

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions	:	
of	:	
CELTIC QUEST, INC.	:	DETERMINATION
for Revision of Determinations or for Refund of	:	DTA NOS. 825281
Sales and Use Taxes under Articles 28 and 29 of the	:	AND 824935
Tax Law for the Period January 1, 2008 through	:	
July 20, 2012.	:	

Petitioner, Celtic Quest, Inc., filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period January 1, 2008 through July 20, 2012.

A hearing was held before Arthur S. Bray, Administrative Law Judge, in New York, New York, on August 20, 2013 at 10:00 A.M., with all briefs to be submitted by October 29, 2013, which date commenced the six-month period for the issuance of this determination. Petitioner appeared by Desmond J. O’Sullivan, Sr., Esq. The Division of Taxation appeared by Amanda Hiller, Esq. (David Gannon, Esq., of counsel).

ISSUE

Whether petitioner has established that its vessels were exempt from sales and use tax because they were primarily engaged in interstate commerce.

FINDINGS OF FACT

1. Petitioner, Celtic Quest, Inc. (Celtic Quest), is a corporation that charters vessels to its clients for parties and fishing expeditions. The corporation is based in Port Jefferson, New York. Desmond O'Sullivan is the president, chief operating officer and sole shareholder of the corporation.

2. Petitioner's customers pay a fee for the opportunity to go fishing on its vessels. They do not pay for the fish that they catch. Most of the passengers bring their own supplies such as coolers, food, rods and bait. However, petitioner is prepared to offer its customers all of the fishing equipment, services and assistance they need, including fishing lessons, in order to take families on a fishing excursion. Petitioner helps its customers harvest, clean and pack the fish in their coolers. The excursions may last a day or a day and half before returning to the port of departure. Usually, petitioner's vessels depart from Port Jefferson, New York. However, in the winter months, the vessels depart from Montauk, New York.

3. In the course of a "marina sweep," the Division of Taxation (Division) identified a vessel named Celtic Quest II. This vessel has a length of approximately 60 feet and is capable of transporting 70 passengers. Following research on the vessel, discussions with Mr. O' Sullivan and the exchange of documents, the Division notified petitioner that sales and use tax was due on the purchase of this vessel.

4. In a letter dated December 2, 2010, petitioner advised the Division that the purchase price of the vessel was \$160,000.00 and asked the Division to calculate the amount of tax due plus interest. Petitioner also requested that the penalty be waived.

5. On January 3, 2011, pursuant to a letter provided by the Division, petitioner paid \$16,926.25 in full satisfaction of the amount determined to be due and owing. Thereafter,

petitioner filed a claim for a refund of the amount paid on the basis that the vessel is exempt from sales and use taxes because it is primarily engaged in interstate commerce. By correspondence dated February 24, 2011, petitioner received notice that its claim for refund was denied.

According to the letter, interstate or foreign commerce means the transportation of persons or property between states or countries and that merely crossing state lines in the course of a business is not considered engaging in interstate commerce. The Division reasoned that since all of the trips began and ended from the same location in New York, the business was not engaged in interstate commerce.

6. During a discussion with Mr. O'Sullivan regarding Celtic Quest II, the Division learned that petitioner had acquired a second vessel, Celtic Quest IV. Each of petitioner's vessels was used interchangeably for parties or fishing depending upon the clientele for the day. Petitioner provided documentation regarding the purchase price, requested a computation of tax and interest due and asked that penalty be waived. In response, the Division advised petitioner that \$26,352.06 was due. On or about July 23, 2012, petitioner paid, under protest, the amount sought. On July 27, 2012, the Division received a claim for refund for the full amount that petitioner paid on the basis that the purchase of the vessel was exempt from sales tax.

7. On September 7, 2012, petitioner was advised that the claim for refund was denied. The Division's explanation for the denial of the refund was the same as that set forth in the previous letter denying a refund (Finding of Fact 5).

8. Mr. O'Sullivan received his boat captain's license about the time he was 20 years old. Upon graduation from school, he began working as a full-time captain managing a fleet in the United States. In 2002, Mr. O'Sullivan started Celtic Quest with one vessel.

9. When Mr. O'Sullivan began his business, he noticed that the fish had changed their migration habits and that the quality of the fishing near Post Jefferson Harbor diminished greatly. He also noticed that the fish began to congregate in greater numbers in the waters of Connecticut and Rhode Island because the plateaus in the area attracted fish. With access to the internet, many other fishermen also became aware of where the fish had moved. Consequently, for approximately 10 months of the year, Mr. O'Sullivan marketed his business with the explicit offer of taking his customers on extended trips to the waters of Connecticut and Rhode Island.

