

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

June 11, 1982

Wayfarer Ketch Corp.  
Hangar G  
Westchester County Airport  
White Plains, NY 10604

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1139 & 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  
Law Bureau - Litigation Unit  
Albany, New York 12227  
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative  
Edward J. P. Zimmerman  
Rm. 5600, 30 Rockefeller Plaza  
New York, NY 10020  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
of	:	
WAYFARER KETCH CORP.	:	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 March 1, 1972	:	
through February 28, 1975.	:	

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Petitioner, Wayfarer Ketch Corp., Hangar G, Westchester County Airport, White Plains, 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 March 1, 1972 through February 28, 1975 (File No. 16030).

A formal hearing was held before David Evans, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 19, 1979 at 2:45 P.M. Petitioner appeared by Edward J.P. Zimmerman, Esq. The Audit Division appeared by Peter Crotty, Esq. (Irwin Levy, Esq. of Counsel).

ISSUES

I. Whether the statute of limitations prohibits the assessment of tax due for the periods ended February 28, 1973, May 31, 1973 and August 31, 1973.

II. Whether petitioner's purchases of tangible personal property and services were made as an agent or whether petitioner was engaged in the sale of tangible personal property and services subject to tax.

III. Whether the Audit Division's projection of a test was proper and correct.

FINDINGS OF FACT

1. Petitioner, Wayfarer Ketch Corp., filed New York State and Local Sales and Use Tax Returns for the period March 1, 1972 through February 28, 1975.
2. On April 30, 1975, petitioner signed a consent to extend the period of limitation for assessment of sales and use taxes for the period March 1, 1972 through February 28, 1975 to any time on or before June 20, 1976.
3. On April 4, 1976, as the result of an audit, the Audit Division issued against petitioner a Notice of Determination and Demand for Payment of Sales and Use Taxes Due for \$113,470.43 in tax plus \$47,845.60 in penalty and interest. The Division asserted that the notice included the audit period March 1, 1972 through February 28, 1975.
4. The aforesaid notice improperly designated the year for periods ended February, May and August 1973 as 1972 due to typographical errors.
5. The Audit Division had furnished to petitioner the audit workpapers. Petitioner has filed the perfected petition indicating that the additional taxes determined due for the quarterly periods December 1, 1972 through February 28, 1973; March 1, 1973 through May 31, 1973; and June 1, 1973 through August 31, 1973, were at issue.
6. Petitioner is a New York Corporation. Its base of operation is Hangar G, Westchester County Airport, White Plains, New York. Its corporate stock was owned by Nelson A. Rockefeller, Laurance S. Rockefeller and David Rockefeller ("The Rockefellers").
7. Petitioner serviced the aircraft owned by The Rockefellers. Similar services were provided for Time Incorporated ("Time") and Chase Manhattan Bank ("Chase"). The services rendered to The Rockefellers were pursuant to an oral agreement. Written contracts existed with Time and Chase.

8. Petitioner, in accordance with the oral agreement and written contracts, operated and maintained the aircraft of The Rockefellers, Time and Chase. Petitioner hangared the aircraft at the Westchester County Airport; petitioner furnished flight crews (i.e. pilots, co-pilots and in-flight engineer-stewards); petitioner purchased fuel, oil and other supplies and services (including catering services); petitioner performed the maintenance, repairs, checks and inspections; petitioner maintained the flight records.

9. Petitioner, pursuant to the oral agreement and written contracts, performed the day-to-day maintenance work on the aircraft with its staff of mechanics at the home base in White Plains, New York. This maintenance was progressive maintenance, similar to the maintenance procedure of air carriers where the airplanes are inspected and repaired on a scheduled basis. Petitioner paid with the filing of the sales and use tax returns the compensating use tax on the mechanics' salaries and fringe benefits.

10. Petitioner received advances to cover the cost and expense of the operation and maintenance of the aircraft. Said advances were based on past experience. Periodically, petitioner made an accounting as to the advances and received reimbursement for the cost and expenses in excess of the advances. Petitioner made no profit on the transactions with The Rockefellers, Chase and Time.

11. On audit, the Audit Division considered petitioner a vendor of tangible personal property and services. The cost to service the aircraft in the period March 1, 1972 through February 28, 1975 of \$7,144,534.93 was established as gross sales. Deductions therefrom for (i) the salaries of pilots (\$1,584,205.73), (ii) air telephones (\$3,934.03), (iii) purchases on which tax was paid the supplier (\$2,119,731.21) and (iv) purchases and tax reported on the tax returns

(\$1,106,977.00) were allowed to arrive at additional taxable sales of \$2,329,686.96 on which the Division applied the applicable tax rate.

12. The Audit Division, in order to determine the allowance for purchases on which tax was paid the supplier (Fact 11. (iii) above), analyzed the costs petitioner incurred in the period September 1, 1974 through November 30, 1974. The percentages of 98.70 percent for fuel cost, 10.21 percent for repair and maintenance, 28.38 percent for catering, 28.72 percent for miscellaneous and 1.727 percent for telephone were developed as tax paid and applied against the total expenses in the various categories.

13. Petitioner maintained adequate books and records. The actual purchases on which tax was paid to the supplier was attainable from said books and records. The test period method was employed due to the voluminous records.

14. At the hearing, petitioner conceded an additional tax liability on additional taxable sales of \$121,167.63. The additional items included insurance allocable to mechanics and administrative staff, a portion of hangar fees, an amount for catering, and an item for overhaul.

15. Petitioner did not raise as an issue the imposition of penalty and interest.

#### CONCLUSIONS OF LAW

A. That section 1147(c) of the Tax Law provides that where a taxpayer has consented to extend the period of limitation for assessment of sales or use taxes the amount of such additional tax due may be determined at any time within such extended period.

