STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
SUNSHINE DEVELOPERS, INC., JOSEPH MORRIS AND ROBERT MORRIS	:	DECISION
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Periods June 1, 1981 through August 31, 1981 and June 1, 1984 through August 31, 1984.	:	

The Division of Taxation filed an exception to the determination of the Administrative Law Judge, issued on May 3, 1990, with respect to a petition filed by Sunshine Developers, Inc., Joseph Morris and Robert Morris, 535 Secaucus Road, Secaucus, New Jersey 07094, for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1981 through August 31, 1981 and June 1, 1984 through August 31, 1984 (File No. 802194). The Division of Taxation appeared by William F. Collins, Esq. (James Della Porta, Esq., of counsel). Petitioners appeared by Simon, Uncyk & Borenkind, Esqs. (Eli Uncyk, Esq., of counsel).

Both parties submitted briefs. At the request of the Division of Taxation, oral argument was heard on November 14, 1990.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioner corporation was a nonresident of New York such that the use of its boats by its officers in New York would be exempted from use tax under Tax Law § 1118(2).

II. Whether Joseph Morris and Robert Morris, officers of the corporation, may be held personally liable for payment of the use tax.

III. Whether petitioners have established reasonable cause for abatement of penalties assessed by the Division of Taxation.

IV. Whether petitioners are entitled to a credit for sales tax paid to the State of New Jersey on the purchase of the 50-foot Hatteras Convertible.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge except for findings of fact "4", "5", "6", "8" and "10" which have been modified. The Administrative Law Judge's findings of fact, except for finding of fact "12", and the modified findings of fact are set forth below.[1]

In the early 1980's, the Division of Taxation undertook a boat audit program, i.e., it canvassed New York waters, surveyed marinas and obtained information from boat dealers for the primary purpose of identifying persons (and corporations) who purchased boats out of state and subsequently brought such boats into the State, thereby incurring potential sales or use tax liability.

Based upon information obtained as a result of this audit program, the Division of Taxation, on April 24, 1985, issued to Sunshine Developers, Inc. (hereinafter "the corporation") and to Robert Morris and Joseph Morris a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of $76,390.00, plus penalty and interest, for a total amount due of $103,953.00 for the quarters ending August 31, 1981 and August 31, 1984. The notice of determination contained the following explanation:

> "Since you did not submit information requested in this Bureau's letters in connection with the purchase of a vessel, the following tax is determined to be due in accordance with the provisions of Section 1138 of the Tax Law.

[1]We have not repeated finding of fact "12" of the Administrative Law Judge's determination, which explained why the Administrative Law Judge had not found certain of the facts proposed by the parties, because it is not relevant to our decision.

Period Ending	*Tax Due	Penalty Due	Interest Due
08/31/81 - 182	$24,165.00	$6,041.00	$11,599.00
08/31/84 - 185	52,225.00	6,267.00	3,656.00

*Represents tax due on:
1981 Hatteras - Sunshine - 50'
1984 Hatteras - Sunshine - 60'"

The corporation was incorporated in Delaware on March 11, 1977. Since its incorporation, Robert Morris (980 shares) and his son, Drew Morris (20 shares), have been its only shareholders. At the hearing, Robert Morris could not recall what consideration was furnished to the corporation in exchange for its stock. Since its inception, Joseph Morris (president) and Robert Morris (secretary-treasurer) have been its only officers. The corporation's offices were located at 535 Secaucus Road, Secaucus, New Jersey. During the periods at issue, the corporation had no employees and maintained no offices other than its Secaucus address. The building wherein this office was located was also the primary business office of other corporations owned and/or operated by Robert and Joseph Morris (the sign on the front of this building did not set forth the names of each of these business entities, but, instead, read "The Morris Companies").

