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BUREAU OF LAW

MEMORANDUM

Income Tax Department
A-2

TO: State Tax Commission

FROM: Solomon Sies, Hearing Officer

SUBJECT: IN THE MATTER OF THE APPLICATION
OF TALBOT M. MALCOLM FOR REVISION
OR REFUND OF PERSONAL INCOME TAXES
UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEAR 1957.

IN THE MATTER OF THE APPLICATIONS
OF TALBOT M. & MARGARET R. MALCOLM
FOR REVISION OR REFUND OF PERSONAL
INCOME TAXES UNDER ARTICLE 16 OF
THE TAX LAW FOR THE YEAR 1959 AND
UNDER ARTICLE 22 OF THE TAX LAW FOR
THE YEAR 1960.

IN THE MATTER OF THE PETITION OF
TALBOT M. & MARGARET R. MALCOLM
FOR REDETERMINATION OF A DEFICIENCY
OR FOR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 22 OF THE TAX
LAW FOR THE YEARS 1961 AND 1962.

A combined formal hearing in connection with the
above matters, with the consent of the taxpayers, was held
at the New York City office on June 13, 1966.

The common issue involves deduction of expenses
and losses in connection with a boat owned by the taxpayer
Talbot M. Malcolm, a non-resident. The questions to be de-
cided are: 1) whether the operation of the boat constituted
a business or whether it was used primarily for personal
pleasure and the income derived from charters merely used
to defray or reduce part of the cost of operation thereof;
and 2) if the operation of the boat be considered a business,
whether such business is deemed to have been regularly con-
ducted within the State of New York.

The taxpayer Talbot M. Malcolm is an attorney duly
admitted to practice law only in the State of New York. Dur-
ing the years in issue his law office was located in New York
City. In September, 1956, he entered into an agreement with
Wheeler Yacht Company of Classon Point, Bronx, N. Y. for the
construction of a certain boat of required specifications
called the "Monie-Mal II" at a cost of \$110,000.00. The
boat was delivered to the taxpayer in May, 1957. It was docu-
mented at the U. S. Customs House in New York City. In his application,
taxpayer stated that he was the sole owner of the vessel; that
"the vessel business of the owner or owners named below will be
conducted from the following address: 737 Boulevard, Westfield,
N. J." The boat was docked at the boat yard of Morton, Johnson &

Co. in Bayhead, N. J. from May to November and at Bahia-Mar Yachting Center, Fort Lauderdale, Florida for the rest of the year. The boat was operated by a captain who resided in New Jersey and who was employed by the taxpayer on a full-time basis. The taxpayer offered the boat for charter whenever it was not used by him for his personal pleasure. Advertisements for charter of the boat were placed in the New York Times, Wall Street Journal and Herald Tribune listing taxpayer's office address in New York City. The taxpayer also engaged the services of brokerage firms to arrange charters for which he paid brokerage fees. The charters included the services of the full-time captain heretofore mentioned. The notices offering the boat for charter listed both the home and business addresses of the taxpayer (Taxpayer's Exhibit #1). The taxpayer maintained a special bank account in connection with the receipts and expenditures involved in the operation of the boat. The records in connection therewith were all maintained at the taxpayer's law office in New York City. The charters of the boat included cruises in Long Island Sound, Lake Champlain and Bahamian waters. The boat was sold in March, 1962 for \$49,510.00.

The clients of the taxpayer, Talbot M. Malcolm, paid the rent, personnel and utilities of his law office in New York City. The taxpayer did not pay any New York City occupancy tax with respect to the operation of the aforementioned boat nor did he ever file any New York City gross receipt tax returns, which are required to be filed for business carried on in New York City having gross receipts in excess of \$10,000.00 per year, as reported by him for the years 1959 and 1960.

