

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :

of :

STAN GROMAN :

DECISION
DTA NO. 824274

for Revision of a Determination or for Refund of Sales and :
Use Tax Under Articles 28 and 29 of the Tax Law for the :
Period February 9, 2004. :

Petitioner, Stan Groman, filed an exception to the determination of the Administrative Law Judge issued on September 12, 2013. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

Petitioner filed a letter brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a letter brief in reply. Oral argument was not requested.

ISSUES

I. Whether the Administrative Law Judge properly denied petitioner's motion to reopen the record.

II. Whether the Division of Taxation properly assessed use tax upon petitioner's use of a vessel within the State of New York.

III. Whether petitioner has established reasonable cause and an absence of willful neglect, thereby justifying the abatement of penalties asserted pursuant to Tax Law § 1145 (a) (1) (i).

FINDINGS OF FACT

We accept the Findings of Fact as determined by the Administrative Law Judge except for Findings of Fact numbered 8, 9, 11-13, 16, 21, 22 and originally numbered Findings of Fact 27-30, 32, and 35, which have been modified. Also, Findings of Fact originally numbered 26 and 39 have been excluded as unnecessary to our decision. As a result, the Findings of Fact herein following Finding of Fact 25 have been renumbered. We make these changes to more accurately reflect the record.

1. On September 4, 2009, the Division of Taxation (Division) received information from the United States Coast Guard regarding a documented vessel moored in New York State. Shortly thereafter, the Division's Sales Tax Bureau commenced a desk audit of the vessel Bakes Gem owned by petitioner, Stan Groman. In its letter dated September 8, 2009 addressed to petitioner at his Sandy Creek, New York address, the Division indicated that it was unable to verify payment of sales or compensating use tax on the purchase or first use in New York State of the documented vessel Bakes Gem, and requested a copy of the bill of sale and proof of payment of sales tax.

2. On September 16, 2009, the Division received a handwritten response, dated September 13, 2009, from petitioner that stated the vessel was a commercial vessel, purchased in Florida five years earlier and brought into New York State three years prior, and that no tax was due.

3. On September 30, 2009, the auditor left a message for petitioner who returned the telephone call the same day. During that telephone conversation, petitioner indicated that he was a resident of California when he purchased the vessel. Petitioner further indicated that if he could find the bill of sale, he would send a copy of it as proof of his California residency.

4. Subsequently, on October 13, 2009, petitioner faxed copies of two documents that bore

his Redondo Beach, California, address. The first document consisted of two pages of the Bayside Yacht Sales, Fort Myers, Florida, Brokerage Purchase and Sales Agreement, dated February 9, 2004,¹ for petitioner's purchase of Bakes Gem, a 1997 35-foot Bayliner model 3587 aft cabin documented vessel, for a purchase price of \$100,500.00. The second document consisted of a single page of a Southern California Edison utility bill dated March 4, 2006.

5. The auditor conducted on-line Lexis/Nexis property assessment record and motor vehicle payment file searches, and found that petitioner and his wife have owned the Sandy Creek, New York, home since August 1987, and petitioner had registered two boats, a 1992 Bombadier watercraft in September 2001 and a 1999 10-foot rubber dinghy in June 2000, at that Sandy Creek, New York, address.

6. On October 23, 2009, the Division issued a Statement of Proposed Audit Change for Sales and Use Tax (Statement of Proposed Audit Change) to petitioner asserting tax due in the amount of \$8,040.00 for the purchase or use date of February 9, 2004,² plus interest and penalty. The Statement of Proposed Audit Change was "based on information available to this office indicating you purchased a vessel."

7. In a faxed statement dated November 2, 2009, petitioner claimed that the vessel was purchased in Florida in 2004 for use in a new yacht charter business to be conducted in New York State, but the commercial vessel was not brought to Alexandria Bay, New York, for charter until 2006. He also claimed that the vessel was in New Jersey in 2005. Petitioner's faxed

¹ The incomplete copy of the Brokerage Purchase and Sales Agreement contained only petitioner's signature, and did not identify the seller (owner) of Bakes Gem.

² In calculating the tax due, the auditor used the purchase price of \$100,500.00 and an incorrect, more recent tax rate of 8% for Oswego County. That error was corrected prior to the issuance of the Notice of Determination.

statement included a one-page account statement, listing four invoices for unidentified services provided to Bakes Gem, issued to petitioner by Winter Yacht Basin, Inc. (Winter Yacht Basin), Mantoloking, New Jersey, on March 31, 2005, and a printout of the front page of the business website, 1000islandsyachtcharter.com.

8. In support of his claim that the vessel was exempt from tax as a commercial vessel, petitioner submitted a letter dated November 3, 2009, and additional documentation to the auditor. Petitioner's letter stated, in pertinent part:

“[i]n 2004 I was a resident of California and was registered to vote there, had my business³ there, and lived there. Planning retirement in 2006 I decided to start a yacht charter business when we moved to New York and checked on sales tax and was informed by New York State that sales tax would not apply if the vessel were a commercial vessel used in commercial business.

