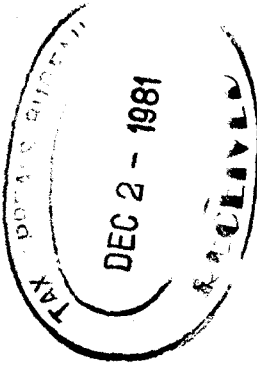
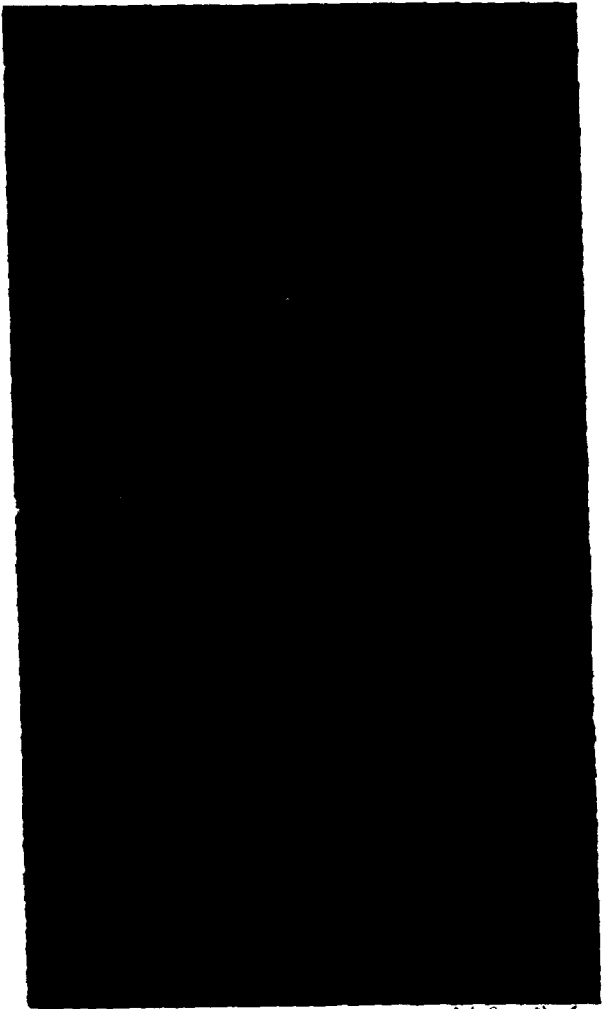


TA 26 (9-79)

STATE OF NEW YORK
State Tax Commission
TAX APPEALS BUREAU
STATE CAMPUS
ALBANY, N. Y. 12227

Boat Race, Inc.
and Harold Fennell, Indiv. and as an Off.
141 Madison Ave.
State Islip, NY 10308





NO 10

| |
|------------|
| ALWAYS USE |
| CODE |
| |
| |
| |

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Boat Place, Inc. :
and Ronald E. Fendt, Indiv. and as an Off. :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Period :
9/1/72 - 8/31/75. :

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 20th day of November, 1981, he served the within notice of by certified mail upon Boat Place, Inc. and Ronald E. Fendt, Indiv. and as an Off. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Boat Place, Inc.
and Ronald E. Fendt, Indiv. and as an Off.
141 Mansion Ave.
Staten Island, NY 10308

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
20th day of November, 1981.

Quinn A. Heylund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Boat Place, Inc. :
and Ronald E. Fendt, Indiv. and as an Off. :
: AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or a Revision
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the
Period 9/1/72 - 8/31/75. :

