

STATE OF NEW YORK

STATE TAX COMMISSION

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| In the Matter | of the Petition | : | |
| | of | : | |
| SUNSHINE DEVELOPERS, INC. | | : | DECISION |
| and | | : | |
| JOE MORRIS | | : | |
| for Revision of a Determination or for Refund | : | | |
| of Sales and Use Taxes under Articles 28 and 29 | : | | |
| of the Tax Law for the Periods May 31, 1977 and | : | | |
| November 30, 1978. | : | | |

Petitioners, Sunshine Developers, Inc., and Joe Morris, 535 Secaucus Road, Secaucus, New Jersey, 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 periods May 31, 1977 and November 30, 1978 (File No. 41786).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 11, 1984 at 2:45 P.M., with all briefs to be submitted by April 19, 1985. Petitioners appeared by Isidore Feldman, C.P.A. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether two boats purchased by petitioner were delivered outside New York State and therefore not subject to sales tax.

II. Whether mooring the boats at marinas in New York State subjected the boats to use tax.

FINDINGS OF FACT

1. Petitioner Sunshine Developers, Inc. (Sunshine) was incorporated in the State of Delaware on or about March 15, 1977. Robert Morris was the principal stockholder and Secretary of the Board of Directors. Petitioner Joe Morris was

President of Sunshine and Chairman of the Board of Directors; however, he was not a stockholder.

Sunshine was formed for the purpose of owning and operating a boat. The boat was used to entertain clients of Morris Industrial Builders and other related corporations owned by Robert and Joe Morris. The offices of all these corporations were located outside New York State.

2. On or about April 8, 1977, Sunshine purchased a 1977 33' "Egg Harbor" boat from Lake's Yacht Sales, Inc. located in Freeport, New York. The boat was delivered by the seller to Richmond Chris-Craft Sales and Marina, Inc. in Edgewater, New Jersey. Sunshine sold this boat to Sanders Roofing Co. on May 9, 1978.

On or about June 29, 1978, Sunshine purchased a 1978 42' "Post Sport Fisherman" boat from Anchorage Boat Sales, Inc. located in Lindenhurst, New York. Petitioner took delivery of this boat at Post Marine Company in Mays Landing, New Jersey.

3. On October 29, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioners for taxes due of \$10,804.00, plus penalty and interest of \$8,131.00, for a total of \$18,935.00. The Notice represented the tax due on the two boats described in Finding of Fact "2" and resulted from the observation of these boats at a marina in New York State.

The Audit Division took the position that Sunshine was a resident of this state for purposes of the Sales and Use Tax Law and that the mooring of the boats in New York State constituted a taxable use.

4. The "Egg Harbor" was moored at Richmond Chris-Craft Sales and Marina, Inc. in Edgewater, New Jersey during 1977. It occasionally made stops at

marinas in New York (West Hampton, Montauk) en route to Martha's Vineyard in Massachusetts and other locations outside New York State.

5. During the period at issue, Joe Morris was a resident of New York State. On April 4, 1978, Mr. Morris arranged for mooring of a boat at Deep Sea Yacht and Racquet Club in Montauk, New York. He negotiated the financing for both boats with Flushing National Bank and obtained the insurance.

6. Petitioner argued that the "Post Sport Fisherman" was primarily moored in Key West, Florida, but on many occasions it stopped in Montauk while in transit to other points outside New York State.

CONCLUSIONS OF LAW

A. That "(t)he 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." [20 NYCRR 525.2(a)(3)].

The sellers of the boats transferred possession to petitioner outside New York State. Accordingly, the transactions were not subject to the tax imposed under section 1105(a) of the Tax Law.

B. That section 1101(b)(7) of the Tax Law defines the term "use" as the 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.

Section 1118(2) of the Tax Law provides an exemption from the imposition of use tax, "In respect to the use of property purchased by the user while a nonresident of this state... A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be

deemed a nonresident with the respect to the use in this state of property in such employment, trade, business or profession."

C. That a corporation is considered to be engaged in "carrying on a business" within New York State if it carries on in New York activities preparatory to the purposes for which it was formed. Sunshine was formed for the sole purpose of owning and operating a boat. The activities of Joe Morris on behalf of Sunshine described in Finding of Fact "5" performed prior to the purchase of the "Post Sport Fisherman" constituted such preparatory activities. Accordingly, Sunshine is deemed a resident of New York at the time of purchase.

The subsequent mooring of the boat at a marina in New York on a seasonal basis constituted "use" within this state in accordance with section 1101(b)(7) of the Tax Law and was therefore subject to the tax imposed under section 1110 of the Tax Law.

D. That the "Egg Harbor" boat was moored in New Jersey. The temporary mooring of the boat at a New York marina while en route to a location outside New York State did not create a "use" within New York State as defined in section 1101(b)(7) of the Tax Law. Therefore, the tax assessed on the purchase of said boat in the amount of \$3,454.00 is cancelled.

E. That the petition of Sunshine Developers, Inc., and Joe Morris, is granted to the extent indicated in Conclusion of Law "D"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales

and Use Taxes Due issued October 29, 1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

DEC 13 1985


PRESIDENT


COMMISSIONER


COMMISSIONER