

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Cycle & Sea, Inc. :
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of :
Sales & Use Tax :
under Article 28 of the Tax Law :
for the Period 12/1/73 - 8/31/76. :

AFFIDAVIT OF MAILING

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Determination by mail upon Cycle & Sea, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cycle & Sea, Inc.
P.O. Box 544
Nesconset, NY 11767

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the petitioner herein and that the address set forth on said wrapper is the last known address of the petitioner.

Sworn to before me this
16th day of May, 1980.

Joanne Knapp

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Cycle & Sea, Inc. :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
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Sales & Use Tax :
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State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 16th day of May, 1980, he served the within notice of Determination by mail upon Sidney Weiss the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

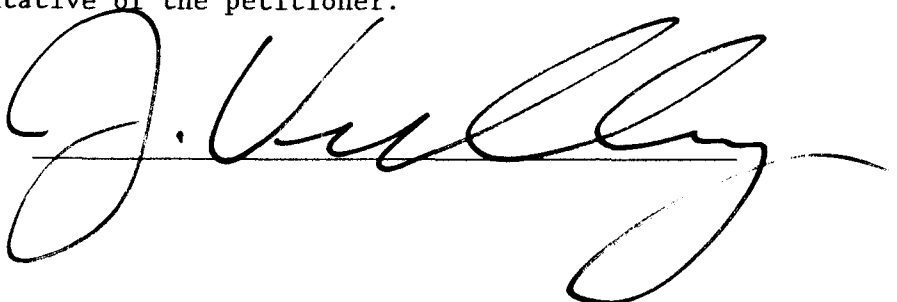
Mr. Sidney Weiss
Rosenstein, Neiman & Weiss, CPA's
61 Broadway
New York, NY 10006

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) under the exclusive care and custody of the United States Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the petitioner herein and that the address set forth on said wrapper is the last known address of the representative of the petitioner.

Sworn to before me this
16th day of May, 1980.

Joanne Knapp



STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

May 16, 1980

Cycle & Sea, Inc.
P.O. Box 544
Nesconset, NY 11767

Gentlemen:

Please take notice of the Determination of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Sidney Weiss
Rosenshein, Neiman & Weiss, CPA's
61 Broadway
New York, NY 10006
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
CYCLE AND SEA, INC.	:	DETERMINATION
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 December 1, 1973 through	:	
August 31, 1976.	:	

Applicant, Cycle and Sea, Inc., P.O. Box 544, Nesconset, New York 11767, filed an application 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 December 1, 1973 through August 31, 1976 (File No. 21241).

A small claims hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 31, 1979 at 9:15 A.M. Applicant appeared by Sidney Weiss, CPA. The Audit Division appeared by Ralph J. Vecchio, Esq. (Barry Bresler, Esq., of counsel).

ISSUE

Whether an audit of applicant's books and records by the Audit Division properly reflected applicant's additional sales and use tax liability for the period December 1, 1973 through August 31, 1976.

FINDINGS OF FACT

1. On October 14, 1977, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against applicant, Cycle and Sea, Inc., and Clyde Britten Miller, Individually

and as an Officer, for the period December 1, 1973 through August 31, 1976 for taxes due of \$11,522.77, plus penalty and interest of \$5,965.71, for a total due of \$17,488.48.

2. Applicant executed a consent extending the time within which to issue an assessment of sales and use taxes for the period in issue to December 20, 1977.

3. Applicant is engaged in the retail sale of boats, boat accessories and fuel oil.

4. On audit, the Audit Division found that applicant's reported markup on fuel oil was 17.527 percent. A markup test was performed for fuel oil based on costs and selling prices in effect during January, 1977, which revealed a markup of 34 percent. It was necessary for the Audit Division to test a month not within the audit period because applicant did not have fuel oil sales invoices available for any other period, and the books and records for the fuel oil business were inadequate for audit purposes. The markup percentage of 34 percent applied to fuel oil purchases for the audit period resulted in additional sales of \$88,434.06.

The Audit Division accepted the accuracy of applicant's books and records with respect to the sale of boats, motors, accessories, parts and repairs. The Audit Division disallowed 73.347 percent of applicant's reported non-taxable motor boat sales, totaling \$61,894.88 on the grounds that exemption certificates were not on file.

A review of fixed asset acquisitions disclosed purchases subject to use tax of \$13,050.61. Applicant disagrees to the use tax asserted on \$11,435.98 which was an amount capitalized in the general ledger as a leasehold improvement. The Audit Division was unable to ascertain the nature of the purchase or

whether sales tax was paid by applicant and, therefore, considered the amount subject to tax.

The Audit Division also found use tax due of \$46.74 on expense purchases and sales taxes undercollected amounting to \$39.47; however, said taxes are not at issue.

5. Applicant presented substantial documentary evidence in the form of a purchase invoice for fuel oil and the advertised selling price to show that its markup on fuel oil in March, 1976 was 15.77 percent.

6. The disallowed non-taxable sales found on audit represented the sale of boats. Applicant argued that the purchaser is required to pay the sales tax when the boat is registered and, therefore, reasoned that it should not be held liable for such taxes since it would result in tax being collected twice.

7. The amount of \$11,435.98 referred to in Finding of Fact "4" was a payment for the construction of an addition to applicant's place of business. William Vita Construction Co. performed the labor and provided all materials in connection with the construction, thereby constituting a capital improvement to real property.

CONCLUSIONS OF LAW

A. That the Audit Division's markup of 34 percent is not applicable to the periods under audit; that applicant's markup of 15.77 percent in March, 1976 is a more accurate indication of its markup on fuel oil during the period at issue; therefore, since applicant's reported markup on fuel oil was 17.527 percent, fuel oil sales as recorded in its books and records and reported on its sales tax returns were correct. Accordingly, the additional sales taxes due of \$6,190.38, resulting from increased fuel oil sales, are cancelled.

B. That section 1132(c) of the Tax Law specifically provides that it shall be presumed that all receipts for property are subject to tax until the contrary is established and the burden of proving that any receipt is not taxable shall be upon the person required to collect tax; that applicant has failed to sustain this burden of proof and therefore is liable for the sales taxes imposed on disallowed non-taxable sales in accordance with section 1133(a) of the Tax Law.

C. That applicant's payment of \$11,435.98 was for the purchase of a capital improvement to real property as indicated in Finding of Fact "7"; therefore, the use tax imposed thereon of \$800.52 is cancelled.

D. That the application of Cycle and Sea, Inc., is granted to the extent indicated in Conclusion of Law "A" and "C"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 14, 1977; and that, except as so granted, the application is in all other respects denied.

DATED: Albany, New York

MAY 16 1980

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER