

**New York State Department of Taxation and Finance
Taxpayer Services Division
Technical Services Bureau**

TSB-A-88 (56)S
Sales Tax
October 27, 1988

STATE OF NEW YORK
COMMISSIONER OF TAXATION AND FINANCE

ADVISORY OPINION

PETITION NO. S880707B

On July 7, 1988, a Petition for Advisory Opinion was received from Entrepreneur Yacht Charters Corp., 2 East 93rd Street, New York, New York 10128.

The issue raised is whether Petitioner's use tax liability can be computed on the basis of the fair rental value of its yacht during the period of use within New York State as provided in Sales and Use Tax Regulation Section 531.4(c)(2).

Petitioner, Entrepreneur Yacht Charters Corp., was incorporated in the state of Delaware. Petitioner was authorized to do business in New York State and maintained a business address at 2 East 93rd Street, New York, New York 10128.

Petitioner purchased a yacht, outside of New York State, on December 20, 1983 for \$635,000.00. The yacht was renovated in Florida during late 1983 and early 1984 for an additional cost of \$1,348,000.00.

Petitioner states that the yacht was initially purchased for chartering Florida clients. Petitioner decided to move the yacht to New York for 4 months to determine if the business could operate at a profit in New York.

The yacht was brought into New York State for its initial charter on May 26, 1984 and remained within the state performing charters until October 16, 1984. At that time the yacht was returned to Florida. Subsequently, the yacht was brought back into New York State and performed charters here during the periods from May 5, 1985 through October 27, 1985 and from May 2, 1986 through October 19, 1986. During the interim periods the yacht was returned to Florida where it was sold on January 20, 1987.

Petitioner entered into four charter contracts prior to May 26, 1984, whereby Petitioner was to perform charters within New York State on or after May 26, 1984. Each of the four charters were of four to six hours in duration. Subsequent to May 26, 1984, Petitioner entered into approximately 70-90 additional charter contracts, all of which were to be performed within New York State during the period May 26, 1984 to October 16, 1984 and all of which were also to be of four to six hours in duration.

Petitioner contends that its use tax liability should be computed on the fair rental value of the yacht as provided in Regulation Section 531.4(c)(2), because the yacht was in New York State for use in performing charters for a period of less than six months and then was removed to a location outside New York State.

Section 1105 of the Tax Law imposes a tax upon:

(a) The receipts from every retail sale of tangible personal property...

* * *

(c) The receipts from every sale, except for resale, of the following services:

- (3) Installing ... maintaining, servicing or repairing tangible personal property ... not held for sale in the regular course of business

Section 1110 of the Tax Law states as follows:

Imposition of compensating use tax. 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 ... except as otherwise exempted under this article,

(A) of any tangible personal property purchased at retail,

* * *

(D) of any tangible personal property, however acquired, where not acquired for purposes of resale, upon which any of the services described under paragraphs ... (3) of subdivision (c) of section eleven hundred five have been performed.

Section 1109(a) of the Tax Law states as follows:

Sales and compensating use taxes for the metropolitan commuter transportation district. (a) General. In addition to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article, there is hereby imposed ... and there shall be paid, additional taxes at the rate of one-quarter of one percent, which shall be identical to the taxes imposed by sections eleven hundred five and eleven hundred ten of this article

Section 1111(b) of the Tax Law provides as follows:

Special rules for computing receipts and consideration. (b) Tangible personal property, which has been purchased by a resident of New York State outside of this state for use outside of this state and subsequently becomes subject to the compensating use tax imposed under this article, shall be taxed on the basis of the purchase price of such property, provided however: ... (2) That the compensating use tax on such tangible personal property brought into this state (other than for complete consumption or for incorporation into real property located in this state) and used in performance of a contract or sub- contract within this state by a purchaser or user for a period of less than six months may be based, at the option of the taxpayer, on the fair rental value of such property for the period of use within this state.