We modify the Administrative Law Judge's finding of fact "4" to read as follows:

> The corporation was formed for the stated purpose of purchasing, owning and operating boats. On or about April 8, 1977, the corporation purchased a 1977 33-foot Egg Harbor boat from Lake's Yacht Sales of Freeport, New York. On or about June 29, 1978, the corporation purchased a 1978 42-foot Post Fisherman boat from Anchorage Boat Sales, Inc. of Lindenhurst, New York. The purchases of these two boats were the subject of a prior assessment (Matter of Sunshine Developers and Joe Morris, State Tax Commission, December 13, 1985, confirmed 132 AD2d 752, lv denied 70 NY2d 609) and are not, therefore, at issue herein.
>
> The boats which are the subject of this proceeding are a 50-foot Hatteras Convertible purchased by the corporation in June 1981 from Lake's Yacht Sales, Inc. of Freeport, New York for $345,210.00 and a 60-foot Hatteras Convertible purchased by the corporation in June 1984 from the same dealer for $720,340.50. Both of these boats were named "Sunshine". No New York State

sales tax was paid upon the purchase of any of the corporation's boats.

The boats under consideration were used exclusively for the personal entertainment and pleasure of Robert and Joseph Morris and their families.[2]

We modify the Administrative Law Judge's finding of fact "5" to read as follows:

At the hearing held on the assessments issued as a result of the purchase and/or use of the boats in 1977 and 1978, petitioner Robert Morris testified that, from time to time, the corporation rented out its boats to other corporations owned by Robert and Joseph Morris. That hearing was held on September 11, 1984. It was, however, the testimony of petitioners at the hearing held herein that the boats at issue in this proceeding were never rented out. In support of their position, petitioners produced photocopies of the corporation's Federal income tax returns which indicated that, for the years 1981 through 1983, the corporation was inactive. For 1984, the corporation reported a loss of $156,286.00 primarily attributable to depreciation and interest payments. These returns indicated that the corporation received no income during any of these years. During the periods at issue, the corporation had no assets other than the boats and at no time did the corporation own more than one boat.

Robert and Joseph Morris transferred into the corporation's bank account whatever funds were needed to pay for the expenses it incurred. Joseph Morris was unable to account for what happened to the proceeds from the sale of the 50-foot boat.[3]

We modify the Administrative Law Judge's finding of fact "6" to read as follows:

From 1977 until approximately 1984, petitioner Joseph Morris leased a rent-controlled apartment located at 1675 York Avenue, New York, New York. On the registration document for the 1981 50-foot Hatteras which was filed with the U.S. Coast Guard in November 1981, Joseph Morris listed the York Avenue apartment as his address.

Joseph Morris represented himself as the sole director and owner of the corporation on the Coast Guard registration document.

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[2]We modified the Administrative Law Judge's finding of fact "4" by adding the last paragraph to more fully reflect the record.

[3]We modified the Administrative Law Judge's finding of fact "5" by adding the last paragraph to more fully reflect the record.

> From April 1, 1980 through February 28, 1985, petitioner Joseph Morris also leased an apartment at 555 North Avenue, Fort Lee, New Jersey. After the expiration of this lease, Joseph Morris moved to 604 Winston Towers, Cliffside Park, New Jersey, a condominium owned by petitioner Robert Morris since 1973. Joseph Morris continues to reside at this address.
>
> Petitioner Robert Morris has continuously resided in the State of New Jersey from 1973 to the present.[4]

The 1981 50-foot Hatteras Convertible was picked up by Joseph Morris at the Hatteras factory in New Bern, North Carolina on or about June 27, 1981. Joseph Morris took the boat to Ocean City, Maryland, Atlantic City, New Jersey and then to Montauk, New York where the boat was moored at the Deep Sea Yacht Club. During the summer of 1981, the boat was taken to Maine. At the conclusion of each boating season (approximately Labor Day), the boat was taken to Florida and the Bahamas.

