

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
DIRK J. OUDEMOOL, INC.
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 November 30,
1977.

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DECISION

Petitioner, Dirk J. Oudemool, Inc., Wilmington Tower, P.O. Box 2306, Wilmington, Delaware 19899, 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 November 30, 1977 (File No. 42870).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, 333 East Washington Street, Syracuse, New York, on November 27, 1984 at 9:15 A.M., with all briefs to be submitted by February 15, 1985. Petitioner appeared by Bruce B. Roswig, Esq. The Audit Division appeared by John P. Dugan, Esq. (Anne Murphy, Esq. of counsel).

ISSUE

I. Whether a boat purchased by petitioner was delivered outside New York State and therefore not subject to sales tax.

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

III. Whether penalty and that portion of interest exceeding the minimum statutory rate should be cancelled.

FINDINGS OF FACT

1. Petitioner, Dirk J. Oudemool, Inc., was incorporated in the State of Delaware on April 22, 1976. The sole officer and stockholder of petitioner was Dirk J. Oudemool who resided in Syracuse, New York. The purpose of the corporation was to own and operate a boat.

2. On April 23, 1976, petitioner purchased a 42' 1969 Chris Craft Commander Salon Cruiser, "Defense Rests", from Tamco Marine, Inc. for \$48,000.00. Tamco Marine, Inc. is located in Buffalo, New York. The invoice indicated F.O.B. Rochester and that a \$5,000.00 deposit was received with the balance to be paid in full by April 30, 1976.

A condition of the sale was the completion of a satisfactory demonstration of all mechanical and electrical systems. This demonstration took place on April 30, 1976 on Lake Ontario. The seller's representative appeared at Oswego Harbor where Mr. Oudemool, on petitioner's behalf, and a mechanic hired by petitioner boarded the boat. The boat was taken out on to Lake Ontario approximately one mile north of Oswego Harbor where various tests of the boat were performed. Mr. Oudemool was satisfied with the performance of the boat and at that time exchanged money for a bill of sale and other documents. Mr. Oudemool then piloted the boat back to Oswego Harbor, discharged the seller's representative and continued on to Syracuse.

3. Immediately after taking possession of the boat, petitioner moored and stored the boat at Anchorage Marina, Bridgeport, New York, until 1979. In 1979, the boat was moored at Lakeshore Yacht and Country Club in Oneida, New

York. The boat was not used in New York during the month of August. The boat was used primarily by Mr. Oudemool.

4. The boat was mortgaged by the Bank of New York in Syracuse and was insured through a Syracuse insurance agent.

5. The Audit Division observed petitioner's boat at a marina in New York. Since the boat did not have a New York registration, inquiries were sent to petitioner in order to determine if the boat was subject to sales or use tax.

On December 13, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of \$7,350.00, plus penalty of \$1,837.00 and interest of \$4,561.00, for a total of \$13,748.00. The amount of tax was computed based on an estimated sales price of \$105,000.00 (42' boat X \$2,500 per foot).

At the hearing, counsel for the Audit Division conceded that the tax should be revised to \$3,360.00 using the actual sales price of \$48,000.00.

6. Petitioner argued that possession of the boat was transferred outside New York State and therefore the transaction was not subject to sales tax. He further argued that he was a nonresident of New York at the time of purchase of the boat and as such the subsequent use of the boat within the state was not subject to use tax.

With respect to the cancellation of penalty and interest, petitioner relied on Regulation 536.1(b)(5) which provides that grounds for reasonable cause may include the following:

"pending petition to Tax Commission or formal hearing proceedings involving a question or issue affecting the computation of tax for the year, quarter, month or other period of delinquency."

CONCLUSIONS OF LAW

A. That section 7-a(A) of the State Law provides that the jurisdiction of New York State extends to and over, and is exercisable with respect to waters offshore from the coasts of New York as follows: (1) those portions of the Great Lakes lying within the territorial limits of this state.

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)].

B. That the seller of the boat transferred possession to petitioner in New York territorial waters off of the City of Oswego. Accordingly, the boat was delivered within New York State and was subject to the sales tax imposed under section 1105(a) of the Tax Law. The applicable tax jurisdiction was the City of Oswego (7%).

C. That since delivery of the boat took place in New York State, issue II is moot.

D. That petitioner's reliance on Regulation 536.1(b)(5) for cancellation of penalty and interest is misplaced. Petitioner failed to establish that its failure to pay the sales tax was due to reasonable cause and was not due to willful neglect.

E. That in accordance with Finding of Fact "5", the tax due is reduced to \$3,360.00.

F. That the petition of Dirk J. Oudemool Inc. is granted to the extent indicated in Conclusion of "E"; the Audit Division is hereby directed to modify

the Notice of Determination and Demand for Payment of sales and Use Taxes Due issued December 13, 1982; and that, except was so granted, the petition is in all other respects denied.

DATED: Albany, New York

OCT 03 1985

STATE TAX COMMISSION

Richard A. Allen
PRESIDENT

Francis Q. Koenig
COMMISSIONER

Mark J. Smith
COMMISSIONER