The taxpayer filed Notices of Federal Changes for the years 1957 and 1959 on January 18, 1962 and April 27, 1962 respectively, together with checks in the amounts of \$294.30 and \$633.60 for the respective years, based upon the additional tax computed due thereon. The Federal changes consisted of partial disallowance of boat expenses deemed to be personal and further disallowance of business expenses.

On March 18, 1963 a final Federal determination was made against the taxpayers for the year 1960, disallowing partial boat expenses, deemed personal in the amount of \$9,142.77 and further disallowing business and entertainment expense, as unsubstantiated, in the amount of \$600.00. The taxpayers did not file any Notice of Federal Changes with respect to the year 1960. The taxpayers did not protest the Federal audits.

The taxpayer duly executed consents extending the period for the making of an additional assessment for the year 1957 to April 15, 1963. On November 29, 1962, the Department made additional assessments against the taxpayer, Talbot M. Malcolm, for the year 1957 (Assessment No. FA-97128) and against

the taxpayers Talbot M. Malcolm and Margaret M. Malcolm, his wife, for the years 1959 and 1960 (Assessment Nos. FA-97129 and FA-97130 respectively), based upon field audit disallowing a portion of the deductions claimed for business expenses for lack of substantiation and further disallowing interest as an improper deduction for a non-resident. In addition, the assessments included income received by the taxpayer Talbot M. Malcolm omitted from said returns and deemed to be attributable to sources within this state. On March 15, 1965 the Department issued the Statement of Audit Changes and Notice of Deficiency for the years 1961 and 1962 disallowing the claimed deductions for boat expenses and losses.

The taxpayers are contesting the aforementioned assessments and Notice of Deficiency only insofar as they relate to the disallowance of boat expenses and losses except for that portion which was disallowed on the Federal audits. It is to be noted that the taxpayers have also paid the assessments for the years in issue as well as the deficiency for the years 1961 and 1962.

The taxpayer contends that he was engaged in the business of chartering a boat for hire and that except for the periods when the boat was used by him for his personal pleasure, such business was conducted within the State of New York. In support of his contention he cites the case of Lummis v. Graves, 251 App. Div. 591, which dealt with a non-resident who was paid on a commission basis as a sales agent for an Ohio corporation, his district including territory both within and without the State of New York. In that case, the taxpayer's only office was in New York City where he maintained an office force and also employed three salesmen, who, with himself, operated from said office. All salaries and commissions of his salesmen and expenses were paid by the taxpayer. The Tax Commission determined that the taxpayer was carrying on a business within the state and not elsewhere and imposed Unincorporated Business Tax on all commissions received, whether for orders shipped into New York State or elsewhere. The Court sustained the Commission's determination. It is obvious that the Lummis case has no bearing upon the facts in the instant case.

I am of the opinion that the operation of the boat by the taxpayer did not constitute the carrying on of a business; that the boat was operated by him primarily for his personal pleasure and that the charters were used to reduce or defray part of the expense incurred in the operation thereof. It is to be noted that it is not claimed in this particular case that the taxpayer was required to entertain his clients. In addition, even if it be assumed that the operation of the boat constituted a business, I am, nevertheless, of the opinion that such business was not actually carried on within the State of New York. Section 415 of Personal Income Tax Regulations defines "business

carried on within the state. It states in part that "A taxpayer may enter into transactions for profit and yet not be engaged in a trade or business. If a taxpayer pursues an undertaking constantly as one relying on his profit therefrom for his income or part thereof he is carrying on a business or occupation." The maintenance of records in New York City was solely for the greater convenience of the taxpayer.

However, the taxpayer is entitled to a refund for the years 1957 and 1959 in the amounts of \$294.30 and \$633.60, respectively, by virtue of the fact that he paid said amounts on the filing of the IT-115's (which included the disallowances contained in the assessments for said years) and also paid the assessments and the 1961 and 1962 deficiency on December 23, 1963.

For the reasons stated above, I recommend that the determinations and decision of the Tax Commission in these matters be substantially in the form submitted herewith.