The 1984 60-foot Hatteras was also picked up by Joseph Morris in New Bern, North Carolina. He took the boat to Ocean City, Maryland and then to the Deep Sea Yacht Club in Montauk, New York. During the 1984 boating season, the boat was taken to Block Island, Rhode Island, Nantucket, Martha's Vineyard and various other ports in Massachusetts and Maine. After Labor Day, the boat was navigated to Florida and the Bahamas.

From 1981 through 1984, a boat named "Sunshine" was moored at the Deep Sea Yacht Club in Montauk, New York during the summer boating season. Robert Darenberg, the dockmaster at the Deep Sea Yacht Club until June 1984, and Guy Lamotta, who became the dockmaster in June 1984, confirmed to the auditor that Joseph Morris had leased dock space for a boat named Sunshine during each of these seasons.

We modify the Administrative Law Judge's finding of fact "8" to read as follows:

> In April 1988, the New Jersey Department of the Treasury, Division of Taxation issued an assessment of sales and use tax to Joseph Morris in the amount of $17,260.00, plus penalty and interest, for a total assessment of $44,185.00 relative to the

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[4]We modified the Administrative Law Judge's finding of fact "6" by adding the second paragraph to more fully reflect the record.

> purchase of the 1981 Hatteras. On May 3, 1988, in full satisfaction of the assessment, Joseph Morris drew a check on his own checking account in the amount of $19,470.00 for payment of the tax to the New Jersey Department of Treasury.[5]

Each of the boats at issue was purchased by the corporation and not by Joseph Morris and/or Robert Morris individually. There has been no evidence presented which would indicate that the corporation (a Delaware corporation with offices in New Jersey) maintained offices in New York or in any way carried on business or had any employees in New York.

We modify the Administrative Law Judge's finding of fact "10" to read as follows:

> Robert Morris testified that there was never any formal meeting of the Board of Directors (of which Joseph Morris was the sole member) of the corporation. However, there was a special Board meeting held at 634 City Island Avenue, City Island, New York, whereby Joseph Morris resolved that the corporation should purchase the 1981 50-foot Hatteras. Joseph Morris was the only person present at this meeting; he elected himself chairman and secretary of the meeting. There was no other Board meeting held on record. No explanation was provided for the location of this meeting.[6]

At one time, the corporation had a bank account at the Flushing National Bank in New York. It is not clear from the record as to when this account was maintained. It should be noted

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[5]The Administrative Law Judge's finding of fact "8" read as follows:

> "In April 1988, the New Jersey Department of Treasury, Division of Taxation issued an assessment of sales and use tax to Joseph Morris in the amount of $17,260.00, plus penalty and interest, for a total assessment of $44,185.00 relative to the purchase of the 1981 Hatteras. On May 3, 1988, Joseph Morris paid the sum of $19,470.00 in full satisfaction of this assessment."

We have modified this finding of fact to more accurately reflect the record.

[6]The Administrative Law Judge's finding of fact "10" read as follows:

> "The meeting of the board of directors (Joseph Morris was the sole member) which authorized the purchase by the corporation of the 1981 50-foot Hatteras was held at 634 City Island Avenue, City Island, New York. No explanation was provided for the location of this meeting."

We have modified this finding of fact to more fully reflect the record.

that the corporation's 1983 Annual Franchise Tax Report filed with the State of Delaware was accompanied by a corporate check dated February 8, 1984 which was drawn on the National Community Bank of New Jersey.

OPINION

The Administrative Law Judge determined that petitioners' use of the two boats in New York was exempted from use tax under Tax Law § 1118(2). In applying the corporate franchise tax definition of "doing business" to petitioner corporation's activities, he found that petitioner corporation was a nonresident and that it did not engage in carrying on any business in this State. The Administrative Law Judge further stated that the holding in Matter of Sunshine Developers v. Tax Commn. of State of New York (132 AD2d 752, 517 NYS2d 317, lv denied 70 NY2d 609, 522 NYS2d 109) did not bar petitioners from contesting that the corporation is a New York resident. He stressed that the court in Sunshine Developers did not conclude that the corporation was a resident, but rather, concluded that it was not entitled to the nonresident exemption set forth in Tax Law § 1118(2). He pointed out that crucial to the court's holding in that case was the fact that petitioners admitted they chartered their boats to other businesses. The Administrative Law Judge also rejected the assertion of the Division of Taxation (hereinafter the "Division") that the corporate veil should be pierced and the officers be held personally liable for the assessed tax. While recognizing that the corporation was dominated and controlled by the Morris brothers, he did not find any evidence of fraud or wrongdoing. He opined that the officers' acts of forming the corporation in Delaware and causing it to take delivery of the boats in North Carolina constituted legitimate business practices designed to avoid taxation. Thus, he concluded there was no basis for disregarding the corporate form and imposing liability on the officers.

On exception, the Division claims that the Administrative Law Judge improperly applied the corporate franchise tax definition of "doing business" to petitioners' activities and asserts,

instead, that any regular activity in the State may constitute "doing business" for purposes of sales and use tax. It argues that because petitioners were performing a business function in New York, they are liable for use tax in respect to the use of the boats in this State. The Division argues that even assuming that the franchise tax definition of "doing business" was applicable for use tax purposes, the corporation's activities nevertheless satisfied all the requirements stated therein. Accordingly, the Division contends that the corporation was carrying on a business in this State. Moreover, the Division argues that the corporation's prior leasing activity could not have been determinative of the court's decision in Sunshine Developers since there was no proof of such activity in the hearing record. In any event, the Division insists that there need not be any income-producing activity for a finding of "doing business." It posits that if a corporation's purpose or activity changes, as it did here, the activity must be evaluated in light of the new purpose. The Division reasons that since petitioner corporation's business purpose was to purchase and hold title to boats employed by its officers for leisure, the use of such boats in New York was in furtherance of such business. Lastly, the Division asserts that petitioners have not established reasonable cause for their conduct.

Petitioners, in response, argue that the boats were only kept in New York casually and were not used in "carrying on in this state any employment, trade, business or profession." They claim that the Division's contention that "any regular activity in the State may constitute doing business for purposes of [use] tax" creates an unreasonably low threshold for finding "carrying on a business." Petitioners also assert that the Administrative Law Judge had the authority to assess the credibility of witnesses and to draw inferences from the evidence and that the Division is barred from contesting his determination of the same. Petitioners then argue that the corporation was not found to be a "resident" in Sunshine Developers. They reason that since the court there ruled that only one of the two boats was subject to use tax even though the other boat had also been used in New York, a finding of "residency" with respect to one boat does not necessitate the same finding for other boats. Petitioners conclude by maintaining that the Division's attempt to

disregard the corporate entity was untenable, arguing that the court by its holding in Sunshine Developers implicitly dismissed such a theory for finding personal liability on the part of the officers.

We reverse the determination of the Administrative Law Judge.

We deal first with the issue of whether petitioner corporation was a nonresident of New York such that the use of its boats by its officers in this State would be exempted from use tax. Tax Law § 1110 provides, in part, for the imposition of the compensating use tax 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 on and after June first, nineteen hundred seventy-one except as otherwise exempted under this article, (A) of any tangible personal property purchased at retail . . ."

Tax Law § 1118(2) exempts the following uses of property from the compensating use tax as follows:

> "In respect to the use of property purchased by the user while a nonresident of this state, except in the case of tangible personal property which the user, in the performance of a contract, incorporates into real property located in the state. A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be deemed a nonresident with respect to the use in this state of property in such employment, trade, business or profession."

A corporation may not be deemed a nonresident if it was not incorporated, doing or maintaining a place of business, or carrying on any employment, trade, business or profession in this State (20 NYCRR 526.15[b][1] and [2]). It is undisputed that petitioner corporation was incorporated under the laws of Delaware and that it did not maintain a place of business or carry on any employment, trade or profession in New York at the time it purchased the boats. The inquiry then is whether the corporation was "doing" or "carrying on a business" in the State.

