

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
WILLIAM W. MACDOUGAL : DECISION
D/B/A W.W. MACDOUGAL YACHT : DTA NO. 821368
: :
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 March 1, 1987 through May 31, 1989. :
:

Petitioner, William W. MacDougal d/b/a W.W. MacDougal Yacht, filed an exception to the determination of the Administrative Law Judge issued on April 24, 2008. Petitioner appeared by Silberling & Silberling, Esqs. (Stephen P. Silberling, Esq., of counsel). The Division of Taxation appeared by Daniel Smirlock, Esq. (Jennifer A. Murphy, Esq., of counsel).

Petitioner filed a brief in support of his exception. The Division of Taxation filed a brief in opposition. Petitioner filed a brief in reply. Oral argument was not requested.

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

ISSUES

- I. Whether the Division of Taxation properly assessed sales and use taxes on seven sales made by petitioner during the period at issue.
- II. Whether petitioner has established reasonable cause and the absence of willful neglect so as to warrant abatement of penalties assessed.

III. Whether interest should be abated due to unreasonable errors or delays 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.

During the period at issue, William W. MacDougal d/b/a W.W. MacDougal Yacht (petitioner) sold boats and related services at the West Shore Marina located at 100 West Shore Road, Huntington, New York. Petitioner held exclusive rights to sell Mason boats in New York State during the audit period.

The business was operated as a sole proprietorship by William W. MacDougal, who handled the day-to-day business operation including its financial affairs.

In March 1991, an audit of petitioner for the period June 1, 1986 through May 31, 1989 was commenced by the Division of Taxation ("Division"). By letter dated March 27, 1991, petitioner was informed of the audit and was provided with a list of books and records to be produced which included, among other things, income tax returns, journals, ledgers, sales invoices, purchase invoices, register tapes, exemption certificates and other sales tax records.

At the time of the audit, petitioner provided the auditor with sales invoices, purchase invoices and certain miscellaneous documents. Bank statements, general ledgers and federal income tax returns were not made available to the auditor.

While petitioner was registered with the State of New York as a sales tax vendor, no sales and use tax returns had been filed for the audit period. The auditor attempted to visit the business, but at the time of commencement of the audit (1991), it was no longer in operation.

The auditor was unable to verify petitioner's total gross or taxable sales with the records provided because he could not determine whether the sales and purchase invoices provided were complete. He conducted an audit of the records provided, however, and assessed tax on seven sales transactions.

On September 6, 1991, the Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to petitioner, which assessed sales and use taxes in the amount of \$36,423.26, plus penalty of \$10,926.97 and interest of \$17,107.61, for a total amount due of \$64,457.84 for the period June 1, 1986 through May 31, 1989.¹ The address to which the notice was sent was "6 Bay Bright Court, Bay Shore, NY 11707." Both statutory and omnibus penalties were assessed pursuant to Tax Law § 1145(a)(1)(i) and (iv). The tax assessed represented tax due on the seven transactions previously referenced to. Each shall be addressed separately.

Petitioner held the exclusive rights to sell Mason boats in New York State. After receiving payment from the sale of a boat, petitioner paid the manufacturer. Petitioner acted either as a retail seller or as a broker acting on behalf of the manufacturer.

The Division assessed tax on petitioner's sale of a 1987 Mason 33, Hull# 23, to J.M. Thom, a New York resident, who purchased the boat for the price of \$108,935.00, less a trade-in of \$40,098.00, for a balance due of \$68,837.00. Tax due on the sale, per the invoice, was \$4,990.68. The invoice for this transaction was dated October 1986 and was signed by petitioner and the purchaser.

¹ While the Notice of Determination indicates that the audit period is June 1, 1986 through May 31, 1989, no tax was assessed for periods prior to the period ended May 31, 1987. Therefore, the caption in this determination indicates that the audit period at issue herein is the period March 1, 1987 through May 31, 1989.

As proof that sales tax was paid on this transaction, petitioner offered a photocopy of a nonnegotiable carbon copy of a bank check from Citibank payable to "NY Dept of Taxation" in the amount of \$4,914.75. The check was dated June 17, 1988, which date is more than one and one-half years after the date on the sales invoice. On the front of the carbon copy is typewritten "J. Thom."

The auditor requested, but did not receive, a copy of the canceled check in order to ascertain, by means of an eight-digit deposit serial number, whether the check was ever received by the Division and, if received, whether the proceeds had been applied to this transaction. The auditor admitted that he could not state, for certain, whether the Division received this payment.

An invoice from petitioner to Peter Costigan, a New York resident, dated March 4, 1987, indicated that a boat was sold to Mr. Costigan for the sum of \$83,916.30 with tax due, per the invoice, in the amount of \$6,293.70. Petitioner provided no documentation to show that the tax due on the transaction was paid.

An invoice from petitioner to Jeff Shane, a New York resident, dated January 31, 1988, indicated that a boat was sold to Mr. Shane for the sum of \$40,000.00, less a trade-in of \$23,000.00, for a balance due of \$17,000.00. The invoice, in the section for "Work Order No.," states "Chouette (D.Brown)." In addition, the invoice indicated that Mr. Shane purchased miscellaneous equipment from the estate of D. Brown for \$17,500.00. According to the invoice, sales tax of \$1,275.00 was charged only on the \$17,000.00 balance due on the sale of the boat. The auditor assessed tax in the amount of \$2,587.50 ($\$17,000.00 \text{ boat} + \$17,500.00 \text{ miscellaneous equipment} = \$34,500.00 \times .075 \text{ sales tax rate}$).

On the top of the invoice is handwritten "W. Simendinger D/B/A Mason East." At the hearing, petitioner stated that Walter Simendinger, a business associate, sold the boat to Mr. Shane and that petitioner received none of the proceeds therefrom.

The invoice indicates that the purchaser made a deposit of \$2,400.00 towards the purchase price of the boat. The record includes a copy of a check dated January 31, 1988 (the same date as the invoice) drawn on the account of J D M Corp. of Mineola, New York, payable to "W. Simendinger D/B/A Mason East" in the amount of \$2,400.00.

A business card of W.W. MacDougal Yacht Sales, Inc.,² was introduced into evidence, which contained the names of both "Bill MacDougal" and "Walter Simendinger." This business card noted that the business sold "Fine Mason Yachts."

Also in evidence is a letter, on the letterhead of W.W. MacDougal Yacht Sales, to the representative of the estate of Daniel Brown relating to the yacht Chouette and a Brokerage Agreement between W.W. MacDougal Yacht Brokers and Helga Weiss, executrix of the estate of Daniel G. Brown, seller of the yacht, Chouette.

It must also be noted that during the audit, the invoice relating to the sale to Mr. Shane was in the possession of petitioner.

An undated invoice from petitioner to Robert Greenbaum for the sale of a 1988 Mason boat indicates that the purchase price of the boat was \$229,629.00, less a trade-in of \$80,000.00, for a total price of \$149,629.00. The Division assessed sales tax in the amount of \$11,222.18 on this transaction ($\$149,629.00 \times .075$ sales tax rate). The invoice shows that the purchaser made a

² Other than this business card, there is nothing in the record to indicate that the business operated as a corporate entity.

down payment in the amount of \$21,629.00, leaving a balance due of \$128,000.00. The invoice does not contain the address of the purchaser, Robert Greenbaum.

At the hearing, petitioner produced a document on the letterhead of the Mason boat manufacturer, Pacific Asian Enterprises, Inc. ("PAE"), dated June 2, 1989, which states as follows:

I hereby authorize Pacific Asian Enterprises to complete the sale of Mason 44#45 to Mr. Robert Greenbaum. I understand that PAE will negotiate and collect monies from and deliver title documents to Mr. Greenbaum.

This document was signed by petitioner on June 8, 1989.