SOLOMON SIES
Hearing Officer

O.K. M.S.
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STATE OF NEW YORK

STATE TAX COMMISSION

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IN THE MATTER OF THE PETITION

OF

TALBOT M. & MARGARET R. MALCOLM

FOR REDETERMINATION OF A DEFICIENCY OR
FOR REFUND OF PERSONAL INCOME TAXES
UNDER ARTICLE 22 OF THE TAX LAW FOR
THE YEARS 1961 AND 1962.

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The above-named taxpayers having filed a petition for redetermination of a deficiency or for refund of personal income taxes under Article 22 of the Tax Law for the years 1961 and 1962 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N. Y. on the 13th day of June, 1966 before Solomon Sies, Hearing Officer of the Department of Taxation & Finance, at which hearing the taxpayer, Talbot M. Malcolm, appeared personally, and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer entered into an agreement in 1956 with the Wheeler Yacht Company, Classon Point, Bronx, N. Y. for the construction of a certain boat or yacht known as the "Monie-Mal II" at a cost of \$110,000; that the vessel was delivered to the taxpayer in May, 1957; that the boat was documented at the U. S. Customs House in New York City; that in his application, the taxpayer stated that he was the sole owner of the vessel; that "the vessel business of the owner or owners named below will be conducted from the following address: 737 Boulevard, Westfield, New Jersey"; that the boat

was docked at the boat yard of Morton, Johnson & Co. in Bayhead, N. J. from May to November and at Bahia Mar Yachting Center, Fort Lauderdale, Fla. the rest of the year; that the boat was operated by a captain who resided in New Jersey and who was employed by the taxpayer on a full-time basis; that the taxpayer offered the boat for charter whenever it was not used by him for his personal pleasure; that advertisements for charter of the boat were placed in the "New York Times", "Wall Street Journal" and "Herald Tribune" listing taxpayer's office address in New York City; that the taxpayer also engaged the services of brokerage firms to arrange charters, for which he paid brokerage fees; that the charters included the services of the full-time captain heretofore mentioned; that the notices offering the boat for charter listed both the home and business addresses of the taxpayer (Taxpayer's Exhibit #1); that a separate bank account was maintained in New York in connection with the receipts and disbursements of the boat; that the records in connection therewith were maintained at the taxpayer's law office in New York City; that the charters of the boat included cruises in Long Island Sound, Lake Champlain and Florida and Bahamian waters; that the boat was sold in March, 1962 for \$49,510.00.

(2) That the taxpayer, Talbot M. Malcolm, was and still is an attorney and counsellor-at-law, duly admitted to practice law only in the State of New York; that during the years in issue, the taxpayer was engaged in the practice of law in the City and State of New York; that during the years in issue and prior thereto, the taxpayers were and still are residents of the State of New Jersey.

(3) That the taxpayers filed non-resident personal income tax returns for the years 1961 and 1962 in which the taxpayer,

Talbot M. Malcolm, reported income from profession as attorney and deducted therefrom losses incurred in the operation and sale of the aforementioned boat; that the expenses paid or incurred in the operation of the boat were insurance, salaries, dockage, repairs and maintenance, supplies, miscellaneous, fuel and depreciation; that on March 15, 1965, the Department of Taxation and Finance issued a statement of audit changes disallowing the deductions claimed in the operation and sale of the boat, adjusted the tax due and accordingly issued a notice of deficiency against the taxpayers for the years 1961 and 1962 in the amount of \$2,406.04, including interest.

(4) That the operation of the aforementioned boat was primarily for the taxpayers' personal pleasure; that the charters were used merely to defray and reduce a portion of the expense incurred in the operation of said boat.

(5) That the clients of the taxpayer, Talbot M. Malcolm, paid the rent, personnel and utilities of his law office in New York City; that the taxpayer did not pay any New York City occupancy tax with respect to the operation of the aforementioned boat; nor did he ever file New York City gross receipts tax returns, which are required to be filed for business carried on in New York City and having gross receipts in excess of \$10,000 per year as indicated by him for the years 1959 and 1960.

