

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HMY NEW YACHT SALES, INC.,)	
)	
Petitioner,)	
)	
vs.)	CASE NO. 94-4909
)	
DEPARTMENT OF REVENUE,)	
)	
Respondent.)	
<hr/>)	

RECOMMENDED ORDER

Pursuant to Notice, this cause was heard by Linda M. Rigot, the assigned Hearing Officer of the Division of Administrative Hearings, on May 8, 1995, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Cynthia S. Tunnicliff, Esquire
Pennington & Haben, P.A.
Post Office Box 10095
Tallahassee, Florida 32302-2095

For Respondent: Mark T. Aliff, Esquire
Office of the Attorney General
Tax Section, The Capitol
Tallahassee, Florida 32399-1050

STATEMENT OF THE ISSUE

The issue presented is whether HMY New Yacht Sales, Inc., is liable for the payment of use tax, together with penalty and interest, on a yacht which it purchased for resale and for use as a demonstrator.

PRELIMINARY STATEMENT

On November 5, 1992, the Department issued to Petitioner its Notice of Proposed Assessment, and Petitioner thereafter filed its Written Protest of Florida Sales and Use Tax with the Department. On April 21, 1994, the Department issued its Notice of Decision sustaining its assessment, and Petitioner timely requested a formal hearing regarding that determination. This cause was thereafter transferred to the Division of Administrative Hearings to conduct the formal proceeding.

Petitioner presented the testimony of Stephen D. Moynihan by way of deposition. Denise Warren testified on behalf of the Department. Additionally, Joint Exhibits numbered 1-4 and Petitioner's Exhibit numbered 1 were admitted in evidence.

Both parties submitted post-hearing proposed findings of fact in the form of proposed recommended orders. A specific ruling on each proposed finding of fact can be found in the Appendix to this Recommended Order.

FINDINGS OF FACT

1. Petitioner HMY New Yacht Sales, Inc., is a Florida corporation located in Dania, Florida. It is a franchise and an authorized dealer for several lines of new boats. Petitioner is registered as a dealer for Florida sales tax purposes and has a dealer decal.

2. Petitioner became an authorized dealer for Davis Yachts, a manufacturer located in North Carolina, in 1985. In January 1990 Petitioner purchased a boat from Davis Yachts to be used for demonstration and promotional activities and for resale. The boat was a 47-foot fiberglass sports fisherman named "The Bandit."

3. When the boat was delivered, Petitioner outfitted The Bandit with extensive electronics and fishing equipment, including a tuna tower, outriggers, a fighting chair, rocket launchers, and live wells. It took approximately two months (until the second week in March 1990) to outfit the boat to have it ready for its intended sports fishing purpose. The type of equipping done by Petitioner is typical of that done on every such boat when it is sold since such a boat cannot be used for its intended purpose without the electronics and other equipment. Petitioner, however, wanted the boat to be "ready to go," when Petitioner sold it rather than having the purchaser wait for the outfitting to be done before the purchaser could use the boat.

4. Petitioner paid the factory approximately \$520,000 for the boat. Petitioner's payments to local vendors for services and materials used in outfitting the boat brought Petitioner's cost to approximately \$590,000.

5. The Bandit was never documented or registered in the state of Florida. It was only operated under Petitioner's dealer registration and decal, as provided in Section 327.13, Florida Statutes.

6. The boat was purchased with the intent to sell it, and it was always for sale from the first moment it was outfitted and ready to be shown. It was never Petitioner's intent to keep the boat. As soon as it was outfitted, the boat had on board, at all times, a file containing a complete inventory of the boat's equipment, including custom and standard options, and a color brochure with pictures of the boat to be given to potential customers.

7. While Petitioner was attempting to sell the boat, it was also used by Petitioner as a sales promotional tool. Petitioner took the boat to various fishing tournaments and exhibited it at boat shows and open houses. Davis Yachts bore some of the expense of those activities since promoting the boat inured to the benefit of Davis as well as of Petitioner. When the boat was being used for promotional or sales activities, it would always have on board employees or salespersons of Petitioner or of Davis Yachts and customers. On occasion, family members accompanied Petitioner's salespersons on board the boat. The manner in which The Bandit was marketed--taking it to fishing tournaments and boat shows and having open house at various events--is typically the way new sport fisherman yachts are sold throughout the industry.