In Sunshine Developers, where the same issue and parties were involved for a prior period, the court concluded as follows:

> "[P]etitioner admits that it is in the business of chartering boats to businesses. Also, as discussed above, [the Division] properly found that the Post boat was seasonally moored, and therefore used, in New York. These facts support [the Division's] further conclusion that petitioners were engaged in carrying on a business in this State and, thus, not entitled to the exemption for nonresidents" (Matter of Sunshine Developers v. Tax Commn. of State of New York, supra; 517 NYS2d 317, 319-320).

Crucial to the court's holding was the fact that petitioner admitted that it was in the business of chartering boats to its customers. There was no such admission in the instant case. Moreover, the record reveals that at all relevant times the corporation maintained no offices in New York, derived no income from its New York activities, and employed no agents, officers or employees in New York. More importantly, the facts indicate that at no time during the periods in question did the corporation engage in doing or carrying on a business in this State.

We are unpersuaded by the Division's argument that because the corporation's purpose was to purchase and hold title to the boats, the carrying out of these activities in New York constitutes doing or carrying on a business. Section 1118(2) of the Tax Law states that for purposes of the nonresident exemption, any person engaged in carrying on any employment, trade, business or profession in New York shall not be deemed a nonresident. Significantly, the Legislature used the term "business" in conjunction with the terms "employment, trade, and profession." Viewed in this context and consistent with its commonly understood meaning, the term "business" clearly describes activities which have a business or commercial character, as distinct from other kinds of activities. It follows then that the phrase "doing business" or "carrying on a business" refers to carrying on a commercial or mercantile activity engaged in for gain or livelihood (Webster's Third New International Dictionary 302 [unabridged 1986]; Black's Law Dictionary 179 [5th ed 1979]). Applying this test,[7] we hold that the corporation's purchase and ownership of the boats in

[7]In this connection, the Administrative Law Judge and petitioners also turned to the definition of "doing business" in the corporate franchise tax area for guidance. We decline to adopt this approach. The corporate franchise tax is a tax imposed on corporations for the privilege of exercising their corporate franchise in New York. It applies only to corporations which were organized and operated for profit (Tax Law § 209[1]; 20 NYCRR 1-

(continued...)

question did not constitute doing or carrying on a business in New York. It is unchallenged that the corporation performed no other functions but that of buying and holding title to boats operated solely for the pleasure of its officers. Also, the corporation owned no other assets but the vessels at issue and there is no showing that they were leased out to other businesses during the relevant periods. Given these facts, we conclude that there was nothing commercial about petitioners' activity. Accordingly, we conclude that the corporation did not engage in doing or carrying on a business in New York.

The Division, however, argues that so long as the corporation's activities are in accord with its stated purpose, it may be deemed to be carrying on a business. Under this interpretation, a corporation could never qualify for the exemption. We reject this interpretation because it wholly ignores the statutory scheme for establishing entitlement to the nonresident exemption. Section 1118(2) explicitly conditions such entitlement on, inter alia, a factual determination of whether the taxpayer was engaged in carrying on a business not on whether the taxpayer was a corporation.

In sum, because petitioner corporation was not a resident and it did not do or carry on a business in New York, we conclude that it was exempted from use tax with respect to the use of the boats by its officers in this State.

