STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition of REGAN CORPORATION 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 May 31, 1975.	DECISION

Petitioner, Regan Corporation, c/o Lally & Lally, 220 Old Country Road, Mineola, New York 11501, 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 May 31, 1975 (File No. 43501).

A hearing was held before Sandra F. Heck, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on February 24, 1986 at 1:40 P.M. Petitioner appeared by Lawrence M. Lally, Esq., President. The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUES

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 of its purchase of a boat and, therefore, exempt from liability for compensating use tax for the subsequent use of the boat in New York State.

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

FINDINGS OF FACT

1. Petitioner was a Delaware corporation which was formed in the early part of 1975 for the purpose of accepting title to the vessel, Regan III. The president and sole shareholder of petitioner corporation, Lawrence M. Lally, was a New York resident.

2. Mr. Lally was an attorney with a law practice in Mineola, New York and Jensen Beach, Florida, who purchased the Regan III to use as living accommodations and to entertain clients while in Florida.

3. The vessel, Regan III, a 1966 48-foot Chris Craft boat, Hull #CAA-48-00099A, was purchased from the Mattatuck Inlet Marina & Shipyard, Inc. (hereinafter "Mattatuck") for $38,000.00, as evidenced by a bill of sale dated February 2, 1975, addressed to petitioner at a Delaware address and signed by Mr. Lally "for owner". Said bill of sale indicated payment of a $5,000.00 deposit, with payment of the balance of $33,000.00 on February 14, 1975. The petitioner also paid the sum of $2,000.00 to Mattatuck on March 30, 1975, which sum represented the sales commission due on the boat. No sales tax was paid on the purchase price of the vessel. In addition to making the aforesaid payments to purchase the boat, petitioner purchased insurance for the Regan III in preparation for taking possession of the vessel. The vessel was documented with the United States Coast Guard and was not registered in any state.

4. The vessel was delivered by Mattatuck to petitioner in Clinton, Connecticut in July, 1975, at which time the keys were delivered and title passed to petitioner.

5. During the fall of 1975, the vessel was moved to Florida where it was discovered that the boat needed extensive repairs. Petitioner also discovered

that it would be nearly impossible to sell the Regan III in southern waters because its wooden hull was susceptible to damage by ship worms.

6. In 1976, the vessel was moved to Swan Point Marina in Sneads Ferry, North Carolina for the necessary repairs. In the latter part of 1976, the Regan III was returned to New York State at the Willis Marine Center in Huntington, New York and immediately placed on the market for sale.

7. Following several unconsummated sales, petitioner sold the boat in October, 1982. During the period of time that the boat was in New York for the purpose of selling it, 1976 to October, 1982, petitioner made very limited use of the boat, primarily in connection with its efforts to sell it.

8. In October, 1980, the Audit Division observed petitioner's boat in Willis Marine Center, Inc., Huntington, New York. On January 17, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner for taxes due of $10,080.00, plus penalty of $2,520.00 and interest of $8,203.00, for a total amount due of $20,803.00. The amount of tax was computed based on an estimated sales price for the vessel, which estimate was based on the footage of the boat. At the hearing, it was conceded by the attorney for the Audit Division that the assessment should be revised downwards to reflect the actual purchase price of the boat ($38,000.00).[1]

9. Petitioner argued that the corporation was not "doing business" in the State of New York and, as a nonresident, was exempt from the imposition of use tax on the use of the boat within the state. Petitioner further argued that a

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1 The Audit Division revised its assessment to a base tax due amount of $2,800.00. This figure was based on a purchase price of $40,000.00 which erroneously includes the sales commission as an item subject to sales tax.

vessel brought into New York solely for the purpose of sale should not be chargeable with use tax.

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 seller of the vessel transferred possession to petitioner outside New York State. Accordingly, the transaction was 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 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 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 the retention of the Regan III at a marina in New York for a period in excess of five years constitutes a "use" under section 1101(b)(7) of the Tax Law. The fact that the boat was brought into New York for the sole purpose of selling it does not exempt the petitioner from use tax liability.

E. 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). The Regan Corporation was formed for the sole purpose of taking title to the Regan III. The activities of the president of petitioner corporation performed prior to the purchase of said vessel constituted such preparatory activities (e.g. arranging for the purchase of such vessel and executing the bill of sale dated February 2, 1975, paying for the vessel, and arranging for insurance). Accordingly, petitioner is deemed a resident of New York at the time of purchase.

F. That section 1145 of the Tax Law provides for the imposition of penalties for failure to file a return or to pay over any tax required by Article 28 of the Tax Law. If, however, the Tax Commission determines that such failure was due to reasonable cause and not due to willful neglect, it may remit all such penalty. Petitioner's failure to pay use tax was due to reasonable cause and not willful neglect, in that its failure was due to good faith reliance on a legal interpretation of an unsettled point of law.

G. That the petition of Regan Corporation is granted to the extent indicated in Finding of Fact "8" and Conclusion of Law "F"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 17, 1983; and that, except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

JUL 03 1986

STATE TAX COMMISSION

Roderick Chu

PRESIDENT

Francis R. Koenig

COMMISSIONER

COMMISSIONER