(6) That the records of the operation of the boat and the maintenance of a bank account in New York City in connection therewith were so maintained solely for the taxpayer's greater convenience.

Based upon the foregoing findings and all the evidence presented herein,

The State Tax Commission hereby

DECIDES:

(A) That the operation of the boat by the taxpayer, Talbot M. Malcolm, for his personal pleasure and the charters used to defray or reduce part of the expense incurred in the operation thereof, did not constitute a business or the carrying on of a business within the intent and meaning of Section 703 of the Tax Law.

(B) That, in any event, the operation of the boat by the taxpayer did not constitute the regular carrying on of a business within the State of New York so as to entitle the taxpayer to claim deductions as expenses and losses paid or incurred in connection with a business carried on within the State of New York.

(C) That, accordingly, the notice of deficiency issued against the taxpayers for the years 1961 and 1962 is correct and does not include any tax or other charge which could not have been lawfully demanded; that the taxpayers' petition for redetermination of a deficiency or for refund filed with respect thereto be and the same is hereby denied.

Dated: Albany, New York, on the 25th day of March , 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

A. BRUCE MANLEY

Commissioner

/s/

SAMUEL E. LEPLER

Commissioner

STATE OF NEW YORK
STATE TAX COMMISSION

- - - - -X
IN THE MATTER OF THE APPLICATIONS

OF

TALBOT M. & MARGARET R. MALCOLM

FOR REVISION OR REFUND OF PERSONAL INCOME
TAXES UNDER ARTICLE 16 OF THE TAX LAW FOR
THE YEAR 1959 AND UNDER ARTICLE 22 OF THE
TAX LAW FOR THE YEAR 1960.

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The above-named taxpayers having filed applications for revision or refund of personal income taxes under Article 16 of the Tax Law for the year 1959 and under Article 22 of the Tax Law for the year 1960 and a hearing having been held in connection therewith at the office of the State Tax Commission at 80 Centre Street, New York, N. Y. on the 13th day of June 1966 before Solomon Sies, Hearing Officer of the Department of Taxation & Finance, at which hearing the taxpayer Talbot M. Malcolm appeared personally, testimony having been taken and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer Talbot M. Malcolm entered into an agreement in 1956 with the Wheeler Yacht Company, Classon Point, Bronx, N. Y. for the construction of a certain boat or yacht known as the "Monie-Mal II" at a cost of \$110,000; that the vessel was delivered to the taxpayer in May, 1957; that the boat was documented at the U. S. Customs House in New York City; that in his application, the taxpayer stated that he was the sole owner of the vessel; that "the vessel business of the owner or owners named below will be conducted from the following address: 737 Boulevard, Westfield, New Jersey"; that the boat was docked at the boat yard of Morton, Johnson & Co. in Bayhead, N. J. from May to November and at Bahia Mar Yachting Center Fort Lauderdale, Fla. the rest of the year; that the boat was operated by a captain who resided in New Jersey and who

was employed by the taxpayer on a full-time basis; that the taxpayer offered the boat for charter whenever it was not used by him for his personal pleasure; that advertisements for charter of the boat were placed in the New York Times, Wall Street Journal and Herald Tribune listing taxpayer's office address in New York City; that the taxpayer also engaged the services of brokerage firms to arrange charters, for which he paid brokerage fees; that the charters included the services of the full-time captain heretofore mentioned; that the notices offering the boat for charter listed both the home and business addresses of the taxpayer (Taxpayer's Exhibit #1); that a separate bank account was maintained in New York in connection with the receipts and disbursements of the boat; that the records in connection therewith were maintained at the taxpayer's law office in New York City; that the charters of the boat included cruises in Long Island Sound, Lake Champlain and Florida and Bahamian waters; that the boat was sold in March, 1962 for \$49,510.00.