Petitioner also introduced a letter dated June 16, 1989 from PAE, which stated that PAE has "decided to cancel our dealership arrangement with you effective immediately." PAE's letter further stated that "[y]ou presently have an outstanding balance due with PAE of about \$58,000. This amount will be adjusted to a more precise number after the delivery of Mason 44145 to Bob Greenbaum."

An Agreement to Purchase Brokerage Yacht between petitioner and E.P. Bierrie of Cold Spring Harbor, New York, dated February 1989, provided for the sale of the yacht Prima Donna (Sabre 38) for the price of \$115,500.00, less a credit for a trade-in of \$38,000.00, for a net selling price of \$77,500.00. The Division assessed tax on this transaction in the amount of \$5,812.50.

At the hearing, petitioner stated that the boat was in Connecticut where it was picked up and that the boat was purchased by a Delaware corporation. No documentation to support these contentions was provided by petitioner.

By an invoice dated April 25, 1989, Boscola's Mattituck Marine, Inc. ("Boscola's"), of Mattituck, New York, sold a used 1986 Silverton 34-foot boat to petitioner for the sum of

\$65,500.00. On the same date, petitioner executed a resale certificate to Boscola's relative to his purchase of this boat. The resale certificate is specifically referenced on the sales invoice.

During the audit, the auditor sent a letter to the U.S. Coast Guard in an attempt to ascertain the owner of this boat. The U.S. Coast Guard replied stating that the owner was Thomas A. Guarino of Lloyd Harbor, New York.

The auditor then contacted Mr. Guarino who stated that he had been trying to get a letter from petitioner acknowledging that he had paid sales tax to him. Mr. Guarino informed the auditor that petitioner would provide the letter to him only if he first paid interest and penalty to petitioner.

The auditor conducted a search with the State Department of Motor Vehicles and learned that this boat was not registered. The auditor assessed tax on the selling price to Mr. Guarino of \$72,500.00, with tax due thereon in the amount of \$5,437.50.

An invoice from West Shore Marina of Huntington, New York, to Steven Lippe, dated May 8, 1989, indicated that West Shore Marina provided boat storage for the price of \$1,056.00. The invoice stated that sales tax in the amount of \$79.20 had been charged, making the total of the invoice \$1,145.20. West Shore Marina was not a registered sales tax vendor. Petitioner was located at the West Shore Marina.

During the audit, the auditor obtained a worksheet used by petitioner to total his costs. The auditor admitted that he was not sure what boat this worksheet pertained to. On the worksheet is an item listed as "West Shore" in the amount of \$1,193.00. The auditor assessed tax on the \$1,056.00 invoice in the amount of \$79.20.

According to the records of the Division, petitioner timely filed a Request for Conciliation Conference on December 4, 1991 which was received by the Division's Bureau of Conciliation and Mediation Services ("BCMS") on December 5, 1991.³

Notice of when a particular conciliation conference is to be held is referred to by BCMS as an appointment letter, and it is mailed to the taxpayer by regular mail to the address listed on the taxpayer's Request for Conciliation Conference. It is the practice of BCMS that the Data Control Unit prepares the appointment letters informing the taxpayers of the date and time that their conciliation conference will be held. Appointment letters are sent approximately 35 days prior to the scheduled conciliation conferences. According to BCMS's Conciliation Conference Calendar for July 30, 1992, a conciliation conference for petitioner was scheduled for petitioner on that date, at 2:45 P.M., at the New York State District Tax Office, State Office Building, Memorial Highway, Hauppauge, New York 11787. The Conciliation Conference Calendar is an internal document (within BCMS) that lists relevant information for cases that have been scheduled for a specific BCMS conferee, conference location and time period. Appointment letters for the cases included on these calendars are created from the same data files, at the same time, and as part of the same process that creates such calendars.

The address for petitioner set forth on the Conciliation Conference Calendar for July 30, 1992 was "6 Bay Bright Ct., Bay Shore, NY 11706," the same address to which the Notice of Determination and Demand for Payment of Sales and Use Taxes Due was sent by the Division, *supra* (*see*, finding of fact above).