We deal next with the issue of whether it is proper here to disregard the corporate form and hold the officers personally liable for the use tax. Ordinarily, the law treats corporations and shareholders as separate and distinct entities, and hence, will not impose liability upon shareholders for the acts of the corporation (Billy v. Consolidated Mach. Tool Corp., 51 NY2d 152, 432 NYS2d 879; Port Chester Elec. Constr. Corp. v. Atlas, 40 NY2d 652, 389 NYS2d 327). Where, however, it is necessary to prevent fraud or illegality or to achieve equity, the courts will

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[7](...continued)
3.4[6]). In contrast, the use tax has a much broader application. It is levied not just on corporations, but on "every person," irrespective of whether it engaged in profit-motivated activities (Tax Law § 1110). Thus, we think it is inappropriate to apply the corporate franchise tax definition of "doing business" to an issue involving use tax.

disregard the separate legal personality of the corporation (see, Billy v. Consolidated Mach. Tool Corp., supra; Bartle v. Home Owners Coop., 309 NY 103; International Aircraft Trading Co. v. Manufacturing Trust Co., 297 NY 285). Specifically, where it is clear that the shareholders are using the corporation as a conduit to transact their personal business as distinct from the corporate business, the courts have held the shareholders liable for acts of the corporation under the general principles of agency (see, Port Chester Elec. Constr. Corp. v. Atlas, supra; Walkovszky v. Carlton, 18 NY2d 414, 276 NYS2d 585). The threshold inquiry is whether "the corporation is a 'dummy' for its individual stockholders who are in reality carrying on the business in their personal capacities for purely personal rather than corporate ends" (Port Chester Elec. Constr. Corp. v. Atlas, supra, quoting from Walkovszky v. Carlton, supra, 276 NYS2d 585, 588).

The United States Supreme Court, in addressing Federal tax questions, held that a corporation would be recognized as a separate taxable entity so long as the purpose of its formation was "the equivalent of a business activity or is followed by the carrying on of a business by the corporation" (Moline Props. v. Commissioner, 319 US 436, 438). Further, the Court declared that "in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction" (Moline Props. v. Commissioner, 319 US 436, 439, citations omitted). Relying upon this standard, the Federal courts do not hesitate to characterize a corporation as a "dummy" for taxation purposes in the absence of a showing that it performed a substantial business function (see, Jackson v. Commissioner, 233 F2d 289, 56-1 USTC ¶ 9506 [where taxpayers created a corporation for purposes of facilitating the transfer of their interest in a pre-existing corporation and avoiding taxation on such transfer, the transactions were treated as if they had been carried on by the taxpayers themselves]; Paymer v. Commissioner, 150 F2d 334, 45-2 USTC ¶ 9353 [where a corporation was formed to hold title to real estate and which served only as a blind to deter creditors of one of the taxpayers, it was disregarded for tax purposes]; United States v.

Brager Bldg. & Land Corp., 124 F2d 349, 41-2 USTC ¶ 9799 [where a corporation was organized to hold title to property of a partnership which owned all its stock and it performed no other function, its income was held to be that of the partnership]). In National Investors Corp. v. Hoey (144 F2d 466, 44-2 USTC ¶ 9407), the Second Circuit elucidated the scope of the "business purpose" doctrine as follows:

> "[T]o be a separate jural person for purposes of taxation, a corporation must engage in some industrial, commercial, or other activity besides avoiding taxation: in order words, that the term, 'corporation' will be interpreted to mean a corporation which does some 'business' in the ordinary meaning; and that escaping taxation is not 'business' in the ordinary meaning" (National Investors Corp. v. Hoey, supra, 44-2 USTC ¶ 9407, at 631).

We now apply the Moline "business purpose" test to the instant case. It is undeniable that at all relevant times petitioner corporation did nothing but purchase, own and maintain the boats for its officers' personal leisure activities. The record also shows that during the periods at issue, the corporation had no assets other than the boats and at no time did the corporation own more than one boat. Petitioners, by their own submission of photocopies of the firm's Federal income tax returns, insist that the corporation was for the most part inactive during the periods from 1981 to 1984. Notwithstanding the "special meeting" at which Joseph Morris was the only person present, the corporation did not hold any formal Board of Directors' meetings; nor did it ever declare dividends for the shares of stock issued. As principal officers of the company, the Morris brothers testified at the hearing below that the corporation was merely a "shell" and that it did not engage in any type of business during the periods in question. Clearly, the corporation was nothing more than a convenient vehicle chosen by the owners to hold title to boats which were operated exclusively for their recreational pleasure. It undertook no activities of its own, commercial or otherwise, it performed no real or substantial business function, and it was at all times a "dummy" completely subject to the dominion and control of the Morris brothers. We conclude that the Division may properly disregard the corporate entity and look to the officers for payment of the assessed use tax.