10. For a period of approximately five weeks to two months of the year, certain fish spawn near Port Jefferson and petitioner did not travel into the waters of other states. Petitioner would never make a practice of fishing in local waters for a longer period of time because, if he did so, his business would suffer. At the hearing, Mr. O'Sullivan estimated that 75 percent of his income was from interstate expeditions.

11. Mr. O'Sullivan noticed that the level of business of those fishing vessels that continue to fish in the area of Port Jefferson has stayed the same or diminished while his business has grown exponentially.

12. Mr. O'Sullivan has taken a number of steps in order to be able to safely and comfortably transport passengers to fishing grounds off nearby states. Petitioner's ships are inspected by the U.S. Coast Guard every two years. As part of this process, he obtained an upgraded coastal certification rather than a simple inland certification. The Coast Guard seeks to verify that the ships' hulls are suitable for long trips and that the ships carry the required safety equipment in order to take passengers a certain distance from shore. The upgraded certification also has much stricter requirements in terms of the stability of the vessel and how many passengers can be transported aboard the vessel. Further, with the upgraded certification, the

ship was required to have a global positioning device. If he were not making interstate trips, he would not have been required to have this item.

13. During the period in issue, Mr. O'Sullivan was registered to operate a party and charter boat in the State of Connecticut. He also had a license to operate a party and charter boat in Rhode Island.

14. During the period in issue, petitioner had a Northeast Federal Fishing Permit. Petitioner needed this permit because when his vessels are outside of state waters, they are in federal waters.

15. As set forth above, Mr. O'Sullivan believed it was essential for him to market out-of-state trips to the waters off Connecticut and Rhode Island where the fish congregate in greater numbers. Toward this end, petitioner offered a number of different fishing trips to its customers. Among the trips offered by petitioner were the following:

a. One of the trips that petitioner offered regularly was called "Connecticut Chunking [sic] Special!!!" This was a special type of fishing involving the use of bait to catch striped bass and bluefish. According to petitioner's advertisement, "These trips travel to Connecticut's [sic] prime Bass and Bluefish grounds located off Bridgeport, home to some of the biggest bass and bluefish in Long Island Sound!" Connecticut's fishing grounds were prized because they had lighter tides and more shallow waters.

b. Petitioner offered a trip called the "East End Promise Land Specials!!" The advertisement for this excursion offered passengers the opportunity to fish the Connecticut waters of the Thimble Islands and described the outing as extended day trips to some of the most productive and fertile bottom fishing grounds in the region. The Thimble Islands are rock structures off the coast of Connecticut. Sea bass, porgies and blackfish congregate in this area.

Mr. O'Sullivan spent thousands of dollars to explore these areas so he would be prepared to take his customers there.

c. A mainstay for petitioner from the middle of July through the fall is a trip called "Middle Ground Madness Combo Trips!!" Petitioner advertises that these trips depart daily to Connecticut waters and feature fishing for striped bass, blue fish, porgies and sea bass. Middle ground madness is an area of Connecticut known as the Stratford Shoal Middle Grounds. The shoal rises out of the water to form a great rock structure. Many types of fish live in this area because it is a natural reef. This is a popular trip and at the time of the hearing, all of petitioner's trips were to the Stratford Shoal Middle Grounds or beyond. The only exception is if weather conditions make such a trip dangerous. In this event, petitioner uses the North Shore of Long Island to take cover from the wind.

d. In the winter, petitioner docks a boat in Montauk, Long Island, and offers a trip known as the "Extended Day Codfish Special!!" This voyage was one of the reasons that petitioner purchased the Celtic Quest IV. Petitioner knew that he needed a larger boat that was more seaworthy and able to carry passengers comfortably in the winter months. On this trip, petitioner's vessel departs on a Friday evening and does not return until Saturday evening. The ship travels to a location that is southeast of Block Island, which are waters under the jurisdiction of Rhode Island. Sometimes petitioner's vessels travel as far as the border of Massachusetts.

e. For the past several seasons, petitioner brought passengers to an area known as Cos's Ledge. This area is located in Rhode Island waters near the border with Massachusetts.

SUMMARY OF THE PARTIES' POSITIONS

16. In essence, the Division maintains that petitioner is not engaged in interstate commerce because all of its trips begin and end in New York waters. The Division notes that

some of petitioner's trips were entirely within New York waters. The Division also maintains that petitioner has not demonstrated that it is primarily engaged in interstate commerce.

17. In response to the Division's position, petitioner submits that the central question in this case is whether petitioner is engaged in interstate commerce when it transports people and equipment from New York to Connecticut and Rhode Island and then returns to New York. Petitioner posits that under both federal and New York law, petitioner is clearly engaged in interstate commerce.

CONCLUSIONS OF LAW

A. Tax Law § 1101(b)(16) defines a commercial vessel as one which is primarily used to "(I) transport persons or property, for hire." Here, since petitioner uses its vessels to transport passengers for parties or participate in fishing trips it satisfies the definition of a commercial vessel.