³ The affidavit of Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS, indicates that, upon information and belief, petitioner's Request for Conciliation Conference was destroyed in the attack on the World Trade Center on September 11, 2001.

On August 28, 1992, BCMS issued a Conciliation Default Order (CMS No. 119359) to petitioner, which provided as follows:

Notice of said Conciliation Conference was mailed on June 25, 1992. The requester failed to appear personally, or by representative, at the Conciliation Conference. A Default has been duly noted.

It is Ordered that the Statutory Notices issued by the Department of Taxation and Finance, which are the subject of this request, be sustained and the request be dismissed.

According to the Division's records, a copy of the Conciliation Default Order was sent to petitioner by certified mail on August 28, 1992. The piece of mail was addressed to petitioner at "6 Bay Bright Ct., Bay Shore, NY 11706."

It is the practice of BCMS that the word processing unit prepare conciliation orders and certified mail records ("CMR"). The CMR is a listing of taxpayers to whom conciliation orders are sent by certified mail on a particular day. The word processing unit forwards the conciliation orders to the conciliation conferee for signature, who in turn forwards the order to a clerk in BCMS assigned to process conciliation orders. The word processing unit also forwards the CMR to the same clerk for processing. The CMR is kept by BCMS in the regular course of business.

The conciliation orders and the CMR are picked up in BCMS by an employee of the Division's Mail Processing Center. The Mail Processing Center returned a copy of the CMR to BCMS with a postmark affixed showing the date of mailing which is listed thereon as August 28, 1992. The CMR is kept in BCMS as a permanent record.

There is no record of the conciliation order being returned to BCMS. If the certified mail containing the order had been undeliverable for any reason, the reason would be noted on the CMR or remailed accordingly.

The facts set forth above were obtained from the affidavits of three employees of the Division: Barry M. Bresler, Director of BCMS; Robert Farrelly, Assistant Supervisor of Tax Conferences of BCMS; and James Steven VanDerzee, Principal Mail and Supply Supervisor in the Division's Registry Unit.

Petitioner denies ever having received the appointment letter from BCMS that scheduled his conciliation conference for July 30, 1992 or the Conciliation Default Order issued on August 28, 1992. According to petitioner, after filing his Request for Conciliation Conference in December 1991, he heard nothing from the Division until August 2001 when he received a letter in his post office box from a collection agency from the Midwest "that claimed I owed thousands and thousands of dollars to sales tax. But I wrote them a letter and said I did not owe it. Never heard from them again."

Pursuant to the Division's Case and Resource Tracking System, Assessments Receivable, in addition to the tax originally assessed against petitioner (\$36,423.26), as of June 20, 2007, petitioner owed penalty in the amount of \$11,473.30 and interest of \$350,416.17.

THE DETERMINATION OF THE ADMINISTRATIVE LAW JUDGE

With respect to the seven sales transactions for which sales tax was assessed, the Administrative Law Judge determined as follows:

(1) J.M. Thom: Tax was assessed on this sale because the purchaser was a New York State resident. Petitioner's proof that tax was paid was a copy of a non-negotiable carbon copy of a bank check payable to "NY Dept. of Taxation" in the amount of \$4,914.75. On the front of the carbon copy was typewritten "J. Thom." Tax due per the sales invoice was \$4,990.68.

Since the check was a bank check, the Administrative Law Judge found that it was reasonable for petitioner's not to have a canceled check. Although the check is in the amount of

\$4,914.75, rather than \$4,990.68 as stated on the sale invoice, the Administrative Law Judge concluded that the fact that the check is made payable to “NY Dept. of Taxation” and contains the notation “J. Thom” was sufficient. The Administrative Law Judge found that petitioner had met his burden of proving that all but \$75.93 (\$4,990.68 - \$4,914.75) was paid to the Division on the sale of a boat to Mr. Thom. Therefore, the Administrative Law Judge reduced the amount remaining due on this transaction from \$4,990.68 to \$75.93, plus applicable penalty and interest.

