSIONER