

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

KING ENTERPRISES, LTD.

:

:

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 November 30,
1979.

Petitioner, King Enterprises, Ltd., c/o Michael Solomon, Esq., 30 South Ocean Avenue, Freeport, New York 11520, 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 November 30, 1979 (File No. 43632).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on December 2, 1986 at 11:30 A.M., with all briefs to be filed by February 2, 1987. Petitioner appeared by Michael Solomon, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether petitioner, King Enterprises, Ltd., is liable for sales tax or the compensating use tax on the purchase of a power boat.

11. If so, whether the Audit Division properly determined the amount of tax due based on an estimated purchase price for said boat.

111. Whether penalty imposed pursuant to section 1145 of the Tax Law on the additional taxes should be remitted.

FINDINGS OF FACT

1. On February 28, 1983, the Audit Division issued to petitioner, Ring Enterprises, Ltd., a Notice and Demand for Payment of Sales and Use Taxes Due,¹ assessing a tax due of \$3,225.00, plus penalty of \$814.00 and interest of \$1,333.00, for a total amount due of \$5,402.00 for the period ended November 30, 1979. The notice contained the following explanation:

"Based on information submitted in previous correspondence, the following tax *is* determined to be due in accordance with the provisions of Sections 1137 and 1138 of the Tax Law."

2. On April 29, 1983, petitioner timely filed a petition for a hearing to review the notice.

3. The events and circumstances leading to the Audit Division's issuance of the above assessment are as follows: In accordance with the Department of Taxation and Finance's tax compliance program relative to the payment of tax on the purchase *of* large pleasure boats in New York State or outside New York State by residents of New York, an auditor from the Mineola District Tax Office made a survey of New York marinas in October 1980. The auditor noted those boats with non-New York registration or documentation. On October 7, 1980, at the Fred Chall Marina in Freeport, New York, the auditor noted, among others, a boat named The King & I which was documented in Delaware. Next, in accordance with compliance procedures, Thomas Mackey, a Sales Tax Technician II with the Audit Division's Casual Sales and Use Tax Unit in Albany, New York, visited the offices of the U.S. Coast Guard in Wilmington, Delaware to ascertain whether

1 The assessment of additional taxes should, properly, have been issued by a Notice of Determination and Demand for Payment of Sales and Use Taxes Due rather than a Notice and Demand; however, the statement on the notice meets all the notice requirements of section 1138(a)(1) of the Tax Law.

the ownership of The King & I had a New York nexus. There, Mr. Mackey found one boat named The King & I which was owned by King Enterprises, Ltd. and which had a New York nexus; that **is**, the address of said corporation was indicated as c/o Michael Solomon, president, 30 South Ocean Avenue, Freeport, New York. In addition to its name, Mr. Mackey also noted the year the boat was built (1979), the documentation number (610178) and its length (31'). By letter dated October 28, 1981, Mr. Mackey requested petitioner to remit the appropriate sales tax or compensating use tax on the purchase of The King & I or, in the alternative, an explanation of why **no** tax was due. Petitioner was also requested to submit a copy of the bill of sale. When this letter went unanswered, Mr. Mackey sent a follow-up letter **on** January 5, 1982. When the second letter went unanswered, the Audit Division issued the above notice based on external indices. It **is** the Audit Division's experience that boats **in** the 30' to 35' range sell for \$1,500.00 per foot. Therefore, the additional taxes were computed as follows:

Estimated purchase price per foot	\$ 1,500
Length of boat	x 31'
Estimated purchase price	\$46,500
Sales or use tax rate	x 7%
Sales or use tax due	\$ 3,255

It should be noted that Mr. Mackey, prior to his actions, as indicated above, had checked the Audit Division's files to see if petitioner had voluntarily paid the tax.

4. On or about July 30, 1979, King Enterprises, Ltd. (formerly known as King Enterprises, Inc.) was incorporated **in** the State of Delaware "to engage in any lawful act or activity for which a corporation may be organized under the General Corporation Law of Delaware." The registered office of the corporation was located at c/o United Corporate Service, Inc., 410 South State Street,

Dover, Delaware. The president of the corporation was Michael Solomon, 30 South Ocean Avenue, Freeport, New York.