(2) That the taxpayer, Talbot M. Malcolm, was and still is an attorney and counsellor-at-law, duly admitted to practice law only in the State of New York; that during the years in issue, the taxpayer was engaged in the practice of law in the City and State of New York; that during the years in issue and prior thereto, the taxpayers were and still are residents of the State of New Jersey.

(3) That the taxpayers filed non-resident personal income tax returns for the years 1959 and 1960 in which the taxpayer Talbot M. Malcolm reported compensation as employee ("lawyer") received from Norman B. Woolworth in the amount of \$5,000.00 for 1959 and income from profession as attorney amounting to \$23,328.41 in 1960; that attached to the return for 1959 was a statement to the effect charter fees received from the operation of the boat amounted to \$12,380.00 and that the expenses amounted to \$28,516.39; that included in the aforementioned expenses in the operation of the boat were insurance, salaries, dockage, repairs and maintenance, supplies, miscellaneous, fuel and depreciation; that the loss claimed from

operation of the boat amounted to \$14,724.67 for 1959; that for 1960 the aforementioned taxpayer claimed "loss on boat chartering business" in the amount of \$20,222.55.

(4) That on April 27, 1962 the taxpayers filed a Form IT-115 (Notice of Federal Changes) for the year 1959; that such changes consisted of partial disallowance of boat expenses deemed to be personal in the amount of \$8,093.74 and further disallowance, as unsubstantiated, of a portion of business expense in the amount of \$300.00 and miscellaneous expense of \$150; that the taxpayer paid the additional tax computed to be due thereon in the amount of \$633.60.

(5) That the taxpayer duly filed consents extending the period for the making of additional assessments for the year 1959 to April 15, 1963; that on November 29, 1962 the Department of Taxation & Finance made additional assessments against the taxpayer based upon audit for the years 1959 and 1960 (Assessment Nos. FA-97129 and FA-97130, respectively) disallowing the deductions claimed for boat expenses; that said assessments further disallowed a portion of deductions claimed for business expenses for lack of substantiation in the amount of \$300.00; that deductions claimed for interest were disallowed; that legal fees omitted from the return were included and held to constitute receipts from a business, occupation or profession carried on within the State; that the taxpayer is only contesting the assessments insofar as they relate to the disallowance of boat expenses except for that portion which was disallowed on Federal audit as more fully set forth in Finding (4) above; that the aforementioned assessments were paid by the taxpayers.

(6) That the operation of the aforementioned boat was primarily for the taxpayers' personal pleasure; that the charters were used merely to defray and reduce a portion of the expense incurred in the operation of said boat.

(7) That the clients of the taxpayer Talbot M. Malcolm paid the rent, personnel and utilities of his law office in New York City;

that the taxpayer did not pay any New York City occupancy tax with respect to the operation of the aforementioned boat, nor did he ever file New York City gross receipts tax returns, which are required to be filed for business carried on in New York City and having gross receipts in excess of \$10,000.00 per year as indicated by him for the years 1959 and 1960.

(8) That the records of the operation of the boat and the maintenance of a bank account in New York City in connection therewith were so maintained solely for the taxpayer's greater convenience.

Based upon the foregoing findings and all the evidence presented herein,

The State Tax Commission hereby

DETERMINES:

(A) That the operation of the boat by the taxpayer for his personal pleasure and the charters used to defray or reduce part of the expense incurred in the operation thereof, did not constitute a business or the carrying on of a business within the intent and meaning of Section 703 of the Tax Law.

(B) That, in any event, the operation of the boat by the taxpayer did not constitute the regular carrying on of a business within the State of New York so as to entitle the taxpayer to claim deductions as expenses and losses paid or incurred in connection therewith, as more fully set forth in Findings (7) and (8) above.

