

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
PAUL FRIEDMAN,	:	DECISION
WANDERLUST, 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 May 31, 1976.	:	

Petitioner, Paul Friedman, Wanderlust, Inc., 1229 East 56th Street, Brooklyn, New York 11234, 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 May 31, 1976 (File No. 44580).

A hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 5, 1985 at 1:15 P.M. Petitioner appeared by Lawrence S. Berkowitz, Esq. The Audit Division appeared by John P. Dugan, Esq. (Angelo Scopellito, Esq., of counsel).

#### ISSUES

I. Whether the Audit Division properly determined that a boat purchased by petitioner on April 23, 1976 was subject to sales and/or use tax.

II. Whether any tax found due as the result of this decision is to be computed at the New York City rate of 8 percent or the Rockland County rate of 4 percent.

FINDINGS OF FACT

1. Petitioner, Wanderlust, Inc., was incorporated in the State of Delaware sometime in the early part of 1976. Paul Friedman was President of Wanderlust, Inc. and its sole stockholder.

Wanderlust, Inc. was formed for the purpose of owning and operating a boat. It was alleged by Mr. Friedman that said corporation was also formed for the purpose of developing sales in the area of freight forwarding and customer brokerage. The boat was to be used as a "floating office" along the eastern seaboard. Wanderlust, Inc. has never engaged in any sales activities and said corporation was described as "inactive". The boat is the only asset owned by Wanderlust, Inc. Wanderlust, Inc. does not maintain an office in the State of Delaware; however, it does have a mailing address within said State.

2. On April 23, 1976, Wanderlust, Inc. purchased a boat for \$100,000.00 from Higgs Marine Service, Inc. (hereinafter "Higgs") located in Bronx, New York. The sales invoice identified the boat as a "Grand Banks '42' powered with Twin Ammarine 404 Cu. In. Diesel Engines. Hull #473. Vessel and equipment as per contract dated 3/22/76." The sum of \$5,000.00 was paid on account on March 22, 1976, and the balance due of \$95,000.00 was paid on April 23, 1976, the date petitioner took delivery of the vessel. No sales tax was paid on the purchase price of the vessel.

3. On March 7, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against "Paul Friedman, Wanderlust, Inc." for taxes due of \$8,000.00, plus simple interest of \$5,040.00, for a total amount due of \$13,040.00. The tax due asserted in the aforementioned Notice was computed by multiplying the purchase price of the vessel described in Finding of Fact "2", supra, by the New York City tax rate of 8 percent.

The Audit Division took the position that petitioner was a resident of New York for purposes of the Sales and Use Tax Law and that the mooring of the vessel in New York constituted a taxable use.

4. On April 23, 1976, Paul Friedman boarded the vessel in question at Higgs facilities in Bronx, New York. An employee of Higgs navigated the vessel out of New York waters and up the coast until said vessel was situated off the shore of the State of Connecticut. At this point, the employee of Higgs shut the engines off and handed the keys to Mr. Friedman. Mr. Friedman tendered a check to said employee in the amount of \$95,000.00. Mr. Friedman thereafter navigated the vessel back into New York waters and moored said vessel at a marina located in Brooklyn, New York. Mr. Friedman maintained a personal residence in Brooklyn, New York and was a resident of New York. In a letter dated June 7, 1985, the Audit Division conceded that "...actual delivery (of the vessel) took place outside the jurisdiction of New York."

5. Mr. Friedman, at the time he took delivery of the vessel in question, was residing with his daughter and son-in-law in Spring Valley, New York. Mr. Friedman's spouse had passed away just prior to the purchase of the vessel and, although he still maintained a residence in Brooklyn, New York, Mr. Friedman was living in Spring Valley, New York. Petitioner contends that if the vessel is determined to be subject to tax, that the tax rate in effect in Spring Valley, New York (4 percent) should be used to compute the tax due.

#### 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.

Section 1118(2) of the Tax Law provides an exemption from the imposition of use tax, "In 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."

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. It is clear that Wanderlust, Inc. was formed for the sole purpose of owning and operating a vessel. The activities of Paul Friedman performed prior to the purchase of said vessel constituted such preparatory activities (e.g. entering into a contract dated March 22, 1976 for the purchase of the vessel and arranging for the payment, mooring and insurance for said vessel). Accordingly, petitioner is deemed a resident of New York at the time of purchase.

The subsequent mooring of the boat at a marina in Brooklyn, New York 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.


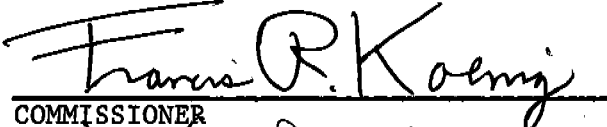
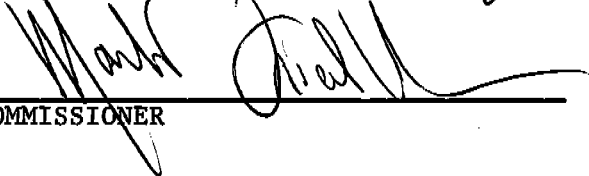
D. That the vessel in question was moored in Brooklyn, New York and Paul Friedman also maintained a residence in Brooklyn, New York. Accordingly, the Audit Division properly imposed tax at the rate of eight percent.

E. That the petition of Paul Friedman, Wanderlust, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued March 7, 1983 is sustained, together with such additional interest as may be lawfully due and owing.

DATED: Albany, New York

STATE TAX COMMISSION

JAN 17 1986

  
PRESIDENT  
  
COMMISSIONER  
  
COMMISSIONER