8. The boat was shown to prospective customers at least once a month. Approximately 50 customers were taken on sea trials.

9. The boat was never loaned or rented to anyone. It was used only under the direction of Petitioner or Davis Yachts. The only compensation received by Petitioner relating to the boat resulted from the occasions when Davis Yachts split some of the expenses for the promotional or sales activities.

10. The boat did not sell as quickly as Petitioner hoped. In October 1990 Petitioner placed the boat on the Buck System, a multiple listing service which distributes information to other yacht brokers concerning boats which are for sale. Generally, boat dealers would not put new inventory in the multiple listing system. Petitioner did so in this instance, however, in order to quickly sell the boat because the government had announced a luxury tax proposal which Petitioner feared would result in a downturn in the boat market. Even with all the effort put into attempting to sell the boat, it did not sell until November 1991.

11. In July 1992 the Department began a routine sales tax audit of Petitioner. The audit was completed in September 1992 and covered the period of time from March 1987 through February 1992.

12. The Department auditor determined that Petitioner owed use tax on The Bandit because in November 1990, on the advice of its accountant, Petitioner took the boat out of its inventory account and placed it in its fixed assets account in order to take depreciation for federal income tax purposes. Based solely on Petitioner's treatment of the vessel on its corporate books, the auditor determined that Petitioner converted The Bandit to its own use and was, therefore, responsible for payment of the statutory use tax rate of 6 percent of the value of the boat as reflected on Petitioner's records.

13. Based upon the audit, the Department issued its Notice of Proposed Assessment, assessing Petitioner \$33,921.94 in tax, \$8,480.50 in penalty, and \$7,085.52 in interest through September 16, 1992. Interest continues to accrue at \$11.15 per day.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties hereto and the subject matter hereof. Section 120.57(1), Florida Statutes.

15. The parties do not dispute that Petitioner was a registered dealer for sales tax purposes and could purchase the boat for resale tax free and collect the tax on the retail sale to the ultimate consumer. The dispute between the parties involves only the question of whether Petitioner converted the boat to its own use and became liable for the payment of use tax solely because Petitioner changed its treatment of the vessel on the corporate books for federal income tax purposes. The answer is that Petitioner did not.

16. There are no statutes or rules which specify that the classification of an asset on the corporate books for federal income tax purposes is the only factor to consider in determining whether property has been converted to a taxpayer's own use. Although the auditor and the Department cited several Florida statutes and administrative rules pertaining to use tax, none specifies that the Department should look at no indicia of intent or use other than the treatment of an asset on the corporate books for federal income tax purposes. There are no statutory or rule provisions which address this particular issue.

17. Further, the Department presented evidence that generally accepted accounting principles (GAAP) prohibit depreciating inventory but allow the depreciation of fixed assets. The Department's auditor testified that GAAP is used for federal income tax purposes, but the Department does not require taxpayers to follow GAAP. Accordingly, generally accepted accounting principles do not dictate that Petitioner's treatment of The Bandit on its corporate books requires the payment of a use tax to the state of Florida.

18. Dispositive of liability for use tax in this proceeding is Petitioner's use of The Bandit. The Department admits that The Bandit was exempt from sales tax when purchased by Petitioner, a registered dealer. Chapter 327, Florida Statutes, regulates the registration of vessels, and Section 327.13(4) specifically regulates a registered dealer's use of a vessel as follows:

(4) A manufacturer or dealer shall not use or authorize the use of any vessel registered pursuant to this section for other than demonstration, sales promotional, or testing purposes. Such vessel shall not be used for any commercial or other use not specifically authorized by this section.

Thus, Chapter 327 provides for the registration of boats and provides for a dealer registration when a boat is being used for demonstration and promotional activities.