State of New York
County of Albany

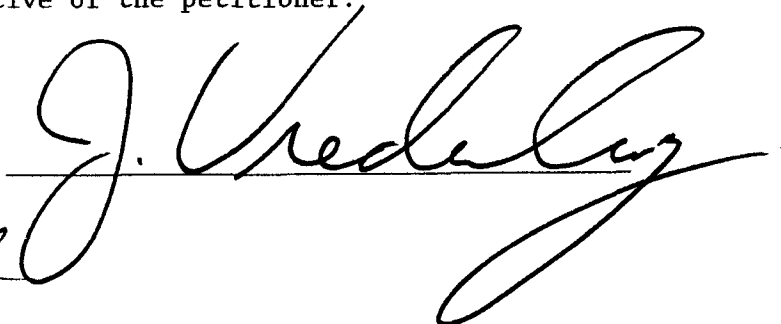
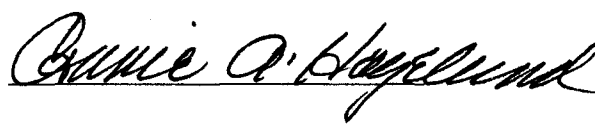
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 20th day of November, 1981, he served the within notice of by certified mail upon Patsy Fusco the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Patsy Fusco
37 New Dorp Plaza
Staten Island, NY 10306

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
20th day of November, 1981.

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

November 20, 1981

Boat Place, Inc.
and Ronald E. Fendt, Indiv. and as an Off.
141 Mansion Ave.
Staten Island, NY 10308

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) Decision 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 1138 & 1243 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
Patsy Fusco
37 New Dorp Plaza
Staten Island, NY 10306
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

THE BOAT PLACE, INC. and
RONALD E. FENDT, Individually and as an Officer:

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 September 1, :
1972 through August 31, 1975.

Petitioners, The Boat Place, Inc. and Ronald E. Fendt, Individually and as an officer, 141 Mansion Ave, Staten Island, New York 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 September 1, 1972 through August 31, 1975 (File No. 14360).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1978 at 2:45 P.M. and was continued before Edward L. Johnson, Hearing Officer, at the same location on August 23, 1978 at 2:45 P.M. Petitioner appeared by Patsy Fusco, Public Accountant. The Audit Division appeared by Peter Crotty, Esq. (James Morris and Frank Levitt, Esqs., of counsel).

ISSUES

- I. Whether the Audit Division allowed petitioners proper credit for the sales tax remittances, trade-ins and out-of-state sales on the audit it performed.
- II. Whether petitioner The Boat Place, Inc. is a vendor and liable for the collection of sales tax on brokerage sales.
- III. Whether section 1132(f) of the Tax Law relieves petitioners from the liability to collect sales tax.

FINDINGS OF FACT

1. During the period under review, petitioner The Boat Place, Inc. was registered as a vendor with the Department of Taxation and Finance under identification number 13-2709755. The Boat Place, Inc. was engaged in the operation of a marina on Great Kills Harbor, New York and, as well, involved in the sale of new and used boats. Petitioner Ronald E. Fendt was its principal officer.

2. On December 11, 1975, a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1972 through August 31, 1975 to December 20, 1976 was executed.

3. On February 20, 1976, as the result of an audit, the Audit Division issued to petitioners, The Boat Place, Inc. and Ronald E. Fendt, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1972 through August 31, 1975 in the amount of \$68,461.45, plus penalty and interest of \$26,377.55.

4. On audit, the books and records for the period June 1, 1974 through May 31, 1975 were thoroughly examined. It was determined therefrom that sales reported on the sales and use tax returns filed for the same period were understated by 45 percent and that no documentation existed to support non-taxable sales. Based on the audit findings and due to the absence of books and records for the period September 1, 1972 through May 31, 1974, the Audit Division increased the sales reported on returns filed by 45 percent and computed the tax thereon. An allowance was made for the tax remitted with the returns. The result was additional tax due of \$68,461.43, which was assessed.