The vessel, a 35 foot Bayliner, purchased in Florida lost an engine while heading north so with waterways closing in winter it was necessary to leave it in New Jersey the first year. In the second year the boat hit a shoal doing \$65,000 damage and we lost 16 months making repairs so it did not arrive in Alexandria Bay, NY ready to lease until June of 2006.

The boat is documented vessel with the US Coast Guard and was inspected for use in charter. A captain was hired for \$2,000 a month to operate the boat since I do not hold a captains [*sic*] license. A web site 1000islandsyachtcharter.com was designed, and ads [*sic*] placed in the Syracuse, Rochester, Watertown and Alexandria Bay newspapers.

If this is not a commercial business, I don't know what is. With the recent collapse of the economy, our business went under since charter business of this sort fell off. We cannot afford to sustain any more losses and have given the boat to Signature Yacht Sales to sell for us.”

9. Additional documentation, submitted with the November 3, 2009 letter, consisted of: Technical Services Bureau Memorandum, TSB-M-88(10)S (Definition of Commercial Vessel Engaged in Interstate or Foreign Commerce), dated May 5, 1988; the first page of Technical

³ Petitioner's business is called Applied Filtration Industries.

Services Bureau Memorandum, TSB-M-96(14)S (Tax Law Defines Commercial Vessels and Commercial Aircraft), dated November 7, 1996; a copy of a U.S. Coast Guard U.S. Merchant Marine Officer License issued to James P. Burns to serve from June 2, 2003 until June 2, 2008 as a Master of Steam or Motor Vessel of not more than 100 gross registered tons (domestic tonnage) upon Great Lakes and Inland Waters, i.e., captain's license; a page containing four clipped newspaper advertisements for 1000 Islands Yacht Charter; the August 16, 2006 edition of the Thousand Islands Sun, Alexandria Bay, New York, containing an advertisement for 1000 Islands Yacht Charter; a copy of a Watertown Daily Times Advertising Contract Branding Program between its publisher, Johnson Newspaper Corporation, and 1000 Islands Yacht Charter, dated June 20, 2006; a copy of an advertisement for 1000 Islands Yacht Charter that appeared in the July 20, 2006 Watertown Daily Times; a copy of a quote and offer of insurance issued to Stan Groman d/b/a 1000 Islands Yacht Charter, by Charter Lakes Marine Insurance Agency, dated August 17, 2009; and a copy of the US Coast Guard Certificate of Documentation for the vessel Bakes Gem issued on May 2, 2004. After reviewing this additional documentation, the auditor concluded that the vessel did not qualify for the commercial vessel exemption and that an assessment would be issued after November 22, 2009.

10. Petitioner did not provide any evidence of payment of sales or use tax on the purchase of the vessel during the audit. In addition, he never supplied any documentation showing the specific date the vessel entered New York State following its purchase or the value of the vessel at the time of its entry into New York State.

11. The Division issued to petitioner a Notice of Determination (assessment number L-033099984), dated December 10, 2009, assessing tax due of \$7,286.25 for the tax period ended February 9, 2004, plus interest of \$9,134.48 and penalty of \$2,185.82 for a total amount due of

\$18,606.55.⁴ The computation section of the notice stated that: “[b]ased on the information you submitted in previous correspondence regarding the purchase of a vessel, we determined that you owe tax, interest, and any applicable penalties, under section 1138 and 1145 of the Tax Law.”

12. At the hearing, petitioner testified about the purchase and subsequent use of the vessel. In 2004, he was contemplating retirement from his California business, Applied Filtration, and wanted to start a retirement business in New York State where he intended to move. According to petitioner, he researched New York law, i.e., Technical Services Bureau Memorandum, TSB-96(14)S (Tax Law Defines Commercial Vessels and Commercial Aircraft), dated November 7, 1996, and found that a commercial vessel primarily engaged in interstate or foreign commerce would not be subject to tax. Therefore, he decided to structure his business as a yacht charter business that would transport people back and forth from the United States to Canada.

13. In February 2004, petitioner purchased the vessel Bakes Gem, located at Fort Myers Yacht Basin, Fort Myers, Florida, at a cost of \$100,500.00. Petitioner did not pay sales tax to the State of Florida on the purchase of the vessel. He subsequently insured it for the purchase price. He also purchased and installed additional equipment on the boat, consisting of a new canvas top and side windows at a total cost of \$4,664.00, including tax in the amount of \$264.00, and marine electronics consisting of radar, a Global Positioning System, a VHF radio and an autopilot system at a total cost of \$14,505.25.⁵ Sometime later, Bakes Gem began its slow journey to Alexandria Bay, New York, traveling from Fort Myers around Key West, up the East

⁴ The tax determined to be due was calculated using the purchase price of \$100,500.00 and the correct tax rate in effect in 2004 for Oswego County of 7¼%.

