

STATE OF NEW YORK

DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
<b>MICHAEL PELLINO</b>	:	<b>DETERMINATION</b>
for Revision of a Determination or for Refund of	:	<b>DTA NO. 825869</b>
Sales and Use Taxes under Articles 28 and 29 of the	:	
Tax Law for the Period Ended July 7, 2008.	:	

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Petitioner, Michael Pellino, filed a petition for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period ended July 7, 2008.

On December 18, 2014 and December 26, 2014, respectively, petitioner, appearing by Wormser, Kiely, Galef & Jacobs LLP (Ira Stechel, Esq., of counsel), and the Division of Taxation, appearing by Amanda Hiller, Esq. (David Gannon, Esq., of counsel) waived a hearing and submitted this matter for determination based on documents and briefs to be submitted by May 1, 2015, which date commenced the six-month period for issuance of this determination. After review of the evidence and arguments submitted, Dennis M. Galliher, Administrative Law Judge, renders the following determination.

***ISSUES***

I. Whether petitioner has established that he is not liable for sales or compensating use tax pursuant to sections 1101(b)(7) and 1110 of the Tax Law based upon the use of his yacht in New York.

II. Whether, assuming petitioner is liable for such tax, he has nonetheless established any bases warranting cancellation or reduction of penalties.

***FINDINGS OF FACT***<sup>1</sup>

1. Petitioner, Michael Pellino, resides in Hopewell Junction, New York, and has lived there since at least May 12, 2005.
2. Petitioner is a New York resident, and has been since at least 2005.
3. In 2005, petitioner purchased a vessel from Bluewater Yacht Sales, Hampton, Virginia. The vessel is listed as a 2000 Viking 50' Convertible, hull ID number VKY50711G900, named "Legend." In June 2005, petitioner's acquisition of the vessel was registered with the United States Coast Guard (USCG), under the USCG numeric designation 1094156.
4. According to the Buyer's Settlement Statement dated May 12, 2005, the purchase price, plus trade of a 1988 Ocean Yacht 48', hull ID number XYU10048A888-F, was \$650,000.00. Petitioner accepted delivery of the vessel in the State of Virginia and paid sales tax in the amount of \$2,000.00 to the State of Virginia (the maximum amount required under Virginia law) in connection with the acquisition of the vessel.
5. After taking possession in Virginia, petitioner transported the vessel directly to the State of Connecticut. In January 2008, and in connection with his use of the vessel permanently and continuously in the State of Connecticut, petitioner paid Connecticut use tax, plus interest, in the amount of \$40,330.00.<sup>2</sup>
6. Thereafter, and pursuant to continuous winter and summer storage and docking contracts, the vessel was moored during the summers of 2006 to 2012 at the Brewer's Yacht Haven Marina (Brewers Marina) in Stamford, Connecticut; was stored during the winter of 2005

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<sup>1</sup> The parties entered into a Stipulation of Facts setting forth some 16 individually numbered and agreed to facts, and the same are set forth herein, together with facts taken from an affidavit submitted by petitioner and from an affidavit submitted by Jeffrey Jennings, a Division of Taxation Tax Technician III.

<sup>2</sup> The Connecticut use tax was calculated as  $\$650,000.00 \times 6\% = 39,000.00$ , less  $\$2,000.00$  (tax paid to Virginia) =  $\$37,000.00$ , plus  $\$3,330.00$  (interest through 01/15/08) =  $\$40,330.00$ .

- 2006 at Norwalk Cove Marina (Norwalk Marina) in East Norwalk Connecticut; was stored during the winters of 2006 - 2007 and 2007 - 2008 at Brewers Marina; and was moored during the winter of 2008 - 2009 at Blue Water Outer Banks Yacht Service in Wanchese, North Carolina.