(2) Peter Costigan: Petitioner offered no proof that the tax on this transaction was paid, and the Administrative Law Judge sustained the tax asserted on this sale.

(3) Jeff Shane: The Division assessed tax in the amount of \$2,587.50 on the sale of a boat and miscellaneous equipment to Mr. Shane, a New York resident. Petitioner maintains that the sale was made, without his knowledge, by Walter Simendinger, a business associate.

The Administrative Law Judge observed that the sale invoice was provided to the auditor at the time of the audit, therefore, the Administrative Law Judge did not find it credible that petitioner was unaware of this transaction. Moreover, the Administrative Law Judge pointed out that petitioner was a sole proprietor responsible for the day-to-day business and financial affairs and by definition, was a person required to collect tax under Tax Law § 1131(1).

The Administrative Law Judge determined pursuant to Tax Law § 1131(1) that petitioner was liable for the collection and subsequent payment to the Division of sales tax on sales made by the business, whether the actual sale was made by petitioner or by an associate or employee. Accordingly, the Administrative Law Judge sustained the tax of \$2,587.50 assessed on the Jeff Shane transaction.

(4) Robert Greenbaum: The Division assessed tax in the amount of \$11,222.18 on the sale of a boat which, after credit for a trade-in, totaled \$149,629.00. The invoice does not contain an

address for Mr. Greenbaum. The Administrative Law Judge determined that petitioner failed to sustain his burden of proving that he was neither the seller nor the broker in this transaction, and the assessment of sales tax in the amount of \$11,222.18 was sustained.

(5) E.P. Bierrie: Tax of \$5,812.50 was assessed on the net proceeds of the boat sale to E.P. Bierrie, a New York State resident. Petitioner claimed that the purchaser was a Delaware corporation and that the boat was located in Connecticut where it was picked up by the purchaser. However, no documentation was produced to substantiate these contentions, and the Administrative Law Judge sustained this portion of the assessment in full.

(6) Thomas Guarino: Tax was assessed in the amount of \$5,437.50 on the sale of a used boat that petitioner had purchased from another vendor. Petitioner produced a signed resale certificate, which he provided to the vendor (Boscola's). The selling price to Mr. Guarino was \$72,500.00.

Petitioner argued that he never received title to this boat and, therefore, never transferred title to Mr. Guarino. He maintained that he merely acted as a broker for this transaction. However, petitioner admitted that he bought the boat for \$65,000.00 from Boscola and sold it for \$73,000.00 to Mr. Guarino (*see*, Transcript, p. 63). Accordingly, the Administrative Law Judge found petitioner liable for the collection and payment of the sales tax in the amount of \$5,437.50 was sustained.

(7) Tax was assessed in the amount of \$79.20 on an invoice from West Shore Marina of Huntington, New York, to Steven Lippe for boat storage.

There being no evidence that petitioner received the boat storage fees charged to Mr. Lippe, the Administrative Law Judge cancelled the tax of \$79.20.

Next, the Administrative Law Judge addressed the statutory and omnibus penalties that were assessed pursuant to Tax Law § 1145(a)(1)(i) and (iv). Petitioner failed to file sales tax returns for the period at issue and pay over sales tax on the transactions at issue in this proceeding. Therefore, the Administrative Law Judge found that petitioner failed to show reasonable cause and penalties were sustained.

Next, the Administrative Law Judge addressed whether interest on the assessment should be abated due to unreasonable errors or delays by the Division with respect to the issuance of the appointment letter or the conciliation default order. The Administrative Law Judge noted that the statute addressing the abatement of interest was enacted by chapter 770 of the Laws of 1992. As such, the Administrative Law Judge noted that such statute had an effective date of December 1, 1992, which fell after the conciliation default order issued in the case. Thus, the Administrative Law Judge found that the statute was inapplicable to the facts in this case.

ARGUMENTS ON EXCEPTION

On exception, petitioner argues as he did below that the tax asserted on the sales to Jeff Shane, E.P. Bierrie, Robert Greenbaum, and Thomas Guarino should be cancelled based on the same arguments as presented to the Administrative Law Judge, i.e.,

- a). Jeff Shane: This sale was made by W. Simendinger d/b/a Mason East, not by petitioner;
- b). Robert Greenbaum: This sale was made by PAE Enterprises;
- c). E.P. Bierrie: This boat was delivered to the purchaser, a Delaware corporation, in Connecticut;

d). Thomas Guarino: Petitioner never received title to this boat and, therefore, did not transfer title to Mr. Guarino. He states that he merely acted as a broker on behalf of the vendor of the boat.

Petitioner also continues to assert that the penalty and additional interest should be abated because his failure to pay tax was due to reasonable cause, i.e., his belief that he did not owe the tax.

The Division states that the Administrative Law Judge completely dealt with the issues before him. The Division also argues that petitioner has offered no new arguments on exception that would justify modifying the determination of the Administrative Law Judge.

OPINION

Every person, like petitioner here, who is under a duty to collect sales tax must keep records of every sale in such form as the Commissioner of Taxation may by regulation require (Tax Law § 1135[a][1]). The Commissioner has adopted regulations, which provide that:

[f]or the proper administration of the Sales and Use Tax Law and to prevent evasion of the sales tax, it is statutorily presumed that all receipts from sales and purchases of property or services of any type mentioned in subdivisions (a) through (d) of section 1105 of the Tax Law . . . are subject to the tax until the contrary is established. The burden of proving that any receipt, amusement charge or rent is not taxable is on the vendor or the customer. To satisfy his burden of proof, a vendor must maintain records sufficient to verify all transactions (20 NYCRR 533.2[a][1]).

The seller must maintain records that substantiate points of delivery if delivery was made at a place other than his place of business. Such documents should include receipts from parcel delivery services, common carriers, unregulated truckers, the United States Postal Service, foreign freight forwarders, and logs from company vehicles. Such documents must be referenced to specific sales transactions (20 NYCRR 533.2[b][3]).

The auditor found that petitioner's records were not verifiable. While petitioner provided purchase and sale invoices, they were incomplete. Bank statements and Federal income tax returns were not provided and New York Sales Tax Returns were not filed for the subject period. Still, the tax asserted on seven transactions was derived from the records petitioner did provide.

The burden of proving that any receipt, amusement charge or rent is not taxable is on the vendor or the customer. To satisfy his burden of proof, a vendor must maintain records sufficient to *verify* all transactions (20 NYCRR 533.2[a][1]). We find that petitioner has failed to carry his burden of proof in this regard. Petitioner's arguments, no matter how well crafted, do not rise to the level of clear and convincing evidence.

We also agree with the Administrative Law Judge that petitioner also failed to establish that he was entitled to abatement of penalty based on reasonable cause. We note that petitioner registered as a sales tax vendor, but then failed to file sales tax returns for the period he was in business. We also reject, for the reasons set forth in the determination of the Administrative Law Judge, petitioner's claim that he is entitled to an adjustment or cancellation of interest asserted.

Accordingly, we affirm the determination of the Administrative Law Judge. We find that the Administrative Law Judge has addressed and correctly decided each of the arguments raised by the parties. We can find no basis, based on the arguments presented, to modify his determination in any respect.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of William W. MacDougal d/b/a W.W. MacDougal Yacht, is denied;
2. The determination of the Administrative Law Judge is affirmed;

3. The petition of William W. MacDougal d/b/a W.W. MacDougal Yacht is granted to the extent set forth in conclusion of law “D” (1) and (7) of the Administrative Law Judge’s determination, but is otherwise denied; and

4. The Notice of Determination issued September 6, 1991, as modified, is sustained.

DATED: Troy, New York
March 5, 2009

/s/ Charles H. Nesbitt
Charles H. Nesbitt
President

/s/ Carroll R. Jenkins
Carroll R. Jenkins
Commissioner