B. That although the Notice of Determination and Demand for Payment of Sales and Use Tax Due issued against petitioner failed to correctly list the quarterly periods at issue, the workpapers furnished petitioner clearly appraised

it of the quarterly periods at issue. Therefore, petitioner was not misled, and the Notice of Determination and Demand is not invalid (Wilkins & Lange, 9 BTA 1127; Nayes, 55 F2d 870).

C. That the Notice of Determination and Demand for Payment of Sales and Use Tax Due issued April 4, 1976 was timely issued for the sales and use tax quarterly periods ended February 28, 1973, May 31, 1973 and August 31, 1973.

D. That section 1105 of the Tax Law imposes, in part, a sales tax upon the receipts from every retail sale of tangible personal property and upon the receipts from the sale of the services of installing tangible personal property or maintaining, servicing or repairing tangible personal property.

E. That section 1101(b)(3) of the Tax Law defines a "receipt" as the amount of the sale price of any property and the charge for any service taxable under this article, valued in money, whether received in money or otherwise. Section 1101(b)(5) defines a "sale" as any transfer of title or possession or both in any manner or by any means whatsoever for a consideration, or any agreement therefore, including the rendering of any service taxable under this article, for a consideration or any agreement therefor.

G. That there is no requirement in the Tax Law that one who renders a service make a profit before a particular transaction or service is taxable (Sperry Rand v. Tully, 99 Misc. 2d at 719).

H. That petitioner did not act as an agent in the performance of the oral agreement with The Rockefellers and the written contracts with Time and Chase. Petitioner's maintenance and operation of the aircraft constitutes a taxable sale within the meaning and intent of section 1105 of the Tax Law, and the advances and reimbursements received therefor constitute a receipt within the meaning and intent of section 1101(b)(3) of the Tax Law.

I. That section 1138(a) of the Tax Law provides that if a return required by this 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.

J. That petitioner had records available to perform a detailed analysis of its transactions for the period in issue. Said records were fully employed in the determination by the Audit Division of petitioner's sales which are not in dispute. Three months of records were, however, the basis of a projection of a credit due petitioner on purchases-for-resale on which tax was erroneously paid the supplier. Petitioner has not produced any evidence that a greater credit would be produced if the complete records were considered. Moreover, had petitioner reviewed the complete records and found a credit due it in excess of that allowed on audit, it had the right to make an application for a credit or refund in accordance with the provisions of section 1139 and section 1147(c) of the Tax Law.

K. That the audit method used by the Audit Division in the determination of petitioner's additional tax liability is proper and in accordance with section 1138 of the Tax Law.

L. That the petition of Wayfarer Ketch Corp. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued April 4, 1976 is sustained.

DATED: Albany, New York

JUN. 11 1982

STATE TAX COMMISSION

*James W. Tuck*  
PRESIDENT

*Frank R. Koenig*  
COMMISSIONER

*Mark J. Doherty*  
COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Wayfarer Ketch Corp. :  
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 3/1/72-2/28/75. :  
\_\_\_\_\_ :

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Wayfarer Ketch Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Wayfarer Ketch Corp.  
Hangar G  
Westchester County Airport  
White Plains, NY 10604

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  
11th day of June, 1982.

Annie R. Hagelund

J. Vredenburg



STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of :  
Wayfarer Ketch Corp. :

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 3/1/72-2/28/75 :

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 11th day of June, 1982, he served the within notice of Decision by certified mail upon Edward J. P. Zimmerman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

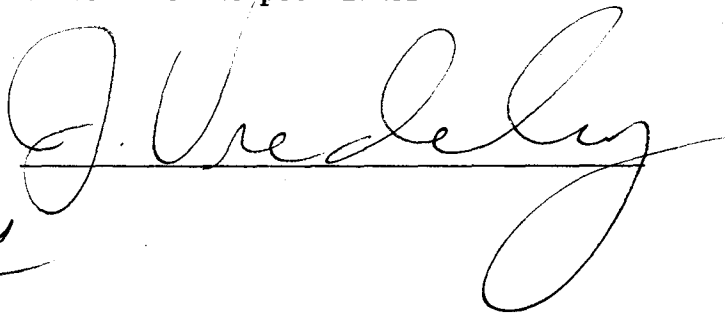
Edward J. P. Zimmerman  
Rm. 5600, 30 Rockefeller Plaza  
New York, NY 10020

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  
11th day of June, 1982.





**P 230 840 297**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

SENT TO		<i>Edward J. Zimmerman</i>		
STREET AND NO.		<i>111-5600 30 Rockaway Blvd</i>		
P.O., STATE AND ZIP CODE		<i>New York, NY 10030</i>		
POSTAGE		<i>1.00</i>		
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	€	
		SPECIAL DELIVERY	€	
		RESTRICTED DELIVERY	€	
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY		€	
TOTAL POSTAGE AND FEES	\$			
POSTMARK OR DATE				

PS Form 3800, Apr. 1976

**P 230 840 296**  
**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED—  
 NOT FOR INTERNATIONAL MAIL  
 (See Reverse)

SENT TO		<i>Wayfair Hotel Corp</i>		
STREET AND NO.		<i>111-5600 30 Rockaway Blvd</i>		
P.O., STATE AND ZIP CODE		<i>Westchester County, NY 10604</i>		
POSTAGE		<i>1.00</i>		
CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	€	
		SPECIAL DELIVERY	€	
		RESTRICTED DELIVERY	€	
		RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	€
			SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	€
			SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	€
	SHOW TO WHOM, DATE AND ADDRESS OF DELIVERY WITH RESTRICTED DELIVERY		€	
TOTAL POSTAGE AND FEES	\$			
POSTMARK OR DATE				

PS Form 3800, Apr. 1976