5. As a result of a canvass that petitioners made, the Audit Division mailed an inquiry to each purchaser involved in an alleged non-taxable sale in

the test period June 1, 1974 through May 31, 1975. The letter made reference to the transaction and explored the method and place of delivery. The responses that were received has resulted in the Audit Division's allowance of \$18,985.00 of the claimed non-taxable sales (\$179,211.00) in the test period. The division accordingly recomputed petitioner's tax liability in following manner:

| | | |
|---------------------------------|---------------|------------------|
| Sales reported for audit period | \$ 764,490.00 | |
| Additional 45% | 344,021.00 | |
| Adjusted sales | 1,108,511.00 | |
| Less non-taxable sales | 117,502.00 | (10.6% Per test) |
| Taxable sales | 911,009.00 | |
| Tax for audit period | 72,344.00 | |
| Less tax paid | 17,835.00 | |
| Additional tax due | \$ 54,509.00 | |

6. At the hearing, it was stipulated that petitioner's trade-ins for the test period June 1, 1974 through May 31, 1975 were in the amount of \$14,217.00, and the Audit Division conceded that an allowance therefor should enter into the recomputation of petitioner's tax liability.

7. After the hearing, petitioners submitted documentary evidence to show that the transactions involving the purchasers Dayton Rubee, Francis Zipprich, Duane Marine Corp., Richard Hamilton, Siluio Cucci and McCarthy's Marina were consummated out-of-state. These transactions in the test period June 1, 1974 through May 31, 1975 amounted to \$76,667.00 in total.

8. Petitioners offered no evidence to show that the remittances with returns exceeded the amount of \$17,835.00 as allowed by the Audit Division.

9. Petitioners used a "purchase agreement" to effect a brokerage sale. Said forms executed with purchasers provided "IT IS UNDERSTOOD THAT THE BOAT PLACE, INC. IS ACTING AS AGENTS ONLY FOR THE OWNERS."

10. Purchase agreements for each of the fourteen brokerage sales made in the period June 1, 1974 through May 31, 1975 were submitted and the majority of

the forms fail to identify the owner even though a space is provided for the information.

11. Petitioner recorded each of the fourteen exchange sales made between June 1, 1974 and May 31, 1975 as "sales" in its sales journal. The sales were also included in the gross sales figure reported on the U.S. Small Business Corporation Income Tax Return for the fiscal year ended May 31, 1975 and payments made to the boat owners in the period were included in the cost of goods sold figure.

12. Section 1132(f) of the Tax Law provides that "(t)he commissioner of motor vehicles shall not issue a registration certificate for any... motorboat, ...except upon proof... that any tax imposed by section eleven hundred five or eleven hundred ten of this article...has been paid, or that no such tax is due."

13. Petitioners offered no substantial evidence to support that the purchasers themselves had paid the applicable New York State and local sales or use tax.

14. Petitioners did not raise as an issue the imposition of penalty and interest.

15. Petitioners books and records were not sufficient for the Audit Division to determine the exact amount of sales tax due.

CONCLUSIONS OF LAW

A. That section 1101(b)(8)(i) of the Tax Law defines the term vendor to include:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article."

B. That petitioner The Boat Place, Inc. was a vendor with respect to the brokerage sales within the meaning and intent of section 1101(b)(8)(i)(A) of the Tax Law.

C. That section 1132(a) of the Tax Law Provides:

"Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies..."

D. That notwithstanding the provisions of section 1132(f) of the Tax Law, petitioners The Boat Place, Inc. and Ronald E. Fendt, were required to collect the tax on boats sold and delivered to purchasers in New York State pursuant to the provisions of section 1132(a).

E. That section 1138(a) of the Tax Law provides:

"If a return required by the article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available."

F. That the result of the audit performed by the Audit Division as described in Finding of Fact "4" did not give consideration to trade-ins or out-of-state sales as described in Finding of Fact "5", "6" and "7".

G. That except as noted in Conclusion of Law "F", the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

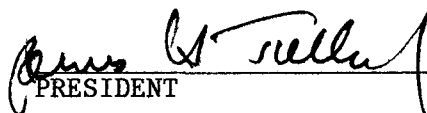
H. That the petition of The Boat Place, Inc. and Ronald E. Fendt is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

for Payment of Sales and Use Taxes Due issued February 20, 1976; and that except as so granted, the petition is in all other respects denied.