⁵ The record does not include a receipted bill of sale for the purchase and installation of the marine electronics, only a quote from Heinz Marine, Electronics, Inc., Fort Myers Beach, Florida, that does not include the amount of tax estimated to be due.

Coast. Petitioner hired a captain to pilot the vessel on this journey. On or before August 19, 2004, one of Bakes Gem's two diesel engines broke down off the coast of New Jersey, near Mantoloking. Because a new engine was needed, the boat was stored for the winter at Winter Yacht Basin, located in Mantokoling, New Jersey, where CB Marine Diesel, LLC, Brick, New Jersey, installed a new engine. According to petitioner, the cost of the new engine was not covered by insurance.

14. On an unidentified date, on or shortly after May 1, 2005, Bakes Gem left Mantoloking, New Jersey, and continued on its journey to Alexandria Bay, New York, traveling the Atlantic Ocean to the waters around the New York City area, up the Hudson River and through the Erie Canal. On or before May 15, 2005, Bakes Gem accidentally struck a rocky shoal in Oneida Lake that destroyed the propellers, the rudders and the struts, and ripped the transmissions off the engines. The boat was towed to Winter Harbor Marina (Winter Harbor), Brewerton, New York, where it was pulled from the water. At that point, the vessel was unable to continue its journey to Alexandria Bay because of the damage sustained in the accident. In his testimony about Bakes Gem's trip from Mantoloking, New Jersey, to Oneida Lake, New York, petitioner never indicated the exact date on which Bakes Gem first entered New York State or the number of days it took to reach Oneida Lake, New York.

15. Over a number of months, removal and replacement of the damaged engines and transmissions took place at Winter Harbor. Photos in the record confirm the damage to Bakes Gem's engines, transmissions and propellers, and the removal of the damaged parts from the boat. The record is silent as to when the replacement of the engines and the other parts was completed.

16. The record includes a summary schedule of expenses incurred for the year 2005

including, among other expenses, replacement of the engines, transmissions, propellers, shafts and rudders at a cost of \$79,715.00. The summary schedule also lists a winter storage expense in the amount of \$2,100.00. The record also includes a page titled "Winter Harbor," on which seven separate invoice numbers (21481, 22002, 22605,⁶ 22643, 21887, 23204 and 23386) and their respective dollar amounts (\$67,939.60, \$1,094.60, \$137.70, \$612.36, \$2,323.60, \$3,376.87 and \$4,181.25), as well as the amount "\$79,665.98" are listed. Below the invoice numbers and dollar amounts the following appears "[s]ales tax paid on all of the above. Replace engines, shafts, rudders, props, transmissions, struts, and mounts." The following Winter Harbor invoices are part of the record: page 13 of invoice number 21481, dated May 15, 2005 ("RUN AGRO..."), "NYS Sales Tax 8.00% \$5,032.56," total \$67,939.60; invoice number 22606, dated June 5, 2006 (for service work on May 25, 2006 - "[f]ix wires on the 110 volt"), total \$137.70; invoice number 23204, dated January 2, 2007 (for winter storage in heated facility), total \$3,376.87; and invoice number 23386, dated January 22, 2007 (for removal of existing props and install new props on boat - notation on bill indicated that it was to be forwarded to an insurance company), total \$4,181.25.

17. On June 15, 2006, Bakes Gem continued its journey from Winter Harbor, Brewerton, New York, to Alexandria Bay, New York. The boat arrived and docked at the Bonnie Castle Resort Hotel (Bonnie Castle), located in Alexandria Bay, New York, on June 16, 2006, where it remained docked for the remainder of the 2006 boating season. Upon arriving at Bonnie Castle, Bakes Gem was renamed 1000 Isle Lady.

18. An aft cabin Bayliner built in 1996, the boat has three separate cabins, two baths and

⁶ The correct invoice number appears to be number 22606 not number 22605.

showers, a galley kitchen, and a dinette. Its equipment includes, among other items, an onboard diesel generator, a refrigerator, forward and rear air conditioning units, marine electronics, and petitioner's 10 foot rubber dingy. The boat can take six passengers.

19. In June 2006, petitioner began doing business as 1000 Islands Yacht Charter. A U.S. Coast Guard licensed captain was hired to operate 1000 Isle Lady as the business's charter vessel. To promote his new business, petitioner joined the Alexandria Bay Chamber of Commerce, created a website, an e-mail address, and purchased newspaper advertisements. Later, for the 2007 season, petitioner created a flyer advertising the business that was kept at information centers located on Interstate 81.