7. The vessel was moved (sailed) from its historically permanent mooring and storage locations in Connecticut in 2008, was moored in North Carolina during the winter of 2008 - 2009 to allow for warranty and non-warranty service work to be performed there on the vessel, and was thereafter moved (sailed) back and returned to its historically permanent mooring and storage locations in Connecticut in 2009.

8. During the entire decade of petitioner's ownership, he docked the vessel in New York on only two brief occasions. In both of these instances, the vessel was docked at Danfords on the Sound Marina (Danfords) in Port Jefferson, New York, as follows:

a) On June 7, 2008, petitioner made a temporary stopover at Danfords to pick up a crew member who was joining him on his trip to North Carolina. During this stopover, petitioner had dinner with the crew member, they stayed overnight and then continued on their trip. Petitioner had no intention of remaining in New York for any period of time, and merely stayed overnight as a courtesy to the crew member who was joining him on his trip.

b) On June 26, 2009, petitioner made a temporary stopover at Danfords when he was transporting the vessel from its 2008 - 2009 winter mooring location for repairs in North Carolina back to its permanent location in Connecticut. Due to the length of the trip from North Carolina to Connecticut, petitioner and his crew made several brief stopovers along the way including one in Virginia, one in New Jersey and one at Danfords in New York. He departed Danfords after three nights on June 29, 2009 to complete his trip by returning to Connecticut.

9. Other than these two stopovers in New York while en route to other destinations for the specific purpose of having service work performed on the vessel, petitioner has never docked the

vessel in New York State, nor has petitioner ever entered into any short-term or long-term contracts for the storage of the vessel, either at Danfords or anywhere else, in New York State.

10. In 2010, the Division of Taxation (Division) conducted a review of marinas and yacht clubs throughout New York State to determine if proper New York State and local sales or compensating use tax had been paid on the purchase or use of vessels docked, moored or stored at New York marinas or yacht clubs. As a result of information supplied, the Division became aware of the two instances where the vessel had stopped in New York, as described above.

11. By correspondence dated October 27, 2011, the Division informed petitioner that, after a review of records, it was unable to verify that petitioner had either paid tax to New York or claimed an exemption from tax for the vessel.

12. On April 24, 2012, the Division issued to petitioner a Notice of Determination assessing tax due in the amount of \$13,812.50, plus interest and penalty.

13. Petitioner challenged the notice by requesting a conciliation conference with the Division's Bureau of Conciliation and Mediation Services (BCMS). On June 7, 2013, BCMS issued a Conciliation Order (CMS No. 253527) reducing the amount of tax assessed from \$13,812.50 to \$8,687.69, plus interest and penalty. The reduction in tax reflects a recalculation of tax due based on the fair market value of the vessel at the time it was first used, as alleged, in New York (\$502,950.00) rather than on its purchase price (\$650,000.00), at the Dutchess County, New York tax rate (8.125%), and allowing credit for taxes previously paid to Virginia (sales tax) and Connecticut (use tax). The dollar amount of adjusted tax assessed does not appear to be in dispute, and was computed as follows:

Fair Market Value (upon first alleged NY use)	\$502,950.00
Dutchess County Tax Rate	8.125%

Tax rate applicable to first \$100,000.00 (8.125% less 2% [Va. tax pd] and 6% [Ct. tax pd.]	0.125%
Tax rate applicable to \$402,950.00 balance (8.125% less 6% [Ct. Tax pd.]	2.125%
\$100,000.00 x 0.125%	\$ 125.00
\$402,950.00 x 2.125%	<u>8,562.69</u>
Tax assessed	<u>\$ 8,687.69</u>

**CONCLUSIONS OF LAW**

A. 20 NYCRR 525.2(a)(3) provides, in pertinent part, as follows:

"The sales tax is a 'destination tax,' that is, the point of delivery or point at which possession is transferred by the vendor to the purchaser or designee controls both the tax incident and the tax rate."

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

B. Tax Law § 1110, 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 . . . by the purchaser thereof and includes, but is not limited to, the receiving, *storage* or *any keeping or retention for any length of time* . . ." (emphasis added).