(C) That, accordingly, the assessments made against the taxpayers for the years 1959 and 1960 (Assessment Nos. FA-97129 and TA-97130, respectively) are correct and do not include any tax or other charge which could not have been lawfully demanded and that the taxpayers' applications for revision or refund filed with respect thereto be and the same are hereby denied.

(D) That since the Notice of Federal Changes (Form IT-115) filed by the taxpayer for the year 1959 and the additional tax paid thereon in the amount of \$633.60 reflecting the Federal changes which were included in the assessment for the year 1959 said amount

represents an overpayment of taxes; that there be refunded to the taxpayer the amount of \$633.60 with any interest that may be lawfully due thereon.

Dated Albany, New York 25th day of March , 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY
President

/s/

A. BRUCE MANLEY
Commissioner

/s/

SAMUEL E. LEPLER
Commissioner

STATE OF NEW YORK
STATE TAX COMMISSION

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IN THE MATTER OF THE APPLICATION

OF

TALBOT M. MALCOLM

FOR REVISION OR REFUND OF PERSONAL IN-
COME TAXES UNDER ARTICLE 16 OF THE TAX
LAW FOR THE YEAR 1957.
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The above-named taxpayer having filed an application for revision or refund of personal income taxes under Article 16 of the Tax Law for the year 1957 and a hearing having been held in connection therewith at the office of the State Tax Commission 80 Centre Street, New York, N. Y. on the 13th day of June, 1966 before Solomon Sies, Hearing Officer of the Department of Taxation & Finance, at which hearing the taxpayer appeared personally and the matter having been duly examined and considered,

The State Tax Commission hereby finds:

(1) That the taxpayer entered into an agreement in 1956 with the Wheeler Yacht Company, Classon Point, Bronx, N. Y. for the construction of a certain boat or yacht known as the "Monie-Mal II" at a cost of \$110,000; that the vessel was delivered to the taxpayer in May, 1957; that the boat was documented at the U. S. Customs House in New York City; that in his application, the taxpayer stated that he was the sole owner of the vessel; that "the vessel business of the owner or owners named below will be conducted from the following address: 737 Boulevard, Westfield, New Jersey"; that the boat was docked at the boat yard of Morton, Johnson & Co. in Bayhead, N.J. from May to November and at Bahia Mar Yachting Center, Fort Lauderdale, Fla. the rest of the year; that the boat was operated by a captain who resided in New Jersey and who was employed by the taxpayer on a full-time basis; that the taxpayer offered the boat for charter whenever it was not used by him for his personal pleasure; that advertisements for charter of the boat were placed in the New York Times, Wall Street Journal and Herald Tribune listing taxpayer's office address in New

York City; that the taxpayer also engaged the services of brokerage firms to arrange charters, for which he paid brokerage fees; that the charters included the services of the full-time captain heretofore mentioned; that the notices offering the boat for charter listed both the home and business addresses of the taxpayer (Taxpayer's Exhibit #1); that a separate bank account was maintained in New York in connection with the receipts and disbursements of the boat; that the records in connection therewith were maintained at the taxpayer's law office in New York City; that the charters of the boat included cruises in Long Island Sound, Lake Champlain and Florida and Bahamian waters; that the boat was sold in March, 1962 for \$49,510.00.

(2) That the taxpayer, Talbot M. Malcolm, was and still is an attorney and counsellor-at-law, duly admitted to practice law only in the State of New York; that during the year in issue, the taxpayer was engaged in the practice of law in the City and State of New York; that during the year in issue and prior thereto, the taxpayer was and still is a resident of the State of New Jersey; that the taxpayer filed a non-resident personal income tax return for the year 1957 in which he reported compensation as employee ("lawyer") received from Norman B. Woolworth in the amount of \$20,000.00; that attached to said return was a statement to the effect that he purchased a certain boat on May 15, 1957 and had placed the same on a business basis on September 1, 1957; that the expenses from the date of the purchase to the end of the year 1959 amounted to \$9,464.87; that included in the aforementioned expenses and the operation of the boat were insurance, salaries, dockage, repairs and maintenance, supplies, miscellaneous, fuel and depreciation; that on Schedule "A" of his return the taxpayer reported total receipts in the amount of \$2,525.00 from the operation of the boat; that the taxpayer deducted from his income the expenses claimed in the operation of the boat.

