STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
THE ABSOLUTE DIFFERENCE, INC.	:	DECISION DTA No. 809686
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 September 1, 1988 through November 30, 1988.	:	

Petitioner The Absolute Difference, Inc., c/o P.O. Box 628, Freeport, New York 11520, filed an exception to the determination of the Administrative Law Judge issued on September 24, 1992. Petitioner appeared by Henry M. Grubel, Esq., P.C. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

Petitioner filed a brief in support of its exception. By letter dated February 1, 1993, the Division of Taxation requested a 30-day extension of time for filing its brief in opposition. By letter dated February 4, 1993, the Secretary to the Tribunal granted the request and set the date for filing of the brief as March 5, 1993. The brief was filed on March 26, 1993. Petitioner, in its reply brief, demanded that the Division of Taxation's late-filed brief be stricken. In response, the Division of Taxation withdrew its late-filed brief and relied on the brief it filed before the Administrative Law Judge. Any reply brief received from petitioner was due on May 26, 1993, which date began the six-month time period for issuance of this decision. Petitioner's request for oral argument was denied.

Commissioner Dugan delivered the decision of the Tax Appeals Tribunal. Commissioner Koenig concurs.

ISSUES

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

II. Whether, if so, petitioner has nonetheless established reasonable cause and an absence of willfulness thereby allowing abatement of penalty imposed by the Division of Taxation.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

In or about mid-1990, through the use of information provided by the United States Coast Guard, the Division of Taxation (hereinafter the "Division") sought to identify persons and/or corporations who had purchased boats out of state and subsequently either took delivery of or used such boats in New York State thereby incurring potential sales and/or use tax liability. As described more completely hereinafter, a desk audit review of Coast Guard boat documentation records contained on computerized tape revealed that a 44-foot vessel known as Just for Fun had been registered to petitioner, The Absolute Difference, Inc., in New York State.

After review of the Coast Guard information, the Division issued a letter to petitioner seeking information relative to the vessel Just for Fun. The address to which this letter was sent, while not specified in the record, allegedly matched the address contained in the Coast Guard information. The auditor who caused issuance of the letter testified that said initial letter was returned as undeliverable, after which she remailed the same letter to The Absolute Difference, 72 Guy Lombardo Avenue, Freeport, New York 11520.

Offered in evidence as Exhibit "1" was a document containing handwritten notes of a telephone conversation between the auditor and petitioner's former accountant, one James McGurran. These notes, dated August 14, 1990, summarize information regarding the vessel Just for Fun as provided by petitioner's former accountant. The notes reflect, inter alia, the

name of the vessel (Just for Fun), the name of the officer and sole shareholder of the corporate petitioner (Henry Grubel), and the assertion that the vessel was purchased in Florida, brought to New York allegedly for use as a charter boat and then returned to Florida. The auditor's notes of the telephone conversation describe the claim by petitioner's former accountant that the vessel was not manufactured in the United States and that the Coast Guard therefore would not register the vessel as a charter boat. Mr. McGurran also advised that petitioner "tried to pay sales tax but MVD [Motor Vehicles Department] [sic] told him no tax was due." The auditor also noted her request for documentary information, as follows:

> "I asked CPA for Bill of Sale, all facts, all incorporation papers, proof of checking account in corporate name, mooring and/or storage contracts for all out of state use."

The notes also include reference to the number "D912534."

A subsequent letter was issued by the Division's auditor to petitioner regarding the vessel Just for Fun. This letter, dated October 11, 1990, and referencing the number "D912536," provides as follows:

> "This is regarding a telephone call on 8/15/90 received from you regarding the above mentioned vessel.
>
> "To date no response has been received with required documentation. Please comply with our request to avoid further collection action."

This letter carries the 72 Guy Lombardo Avenue, Freeport, New York address for petitioner.