DATED: Albany, New York

NOV 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

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

November 20, 1981

Boat Place, Inc.
and Ronald E. Fendt, Individ. and as an Off.
141 Mansion Ave.
Staten Island, NY 10308

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) Decision 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 1138 & 1243 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
Patsy Fusco
37 New Dorp Plaza
Staten Island, NY 10306
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
THE BOAT PLACE, INC. and : DECISION
RONALD E. FENDT, Individually and as an Officer:
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 September 1, :
1972 through August 31, 1975. :

Petitioners, The Boat Place, Inc. and Ronald E. Fendt, Individually and as an officer, 141 Mansion Ave, Staten Island, New York 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 September 1, 1972 through August 31, 1975 (File No. 14360).

A formal hearing was held before Solomon Sies, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 22, 1978 at 2:45 P.M. and was continued before Edward L. Johnson, Hearing Officer, at the same location on August 23, 1978 at 2:45 P.M. Petitioner appeared by Patsy Fusco, Public Accountant. The Audit Division appeared by Peter Crotty, Esq. (James Morris and Frank Levitt, Esqs., of counsel).

ISSUES

- I. Whether the Audit Division allowed petitioners proper credit for the sales tax remittances, trade-ins and out-of-state sales on the audit it performed.
- II. Whether petitioner The Boat Place, Inc. is a vendor and liable for the collection of sales tax on brokerage sales.
- III. Whether section 1132(f) of the Tax Law relieves petitioners from the liability to collect sales tax.

FINDINGS OF FACT

1. During the period under review, petitioner The Boat Place, Inc. was registered as a vendor with the Department of Taxation and Finance under identification number 13-2709755. The Boat Place, Inc. was engaged in the operation of a marina on Great Kills Harbor, New York and, as well, involved in the sale of new and used boats. Petitioner Ronald E. Fendt was its principal officer.

2. On December 11, 1975, a consent extending the period of limitation for assessment of sales and use taxes for the period September 1, 1972 through August 31, 1975 to December 20, 1976 was executed.

3. On February 20, 1976, as the result of an audit, the Audit Division issued to petitioners, The Boat Place, Inc. and Ronald E. Fendt, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for the period September 1, 1972 through August 31, 1975 in the amount of \$68,461.45, plus penalty and interest of \$26,377.55.

4. On audit, the books and records for the period June 1, 1974 through May 31, 1975 were thoroughly examined. It was determined therefrom that sales reported on the sales and use tax returns filed for the same period were understated by 45 percent and that no documentation existed to support non-taxable sales. Based on the audit findings and due to the absence of books and records for the period September 1, 1972 through May 31, 1974, the Audit Division increased the sales reported on returns filed by 45 percent and computed the tax thereon. An allowance was made for the tax remitted with the returns. The result was additional tax due of \$68,461.43, which was assessed.

5. As a result of a canvass that petitioners made, the Audit Division mailed an inquiry to each purchaser involved in an alleged non-taxable sale in

the test period June 1, 1974 through May 31, 1975. The letter made reference to the transaction and explored the method and place of delivery. The responses that were received has resulted in the Audit Division's allowance of \$18,985.00 of the claimed non-taxable sales (\$179,211.00) in the test period. The division accordingly recomputed petitioner's tax liability in following manner:

| | | |
|---------------------------------|---------------|------------------|
| Sales reported for audit period | \$ 764,490.00 | |
| Additional 45% | 344,021.00 | |
| Adjusted sales | 1,108,511.00 | |
| Less non-taxable sales | 117,502.00 | (10.6% Per test) |
| Taxable sales | 911,009.00 | |
| Tax for audit period | 72,344.00 | |
| Less tax paid | 17,835.00 | |
| Additional tax due | \$ 54,509.00 | |

6. At the hearing, it was stipulated that petitioner's trade-ins for the test period June 1, 1974 through May 31, 1975 were in the amount of \$14,217.00, and the Audit Division conceded that an allowance therefor should enter into the recomputation of petitioner's tax liability.

7. After the hearing, petitioners submitted documentary evidence to show that the transactions involving the purchasers Dayton Rubee, Francis Zipprich, Duane Marine Corp., Richard Hamilton, Siluio Cucci and McCarthy's Marina were consummated out-of-state. These transactions in the test period June 1, 1974 through May 31, 1975 amounted to \$76,667.00 in total.