20. Summer of 2006 newspaper advertisements offered flexible customized charters with a captain and mate "to cruise anywhere along the St. Lawrence River in the 1000 Islands" area, including such locations as Boldt Castle, Alexandria Bay or Clayton in the United States, and Gananoque, Kingston or Brockville in Canada, for three hours up to six days with meals. In addition, the customized charters could include fishing, diving, swimming, and the ability to learn navigation and how to pilot the boat. Petitioner's telephone number and the business website were listed in these newspaper ads. The content of the business website was very similar to the content of the newspaper ads, offering complete flexibility in chartering a private yacht with a captain to cruise anywhere along the St. Lawrence River in the 1000 Islands area.

21. According to a summary statement of income and expenses for the year 2006, the charter business had income in the amount of \$5,800.00, and expenses totaling \$26,341.24, consisting of boat payments of \$9,483.24; payments to a full-time captain (June through September) of \$7,000.00; advertising in the amount of \$1,833.00; insurance in the amount of \$2,055.00; Bonnie Castle dockage fees (five months) in the amount of \$3,000.00; and winter

storage in the amount of \$2,970.00.

22. Petitioner stored the boat in Winter Harbor's indoor heated storage facility from October of 2006 until May of 2007. 1000 Isle Lady was docked in Alexandria Bay, New York, at the Bonnie Castle Resort Hotel during the 2007 summer boating season.

23. In February 2007, petitioner hired a yacht broker, Signature Yacht Sales, to sell 1000 Isle Lady for \$159,000.00 because of the huge debt incurred and limited income generated by 1000 Island Yacht Charter. Petitioner testified that he set that price as a starting point, knowing that he would have to make concessions and pay a 15% brokerage commission. Signature Yacht Charter was unsuccessful in selling the boat.

24. According to petitioner, he inherited the Sandy Creek, New York, summer camp (the camp) from his father in 1987. Built over a boathouse and basement garage, the camp drew its water from Sandy Pond and had an on-site septic system, but did not have central heating. Annually, petitioner came to New York to check on and stay at the camp. In or about 2007, petitioner upgraded the camp's on-site septic system, and installed a well, new windows and an oil boiler. Beginning in or about 2007, petitioner and his wife began using the camp year round.

25. In April 2007, petitioner registered "1000 Islands Yacht Charter" for sales tax using the Sandy Creek address.

26. Documents in the record indicate that from May 2, 2004 through August 31, 2007, U.S. Coast Guard certificates of documentation listed the vessel Bake Gem's operational endorsement as "recreation."⁷ According to petitioner, he thought recreation was the proper

⁷ The U.S. Coast Guard may issue a Certificate of Documentation with a registry, coastwise, fishery or recreational endorsement (46 CFR 67.15 [b]). A recreational endorsement entitles a vessel to pleasure use only (46 CFR 67.23 [a]). A coastwise endorsement entitles a vessel to employment in unrestricted coastwise trade, dredging, towing, and any other employment for which a registry or fishery endorsement is not required (46 CFR 67.19 [a]).

endorsement to choose because he interpreted chartering in the Thousand Islands to be recreational. It is unclear when petitioner notified the U.S. Coast Guard of the vessel's name change to 1000 Isle Lady. At some point, he was advised by the U.S. Coast Guard that if a boat was being used in chartering, the proper operational endorsement would be "coastwise."

27. The original U.S. Coast Guard certificates of documentation, issued on August 6, 2010 and July 11, 2011, respectively, for the vessel 1000 Isle Lady, hailing port Sandy Creek, New York, listed its operational endorsement as coastwise.

28. A Yacht Insurance Confirmation issued by Jack Martin & Associates, Inc., Insurance, Annapolis, Maryland, to petitioner confirmed ACE American Insurance Company's issuance of a binder, effective July 1, 2006, insuring the 1997 35-foot Bayliner for occasional charter use,⁸ lay-up ashore from November 1st through April 1st, and warranted navigation confined to non-tidal waters of the continental United States and Canada, excluding the Great Lakes. However, navigation was extended to include Lake Ontario. The yacht insurance binder included coverage for, among other things, "hull coverage" in the amount of \$150,000.00, with a \$3,000.00 deductible.

29. In its quote and offer of insurance dated August 17, 2009, Charter Lakes Marine Insurance Agency indicated that ACE American Insurance Company agreed to cover the 1997 35-foot Bayliner, for occasional charter use, lay-up ashore from October 30th to May 1st, and warranted navigation confined to waters and tributaries of the Great Lakes and St. Lawrence River, not below Quebec City, and the inland waters of the State of New York, excluding the Hudson River below the Tappan Zee Bridge. Quoted insurance coverage included, among other

⁸ This Yacht Insurance Confirmation appears to read "occasional charter" as the word "occasional" is partially covered on the copy in the record.

things, “coverage for up to 20 days of 6-passenger captained charter per year,” and “Physical Damage - Agreed Value” in the amount of \$110,000.00, with a \$2,200.00 deductible. The quoted total premium was \$1,133.00.

30. According to petitioner, when he began the business, his goal was to have a one-week charter during each month of the boating season. When he informed the insurance company of his business goal and the fact that the boat would be in the water for approximately six months of the year, petitioner was advised that the rates would be lower if the boat was insured as an occasional charter. At the hearing, petitioner conceded that the boat’s insurance coverage has never been changed to full-time charter use.

31. On an unknown date, a fire heavily damaged the boat house level of petitioner’s Sandy Creek residence. At the hearing, petitioner claimed that his financial records, including business records related to the 1000 Island Yacht Charter business, were lost due to smoke damage from the fire.

32. Petitioner has been operating 1000 Islands Yacht Charter since June 2006. He sets the fees for and books each charter. Petitioner submitted only three pages of the vessel’s daily cruising log for the year 2006 into the record. None of the vessel’s daily cruising logs for either the years 2004 and 2005, or the years subsequent to 2006, including the period January 1, 2012 through October 23, 2012, were submitted into the record. Petitioner did not submit any records related to the business’s charters or its receipts for the years 2006 or 2007 because he claimed that they were lost in the fire. The record includes two federal schedule Cs that reported gross income in the amount of \$3,700.00 and \$5,867.00 for the years 2010 and 2011, respectively. The supporting documentation used to prepare these two federal schedule Cs was not submitted into the record. Petitioner did not know how his accountant had reported the business’s income for

the years prior to the year 2010. The record does not include any of the business records, i.e., customer names, details of each charter and receipts, for the years 2008 through 2011. In addition, no business records for the period January 1, 2012 through October 23, 2012 are part of the record.

33. Petitioner's yacht charter customers customize their charter cruises. They may choose to cruise anywhere along the St. Lawrence River, the Thousand Islands, or visit locations in New York State, such as Boldt Castle, Alexandria Bay, or Clayton. If a charter party wishes to include cruise locations in Canada, Mr. Groman makes sure that all members of the party have passports with them because the boat must clear Canadian Customs at the first location visited, such as Gananoque, Kingston, or Rockport. Upon the boat's return to the United States, American Customs must also be cleared. Recently, petitioner learned that if the vessel picked up passengers in Canada, there were some unspecified compliance rules with which 1000 Islands Yacht Charter must comply.

34. The record includes 23 e-mail inquiries regarding yacht availability or pricing that were submitted to 1000 Islands Yacht Charter's e-mail address on various dates between July 26, 2006 and August 19, 2012.

35. As a requirement of petitioner's yacht charter insurance coverage on the boat, licensed captains must operate it on charters. Petitioner submitted the sworn statement of Duane Morton, a licensed U.S. Coast Guard boat pilot, and a letter, dated October 2, 2012, from George Ronson, another licensed boat captain, each of whom operated 1000 Isle Lady on one or more charters.

36. In his affidavit, Mr. Morton stated that he was retained, "along with several other boat captains, to operate the yacht 1000 Isle Lady on numerous charters over the past several years." Virtually all of the trips that Mr. Morton captained involved taking passengers back and forth

into Canada and disembarking sometimes for days, in which case he stayed at a hotel while the passengers stayed on the boat. Those passengers “varied from families celebrating an anniversary for the better part of a week to engineers from mainland China wishing to tour the islands.” The record does not include any hotel receipts related to Mr. Morton’s stays in Canada, or any other supporting documentation related to the charters that Mr. Morton captained.

37. In his letter addressed “To Whom it may concern,” Mr. Ronson indicated that he has been a licensed boat captain for a decade and often works at the Antique Boat Museum in Clayton, New York. On occasion, he does private charters when other captains are unavailable.

Mr. Ronson, in his letter, also wrote that:

[s]uch was the case with 1000 Island Yacht Charter where I filled in for another captain who was not available to complete a four day charter. I took an Osteopath MD and his wife from Hawaii from Clayton, NY to Kingston, Ontario, and then up the Rideau Canal in Ontario, Canada to Jones Falls spending the night there.

We cleared Canadian customs in Kingston on the way to the Rideau Canal. The next day we returned to the US clearing customs in Clayton N.Y.

The record does not include any supporting documentation related to the charter that Mr. Ronson captained.

38. Petitioner continues to own and operate Applied Filtration. As of the date of the hearing, petitioner continues to dock and store the vessel 1000 Isle Lady in Clayton, New York, and operate 1000 Islands Yacht Charter.