Here, we recognize that Joseph Morris was not a shareholder,[8] but the facts nonetheless indicate that he was an equitable owner and controlling principal of the corporation. The two Morris brothers were the only officers of the corporation; Joseph Morris served as its president and Robert Morris as its secretary-treasurer. Although Robert Morris owned 980 of the 1,000 outstanding shares of the corporation's stock, the evidence is unmistakable that he exercised neither authority nor control over the affairs of the corporation.[9] By contrast, Joseph Morris was the chairman and secretary of its Board of Directors. He called a special Board meeting, the only one held on record, at which he authorized the purchase by the corporation of a 50-foot Hatteras Convertible; he was the only person present at that meeting; he elected himself chairman and secretary of that meeting and voted as the sole Board member therein. Further, the record plainly shows that Joseph Morris authorized all payments and signed all checks relating to the boats. He routinely transferred his personal funds into the corporation to pay for expenses that had been incurred. Notably, he wrote a check drawn on his own account in the amount of $19,470.00 for payment of use tax to the New Jersey Department of Treasury. Also significant is the fact that he could not account for what happened to the proceeds from the sale of the 50-foot boat. On the Coast Guard registration document, Joseph Morris represented himself as the owner and sole director of the corporation. Robert Morris' name, however, was not to be found on this document. All the evidence indicates that Joseph Morris used the boats,

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[8]We observe that in cases where courts have disregarded the corporate entity and held the owner liable for the debt of the corporation, the owner so held is generally a shareholder of the corporation. However, that does not preclude a finding of ownership on the part of a non-shareholder who is the principal officer and who, in substance and reality, possesses all the indicia of dominion and control over the corporation.

[9]Robert Morris testified to the following: (1) he did not remember when Sunshine was organized (Hearing Tr., p. 60); (2) he did not remember any meetings at which Board of Directors were elected (Hearing Tr., p. 74); (3) he was not certain that his position in the corporation was that of Secretary-Treasurer (Hearing Tr., p. 75); (4) he did not know how the corporation paid for the boat (Hearing Tr., p. 76); (5) he did not know with what bank the corporation maintained an account or whether there was any money in it (Hearing Tr., pp. 77-78); (6) he did not know who the insurance agent was for the boat (Hearing Tr., p.79); and (7) he was not directly involved in the purchase of the two boats and was only "a very occasional user" (Hearing Tr., p. 90). Additionally, Robert Morris was not a member of the Board of Directors of the corporation and was not present at the special Board meeting at which Joseph Morris, sitting alone, authorized the purchase by the corporation of a $345,210.00 boat.

which were the corporation's only asset, as though they were his own. The fact that he was not a shareholder in no way interfered with his control over the corporation nor his access to and operation of these vessels. We conclude that where, as here, the principal officer's dominion and control of the entity is so complete, ownership of the corporation can equitably be imputed to him even though legal title to the shares was held by his brother and nephew.