5. On July 17, 1979, William C. Mudgett 111, a master carpenter, filed a Master Carpenter's Certificate (Builder's Certificate) with the Department of Transportation, U.S. Coast Guard, which indicated that a 31' boat (Hull No. WELA31070679-310-1980) was built by Wellcraft Marine Corporation for King Enterprises, Inc. In addition to specifications regarding the boat and engine, the certificate provided that the boat was built in Sarasota, Florida and completed in 1979.

6. On July 27, 1979, petitioner executed a Boat Purchase Agreement whereby it agreed to purchase the above-described boat from Fred Chall Marine, Inc., as broker for Wellcraft Marine Corporation, for \$40,081.37. The agreement contained a space for indicating a charge for shipping; however, said space was blank. The space provided for sales tax was also blank. The estimated delivery date was indicated as "ASAP"; however, the place of delivery or transfer was not specified.

7. On August 3, 1979, the Hanover Insurance Co. issued a Yacht Insurance Policy insuring King Enterprises, Inc. for The King & I. The navigational limits of the policy provide that "the within named vessel shall be confined to the navigable Atlantic Coastwise and Inland waters tributary thereto, between Eastport, Maine and Pensacola, Florida."

8. On August 9, 1979, petitioner filed an application for documentation of The King & I with the Department of Transportation, U.S. Coast Guard. Petitioner's address was indicated as 410 South State Street, Dover, Delaware. The application was signed by Michael Solomon as president of petitioner.

Official No. 610178 was assigned by the Commandant (G-MVD), U.S. Coast Guard by telephone on August 10, 1979.

9. At the time of the auditor's survey, more specifically on October 7, 1980, The King & I owned by petitioner had a current market value of \$25,000.00.

10. Petitioner's representative, Michael Solomon, argued that the Audit Division has failed to show that the boat sighted by the auditor was the same boat purchased by petitioner. Specifically, Mr. Solomon feels there should be an element of proof in this case attributed to the Audit Division. Mr. Solomon maintained that there are probably many boats named The King & I. Mr. Solomon attempted to subpoena the auditor, but was advised that he no longer worked for the Department of Taxation and Finance.

11. Petitioner maintains that, in the event it **is** decided that it was petitioner's boat that was sighted by the auditor, no sales tax is due on its purchase. Petitioner claims that the blank space for shipping charge **on** the Boat Purchase Agreement is evidence that the boat was purchased and title transferred in Florida. Further, petitioner claims that, in the event it is decided that the compensating use tax is due on petitioner's purchase of The King & I, then it should be computed on \$25,000.00, the current market value at the time it was sighted on October 7, 1980.

12. In support of petitioner's position, Mr. Solomon offered as evidence the Boat Purchase Agreement, the Yacht Insurance Policy, the Master Carpenter's Certificate, a copy of petitioner's Certificate of Incorporation and a copy of the application for documentation. Mr. Solomon testified regarding the documents, but he offered no testimony concerning the delivery or actions of The King & I.

13. Lastly, petitioner requested that the penalty be waived because there was no intent to evade payment of the tax. However, petitioner offered no

evidence or testimony to show that the failure to pay the tax was due to reasonable cause and not willful neglect.

CONCLUSIONS OF LAW

A. That it is well established that, except as otherwise provided by statute, once an assessment has been made, the burden of proof is on the taxpayer to show that it was not properly applied to him (see, e.g., Petrolane Northeast Gas Service, Inc. v. State Tax Commission, 79 AD2d 1043, lv denied 53 NY2d 601). Petitioner has failed to sustain the burden of proof required to show that The King & I was delivered outside New York State and that its purchase was not subject to sales tax.

B. That petitioner has shown that the purchase price for The King & I was \$40,081.37 and not \$46,500.00 as estimated by the Audit Division. The tax should therefore be recomputed based on the correct purchase price.


C. That petitioner failed to sustain the burden of proof required to show that the failure to pay the tax in a timely manner was due to reasonable cause and not due to willful neglect.

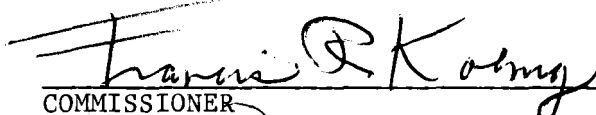
D. That the petition of King Enterprises, Ltd. is granted to the extent indicated in Conclusion of Law "B"; that the Notice and Demand for Payment of Sales and Use Taxes Due issued February 28, 1983 is to be modified accordingly; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 25 1987


PRESIDENT


COMMISSIONER


COMMISSIONER