(3) That on January 18, 1962 the taxpayer filed a Form IT-115 (Notice of Federal Changes) for the year 1957; that such changes consisted of partial disallowance of boat expenses deemed to be personal in the amount of \$3,785.95 and further disallowance, as unsubstantiated, a portion of business expense in the amount of \$300.00 and miscellaneous expense of \$150; that the taxpayer paid the additional tax computed to be due thereon in the amount of \$294.30.

(4) That the taxpayer duly filed consents extending the period for the making of additional assessments for the year ending December 31, 1957 to April 15, 1963; that on November 29, 1962 the Department of Taxation & Finance made an additional assessment against the taxpayer based upon audit for the year 1957 (Assessment No. FA-97128) disallowing the deductions claimed for boat expenses; that said assessment further disallowed a portion of deductions claimed for business expenses for lack of substantiation in the amount of \$300.00; that deductions claimed for interest were disallowed; that legal fees omitted from the return were included and held to constitute receipts from a business, occupation or profession carried on within the State; that the taxpayer is only contesting the assessment insofar as it relates to the disallowance of boat expenses except for that portion which was disallowed on Federal audit as more fully set forth in Finding (3) above; that the aforementioned assessment was paid by the taxpayer on January 3, 1963.

(5) That the operation of the aforementioned boat was primarily for the taxpayer's personal pleasure; that the charters were used merely to defray and reduce a portion of the expense incurred in the operation of said boat.

(6) That the clients of the taxpayer paid the rent, personnel and utilities of his law office in New York City;

that the taxpayer did not pay any New York City occupancy tax with respect to the operation of the aforementioned boat, nor did he ever file New York City gross receipts tax returns, which are required to be filed for business carried on in New York City and having gross receipts in excess of \$10,000.00 per year as indicated by him for the years 1959 and 1960.

(7) That the records of the operation of the boat and the maintenance of a bank account in New York City in connection therewith were so maintained solely for the taxpayer's greater convenience.

Based upon the foregoing findings and all the evidence presented herein,

The State Tax Commission hereby

DETERMINES:

(A) That the operation of the boat by the taxpayer for his personal pleasure and the charters used to defray or reduce part of the expense incurred in the operation thereof, did not constitute a business or the carrying on of a business within the intent and meaning of Section 703 of the Tax Law.

(B) That, in any event, the operation of the boat by the taxpayer did not constitute the regular carrying on of a business within the State of New York so as to entitle the taxpayer to claim deductions as expenses and losses paid or incurred in connection therewith, as more fully set forth in Findings (6) and (7) above.

(C) That, accordingly, the assessment made against the taxpayer for the year 1957 (Assessment No. FA-97128) does not include any tax or other charge which could not have been lawfully demanded and that the taxpayer's application for revision or refund filed with respect thereto be and the same is hereby denied.

(D) That since the Notice of Federal Changes (Form IT-115) filed by the taxpayer for the year 1957 and the additional tax paid thereon in the amount of \$294.30 reflecting

the Federal changes which were included in the assessment for the year 1957 (paid on December 23, 1960) said amount represents an overpayment of taxes in said amount; that there be refunded to the taxpayer the amount of \$294.30 with any interest that may be lawfully due thereon.

Dated Albany, New York 25th day of March , 1968.

STATE TAX COMMISSION

/s/

JOSEPH H. MURPHY

President

/s/

A. BRUCE MANLEY

Commissioner

/s/

SAMUEL E. LEPLER

Commissioner