

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

MARY E. SPIRIT, 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 Ended February 29,
1980.

Petitioner, Mary E. Spirit, Inc., 26 Mill Spring Road, Manhasset, New York 11030, 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 February 29, 1980 (File No. 41790).

A hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 20, 1985 at 10:45 A.M., with additional evidence to be submitted by June 9, 1986. Petitioner appeared by Evan W. Godsall, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

I. Whether two vessels purchased by petitioner were purchased solely for resale and therefore exempt from sales and use taxes.

II. Whether petitioner was a nonresident of New York State at the time it purchased the vessels.

FINDINGS OF FACT

1. Petitioner, Mary E. Spirit, Inc., is incorporated in the State of Delaware. Edward J. Brady, a New York resident, formed Mary E. Spirit, Inc.

for the purpose of operating as a broker for the sale of boats, horses and real estate.

2. Since 1970, petitioner has sold or negotiated the sale of eight boats of various sizes and models. In most of these transactions, petitioner has made a profit.

3. On April 22, 1976, Edward J. Brady purchased a C & C 43 foot Golliwog, the Mary E's Spirit, of which he took delivery in North Carolina. The vessel was assigned to petitioner on May 2, 1977. Petitioner moored the vessel at Flagship Marina, Mineola, New York until it was delivered to Canada and sold to Bornoc Associates II on September 20, 1980. Petitioner had advertised the vessel as being for sale from September, 1979 through July, 1980.

4. On December 27, 1979, petitioner purchased a New York 40 foot yacht, the Mary E, of which it took delivery in Block Island, Rhode Island. Edward J. Brady made arrangements for the purchase of the Mary E and prepared a check from his New York account for such purchase. Petitioner chartered the Mary E out the following summer. In late 1981, petitioner brought the Mary E to New York State, where it is currently in dry dock at Flagship Marina. The vessel has been in dry dock in New York State for the past four years. Petitioner is currently trying to sell the Mary E.

5. The Audit Division observed petitioner's vessels, the Mary E's Spirit and the Mary E, at Flagship Marina. Since the boats were registered in Delaware, inquiries were sent to petitioner to determine if the boats were subject to New York sales or use tax. The inquiries, dated September 28, 1981 and January 5, 1982, were not answered.

6. On October 29, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, in care of Edward J. Brady, for taxes due of \$13,107.00, plus penalty of \$3,276.00 and interest of \$4,381.00, for a total amount due of \$20,764.00. The amount of tax was computed based on an estimated sales price for each vessel. The sales price of the Mary E's Spirit was estimated by adjusting the vessel's value for U.S. Customs purposes. The sales price of the Mary E was estimated based on the footage of the boat (40 feet x \$2,000.00 per foot).

7. Subsequent to the hearing, petitioner produced evidence that the actual purchase price of the Mary E was \$62,500.00.

CONCLUSIONS OF LAW

A. That the 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 delivery of both vessels took place outside of New York State. Accordingly, the transactions were not subject to the tax imposed under section 1105(a) of the Tax Law.

B. That section 1110 of the Tax Law imposes a tax on the use of property within New York State, unless the property has already been subject to the sales tax. The term "use" is defined by section 1101(b)(7) of the Tax Law, in pertinent part, as:

"[t]he 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...of such property."

C. That section 1118(2) of the Tax Law provides an exemption from the imposition of use tax "[i]n 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 respect to the use in this state of property in such employment, trade, business or profession."

D. 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 (Matter of Paul Friedman, Wanderlust, Inc., State Tax Commission, January 17, 1986). Mary E. Spirit, Inc. was formed for the purpose of acting as a broker for the sale of yachts and other property. The activities of Edward J. Brady on behalf of Mary E. Spirit, Inc. described in Finding of Fact "4" constituted such preparatory activities. Accordingly, Mary E. Spirit, Inc. is deemed a resident of New York at the time of purchase.

E. That section 1101(b)(4)(i)(A) of the Tax Law defines retail sale as a sale of tangible personal property for any purpose, other than for resale as such or as a physical component part of tangible personal property.

F. That the language of section 1101(b)(4)(i)(A) exempting sales for resale from sales and use taxes "makes the legislative purpose reasonably clear to exempt only property then solely used for resale because 'any purpose' would include all purposes generally. The words 'other than' narrow the exempted purpose down to the singular. It would seem reasonable to think that using the property for resale and some other purpose or purposes would not carry with it the singular exemption created by the statute" (Jacobs v. Joseph, 282 A.D. 622, 625).

G. That the purchase of the Mary E's Spirit was solely for the purpose of resale. Accordingly, the transaction was not subject to sales or use tax.

H. That although the original intent of petitioner was to resell the Mary E, the resale has not occurred, and petitioner has utilized the vessel. The language of section 1101(b)(4)(i)(A) with respect to sale for resale must be interpreted narrowly, and once petitioner chartered out the Mary E, the vessel could no longer be considered to have been purchased solely for resale. Nowhere does the aforesaid statute either express or imply that the intent of the purchaser at the time of purchase shall govern with respect to whether a purchase is for resale; rather, the actual use of the property is the controlling factor. Therefore, petitioner did not purchase the Mary E for resale within the meaning and intent of section 1101(b)(4)(i)(A) of the Tax Law (see Matter of Naum Brothers, State Tax Commission, February 29, 1984).

I. That the subsequent mooring and dry dock storage of the Mary E at Flagship Marina in Mineola, New York constituted "use" within this State in accordance with section 1101(b)(7) of the Tax Law which was therefore subject to the tax imposed under section 1110 of the Tax Law. The tax due is to be recomputed on an actual purchase price of \$62,500.00 (see Finding of Fact "7").

J. That the petition of Mary E. Spirit, Inc. is granted to the extent indicated in Conclusions of Law "G" and "I"; 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

OCT 07 1986

PRESIDENT

Francis P. Koernig
COMMISSIONER

W. J. [unclear]
COMMISSIONER

*I dissent. I would
sustain Use Tax liability
on the Mary E's Spirit.*

Richard W. Clun