On March 20, 1991, the Division issued to petitioner, The Absolute Difference, Inc., a Notice of Determination and Demand for Payment of Sales and Use Taxes Due assessing tax for the quarter ended November 30, 1988 in the amount of $13,031.04, plus penalty and interest. The auditor indicated by testimony that this notice was issued due to petitioner's failure to offer any documentation in response to the October 11, 1990 letter. The auditor further testified that the notice was based on information on the Coast Guard computer tape. This tape included a listing of all vessels documented in New York as "pleasure" boats as of November 30, 1988. The auditor testified that the amount of sales tax assessed was calculated upon the purchase price of the vessel, which in turn was computed based upon the length of the

vessel (per the Coast Guard information tape) multiplied by a price-per-foot factor taken from a Division value of vessels chart. Neither the Coast Guard tape (or a printout thereof) nor the value-per-foot chart utilized by the auditor to compute the purchase price of the vessel was offered in evidence.

In response to the notice of determination, a timely petition was filed wherein petitioner claimed exemption from tax because the vessel "is a commercial vessel primarily engaged in interstate or foreign commerce." The petition also noted that the tax had been estimated and that "[i]f any tax is due, the actual amount will be less than the estimated amount."

Offered in evidence, inter alia, was a Certificate of Documentation for the vessel Just for Fun, dated April 7, 1987 and issued by the Coast Guard. This document lists the vessel's registration number as D912536 and reveals its length, breadth and depth, respectively, to be 43.8 feet, 15 feet and 8.8 feet. The Certificate of Documentation lists the vessel's home port as New York, New York, its place of manufacture as Taiwan, Republic of China, and its owner as the corporate petitioner, The Absolute Difference, Inc. The owner's address is listed as 72 Guy Lombardo Avenue, Freeport, New York 11520. The vessel is documented for "pleasure" use, and includes the following restrictions: "No coast wise or great lakes license - 1; No fishery license - 1; No registry - 4". The Certificate of Documentation also lists a mortgage on the vessel in the amount of $141,414.64 (plus interest and POMC), with a maturity date of March 5, 2002.

Henry Grubel, president, treasurer and sole shareholder of the corporate petitioner, appeared and testified at hearing.[1] By his testimony, Mr. Grubel explained that in or about late 1986 he desired to enter into a new business venture involving operation of a charter boat in the U.S. Virgin Islands. The 72 Guy Lombardo Avenue address mentioned hereinabove was petitioner's business address until the latter part of 1988, at which time such address was changed to 352 Atlantic Avenue, Freeport, New York. Mr. Grubel's home address is 37

[1]Offered in evidence was a Certificate of Dissolution indicating that the corporate petitioner was dissolved in June of 1989.

Prospect Street, Freeport, New York, and includes a canal located directly behind the home. Over the years, Mr. Grubel has owned several boats including 20 to 24-foot runabouts, a 36-foot whaler and a 47-foot Chriscraft. In order to commence business, Mr. Grubel formed the corporate petitioner on December 16, 1986 with himself as president, treasurer and sole shareholder. Thereafter, on March 5, 1987, the corporation purchased Just for Fun, a 44-foot DeFever off-shore cruiser, from Z. K. Marine International Yacht Distributors, Inc. located in Dania, Florida. The bill of sale lists a purchase price of $170,000.00 for the vessel. Prior to purchasing the vessel, Mr. Grubel enlisted the assistance of a boat captain known to him, one John Barret, to evaluate the type of boat to be purchased.

After purchase, Mr. Grubel engaged the services of another boat captain known to him, one John Schriefer, to take delivery of Just for Fun in Florida, and pilot the boat from Florida to Mr. Grubel's home in Freeport, New York. The trip from Florida to New York took approximately 2½ weeks via the intercoastal waterways. This route was required because the boat had not yet been refitted for off-shore cruising. Mr. Grubel testified that he did not sail with or accompany the boat on any part of its journey from Florida to Freeport, New York.

The vessel was docked behind Mr. Grubel's home in Freeport as of approximately early April 1987, and the work of refitting the vessel for purposes of off-shore cruising commenced shortly thereafter. The refitting involved various additions and modifications to the boat, the largest of which was the installation of a "watermaker", a device by which seawater is desalinized and made potable. Mr. Grubel explained that such a device is necessary for off-shore cruising for any extended periods, and is particularly necessary for cruising in the Caribbean where potable water is a scarce and expensive commodity. During the entire time of its refitting, the vessel was docked behind Mr. Grubel's home.

Insurance was taken on the vessel at or about the time of purchase through a New York insurer. However, policy restrictions were initially listed against cruising or charter use due to the fact that John Schriefer, whom petitioner had intended to employ as captain, was not a

licensed charter captain for Coast Guard purposes. Petitioner, in turn, paid for Mr. Schriefer to attend Coast Guard schooling and obtain a charter captain's license.

Mr. Grubel testified that he contacted the New York State Department of Motor Vehicles and attempted to pay sales tax on the vessel. However, he was allegedly advised that since the boat was to be used for charter purposes, no sales tax was due. Mr. Grubel explained that the reason the vessel was brought to New York for refitting, and in particular was docked behind his home, was so that he could avoid "boatyard" charges and also could be personally available to supervise and review the work being performed on the vessel.

In or about late December 1987, petitioner engaged the services of John Barret to pilot the vessel from New York back to Florida. The vessel was to stop in Florida to have hull stabilizers added, and thereafter Mr. Barret was to pilot the vessel to the U.S. Virgin Islands for use as a charter boat, carrying passengers for sightseeing or overnight trips.

John Barret piloted the vessel to Florida, taking approximately seven or eight days for the trip. This return trip to Florida was quicker than the initial trip from Florida to New York because, as refitted, the boat was capable of off-shore cruising.

The vessel was docked behind Mr. Barret's home in Fort Lauderdale, Florida and a contract was allegedly entered into for adding stabilizers. However, Mr. Grubel testified that in January or February of 1988 he first learned that, pursuant to Coast Guard rules, a vessel manufactured outside of the United States will not be registered by the Coast Guard for use as a charter boat (the Coast Guard will not lift a "coast-wise" restriction; see 46 CFR 67.17-5[b][1]). Mr. Grubel explained that such restriction precluding charter use frustrated his entire purpose in purchasing the vessel. In response, the vessel was offered for sale and, eventually, was sold on October 11, 1988 to Woods and Evaat Marina in Fort Lauderdale, Florida. The selling price for the vessel was not specified in the record. Mr. Grubel noted that he never used the boat for pleasure cruising during the entire time of its ownership by petitioner. Shortly after learning that the vessel could not be licensed for commercial (charter) use, Mr. Grubel "took all of [his]

personal belongings off that boat and had them shipped up to New York . . . ." The "personal belongings" removed and shipped were not more particularly described in the records.

OPINION

The Administrative Law Judge determined:

> "[p]etitioner's own presentation admits that the vessel in question was never licensed for use as a commercial vessel, was never so used and, due to its foreign manufacture, could not have become so licensed. Therefore, despite petitioner's avowed intent at the time of acquisition to use the vessel solely in a manner which would qualify for exemption, the impossibility of licensing such vessel for such use itself precludes entitlement to the described exemption (cf., Matter of DJH Constr. v. Chu, 145 AD2d 716, 535 NYS2d 249)" (Determination, conclusion of law "D," emphasis in original).

The Administrative Law Judge further held that the fact that petitioner kept personal belongings on the vessel and the lack of evidence that the described modifications would not provide the same benefits to petitioner when the vessel was used for pleasure cruising as well as charter cruising "cast some question on the claim that petitioner's sole aim in purchasing [the vessel] was to use [it] for commercial purposes and the claim that the vessel was never 'used' (for pleasure purposes or otherwise) while in New York" (Determination, conclusion of law "E").

The Administrative Law Judge concluded that the evidence in the case supported the conclusion that the piloting of the vessel to New York and its subsequent, approximate nine-month stay in New York, during which period it was refitted as described, clearly constituted use within the language of Tax Law § 1101(b)(7). The Administrative Law Judge distinguished the facts of this case from those 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 [stopover en route to another out-of-state destination is not a use subject to tax]) and Matter of Jamco Invs. (State Tax Commn., January 17, 1986 [two-week return to a New York marina for warranty-covered emergency repairs is not a use subject to tax]).

On exception, petitioner asserts that:

> "the uncontroverted evidence adduced at the administrative hearing established that the petitioner's intent in purchasing the boat was entirely

> for a business purpose. The [vessel] was purchased for use as a for charter commercial vessel in interstate and foreign commerce and should therefore be exempt from use tax pursuant to Tax Law section 1115(a)(8) and 20 NYCRR section 528.9(a)(3)" (Petitioner's brief, p. 11).

Petitioner urges that the rationale of the court in Matter of D.J.H. Constr. v. Chu (supra) should be followed here and that:

> "[t]he fact that it was subsequently determined that it was impossible for the [vessel] to be licensed by the Coast Guard as a commercial vessel should not be determinative of whether the exemption under Tax Law section 1115(a)(8) applies. Under the rationale of D.J.H. Construction, whether the vessel burned or sank or, as it turned out in the case at bar, whether the vessel could not be licensed for charter use by the Coast Guard, the purpose for which it was purchased and retrofitted, i.e. for use as a commercial charter in interstate and foreign commerce, remained unchanged" (Petitioner's brief, p. 14).

Petitioner goes on to assert that the transaction in this case did not constitute "use" under section 1101(b)(7) of the Tax Law. Petitioner's argument is that: "[t]he test for 'use' under that section is inapplicable to exempt commercial vessels such as that previously owned by the petitioner"; the Administrative Law Judge erroneously relied upon the fact that some personal belongings were kept on the vessel; the retrofitting of the vessel here was similar to that in Matter of Jamco Invs. (supra) which the former State Tax Commission found was not a use; and the situation here is different from that in Matter of Sunshine Developers v. Tax Commn. of State of New York (supra) because there is no evidence here, as there was in Sunshine, that petitioner moored his vessel in the State on a seasonal basis.

Finally, petitioner asserts there is no ground for the assessment of penalty since petitioner relied on the advice of its accountant and conversations with representatives of the Department of Motor Vehicles that the transaction was not subject to tax.

The Division asserts that the determination of the Administrative Law Judge is correct. Relying on its brief to the Administrative Law Judge, the Division asserts that petitioner has not proven that the vessel meets the criteria for exemption as a commercial vessel under section 1115(a)(8) since it never was and never could be used as a commercial vessel. The Division also asserts that section 1115(a)(8) does not condition the exemption for commercial vessels on the intent of the purchaser at the time of the purchase, i.e., "the statute does not, by its language

or context, grant the exemption to vessels which do not actually satisfy the statutory requirements, but for which there is only an intent to do so in the future" (Division's brief at hearing, p. 4). Finally, the Division asserts that penalty is properly imposed because petitioner has not shown that its failure to file a return and pay tax was due to reasonable cause and not willful neglect. The Division asserts that when petitioner became aware of the fact that the vessel could not be used in a manner that would be exempt from tax "it became incumbent upon petitioner to report and pay the use tax due." The Division rejects as without basis in law (citing, Matter of Auerbach v. State Tax Commn., 142 AD2d 390, 536 NYS2d 557) or fact, petitioner's assertion that penalty should not be imposed because it was entitled to rely on the advice of its accountant (Division's brief at hearing, p. 6).

We deal first with the issue of whether the Just for Fun was a commercial vessel, the purchase of which was exempt from tax. We affirm the determination of the Administrative Law Judge.

Tax Law § 1115(a)(8) provides an exemption from the tax on retail sales 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)" (Tax Law § 1115[a][8]).

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]).

The Just for Fun was never "primarily engaged in interstate or foreign commerce" and never "used or engaged in the transportation for hire of persons or property on water" and, thus, does not meet the statutory and regulatory definition of commercial vessel. Petitioner's reliance on D.J.H. Construction for the proposition that the purchaser's intention at the time of purchase is the controlling factor in determining whether the transaction is exempt, is misplaced.

First, D.J.H. Construction did not deal with the exemption at issue in this case but dealt with the so-called production exemption granted by Tax Law § 1115(a)(12). Thus, the decision of the Court is not controlling here.

Second, a review of the decision indicates that the Court's reliance on the purchaser's intent at the time of purchase in applying the exemption flows directly from the wording of the statute, i.e., the purchase of "[m]achinery or equipment for use . . . predominantly in the production of tangible personal property . . . for sale, by manufacturing" (Tax Law § 1115[a][12], emphasis added). As the Court stated, "[r]ead literally, entitlement to the exemption turns on the purpose of acquisition at the time of sale. Later events, while perhaps relevant to ascertain the buyer's intent at the time of the sale, should not be determinative of whether the exemption applies" (Matter of D.J.H. Constr. v. Chu, supra, 535 NYS2d 249, 251).