39. The Division prepared a valuation based upon a later date of entry into New York State, using information derived from the N.A.D.A. Marine Appraisal Guide, National Edition, January through April 2006 (NADA Guide). The auditor’s supervisor testified that, because petitioner had not provided an exact date of entry, or details concerning the vessel, an average retail value of \$86,575.00 was obtained, using the average retail value of four models of this

vessel, a 1996 model 3587 Bayliner aft cabin, listed in that NADA Guide. In its brief, the Division has indicated that if the evidence in the record is sufficient to show that the vessel entered New York State more than six months after purchase, it would adjust the assessment to the tax on \$86,575.00, the value obtained from the NADA Guide.

40. Petitioner did not submit an appraisal or any professional valuation of the vessel based upon the date it was brought into New York State. He also never identified the specific date on which the vessel was first brought into New York State.

41. The hearing in this matter was held on October 23, 2012 in Rochester, New York. Prior to the conclusion of the hearing, the administrative law judge asked both parties whether they had additional evidence they wished to submit, and advised the parties that the record would otherwise be closed. Petitioner replied that he had nothing further he wished to submit. The Division's representative also replied that he had nothing further he wished to submit. The record closed at the conclusion of the hearing, and a briefing schedule was set.

42. On December 6, 2012, as part of his initial brief, petitioner included statements allegedly made to him by "Maureen" and "Ann," employees of the New York State Department of Taxation and Finance, and "Bob Gauvin" of the U.S. Coast Guard. Petitioner's initial brief also included a statement concerning his current selling price for the vessel. These statements were not part of the record at hearing. Rather, they constitute additional evidence submitted after the record in this matter closed.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

Preliminarily, the Administrative Law Judge refused to allow petitioner's submission of additional evidence with his brief, following the close of the record.

Next, the Administrative Law Judge determined that use tax was due when the vessel first

entered New York waters and that petitioner had not demonstrated a clear and unambiguous entitlement to the exemption from sales and use tax under Tax Law § 1115 (a) (8) for commercial vessels primarily engaged in interstate or foreign commerce.

The Administrative Law Judge further determined that petitioner used the vessel for more than six months prior to his first use of the vessel in New York. Accordingly, the Administrative Law Judge directed the Division to recompute the tax herein based upon the value of the vessel at its first use in New York State on May 1, 2005, pursuant to Tax Law § 1111 (b) (1). The Administrative Law Judge directed the Division to base its recomputation upon the value obtained from the NADA Guide (*see* Finding of Fact 39). The Administrative Law Judge rejected petitioner's claimed value of \$20,000.00 for the vessel at the time of its first use in New York, noting the absence of any supporting valuation documentation.

The Administrative Law Judge also found that petitioner failed to establish reasonable cause and an absence of willful neglect in connection with his failure to report and pay use tax on the vessel, and, accordingly, sustained the imposition of penalty pursuant to Tax Law § 1145 (a) (1) (i).

THE ORDER OF THE ADMINISTRATIVE LAW JUDGE

The determination in this matter was issued on September 12, 2013. On October 23, 2013, petitioner filed a motion to reopen the record pursuant to section 3000.16 of the Rules of Practice and Procedure of the Tax Appeals Tribunal (20 NYCRR 3000.16). The basis of petitioner's motion was his claim that he had obtained newly discovered evidence among files that were previously damaged and thought to be lost as a result of a house fire in 2010. Petitioner also asserted that his failure to submit proof of the value of the vessel at the hearing was caused by erroneous tax information provided by Division employees. On March 6, 2014, the

Administrative Law Judge issued an order denying the motion because it was not filed within thirty days of the date of issuance of the determination.

ARGUMENTS ON EXCEPTION

Although he does not expressly contest the Administrative Law Judge's order, petitioner continues to assert, as he did in his motion, that he was misled by the erroneous advice of Division employees, and that such "misrepresentations" caused his failure to provide proof of the boat's value at the hearing. Petitioner submitted documents purportedly related to such valuation with his letter brief on exception. By letter dated June 11, 2014, this Tribunal advised him that we would not consider such documents in rendering our decision.

Petitioner also continues to argue on exception that the sales tax is a destination tax, and that the destination of the boat was Alexandria Bay, New York. Petitioner thus contends that the boat's value for use tax purposes should be based on its value when it arrived in Alexandria Bay, and that such value was far less than the NADA book value upon which the revised assessment was based.

Petitioner also continues to assert that the boat was primarily engaged in foreign commerce and therefore exempt from tax.

Petitioner further asserts that he was a California resident at the time he purchased the subject vessel, and thus questions whether he was a New York resident for use tax purposes.

The Division contends that the Administrative Law Judge properly denied petitioner's motion to reopen the record; that the vessel was subject to use tax upon its first use in New York; that the NADA valuation for the revised assessment was reasonable; that petitioner failed to prove entitlement to any exemption from tax; and that penalty was properly imposed.

OPINION

Addressing first the Administrative Law Judge's order, pursuant to the Rules of Practice and Procedure, a motion to reopen the record must be made "within 30 days after the determination has been served" (20 NYCRR 3000.16 [b]). Here, the determination was served by mail on September 12, 2013 (*see* 20 NYCRR 3000.23 [a]). Petitioner's motion to reopen, however, was not filed until October 23, 2013, or eight days beyond the 30-day limitations period. The Administrative Law Judge thus properly denied petitioner's motion (*see Matter of Czernicki*, Tax Appeals Tribunal, April 22, 2004).

We note further that, even if the motion to reopen was timely filed, petitioner has presented no facts that would constitute a basis for reopening the record.

The Rules of Practice and Procedure (20 NYCRR 3000.0 et seq.) provide the following grounds for vacating a determination rendered by an administrative law judge:

(1) newly discovered evidence which, if introduced into the record, would probably have produced a different result and which could not have been discovered with the exercise of reasonable diligence in time to be offered into the record of the proceeding, or

(2) fraud, misrepresentation, or other misconduct of an opposing party (20 NYCRR 3000.16 [a] [1], [2]).

Petitioner argues that its "newly discovered evidence" consists of recently discovered files and financial records that were damaged in a fire at his Sandy Creek residence. According to petitioner, the fire occurred in December 2010. Petitioner asserts that such newly discovered files will establish the boat's value and the boat's percentage of use in various chartering activities. Petitioner has not shown, however, that the new evidence was undiscoverable with reasonable diligence as of the time of the October 23, 2012 hearing. Accordingly, this basis for reopening the record must fail.

Petitioner also argues that purported erroneous advice provided by Division employees constitutes a “misrepresentation” within the meaning of 20 NYCRR 3000.16 (a) (2) and thus requires reopening the record in this matter. We disagree. Petitioner has not established the substance of any conversations he may have had with Division employees. Accordingly, he has not established that he received erroneous advice or whether he simply misunderstood the information that may have been conveyed to him. This rationale for petitioner’s motion thus also fails.

Turning to the use tax issue, such tax is imposed on the use within New York of certain tangible personal property purchased by a New York resident that would have been subject to sales tax if purchased in New York (*see* Tax Law § 1110 [a]; 20 NYCRR 525.2 [b] [1]). For purposes of the tax, “use” is defined broadly and includes “the exercise of any right or power over tangible personal property . . . by the purchaser thereof” (Tax Law § 1101 [b] [7]).

A “resident” for use tax purposes includes “any individual who maintains a permanent place of abode in [New York]” (20 NYCRR 526.15 [a]). Additionally, “any person while engaged in any manner in carrying on in [New York] any . . . business . . . shall be deemed a resident with respect to the use in [New York] of tangible personal property . . . in such . . . business . . . ” (20 NYCRR 526.15 [b] [2]).

Here, petitioner purchased and took possession of the subject vessel in Florida in 2004 (*see* Finding of Fact 13). That retail transaction was, of course, not subject to New York sales tax, but would have been if the purchase occurred in New York. Subsequent to the purchase, petitioner “used” the vessel, as that word is defined in the Tax Law, by causing it to sail north from Florida. Petitioner’s use of the vessel continued when it entered New York waters in May 2005. As the Administrative Law Judge correctly determined, at that point, the vessel became

subject to use tax (*see* 20 NYCRR 531.6 [b] [2]).

Contrary to petitioner's apparent understanding, "destination tax" as used in the sales and use tax regulations, refers to the point at which a purchaser takes possession of tangible personal property in a sales transaction (*see* 20 NYCRR 525.2 [a] [3]). That point controls both the incidence and rate of sales tax (*id.*). Accordingly, that term has relevance only with respect to sales tax.

Turning to petitioner's claim that his use of the boat was exempt from tax because it was a commercial vessel primarily engaged in interstate or foreign commerce (*see* Tax Law § 1115 [a] [8]), a commercial vessel is primarily engaged in interstate or foreign commerce "when 50 percent or more of the receipts from the vessel's activities are derived from interstate or foreign commerce" (20 NYCRR 528.9 [a] [4]). Interstate or foreign commerce is "the transportation of persons or property between states or countries" (20 NYCRR 528.9 [a] [5]). Upon review of the record, we agree with the Administrative Law Judge's analysis that petitioner failed to show the percentage of his receipts derived from transporting passengers in interstate or foreign commerce. The Administrative Law Judge's review of the record found, and we concur, that "petitioner failed to maintain and present any records listing his charters, detailing the character of the charters, and the amounts paid (receipts) for such charters." Petitioner thus failed to prove that his use of the vessel was exempt from tax under Tax Law § 1115 (a) (8).

Regarding the question of whether petitioner was a resident for use tax purposes, the regulations define such an individual as one who maintains a permanent place of abode in New York (20 NYCRR 526.15 [a] [1]). Here, the record supports a finding that petitioner maintained a permanent place of abode in New York at the time the boat was purchased (*see* Findings of Fact 5 and 24). We note that petitioner did not contest the Sandy Creek camp's status as a

permanent place of abode. In any event, since the boat was used in a business in New York, the regulations deem petitioner a resident for use tax purposes even if he did not maintain a permanent place of abode (*see* 20 NYCRR 526.15 [b] [2]).

Turning to the issue of valuation, the Administrative Law Judge properly determined that the vessel was subject to use tax based on its market value as of its first use in New York pursuant to Tax Law § 1111 (b) (1). We further agree with the Administrative Law Judge's conclusion that the NADA Guide's average retail value for the vessel was a reasonable valuation under the facts and circumstances herein.

Petitioner's contention that the vessel's value was substantially less than the NADA estimate is unsupported by any valuation in the record and is thus insufficient to overcome the Division's estimate.

In arguing in favor of a lower value for the boat, petitioner emphasizes the damage to the boat in New Jersey and on Oneida Lake. On this point, we note that although the boat sustained significant damage on its way to New York and soon after entering New York, it is not clear from the record the extent to which such damage affected the boat's market value. Petitioner continued to use the boat in his charter business and subsequently insured it for amounts well in excess of the NADA value (*see* Findings of Fact 28 and 29). Absent any evidence to the contrary, these facts suggest that the repairs restored the boat to a condition of fitness and that the boat retained a market value comparable to the NADA Guide's average retail value.

The Division asserted penalty herein pursuant to Tax Law § 1145 (a) (1) (i). That provision states that any person failing to file a return or pay over any sales or use tax "shall" be subject to a penalty. This penalty may be canceled if the failure was "due to reasonable cause and not due to willful neglect" (Tax Law § 1145 [a] [1] [iii]). Consistent with this statute, the

Division's regulations provide that penalty imposed under Tax Law § 1145 (a) (1) (i) "must be imposed unless it is shown that such failure was due to reasonable cause and not due to willful neglect" (20 NYCRR 2392.1 [a] [1]).

We agree with the Administrative Law Judge that petitioner has not established reasonable cause or an absence of willful neglect in connection with his failure to timely report and pay use tax on the subject vessel. We note that petitioner offered two theories as to why his use of the boat would not be subject to any use tax and thus why his failure to timely report and pay any use tax might be deemed reasonable.

First, petitioner claimed an exemption as a commercial vessel primarily engaged in interstate or foreign commerce. As noted previously, however, the record shows that petitioner failed to maintain or offer any records detailing his charter receipts to support his claim. Such a failure to maintain and present records to support a claim of exemption is inconsistent with reasonable cause and an absence of willful neglect. Second, petitioner claimed that he was not subject to use tax because he was not a New York resident at the time he purchased the boat. At the hearing, petitioner testified that a Division employee advised him that he was not subject to use tax because he was a nonresident. Even if accurate, this claim does not support a finding of reasonable cause and an absence of willful neglect because there is no evidence as to when petitioner obtained such advice. While a good faith effort to ascertain one's proper tax liability at or around the time the tax is due may be indicative of reasonable cause and good faith (*see* 20 NYCRR 2392.1 [g] [2]), an effort to justify one's position after the fact is clearly not.

Finally, we note that the documents submitted with petitioner's brief on exception have not been included in the record herein and have not been considered in the rendering of this decision.

As we stated recently:

“We have held that a fair and efficient hearing process must be defined and final, and that the acceptance of evidence after the record is closed is not conducive to that end and does not provide an opportunity for the adversary to question the evidence on the record [citations omitted]’ (*Matter of Ippolito*, Tax Appeals Tribunal, August 23, 2012, *affd sub nom Matter of Ippolito v Commissioner of N.Y. State Dept. Of Taxation and Fin.*, 116 AD3d 1176 [2014]). Accordingly, we reaffirm our longstanding policy against considering evidence that was not made part of the record below (*see Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991)” (*Matter of Shi Ying Tan*, Tax Appeals Tribunal, October 16, 2014).

We note that this same reasoning is applicable to, and thus supports, the Administrative Law Judge’s rejection of evidence offered by petitioner with his initial brief below (*see also Matter of Saddlemire*, Tax Appeals Tribunal, June 14, 2001).

Accordingly, it is ORDERED, ADJUDGED AND DECREED that:

1. The exception of Stan Groman is denied;
2. The order of the Administrative Law Judge is affirmed;
3. The determination of the Administrative Law Judge is affirmed;
4. The petition of Stan Groman is denied; and
5. The notice of determination dated December 10, 2009, as modified pursuant to

Conclusion of Law M of the Administrative Law Judge’s determination, is sustained.

DATED: Albany, New York
December 4, 2014

/s/ Roberta Moseley Nero
Roberta Moseley Nero
President

/s/ Charles H. Nesbitt
Charles H. Nesbitt
Commissioner

/s/ James H. Tully, Jr.
James H. Tully, Jr.
Commissioner