Sales and Use Tax Regulations Section 531.4 provides as follows:

Property used outside of State prior to use in New York. (a) General rule. When tangible personal property is purchased outside of the state by a resident of the State, for use outside of the State, and is subsequently used in the State, the compensating use tax is due on the purchase price.

(b) ...

(c) Use of property in performing a contract. (1) Tangible personal property brought into New York State for use in the performance of a contract or subcontract within this State is subject to the compensating use tax based on the purchase price of such property.

(2) Where the tangible personal property brought into the state will be used for a period of less than six months, the user, at his option may elect to pay the compensating use tax based on the fair rental value of the property for the period of use within New York. This treatment is not applicable to tangible personal property completely consumed, or incorporated into real property located in the state.

Example: A contractor performing a construction contract in New York State purchases a crane for \$100,000 outside the State and brings it into this State for temporary (less than six months) use in the contract work. The crane has a fair rental value of \$2,500 per month. The contractor is liable for the compensating use tax on the \$100,000 purchase price unless he elects to report such tax based on the fair rental value of \$2,500 per month.

Section 1111(b)(2) of the Tax Law offers residents of New York State an optional method for computing the amount of use tax due on purchases of tangible personal property where the following criteria are met:

1. The tangible personal property is purchased and used outside of New York State prior to being brought into New York State.
2. The tangible personal property is brought into New York State (other than for complete consumption or for incorporation into real property located in the State) for the purpose of being used to perform an existing contract(s) or subcontract(s), such contract(s) or subcontract(s) having been entered into on or before the date the tangible personal property was brought into New York State.
3. The property was temporarily (less than six months) used in performance of the existing contract(s) or subcontract(s) where upon completion of its use in such contract(s) or subcontract(s), the property was removed from New York State.

When a resident of New York State brings tangible personal property into the State under criteria 1, 2 and 3 stated above, the resident may choose the optional method of computing use tax due based on the fair rental value of the tangible personal property for the period of its use within New York State.

In the instant case, Petitioner purchased and used the yacht outside New York State prior to bringing it into the State on May 26, 1984, thereby meeting criterion 1.

Petitioner entered into four contracts for chartering with New York clients on or before May 26, 1984, thereby meeting criterion 2.

However, since Petitioner's decision to initially bring the yacht into New York State for 4 months (May 26, 1984 to October 16, 1984) was to determine if the business could operate at a profit in New York, it is obvious that Petitioner's intent was not to bring the yacht into New York to perform the four contracts and then remove the yacht from New York upon completion of the yacht's use in such contracts. Rather, Petitioner intended to keep the yacht in New York State for 4 months for the purpose of using the yacht in the operation of an ongoing business and generating additional charters within the State by holding the yacht out as available for charter. Petitioner demonstrated this by entering into an additional 70-90 contracts with New York clients during the period from May 26, 1984 to October 16, 1984. On this basis, Petitioner has failed to meet criterion 3 inasmuch as it did more than merely bring equipment into the state for use in the performance of a contract or subcontract.

Whereas Petitioner did not meet all of the 3 criterion stated above, Petitioner's contractual activities are not considered to have fallen within the provision of Section 1111(b)(2). Accordingly, Petitioner does not qualify to use the optional method for computing the compensating use tax due as provided under Section 1111(b)(2). Rather, Petitioner is liable for the combined statewide and applicable local compensating use taxes on both the original purchase price of the yacht and the additional cost of the renovations.

However, it is noted that Section 1118(7)(a) of the Tax Law provides a credit against the compensating use tax liability in respect to use of property on which sales or use tax was legally due and paid thereon, without any right to a refund or credit thereof, to any other state which allows a corresponding credit for sales and use tax paid to New York State. Because New York State and Florida practice reciprocity, Petitioner may be entitled to a credit for any sales or use tax paid to the State of Florida on the purchase price plus the cost of renovations of the yacht.

DATED: October 27, 1988

FRANK J. PUCCIA
Director
Technical Services Bureau

NOTE: The opinions expressed in Advisory Opinions
are limited to the facts set forth therein.