The question of whether Joseph Morris can be personally held liable for the tax, once again, turns on whether he meets the requirements of the nonresident exemption stated in Tax Law § 1118(2). That provision exempts the use of property from the compensating use tax if the property was "purchased by the user while a nonresident of this state" (Tax Law § 1118[2], emphasis added). To qualify for this exemption, the user must be a nonresident at the time of the purchase of the property at issue. The regulations state that an individual who maintains a permanent place of abode in this State is a resident (20 NYCRR 526.15[a][1]). A permanent place of abode is defined as a dwelling place which encompasses, among other things, an apartment (20 NYCRR 526.15[a][2]). Here, it is not disputed that Joseph Morris leased an apartment located at 1675 York Avenue, New York, New York, from 1977 to 1984. The record indicates that the first of the two boats at issue in the instant matter was purchased on June 1981 and the second on June 1984. Since Mr. Morris maintained an apartment in New York City at the time he purchased the first vessel on behalf of the corporation, he was clearly a New York resident in respect to the use of that vessel in this State. Moreover, while it is not clear from the facts as to when Mr. Morris actually relinquished his apartment in New York City, we note that the burden of proving entitlement to a tax exemption rests with the taxpayer (Matter of Saratoga Harness Racing v. New York State Tax Commn., 119 AD2d 919, 501 NYS2d 200, lv denied 68 NY2d 610, 508 NYS2d 1027; Dental Socy. of State of New York v. New York State Tax Commn., 110 AD2d 988, 487 NYS2d 894, affd 66 NY2d 939, 498 NYS2d 797). On this record, there is no proof that Mr. Morris had terminated the lease for his apartment in New York City at the time he caused the corporation to purchase the second vessel. We hold that Mr.

Joseph Morris was not a nonresident of this State when the first and second vessel were acquired. Thus, we conclude that he is not entitled to the nonresident exemption set forth in section 1118(2) and that he is personally liable for the use tax assessed.

Next, we turn to the issue of whether petitioners have established reasonable cause for abatement of penalties assessed. Tax Law § 1145(a)(1)(i) authorizes the imposition of a penalty plus interest at the rate specified therein for failure to file a return or to pay or pay over any tax in a timely manner. However, these charges are to be cancelled if "reasonable cause" is affirmatively shown by the taxpayer (Tax Law § 1145[a][1][iii]; former 20 NYCRR 536.1[b]; see, 20 NYCRR 536.5[b]). The regulation in 20 NYCRR 536.5(c)(5) provides, in pertinent part, that reasonable cause, where clearly established, may encompass the following:

> "Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause."

In order to abate penalty the burden is upon the taxpayer to show that the failure to comply with the law was due to reasonable cause and not due to willful neglect. Here, petitioners have offered no evidence to prove the existence of reasonable cause and the lack of willful neglect for their failure to pay sales taxes when due. We conclude that the assessment of penalty and interest was proper under the circumstances.

Finally, we address the question of whether petitioners are entitled to a credit for sales and use tax paid to the State of New Jersey on the purchase of the 50-foot Hatteras Convertible. Tax Law § 1118(7)(a) provides, in part, a credit for sales or use tax paid to another state as follows:

> "In respect to the use of property or services to the extent that a retail sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state or jurisdiction within any other state but only when it is shown that such other state or jurisdiction allows a corresponding exemption with respect to the sale or use of tangible personal property or services upon

which such a sales tax or compensating use tax was paid to this state."

The State of New Jersey has an identical exemption statute allowing a credit for sales and use tax paid to another state which has a similar credit provision (N.J. Stat. Ann. § 54:32B-11[6]). Mr. Joseph Morris had paid the New Jersey Department of Treasury the sum of $19,470.00 in full settlement of the sales and use tax imposed by that state on the 50-foot Hatteras Convertible. Therefore, we conclude petitioners are entitled to a credit in the amount of $19,470.00 against the use tax imposed by New York.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the Division of Taxation is granted;

2. The determination of the Administrative Law Judge is reversed;

3. The petition of petitioner Joseph Morris is denied,. but the petitions of petitioners Sunshine Developers, Inc. and Robert Morris are granted; and

4. The Notice of Determination dated April 24, 1985 issued to Joseph Morris is modified to the extent that credit shall be allowed for the payment of $19,470.00 made to the State of New Jersey, but the Notice is otherwise sustained.

DATED: Troy, New York
May 2, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner