

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Stephen J. Phillips :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax  
under Article(s) 28 & 29 of the Tax Law for the :  
Period Ending May 31, 1980.  
:

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of October, 1986, he/she served the within notice of Decision by certified mail upon Stephen J. Phillips the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Stephen J. Phillips  
18 Garner Lane  
Bay Shore, New York 11706

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
23rd day of October, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :  
of  
Stephen J. Phillips :

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for Redetermination of a Deficiency or Revision :  
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under Article(s) 28 & 29 of the Tax Law for the :  
Period Ending May 31, 1980.

State of New York :  
ss.:  
County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 23rd day of October, 1986, he served the within notice of Decision by certified mail upon Allan Ross, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Allan Ross  
Nydick & Ross  
275 Broad Hollow Road  
Melville, NY 11747

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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  
23rd day of October, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

October 23, 1986

Stephen J. Phillips  
18 Garner Lane  
Bay Shore, New York 11706

Dear Mr. Phillips:

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) 1138 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

Petitioner's Representative:  
Allan Ross  
Nydick & Ross  
275 Broad Hollow Road  
Melville, NY 11747

STATE OF NEW YORK

STATE TAX COMMISSION

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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.

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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

R. David Allen  
PRESIDENT

Francis R. Koeng  
COMMISSIONER

Mark J. Juel  
COMMISSIONER

P 319 117 441

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

Stephen J Phillips  
 18 Garner Lane  
 Bayshore N.Y. 11706

Postage	
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	
Postmark or Date	

P 319 117 442

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED

NOT FOR INTERNATIONAL MAIL

(See Reverse)

Allen Ross  
 Nydick + Ross  
 275 Broad Hollow Rd.  
 Melville, N.Y. 11747

Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

\* U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985