B. Tax Law § 1115(a)(8) and 20 NYCRR 528.9(b)(1) grant commercial vessels that are primarily engaged in interstate or foreign commerce an exemption from sales tax. The term "interstate or foreign commerce" is defined as the transportation of persons or property between states or countries (20 NYCRR 528.9[a][5]). Thus, the question presented is whether the transportation of customers that begins and ends in New York, but has as its destination the waters of another state, constitutes interstate commerce.

C. In *Central Greyhound Lines v. Mealey*, 334 US 653 (1948) the Court reviewed a tax imposed by New York on a carrier's gross receipts arising from transportation between locations within New York but which utilized routes over the highways of Pennsylvania and New Jersey. Central Greyhound maintained that New York may not impose a tax on the gross receipts from such transportation because it was engaged in interstate commerce. In response to this claim, the

Court first concluded that the transportation in issue was interstate commerce stating: “It is too late in the day to deny that transportation which leaves a State and enters another State is ‘Commerce * * * * among the several states’ simply because the points from and to are in the same State.” (citations omitted.) The principle recited in *Central Greyhound* is determinative and requires that the Division’s position that petitioner is not engaged in interstate commerce be rejected.¹

D. In reaching the conclusion that petitioner was engaged in interstate activity, the determinative factor is that the destinations of the voyages were the waters off Connecticut or Rhode Island for fishing. Significantly, petitioner advertised the interstate nature of the voyages in order to prompt petitioner’s customers to book passage on its vessels. This is not a situation where the passages through Connecticut or Rhode Island were incidental to an intrastate voyage or where the travel through nearby states was simply to avoid imposition of sales tax. Rather, the interstate voyages were a central element of the business plan. It is for this reason that the cases cited by the Division are distinguishable. In *Matter of Callanan Marine Corp. v. State Tax Commn.* (98 AD2d 555 [3d Dept 1984]) the Court found that a route that began and ended in New York was not primarily engaged in interstate or foreign commerce because it found that a temporary docking in New Jersey and a temporary passage through New Jersey waters was merely incidental to a clearly intrastate journey. Similarly, *Matter of Day-Line, Inc.* (State Tax Commission, July 18, 1980) presented a situation where travel was made to New Jersey merely to avoid New York sales tax.

¹ The Division appears to have recognized this principle in the past on at least one occasion (*see* TSB-M-09[7]S).

E. The Division next maintains that petitioner has failed to meet its burden of proof to show that it was primarily engaged in interstate commerce. Specifically, the Division's brief states, in part:

no trip diaries, logs, coordinates, routes, maps, reports, etc. have been provided detailing the trips taken by the vessels in question during the periods in question. Further, no revenue or other financial information relating to the trips taken by the vessels in question during the periods in question has been provided.

F. The raising of this issue is problematic. As explained in the Findings of Fact, petitioner was denied an exemption from sales and use tax because each trip began and ended at the same New York port and this was not considered as interstate commerce. There is no indication in the record of any factual issue raised by the Division regarding the number of trips taken, the routes that were taken, the amount of time spent on the voyages, the number of passengers on each trip or the amount of revenue generated. Similarly, the answer of the Division merely states that all purchases and sales of tangible personal property are presumptively subject to tax and that petitioner has the burden of proof.

The Tax Appeals Tribunal has explained that in determining whether an issue may be raised for the first time, it is necessary to distinguish legal from factual issues. The raising of new legal issues after the record has been closed has been permitted (*see Matter of Howard Enterprises*, Tax Appeals Tribunal, August 4, 1994). However, the Tribunal has precluded the raising of new factual issues after the record is closed because it denies the party that bears the burden of proof the opportunity to submit evidence (*Matter of Clark*, Tax Appeals Tribunal, September 14, 1992).

In this instance, by raising an issue regarding the sufficiency of the proof pertaining to the nature of the trips, the Division has changed the focus of the inquiry from a legal issue, whether a

trip that begins or ends at the same location can be regarded as an interstate voyage, to a factual one regarding the sufficiency of the evidence. In my opinion, it is unfair to permit a party to raise this type of factual issue after the record is closed for the reason set forth directly above.

Assuming that the foregoing issue may be properly raised, it is concluded that Mr. O'Sullivan's credible testimony clearly establishes that more than 50 percent of petitioner's receipts were derived from interstate commerce. Contrary to the assertion raised by the Division, credible testimony is sufficient to sustain a petitioner's position (*see Matter of Avildsen*, Tax Appeals Tribunal, January 26, 1995).

G. The petitions of Celtic Quest, Inc. are granted, and the Division is directed to refund the amounts claimed plus applicable interest.

DATED: Albany, New York
April 3, 2014

/s/ Arthur S. Bray
ADMINISTRATIVE LAW JUDGE