8. Petitioners offered no evidence to show that the remittances with returns exceeded the amount of \$17,835.00 as allowed by the Audit Division.

9. Petitioners used a "purchase agreement" to effect a brokerage sale. Said forms executed with purchasers provided "IT IS UNDERSTOOD THAT THE BOAT PLACE, INC. IS ACTING AS AGENTS ONLY FOR THE OWNERS."

10. Purchase agreements for each of the fourteen brokerage sales made in the period June 1, 1974 through May 31, 1975 were submitted and the majority of

the forms fail to identify the owner even though a space is provided for the information.

11. Petitioner recorded each of the fourteen exchange sales made between June 1, 1974 and May 31, 1975 as "sales" in its sales journal. The sales were also included in the gross sales figure reported on the U.S. Small Business Corporation Income Tax Return for the fiscal year ended May 31, 1975 and payments made to the boat owners in the period were included in the cost of goods sold figure.

12. Section 1132(f) of the Tax Law provides that "(t)he commissioner of motor vehicles shall not issue a registration certificate for any... motorboat, ...except upon proof... that any tax imposed by section eleven hundred five or eleven hundred ten of this article...has been paid, or that no such tax is due."

13. Petitioners offered no substantial evidence to support that the purchasers themselves had paid the applicable New York State and local sales or use tax.

14. Petitioners did not raise as an issue the imposition of penalty and interest.

15. Petitioners books and records were not sufficient for the Audit Division to determine the exact amount of sales tax due.

CONCLUSIONS OF LAW

A. That section 1101(b)(8)(i) of the Tax Law defines the term vendor to include:

"(A) A person making sales of tangible personal property or services, the receipts from which are taxed by this article."

B. That petitioner The Boat Place, Inc. was a vendor with respect to the brokerage sales within the meaning and intent of section 1101(b)(8)(i)(A) of the Tax Law.

C. That section 1132(a) of the Tax Law Provides:

"Every person required to collect the tax shall collect the tax from the customer when collecting the price, amusement charge or rent to which it applies..."

D. That notwithstanding the provisions of section 1132(f) of the Tax Law, petitioners The Boat Place, Inc. and Ronald E. Fendt, were required to collect the tax on boats sold and delivered to purchasers in New York State pursuant to the provisions of section 1132(a).

E. That section 1138(a) of the Tax Law provides:

"If a return required by the article is not filed, or if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the Tax Commission from such information as may be available."

F. That the result of the audit performed by the Audit Division as described in Finding of Fact "4" did not give consideration to trade-ins or out-of-state sales as described in Finding of Fact "5", "6" and "7".

G. That except as noted in Conclusion of Law "F", the audit performed by the Audit Division was proper and in accordance with the provisions of section 1138(a) of the Tax Law.

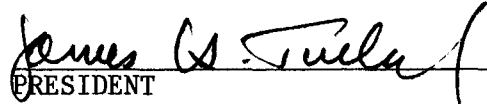
H. That the petition of The Boat Place, Inc. and Ronald E. Fendt is granted to the extent indicated in Conclusion of Law "F"; that the Audit Division is hereby directed to modify the Notice of Determination and Demand

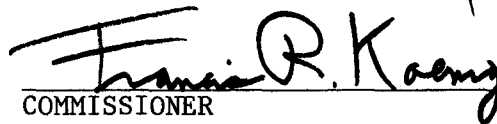
for Payment of Sales and Use Taxes Due issued February 20, 1976; and that except as so granted, the petition is in all other respects denied.

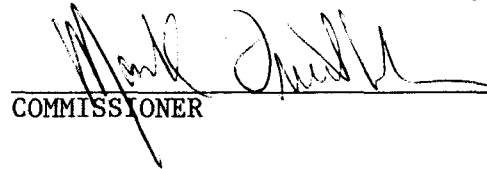
DATED: Albany, New York

NOV 20 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER