

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition :
of :
STAN GROMAN : DETERMINATION
for Revision of a Determination or for Refund of Sales and : DTA NO. 824274
Use Tax Under Articles 28 and 29 of the Tax Law for the :
Period February 9, 2004. :

Petitioner, Stan Groman, filed a petition 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.

A hearing was held before Winifred M. Maloney, Administrative Law Judge, at the offices of the Division of Tax Appeals, 183 East Main Street, Rochester, New York, on October 23, 2012 at 10:30 A.M., with all briefs submitted by March 15, 2013, which date began the six-month period for issuance of this determination. Petitioner appeared pro se. The Division of Taxation appeared by Amanda Hiller, Esq. (Robert Maslyn, Esq., of counsel).

ISSUES

I. Whether the Division of Taxation properly assessed either (a) sales tax on the purchase of a vessel by petitioner or (b) use tax upon the subsequent use of such vessel within the State of New York by petitioner.

II. 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

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

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.

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 statement included a one-page account statement, listing four invoices for unidentified services provided to Bakes Gem,³ 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

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.

³ The account statement listed only the issuance date, due date, invoice number, original amount due and balance due for the four invoices.

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 business 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 adds [*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 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; a portion of page 22 of 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, Summer Fun section; 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-033099984-8), dated December 10, 2009, assessing tax due in the amount of \$7,286.25 for the tax period ended February 9, 2004, plus interest in the amount of \$9,134.48 and penalty in the amount of \$2,185.82 for a total amount due of \$18,606.55.⁴ The computation section of the

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%.

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 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, borrowing \$100,000.00 of the purchase price from Bank of America, N.A. Petitioner admitted that he did not pay sales tax to the State of Florida on the purchase of the vessel. Following his purchase of the vessel, petitioner 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 Coast. On or before August 19, 2004, one of Bakes Gem’s two diesel engines broke down off

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.

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. Petitioner did not include any supporting documentation used to prepare the summary schedule of expenses for the year 2005. 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. None of the other Winter Harbor invoices listed on the page titled "Winter Harbor" are part of the record. Insurance proceeds in an unspecified amount paid the replacement costs incurred due to the accident on Oneida Lake. The record does not include any receipted invoices for the replacement of the engines and the other parts.

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

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

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 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. The record does not include the supporting income and expense source documentation used to create this summary statement.

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. It is unclear whether lay-up and winter storage for the year 2007 took place in Brewerton, New York, or in the Thousand Islands.

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. Petitioner did not register the vessel with the New York State Department of Motor Vehicles because the U.S. Coast Guard allegedly advised him that a documented vessel did not have to be registered in any state.

27. 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 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."

28. The record includes 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. The reverse side of each of these certificates of documentation contained the following information:

This certificate is not valid for operation of the vessel until the vessel is marked with the name, official number, and hailing port as shown on the certificate. The original certificate must be kept aboard the vessel at all times when in operation and must be presented upon the demand of federal, state or local officials for law enforcement purposes. Vessels with only a recreational endorsement may not engage in commercial trade.

Documented vessels may be registered by states for tax and other purposes and may be required to display a state decal. This certificate is valid for one year. Renewal is the responsibility of the owner. . . .

29. A Yacht Insurance Confirmation issued by Jack Martin & Associates, Inc., Insurance,

⁷ The U.S. Coast Guard may issue a Certificate of Documentation with a registry, coastwise, fishery or recreational endorsement (46 CFR 67.15[a]). A recreational endorsement entitles a vessel to pleasure use only (46 CFR 67.23). 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]).

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. The total policy premium due was \$2,055.00. The insurance policy, effective July 1, 2006, issued by ACE American Insurance Company is not part of the record.

30. 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 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. The insurance policy issued by Ace American Insurance Company is not part of the record.

31. 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

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

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.

32. On an unknown date, a fire heavily damaged the boat house level of petitioner's Sandy Creek residence. At that time, petitioner claims his financial records including business records related to the 1000 Island Yacht Charter business were lost due to smoke damage. According to petitioner, the repairs to the Sandy Creek residence took almost a year. During that time, he and his wife stayed at a friend's nearby camp and in a trailer on the Sandy Creek property.

33. 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.

34. 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.

35. The record includes 23 e-mail inquiries submitted to 1000 Islands Yacht Charter's e-mail address on various dates between July 26, 2006 and August 19, 2012.⁹ Some of these e-mail inquiries requested information about the availability of the yacht for charter on one or more specific dates. Other e-mail inquires requested general information about prices for charters of various durations, i.e., a half-day, one day, two days, three days, or four to six days, and the activities available during the charters.

36. 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.

37. 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

⁹ Six e-mail inquiries bore dates between July 26, 2006 and November 14, 2006; five e-mail inquiries bore dates between January 23, 2007 and June 21, 2007; four e-mail inquiries bore dates between April 6, 2011 and July 27, 2011; and eight e-mail inquiries bore dates between January 31, 2012 and August 19, 2012.

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.

38. 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.

39. To reduce dockage and storage costs, beginning in 2008 and continuing to the date of the hearing, 1000 Isle Lady has been docked at the French Creek Marina, located in Clayton, New York, where lay-up ashore and storage under cover outside have taken place. Clayton, New York, is approximately 60 miles from petitioner’s Sandy Creek residence. Petitioner docks his personal boats, a 15-foot runabout and a 27-foot cruiser, at the dock located behind his Sandy Creek residence.

40. 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.

41. 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.

42. 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.

43. 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 each party 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.

44. 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.

CONCLUSIONS OF LAW

A. Addressing first petitioner's submission of additional evidence in his initial brief, it is well established that new evidence may not be introduced after the record is closed.

The Tax Appeals Tribunal has established a firm policy of not allowing the submission of evidence after the record is closed. In *Matter of Saddlemire* (Tax Appeals Tribunal, June 14, 2001), the Tribunal succinctly stated:

[w]e have held that in order to maintain a fair and efficient hearing system, it is essential that the hearing process be both defined and final. If the parties are able to submit additional evidence after the record is closed, there is neither definition nor finality to the hearing. Further, the submission of evidence after the closing of the record denies the adversary the right to question the evidence on the record (*Matter of Emerson*, Tax Appeals Tribunal, May 10, 2001; *Matter of Schoonover*, Tax Appeals Tribunal, August 15, 1991).

Consistent with the reasoning in *Saddlemire*, petitioner's additional evidence, submitted after the record closed at the conclusion of the hearing on October 23, 2012, has not been included in the record and will not be considered in the rendering of this determination.

B. Tax Law § 1105(a) imposes a sales tax upon the receipts from "every retail sale of tangible personal property. . . ." Tax Law § 1132(c)(1) sets forth a presumption that all sales receipts for tangible personal property are subject to tax "until the contrary is established," and sets the burden of proving the contrary upon the vendor or its customer (20 NYCRR 532.4[a][1]; [b][1]).

C. 20 NYCRR 525.2(a)(3) provides as follows:

Except as specifically provided otherwise, the sales tax is a "destination tax." The point of delivery or point at which possession is transferred by the vendor to the purchaser, or the purchaser's designee, controls both the tax incidence and the tax

rate.

In this case, the evidence submitted supports a conclusion that purchase occurred and possession of the subject vessel was transferred to petitioner in Florida at some point in February, 2004. Therefore, the transaction was not subject to New York State sales tax imposed pursuant to Tax Law § 1105(a).

D. Tax Law § 1110(a), which imposes a compensating use tax, provides, in pertinent part, as follows:

Except to the extent that property or services have already been or will be subject to the sales tax under this article, there is hereby imposed on every person a use tax for the use within this state . . . except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail

Tax Law § 1101(b)(7) defines the term “use” as:

[t]he exercise of any right or power over tangible personal property . . . which are subject to tax under section eleven hundred ten of this article or pursuant to the authority of article twenty-nine of this chapter, by the purchaser thereof, and includes, but is not limited to, the receiving, storage or any keeping or retention for any length of time

E. Petitioner asserts that the subject vessel is exempt from use tax because it is a commercial vessel primarily engaged in interstate or foreign commerce. He claims that the evidence clearly establishes that since June of 2006, the majority of the time the subject vessel has been used in foreign commerce as a charter vessel that transports passengers to and from ports in the United States and Canada.

F. Tax Law § 1115(a)(8) provides exemption from sales and use taxes for:

[c]ommercial vessels primarily engaged in interstate or foreign commerce and property used by or purchased for the use of such vessels for fuel, provisions, supplies, maintenance and repairs (other than articles purchased for the original equipping of a new ship).

The Division’s regulations, in relevant part, define a “commercial vessel” as “any vessel

used or engaged in the transportation for hire of persons or property on water. Any vessel used or engaged for other purposes on more than an occasional basis is not a commercial vessel” (20 NYCRR 528.9[a][3]). 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” (20NYCRR 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]).

G. Statutes creating tax exemptions are to be strictly construed (*see Matter of Grace v. New York State Tax Commn.*, 37 NY2d 193, 371 NYS2d 715 [1975], *lv denied* 37 NY2d 708, 375 NYS2d 1027 [1975]). The burden of demonstrating clear and unambiguous entitlement to the exemption claimed rests with the party seeking the exemption (*see Matter of Marriott Family Rests. v. Tax Appeals Tribunal*, 174 AD2d 805, 570 NYS2d 741 [1991], *lv denied* 78 NY2d 863, 578 NYS2d 877 [1991]).

H. The evidence in the record clearly shows that the subject vessel entered New York State on or shortly after May 1, 2005, and has remained docked and stored in New York State ever since. It also shows that beginning in June of 2006 and continuing to the date of the hearing, petitioner has used the subject vessel in his business, 1000 Islands Yacht Charter. Petitioner’s yacht charter customers customize their charter cruises, but he sets the fees for and books each charter. As a requirement of his yacht charter insurance, petitioner employs U.S. Coast Guard licensed boat captains to operate the boat on the charters. While the affidavit of Mr. Morton does indicate that he captained charters that included locations in Canada, neither the dates of such charters nor the amounts paid for such charters are part of the record. In addition, Mr. Morton’s affidavit indicates that other unnamed captains also operated the vessel, but there are no affidavits from the other unnamed captains. Mr. Ronson’s statement regarding the charter

he captained into Canada also fails to identify the date of and the amount paid for such charter. The record includes only three pages of the vessel's daily cruising log for the year 2006. None of the vessel's daily cruising logs for the years subsequent to 2006 and the period January 1, 2012 through October 23, 2012 are part of the record. As evidence of the income earned by his business, petitioner submitted a summary of income and expenses for the year 2006 and two federal schedule Cs for the years 2010 and 2011, without any supporting source records. It is impossible to determine what percentage, if any, of the receipts, i.e. gross income, earned in the years 2006, 2010 and 2011 was from foreign commerce, i.e., charters transporting passengers to and from Canada; rather than charters conducted solely within New York State. Additionally, petitioner failed to submit any evidence regarding the receipts earned, i.e., detailed information about each charter conducted (the date, the amount paid and cruise destinations), during the years 2007 through 2009, and the period January 1, 2012 through October 23, 2012. Given the very limited information in the record regarding the receipts earned by 1000 Isle Lady as a charter vessel from June of 2006 to October 23, 2012, i.e., the date of the hearing, it is impossible to determine the percentage of its receipts derived from transporting passengers in interstate or foreign commerce. Petitioner failed to establish that the subject vessel is a commercial vessel engaged in interstate or foreign commerce. As such, the vessel is not exempt from compensating use tax.

I. Tax Law § 1111(b) provides in pertinent part as follows:

Tangible personal property, which has been purchased by a resident of New York state outside of this state for use outside of this state and subsequently becomes subject to compensating use tax imposed under this article, shall be taxed on the basis of the purchase price of such property, provided, however:

(1) That where a taxpayer affirmatively shows that the property was used outside such state by him for more than six months prior to its use within this

state, such property shall be taxed on the basis of current market value of the property at the time of its *first use* within this state. The value of such property, for compensating use tax purposes, may not exceed its cost. (Emphasis added.)

J. As noted above, petitioner provided very limited information regarding the vessel during the audit. He provided only two pages from the Brokerage Purchase and Sale Agreement, dated February 9, 2004, that listed the vessel's purchase price as \$100,500.00. Neither the vessel's date of entry into New York State nor the current market value of the vessel on such date was provided during the audit. As a result, the Division assessed tax due based upon the purchase price listed in the February 9, 2004 Brokerage Purchase and Sale Agreement.

K. It is petitioner's position that no use tax is due on the purchase of the subject vessel to start a yacht charter business because it was damaged in transit, had to be repaired or replaced before ever reaching its destination in Alexandria Bay, New York, and New York State sales tax was paid on such replacement. He points out that the vessel was in its second year of ownership when the second accident occurred on Oneida Lake, and in its third year of ownership when it finally reached Alexandria Bay in June of 2006 to begin chartering. He claims that several years of depreciation should be considered besides the fact that half the boat's worth was added by replacing an engine in New Jersey and paying tax on that portion. As such, petitioner contends that if use tax was due, the net taxable value of the boat could not be more than \$20,000.00 at that point.

L. With respect to petitioner's claim that delivery of the vessel was not completed until it reached Alexandria Bay, New York, where it was to be docked in June of 2006, it is meritless. His purchase of the subject vessel took place in February of 2004, at which time he took delivery and possession of the vessel. Following his purchase of the boat, petitioner purchased and installed additional equipment on the boat (*see* Finding of Fact 13). The exact date on which the

vessel left Fort Myers, Florida, for New York State is not part of the record because petitioner could not recall it, and he failed to submit the vessel's daily cruising log for the year 2004. However, documents in the record clearly show that the subject vessel broke down off the coast of New Jersey, near Mantoloking, on or before August 19, 2004, and it remained at Winter Yacht Basin, located in Mantoloking, New Jersey, for repairs and winter storage. On or about May 1, 2005, the subject vessel left New Jersey, traveled the Atlantic Ocean to the waters around the New York City area, up the Hudson River, through the Erie Canal, and onto Oneida Lake, where an accident destroyed the propellers, the rudders and the struts, and ripped the transmissions off the engines. Documents in the record indicate that from at least May 15, 2005 until June 15, 2006, the subject vessel was ashore, repaired and stored at Winter Harbor, Brewerton, New York. On June 15, 2006, the vessel traveled from Brewerton, and arrived at Alexandria Bay, New York, on June 16, 2006, where it remained docked for the 2006 boating season. Lay-up and winter storage for the year 2006 took place in Brewerton. During the 2007 boating season, the vessel was docked in Alexandria Bay. However, it is unclear whether lay-up and winter storage for the year 2007 took place in Brewerton, or in the Thousand Islands. Beginning in 2008 and continuing to the date of the hearing, the subject vessel has been docked and stored in Clayton, New York. The evidence clearly shows that beginning on or about May 1, 2005 and continuing to the date of the hearing, petitioner's vessel has been kept, docked, repaired and stored in New York State. Despite the absence of the vessel's daily cruising log for the year 2005 and petitioner's vague testimony, it is clear that the vessel was first used in New York State on May 1, 2005, approximately two weeks before the Oneida Lake accident occurred (*see* Tax Law § 1101[b][7]), and almost sixteen months after it was purchased in Florida.

M. Since the evidence clearly shows that the vessel was used outside of New York State

for more than six months prior to its use within this state, the vessel was subject to compensating use tax based upon its current market value at the time of its first use within New York State (Tax Law § 1111[b][7]). Petitioner contends that the current market value of the vessel could not be more than \$20,000.00 at the time of its first use in New York State. However, he failed to submit an appraisal or any professional valuation of the vessel based upon its entry date into New York State. Given the absence of any supporting valuation documentation, petitioner's claimed value is rejected.

As noted above, the Division prepared a valuation based upon a later date of entry into New York State, using information obtained from the NADA Guide for the period January 2006 through April 2006. Since petitioner never provided an exact date of entry, or details concerning the vessel, the Division determined an average retail value of \$86,575.00, using the average retail value of four models of the subject vessel listed in the NADA Guide (*see* Finding of Fact 41). Since petitioner failed to submit an appraisal or any professional valuation of the vessel based upon its entry date of May 1, 2005, I find the Division's valuation of \$86,575.00 to be reasonable and it is accepted as the current value of the vessel on its first use in New York State, i.e. May 1, 2005. Therefore, the Division is directed to recompute the tax due in this matter based upon \$86,575.00, the current value of the vessel at its first use in New York State on May 1, 2005.

N. Tax Law § 1145 (a)(1)(I) imposes a penalty upon persons who fail to timely file a return or timely pay the tax imposed by Articles 28 and 29 of the Tax Law. The penalty may be waived if "such failure or delay was due to reasonable cause and not due to willful neglect" (Tax Law § 1145[a][1][iii]). In determining whether reasonable cause and good faith exist, the regulations provide several specific grounds and also a catchall provision, which provides for a finding of reasonable cause based upon any ground for delinquency which would appear to a

person of ordinary prudence and intelligence as a reasonable cause for delay, demonstrating an absence of willful neglect (20 NYCRR 2392.1[d][5]). The taxpayer bears the burden of establishing that his actions were based upon reasonable cause and not willful neglect (*see Matter of Philip Morris*, Tax Appeals Tribunal, April 29, 1993; *Matter of MCI Telecommunications Corp.*, Tax Appeals Tribunal, January 16, 1992, *confirmed* 193 AD2d 978, 598 NYS2d 360 [1993]).

O. Petitioner has failed to establish reasonable cause or the absence of willful neglect in the present matter. As the Division pointed out in its brief, petitioner failed to report the use of the boat regardless of whether tax was due (20 NYCRR 531.6[f]). In addition, petitioner failed to retain and present any records, listing his charters, detailing the character of the charters, and the amounts paid (receipts) for such charters, to support his claim of exemption as a commercial vessel engaged in interstate or foreign commerce. As such, the Division's imposition of penalty is sustained.

P. The petition of Stan Groman is granted to the extent indicated in Conclusion of Law M; the Division of Taxation is hereby directed to modify the Notice of Determination issued on December 10, 2009 accordingly, and except as so granted, the petition is in all other respects denied.

DATED: Albany, New York
September 12, 2013

/s/ Winifred M. Maloney
ADMINISTRATIVE LAW JUDGE