

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
SOUTHTOWNS DATSUN, INC. : **DECISION**
AND THOMAS FLYNN AND :
DANIEL FABRIZIO, OFFICERS :
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 Ended August 31, :
1982 and August 31, 1983. :
:

Petitioners, Southtowns Datsun, Inc., and Thomas Flynn and Daniel Fabrizio, as officers, 3580 Southwestern Boulevard, Orchard Park, New York 14127, filed an exception to the determination of the Administrative Law Judge issued on November 17, 1988 with respect to their petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods ending August 31, 1982 and August 31, 1983 (File No. 803201). Petitioners appeared by G. Daniel O'Connell, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

Petitioners did not submit a brief on exception. The Division submitted a letter in lieu of a brief.

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

ISSUE

Whether the Division of Taxation properly assessed compensating use tax on two boats purchased and subsequently resold by petitioner Southtowns Datsun, Inc.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge's determination and such facts are repeated below except that we modify finding of fact "6" as indicated below.

On December 17, 1988, following an audit, the Division issued notices of determination and demands for payment of sales and use taxes due to petitioners, Southtowns Datsun, Inc., and Thomas Flynn and Daniel Fabrizio, as officers. Each of the notices assessed \$1,610.00 in tax due for the quarter ended August 31, 1982 and \$4,144.37 in tax due for the quarter ended August 31, 1983, plus penalty and interest for each of the periods at issue.

The assessments herein result from Division determinations that two boats purchased by Southtowns Datsun, Inc., together with costs of repairs and refurbishments to each boat, were properly subject to compensating use tax. The purchase price of each boat and the repair costs were taken from the books of Southtowns Datsun.

Petitioners Flynn and Fabrizio were president and secretary-treasurer, respectively, of Southtowns Datsun during the relevant period. Petitioner Southtowns Datsun, Inc. is an automobile dealership. In June 1982, Mr. Flynn caused Southtowns to purchase its first boat, a 1965 Chris Craft 37-foot cabin cruiser. This boat was in need of substantial repairs and refurbishments. It was put in the water in July 1982, but more repairs were necessary. Most important of these was the replacement of the boat's generator, which was installed in August 1982. Still more repairs were needed and the boat was taken out of the water in October 1982 for winter storage. Additional work was done on the boat over the winter. Given the extensive repairs on the boat, little use was made of it during the summer of 1982. Mr. Flynn used the boat perhaps six times during 1982.

We modify the Administrative Law Judges finding of fact "6" to read as follows:

"The boat was put back into the water in May 1983. It was subsequently taken back out of the water to be painted. Following painting, the boat was put back into the water in July 1983. At that time, the boat was considered by Mr. Flynn to be ready for sale. The boat was sold in August 1983 by Southtowns in a transaction not subject to sales tax."¹

¹The Administrative Law Judge's finding of fact "6" read as follows:

In July 1983, Mr. Flynn caused Southtowns to purchase a second boat, a Chris Craft 48-foot flush deck cruiser. Compared to the first boat, this boat required little, if any, repair work, and was "up and ready" for sale soon after purchase. This boat was sold by Southtowns in October 1983.

Mr. Flynn used the boats frequently during the 1983 season. He took the first boat out about once a week and the second boat out about twice a week. He generally took four-hour cruises on the boats. For the most part, Mr. Flynn used the boats to show prospective buyers or acquaintances of prospective buyers how the boats operated and to demonstrate the "fun" of owning a boat. On these cruises, Mr. Flynn was attempting to create a market for the boats, which were larger than most pleasure craft in the Buffalo area.

Mr. Flynn conceded that, in addition to the usage described above, he also made some purely personal use of the boats. He estimated that 20 to 30 percent of his use of the first boat was personal, while his personal use of the second boat was somewhat less. Following their purchase, each of the boats was placed in one of Southtowns' fixed asset accounts entitled "Airplane Account". At the time of purchase of each of the boats, Mr. Flynn intended to resell each when it became "up and ready" for sale. Southtowns registered as a boat dealer with the Department of Motor Vehicles on November 3, 1983. Southtowns purchased and sold boats, to a limited extent, subsequent to the purchases and sales discussed herein. Southtowns is no longer engaged in any buying and selling of boats.

¹(...continued)

"The boat was put back into the water in May 1983. It was subsequently taken back out of the water to be painted. Following painting, the boat was put back into the water in July 1983. At that time, the boat was considered by Mr. Flynn to be ready for sale. The boat was sold in August 1983. Southtowns collected and paid over sales tax on the sale of the boat."

We have modified this finding of fact because the record indicates that the boat was sold in a nontaxable transaction.

OPINION

In the determination below the Administrative Law Judge decided that the Division properly assessed compensating use tax on the two boats purchased and subsequently resold by petitioner, Southtowns Datsun, Inc. (hereinafter "Southtowns"). Specifically, it was concluded that Southtowns was not a boat dealer during the period at issue and that the boats in question were not held in inventory during the period at issue.