C. The burden of establishing the exemption from tax is upon the petitioner, but the burden of proving that the use was subject to tax is upon the Division (*Matter of Sunshine*

*Developers v. Tax Commn. of State of New York*, 132 AD2d 752 [1987], *lv denied* 70 NY2d 609 [1987]).

D. The Division essentially argues that the mere fact that the vessel was physically present in New York at all, having made two, very short-lived stops, some one year apart from each other and while the vessel was en route or in transit to another state, demonstrates a taxable "use" in New York under Tax Law § 1107(b)(7). Although the statutory definition of "use" is broad, it is not all encompassing. It has been recognized that "use" in New York may be so de minimis that the tax is not triggered. In *Matter of Sunshine Developers* (State Tax Commission, December 13, 1985 [TSB-H-86(84)S]), the former State Tax Commission found that "the temporary mooring of [a] . . . boat at a New York marina while en route to a location outside of New York State did not create a 'use' within New York State as defined in section 1101(b)(7) of the Tax Law." (*confirmed Matter of Sunshine Developers v. Tax Commn.*, at 754). In another case, the Commission determined that bringing a vessel into New York for emergency repairs covered under a warranty did not constitute a New York use (*Matter of Jamco Investments*, State Tax Commission, January 17, 1986 [TSB-H-86(19)S]).<sup>3</sup>

E. The temporary physical presence of petitioner's vessel in New York while en route to another state, as here, was not sufficient to trigger the compensating use tax imposed by Tax Law § 1110. That is, the facts of this case compel the conclusion that the two brief stops in New York for one night while petitioner was initially piloting the vessel to North Carolina from its historically permanent mooring and storage location in Connecticut, specifically for the performance of warranty and non-warranty service work on the vessel while it was moored

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<sup>3</sup> Decisions of the former State Tax Commission, while not binding on this forum, are entitled to respectful consideration (*see Matter of The Racal Corporation*, Tax Appeals Tribunal, May 13, 1993).

in North Carolina during the winter of 2008 - 2009, and for three nights while petitioner was return-piloting the vessel back from North Carolina following the completion of such service work to its historically permanent mooring and storage locations in Connecticut, clearly were transient stops while en route between locations in other states. Such stops do not constitute a “use” upon which use tax may properly be imposed.

F. Here, over the course of petitioner’s near decade-long period of ownership, the vessel was moored and stored in Connecticut continuously since its purchase, with the sole exception of one winter in North Carolina for purposes of service as described. In connection with that sole exception, the vessel stopped in New York during its transit from Connecticut to North Carolina and during its transit from North Carolina back to Connecticut. A “use” for purposes of the regulation requires something more than a mere stopover during the passage of a vessel through New York on a transient basis. Here there was no intent to “keep,” “store” or “retain” the vessel in New York, nor was the vessel in fact “kept,” “stored” or “retained” in New York, as such terms are reasonably understood and applied in the context of the vessel’s ephemeral period of presence in New York. As noted, a temporary mooring or docking at a particular marina within New York State, essentially constituting a "stopover" en route to another out-of-state destination, is not a use subject to tax (*see Matter of Sunshine Developers v. Tax Commission; see also Matter of Jamco Investments*). That the property in question is a boat that was in transit over the water is of no particular significance. The result would be no different if the boat had instead been placed on a trailer for transit to North Carolina by petitioner, with petitioner making an overnight stop in New York at a hotel rather than at a marina (or at a private residence for that matter) during the course of such transit (except,

perhaps, for the availability of records by which such stop might be discovered). Such a stop in New York simply does not rise to the level of a taxable use.

G. The petition of Michael Pellino is hereby granted and the Notice of Determination dated April 24, 2012 is canceled.

DATED: Albany, New York  
October 1, 2015

/s/ Dennis M. Galliher  
ADMINISTRATIVE LAW JUDGE