

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
STEPHEN J. PHILLIPS	:	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 ending May 31,	:	
1980.	:	

Petitioner, Stephen J. Phillips, 18 Garner Lane, Bay Shore, New York 11706, 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 ending May 31, 1980 (File No. 61431).

On May 25, 1986, petitioner waived his right to a hearing and submitted his case for decision based upon the entire file. After due consideration, the State Tax Commission renders the following decision.

ISSUES

I. Whether petitioner timely filed a petition for a hearing with the State Tax Commission within 90 days of the issuance of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due.

II. Whether the Audit Division properly determined additional sales tax due on petitioner's purchase of a boat.

FINDINGS OF FACT

1. The Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 29, 1983 against petitioner, Stephen J. Phillips, in the sum of \$1,785.00 plus interest of \$571.20, for a total due of \$2,356.20 for the period ended May 31, 1980.

2. The tax assessed was based on petitioner's purchase of a boat, The Sandra Lee, from Venice Marina of Lindenhurst, New York on or about April 20, 1981 for a purchase price of \$25,500.00.

3. Petitioner filed a petition in response to the Audit Division's Notice of Determination and Demand for Payment of Sales and Use Taxes Due on May 8, 1985.

4. Petitioner moved to a new residence on or about May 27, 1982, subsequent to his purchase of the boat, and filed estimated tax returns and a personal income tax return for tax year 1982, all indicating his new address at 52 Lawrence Lane, Bay Shore, New York. However, Tax Department records and the boat vendor's records indicated petitioner's address as 9 Byron Lane, Islip, New York, to which address the Notice of Determination was sent.

5. The Audit Division submitted no evidence of registered or certified mail delivery other than the statement by Thomas Mackey in his affidavit that the Notice of Determination was not returned to the Audit Division as undeliverable by the United States Post Office.

6. A delivery receipt and summary of payment received from the boat vendor indicated a date of sale of the vessel of April 20, 1981 and a delivery date of May 21, 1981. Said receipt stated in the column marked "tax" that no tax was collected because the vessel was delivered out of state. A different receipt and summary of payment was received from petitioner. It indicated a date of sale of April 20, 1981 but a delivery date of May 4, 1981. Also, it was not executed and the purchase price, financing and fuel cost were different.

7. A "Schedule of Sales Tax Transactions" received from Venice Marina indicated that petitioner purchased the boat, The Sandra Lee, on or about

April 20, 1981 but took delivery of the vessel at Venice Marina, Lindenhurst, New York on or about May 21, 1981.

8. In his sworn affidavit, dated May 14, 1986, petitioner alleged that the boat was delivered to him in early May 1981 in Rehobeth, Delaware, but he did not know who delivered it or who made arrangements for the delivery.

9. Petitioner submitted a copy of the application for Delaware boat registration which was dated May 11, 1981.

CONCLUSIONS OF LAW

A. That §1138(a)(1) of the Tax Law provides, in pertinent part:

"Notice of such determination shall be given to the person liable for the collection or payment of the tax. Such determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

B. That petitioner did not respond within ninety days of the date of the Audit Division's Notice of Determination and Demand for Payment of Sales and Use Taxes Due. However, Tax Law §1147(a)(1) provides that the Audit Division must notify a taxpayer by certified or registered mail in order for there to be presumptive evidence of receipt of said notice by the taxpayer. The Audit Division failed to present evidence of certified or registered mailing of the Notice of Determination and Demand for Payment of Sales and Use Taxes Due and therefore there can be no presumption of receipt by petitioner and the petition is deemed timely filed.

C. That Tax Law §1105(a) imposes a sales tax upon the receipt from every retail sale of tangible personal property. Further, the sales and use tax regulations define the sales tax as a destination tax, i.e., the point of delivery by the vendor to the purchaser controls the tax incident and the tax

rate (20 NYCRR 525.2[a][3]). Petitioner could not establish who delivered the vessel to him or who arranged for said delivery. He did not explain why the boat was purchased with over 100 gallons of fuel on the marina's delivery receipt if the vessel was to be hauled over land from New York to Delaware. Since petitioner's only evidence of out-of-state delivery was his unexecuted delivery receipt, subsequently contradicted by the vendor's copy of same and the vendor's "Schedule of Sales Tax Transactions", he did not carry his burden of proving out-of-state delivery and, therefore, sales tax is due on the transaction.


D. That petitioner had a duty to file a return and pay the sales tax directly to the commission on the purchase of the vessel, The Sandra Lee, within twenty days of the transaction (Tax Law §1133[b]; 20 NYCRR 532.1[e]).

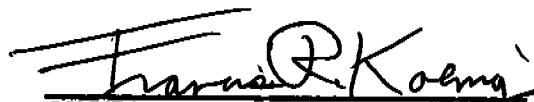
D. That the petition of Stephen J. Phillips is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated March 29, 1983 is sustained together with such additional interest as may be lawfully owing.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 23 1986


PRESIDENT


COMMISSIONER


COMMISSIONER