In contrast, the exemption for commercial vessels turns on whether the vessel is "primarily engaged" in interstate or foreign commerce, not whether it was purchased "for use" in foreign or interstate commerce.

Next, we would point out that in D.J.H. Construction the court did not, as petitioner implies, rely solely on the statement of the purchaser's intent at the time of purchase, but found that the objective facts proved by the purchaser substantiated the stated intent. The uncontroverted facts were that D.J.H., pursuant to a business decision to embark upon large scale manufacturing of concrete pipe for sale to others, purchased the machinery and equipment at issue and installed a plant having the capacity to produce some 770,000 tons of concrete pipe annually. Petitioner's needs for its own business of installing such pipes were 500 tons annually, a "minuscule percentage of the plant's capacity" (Matter of D.J.H. Constr. v. Chu, supra, 535 NYS2d 249, 251). Once the plant was fully operational, petitioner actively sought to obtain pipe business. Unfortunately, these efforts failed because of bad economic conditions.

In reviewing the Tax Commission's decision, the Court noted that "despite the fact, implicit in the Tax Commission's findings that petitioner's purpose at the time of purchase and installation undoubtedly was to employ the plant predominantly to produce pipe for sale"

(Matter of D.J.H. Constr. v. Chu, supra, 535 NYS2d 249, 251), the Commission denied the exemption because the lack of sales to outsiders meant that the plant was not being used predominantly (i.e., at least 50 percent of the time) in the production of tangible personal property for sale.

Under the circumstances, the Court held that:

> "[t]he Tax Commission's entire reliance in denying the exemption upon economic circumstances subsequent to petitioner's acquisition of the plant and equipment, rather than merely as providing evidence of the purpose of the buyer at the time of sale, is not only inconsistent with the statute, but administratively unworkable. As previously demonstrated, the taxable event here was the purchase or first acquisition of physical possession of the pipe-producing equipment by [the taxpayer], and it was then that liability for sales and use taxes had to be adjudged. At that point, petitioner was either entitled to the exemption or was not. The Tax Commission's interpretation, in which eligibility for the exemption turns exclusively on the taxpayer's subsequent history of use of the equipment in production, leaves totally uncertain the period during which the record of production will be examined. It is noteworthy that when the Legislature decided that taxability will turn on postsale events, it did so explicitly and specified the relevant period (see, Tax Law § 1111[b][1], [2])" (Matter of D.J.H. Constr. v. Chu, supra, 535 NYS2d 249, 252, emphasis added).

The situation here is distinctly different from that in D.J.H. Construction in that there are no facts to show that the Just for Fun became an operational commercial vessel and, thus, nothing to support petitioner's assertion that he purchased the Just for Fun for use as a commercial vessel. Moreover, the discovery by petitioner, after the purchase, that the Just for Fun could never be used as a commercial vessel, does not equate to the economic circumstances in D.J.H. Construction[2]

We deal next with the issue of whether the piloting of the vessel to New York and its subsequent approximate nine-month stay in New York constituted use within the language of section 1101(b)(7) of the Tax Law.[3] This issue was fully considered by the Administrative Law

---

[2]The analogous situation would seem to be where the Just for Fun was placed in service as a commercial vessel but because of a poor economy never became "engaged in interstate or foreign commerce" as required by section 1115(a)(8).

[3]Tax Law § 1110, which imposes a compensating use tax, provides, in pertinent part, as follows:

> "[e]xcept to the extent that property or services have already been or will be subject to

Judge and correctly decided by him. We affirm his determination for the reasons stated therein.

We deal finally with the issue of penalty. The arguments raised by petitioner on exception were dealt with fully and correctly by the Administrative Law Judge in his determination and we affirm for the reasons stated therein.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of petitioner The Absolute Difference, Inc. is denied;

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

3. The petition of The Absolute Difference, Inc. is denied; and

4. The Notice of Determination issued on March 20, 1991 is sustained.

DATED: Troy, New York
November 24, 1993

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

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

---

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).