On exception petitioners contend that they were assessed a greater amount of use tax than they are responsible for as a result of their use of the boats during the years in question. In particular, Southtowns argues that it was properly licensed and registered to sell boats. Further, Southtowns claims that upon the sale of the boats, it collected and paid all applicable sales taxes as a retail vendor. Additionally, Southtowns asserts that the account in which the boats were held functioned as an inventory account bringing it into compliance with the relevant statutes and regulations. As a result Southtowns requests that its use tax liability be redetermined pursuant to the formula in TSB-M-82(3.2)S.

In response the Division argues that the determination of the Administrative Law Judge is correct. Specifically, the Division contends that Southtowns was not a registered boat dealer during the period of the audit. Further, the Division claims that Southtowns did not show an intent to resell the boats as the boats were not held by it in inventory.

We affirm the determination of the Administrative Law Judge.

Tax Law section 1105(a) imposes sales tax on the receipts from retail sales of tangible personal property, with exceptions not relevant here. Sales for resale, however, are excluded from the definition of a retail sale (Tax Law § 1101[b][4][i][A]) and as a result are excluded from the tax imposed by Tax Law section 1105(a). If tangible personal property which was purchased for resale is subsequently put to a taxable use, then compensating use tax is due on such use (Tax Law § 1110; 20 NYCRR 531.3[a][2]).

The Division of Taxation in TSB-M-82(3.2)S established a formula to determine the amount of use tax that must be paid by a boat dealer for occasional personal use of a vessel held in inventory. The issue before us concerns whether Southtowns should have the benefit of this

formula when calculating the use tax due on certain vessels that it owned. In order for Southtowns to qualify for such treatment it must show both that it was a boat dealer and that the boats were held in inventory at the time of the personal use of the boats (TSB-M-82[3.2]S).

The first matter which we will address is the requirement that Southtowns be a dealer at the time of the use. The Administrative Law Judge found that Southtowns was not a dealer at the time of the use of the boats because it did not register as a boat dealer with the Department of Motor Vehicles until after the boats at issue had been sold.

Article 48 of the former Vehicle and Traffic Law entitled "Registration of Motorboats" applies to the period at issue. Section 2250 defines a "Dealer" as, "Any person engaged in the business of buying, trading in, selling or manufacturing motorboats." Section 2253(2) requires that, "Any person who is a dealer shall register as a dealer." Further, in its opening sentence, TSB-M-82(3.2)S states that it supplements TSB-M-82(3)S. The latter Technical Services Bureau memorandum opens with the statement "[t]he following has been prepared as a guideline to assist registered dealers . . ." (emphasis supplied). Since Southtowns did not register as a boat dealer as required by the Vehicle and Traffic Law and by TSB-M-82(3)S until after the period at issue, we conclude that it is not entitled to the use tax apportionment formula expressed in TSB-M-82(3.2)S.

Petitioner's contention that it was licensed to sell boats by virtue of the fact that it was licensed to sell new and used vehicles is not persuasive. We find no support for the proposition that one who is licensed to sell new and used motor vehicles also is licensed to sell boats as a result of the motor vehicle licensing. The Vehicle and Traffic Law clearly contains separate licensing requirements for motor vehicles and vessels. We have found no proof, and Southtowns has offered only unsubstantiated statements, that its motor vehicle dealer status afforded it the license to deal in boats.

While our decision that Southtowns was not a boat dealer at the time of the personal use involved prohibits it from using the tax apportionment formula in TSB-M-82(3.2)S, we also address its claim that the boats at issue were held in an inventory account. The boats must have been held in inventory exclusively for resale if Southtowns is to avail itself of the apportionment formula expressed in TSB-M-82(3.2)S. Southtowns claims that while the boats were held in a fixed asset account titled "airplane", the account functioned as an inventory account for accounting purposes. The only distinction, argues Southtowns, is that the boat inventories were segregated from the vehicle related inventories on the balance sheet.

We find that Southtowns has not shown that the account in which the boats at issue were held was an inventory account. The burden of proof is upon petitioner to prove its entitlement to the exclusion at issue (see, 20 NYCRR 3000.10[d][4]). The record before us lacks any affirmative proof, in the form of testimony or documentation, that the account labeled "airplane" was an inventory account for the boats at issue. On the evidence presented, we cannot find that the boats at issue were held in an inventory account for resale.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioners Southtowns Datsun, Inc. and Thomas Flynn and Daniel Fabrizio, officers, is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Southtowns Datsun, Inc. and Thomas Flynn and Daniel Fabrizio, officers, is denied; and

4. The notices of determination dated December 17, 1988 are sustained.

DATED: Troy, New York
July 6, 1989

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

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

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