19. The evidence is uncontroverted that from the day Petitioner purchased the Bandit until November 1991 when Petitioner sold the vessel to its ultimate consumer Petitioner only used the vessel for demonstration and promotional purposes. It was never used to carry passengers for hire or for any other commercial activity. It was always for sale. The evidence is further uncontroverted that the vessel was always operated under Petitioner's dealer registration decal. The only conclusion that can be drawn from the evidence in this cause is that the boat was purchased for resale and remained for resale during the entire time it was held by the Petitioner. In short, the use of the vessel never changed although the entry for the vessel on Petitioner's corporate books did change. The Department's auditor did not consider Section 327.13, Florida Statutes, in determining that Petitioner was liable for use tax because she was not aware of the existence of that statutory provision.

20. It is interesting to note that the change in treatment on the corporate books relied on by the Department to determine that the vessel was no longer for sale but had been converted to Petitioner's own use occurred at about the same time that Petitioner placed the vessel on the multiple listing service to provide other yacht dealers with information on the vessel in order to increase Petitioner's opportunities to sell The Bandit. The listing of The Bandit on the multiple listing service is certainly another indicia of Petitioner's continuing intent to sell the vessel. The Department offers no explanation for its choice of treatment on the corporate books for federal income tax purposes being a controlling factor in determining the use of a vessel rather than the continuous display of the dealer registration decal and the listing of the vessel for sale on a multiple listing service.

21. The better reasoned argument is that the treatment of an item on the corporate books may be one indication of whether personal property is being held for resale, but it is not the only or conclusive indication. Where, as here,

Petitioner purchased a new vessel for resale as an exempt purchaser and continuously put forth efforts to accomplish that resale, only using the vessel as authorized for a registered dealer, then Petitioner evidenced no intent to convert the boat and did not convert the boat to its own use based only on bookkeeping entries in the corporate records, following the advice of its tax professional. Under the Department's argument, it is the bookkeeping entry which the Department has elevated to a taxable event rather than the actual use of the vessel, a proposition not supported by any statutory or rule citation.

22. In its Supplemental Proposed Recommended Order, Petitioner argues that in the event the assessment of tax is upheld in this Recommended Order, no penalty or interest should be imposed pursuant to the Department's broad discretion in determining whether to assess penalty and interest for the late payment of sales and use tax. Section 213.21(3), Florida Statutes, authorizes the Department to settle or compromise a taxpayer's liability for penalties if ". . . the noncompliance is due to reasonable cause and not to willful negligence, willful neglect, or fraud." No evidence was offered and no argument was made that Petitioner failed to pay a use tax on The Bandit due to willful negligence, willful neglect, or fraud. Rather, it is undisputed that Petitioner believed no use tax was due and relied upon the advice of Petitioner's accountant.

23. Similarly, Rule 12-13.001, Florida Administrative Code, authorizes the Department to settle or compromise the liability for interest, and Section 12-13.005 authorizes such settlement when there is doubt as to the liability for interest based on the facts and circumstances of a specific case. In the case at bar, there are no statutes or rules specifying that the classification of an asset on corporate books for federal income tax purposes is the only criterion the Department will utilize to determine that a vessel has been converted to the retail dealer's own use, so as to render it taxable. In the case at bar, Petitioner relied on advice of its tax professional and changed the way the boat was treated on its corporate books, with no knowledge that such might render it liable for use tax. Further, no evidence was offered that there was any intent or attempt to wrongfully evade the Florida use tax.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be entered determining that Petitioner is not liable for payment of use tax, penalty, or interest on The Bandit, and withdrawing the assessment which is the subject of this proceeding.

DONE and ENTERED this 2nd day of August, 1995, at Tallahassee, Florida.

LINDA M. RIGOT, Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 2nd day of August, 1995.

APPENDIX TO RECOMMENDED ORDER

1. Petitioner's proposed findings of fact numbered 1-12, 15, and 19 have been adopted either verbatim or in substance in this Recommended Order.

2. Petitioner's proposed findings of fact numbered 13, 14, and 18 have been rejected as not constituting findings of fact but rather as constituting argument of counsel, conclusions of law, or recitation of the testimony.

3. Petitioner's proposed findings of fact numbered 16, 17, and 20 have been rejected as being unnecessary to the issues involved herein.

4. Respondent's proposed findings of fact numbered 1-3, 6, 8, and 9 have been adopted either verbatim or in substance in this Recommended Order.

5. Respondent's proposed findings of fact numbered 4, 5, and 10 have been rejected as not being supported by the weight of the competent evidence in this cause.

6. Respondent's proposed finding of fact numbered 7 has been rejected as being unnecessary to the issues involved herein.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.

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DISTRICT COURT OPINION
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IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

HYM YACHT SALES, INC.,
Appellant,

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED.

vs.

CASE NO. 95-4169
DOAH CASE NO. 94-4909

DEPARTMENT OF REVENUE,
Appellee.

_____ /

Opinion filed July 16, 1996.

An appeal from an order of the Department of Revenue.

Cynthia S. Tunnicliff of Pennington, Culpepper, Moore, Wilkinson, Dunbar & Dunlap, Tallahassee, for Appellant.

Robert A. Butterworth, Attorney General, and Mark T. Aliff, Assistant Attorney General, Tallahassee, for Appellee.

BARFIELD, C.J.

HMY New Yacht Sales, Inc. (HMY) challenges a final order of the Department of Revenue (FOR) adopting the hearing officer's findings of fact, but rejecting her conclusions of law and finding that HMY is liable for the payment of use tax and interest on a yacht which it purchased for resale, but which was also used by HMY and by the manufacturer for demonstration and general sales promotional purposes. We affirm the finding that HMY is liable for the payment of use tax and interest on the yacht, notwithstanding procedural error on the part of DOR.

The parties do not dispute the facts. HMY (a Florida boat dealer) purchased the 47 - foot fishing yacht, "The Bandit," from Davis Yachts, Inc. (the manufacturer) in January 1990 for \$420,000. HMY intended to resell the yacht, but also to use it for demonstration and sales promotional activities until its resale. The yacht was taken to boat shows and fishing tournaments, was used only under the direction of HMY or Davis Yachts, and was never loaned or rented to anyone. Davis Yachts bore some of the expense of the promotional activities, which inured to the benefit of both businesses. The yacht was at all times operated under HMY's dealer registration and decal, as provided in section 327.13(4), Florida Statutes (1991). 1/

In October 1990, HMY placed the yacht on a multiple listing service in an effort to quickly sell it in face of a government announcement of a luxury tax proposal which HMY feared would adversely affect the boat market. In November

1990, on the advice of its accountant, HMY took the yacht out of its inventory account and placed it in its fixed assets account in order to take depreciation for federal tax purposes. The boat was sold in November 1991.

In 1992, DOR performed a routine sales tax audit of HMY, covering the period from March 1987 through February 1992. Based upon the change in the accounting status of the yacht from inventory to capital asset, the auditor determined that HMY had converted "The Bandit" to its own use and was therefore responsible for payment of the statutory use tax under section 212.05, Florida Statute (1991). Based on the audit, DOR issued a notice of proposed assessment of use tax, penalty, and interest, and HMY filed a written protest. DOR thereafter issued a notice of decision sustaining its assessment, and HMY requested a formal hearing, which was held before a Department of Administrative Hearings (DOAH) hearing officer.

HMY's prehearing statement argued that no use tax was due because the yacht "was purchased for resale and used as a demonstrator" and that "[a] dealer is not deemed to have used a vessel in Florida so as to be subject to the use tax when he has a vessel for sale and is using it as a demonstrator, with a Florida dealer registration decal as provided in Section 327.13, Florida Statutes." DOR's prehearing statement stated its position, "that Petitioner's accounting treatment for the boat in question and use as a general demonstrator vessel converted the vessel to Petitioner's use and rendered it taxable, pursuant to Chapter 212, Fla. Stat., despite the fact that this boat was sold in October, 1991."

The hearing officer considered the live testimony of the DOR auditor and deposition testimony of the vice president of HMY. HMY's attorney argued that HMY was not liable for the use tax "simply because of the treatment that was given the yacht on the corporate books." DOR argued:

. . .the use of which this boat was put, accountingwise, was inconsistent with that to be afforded inventory. And at that point in time, it was converted to the use and benefit of this particular taxpayer, and benefits were derived . . . [a]nd that is the basis [for the use tax assessment].

When HMY's vice president was asked whether the yacht was purchased as a demonstrator, he responded:

- A. Yes. Our intention, in 1990, was to have a boat for demonstration and promotional purposes to enhance our business and to use as a vehicle, or vessel in this case to draw more business and create more sales. That was the purpose in getting that boat in 1990.
- Q. Did it create more sales?
- A. I absolutely think it did.

He testified that it was always HMY's intent to resell the yacht, that the yacht was always for sale, that it was operated under HMY's dealer registration and decal, and that HMY complied with section 327.13. On cross-examination, he agreed that the reason for purchasing the yacht was "for use as a demonstrator, as opposed for (sic) an investment . . . the plan, from day one, was to use it as it was used, which was as a demonstrator . . . [t]he plan was for it to be a demonstrator boat, and to use it for promotional activities that we were involved with then, and still are today, and to do the boat tests, and to do the factory some good when they needed sea trial and demonstrations done in our part of the country; it was a designated plan." He admitted that Davis Yachts

contributed to some of the demonstration and promotional expenses of the yacht, "because the end result was that it was a benefit, supposed to be a benefit, to both of us to have this thing as a demonstrator . . . that was a lot of the reason for Davis' participation, was that it was going to be good for us both, and as a demonstrator, we would be able to have this boat available for these kinds of things." The auditor testified that she was not aware of section 327.13(4), and that the sole basis for the use tax assessment was the change in accounting of the yacht.

In its proposed recommended order, DOR suggested the hearing officer find that the use tax assessment was made against the yacht "because the Petitioner converted this boat to its own use by transferring it out of inventory and taking a federal income tax benefit that is inconsistent with the treatment to be afforded inventory, which cannot be depreciated." It proposed that the hearing officer make the following conclusions of law: that under the applicable statutes, "the use of which the Petitioner converted this vessel was inconsistent with its keeping [it] as inventory"; that "the conclusion that [the vessel] was used in the trade or business is warranted"; and that although HMY purchased the yacht without sales tax liability, "its inconsistent accounting treatment and actual use of the vessel supports the conclusion that "The Bandit's had been converted to Petitioner's use and merged with the mass of property in this State, therefore rendering it liable for use tax as assessed by Respondent. . ."

In her recommended order, the hearing officer concluded that HMY's actual use of "The Bandit" was dispositive of its liability for use tax. She cited the fact that HMY had complied with section 327.13(4) and stated that the DOR auditor did not consider section 327.13 in determining that HMY was liable for use tax "because she was not aware of the existence of the statutory provision." She noted that the change in treatment of the yacht on the corporate books "occurred at about the same time that Petitioner placed the vessel on the multiple listing service to provide other yacht dealers with information on the vessel in order to increase Petitioner's opportunities to sell The Bandit." She concluded:

The better reasoned argument is that the treatment of an item on the corporate books may be one indication of whether personal property is being held for resale, but it is not the only or conclusive indication. Where, as here, Petitioner purchased a new vessel for resale as an exempt purchaser and continuously put forth efforts to accomplish that resale, only using the vessel as authorized for a registered dealer, then Petitioner evidenced no intent to convert the boat and did not covert the boat to its own used based only on book-keeping entries in the corporate records, following the advice of its tax professional. Under the Department's argument, it is the bookkeeping entry which the Department has elevated to a taxable event rather than the actual use of the vessel, a proposition not supported by any statutory or rule citation.

The hearing officer noted DOR's broad discretion, under section 231.21(3), in determining whether to assess penalties and interest for the late payment of sales or use tax if "the noncompliance is due to reasonable cause and not to willfull negligence, willful neglect, or fraud." She found that "no evidence was offered that there was any intent or attempt to wrongfully evade the Florida

use tax." She recommended "that a Final Order be entered determining that Petitioner is not liable for payment of use tax, penalty, or interest on The Bandit, and withdrawing the assessment which is the subject of this proceeding."

In its final order, DOR adopted the hearing officer's findings of fact and her legal conclusion that it had jurisdiction, but rejected her other conclusions of law, "because they misapprehend the law or rely on or recite incomplete or inapplicable portions of the statutes or rules," and substituted its own conclusions of law. Noting the definition of "use" in section 212.02(21), it concluded that the facts "establish that Petitioner exercised rights and powers incident to ownership of an interest in the property beyond those necessary for resale of the property." It noted that HMY had admitted using the yacht for demonstration and promotion of sales of other boats, and to generally promote goodwill for its businesses. It stated:

Demonstration and promotional use of specific tangible personal property restricted to that necessary to achieve sale of that specific tangible personal property, would not result in assessment of use tax. There is, however, no exemption from tax for tangible personal property purchased and used for purposes of demonstrating and promoting other tangible personal property.

(Emphasis in the original; footnote omitted.) It also noted that "'The Bandit' was extensively used by petitioner and by Davis Yachts, Inc. (a separate legal entity), for demonstration and promotion of sales of other boats in Davis Yachts's inventory, or to be manufactured by Davis Yachts, and Petitioner received direct compensation for that use." It concluded that "[t]he use by Petitioner of 'The Bandit' for the promotion of its other boats and the use by and for another entity were the exercise by Petitioner of rights and powers incident to ownership beyond any required for resale of the property so used."

DOR found that section 327.13 addresses safe operation and registration of vessels, not taxation, and that "it does not provide an exemption from taxes imposed pursuant to Chapter 212." The agency concluded that it was not possible, under the narrow construction of tax exemption statutes required by *Green v. Pederson*, 99 So. 2d 292 (Fla. 1957),

. . .to imply that the legislature, by specifying uses of a vessel for purposes of regulation and registration under Chapter 327, intended to provide an exemption from a tax expressly imposed under sections 212.05 and 212.06, F.S. If the legislature had intended to grant such an exemption, it could have expressly done so. Compare, for example, section 212.0601, F.S., which provides an exemption from use tax (other than a specified annual amount for each dealer license plate) on use of a motor vehicle with a dealer license plate under section 320.08(1), F.S.

It also concluded that HMY's converting the yacht "from an inventory item to a capital asset was not incident to resale of the property, but was a purposeful use in order to claim depreciation on federal income tax returns" and that "by signing a federal income tax returns" and that "by signing a federal income tax return in which it claimed a deduction for depreciation with respect to the yacht, Petitioner declared that the yacht was not in its inventory of stock in trade held primarily for resale, and that the yacht was used in its trade or business." It ruled that HMY was liable for payment of use tax and interest on

the use of "The Bandit" because it "extensively used this property." However, it exercised its discretion under section 212.21(3) "to waive the penalty related to this portion of the assessment."

We find that DOR properly adopted all the hearing officer's factual findings, notwithstanding how they were labeled by the hearing officer, and that it also properly rejected her legal conclusions. The hearing officer apparently misread the law as stating that a dealer is exempt from the use tax even though it uses the vessel for taxable purposes, if it also intends to sell the vessel. DOR did not dispute that HMY always intended resale of the yacht, or that resale of "The Bandit" and any demonstration or promotional activities intended to aid in selling "The Bandit" are considered non-taxable uses. Its determination that HMY is liable for use tax was based in part on the fact that in addition to resale of "The Bandit," HMY also used the yacht to sell other yachts and to promote its business and the manufacturer's business, all of which DOR interprets as falling within the statutory definition of a taxable "use." This interpretation of the statute is a reasonable one and is within the agency's scope of activity.

The problem is that, notwithstanding that HMY does not deny that it used "The Bandit" to sell other boats and to promote its business and the business of Davis Yachts, the hearing officer did not make such a finding that "The Bandit" was used for more than to aid in its own resale, probably because she did not interpret the statute as making this determination central to the question of whether HMY was liable for use tax in this case. It was not within the agency's province to make this factual finding. See *Boulton v. Morgan*, 643 So. 2d 1103 (Fla. 4th DCA 1994); *Friends of Children v. Department of Health and Rehabilitative Services*, 504 So. 2d 1345 (Fla. 1st DCA 1987); *Cohn v. Department of Professional Regulation*, 477 So. 2d 1039 (Fla. 3d DCA 1985). Were the actual use of the yacht the only basis for the instant tax assessment, we would be compelled to remand this case to DOR for further proceedings, including remand by the agency to the hearing officer for entry of a recommended order containing all findings of fact necessary to the determination of whether HMY would be liable for use tax on "The Bandit." However, because the tax assessment is also based upon HMY's accounting treatment of the yacht, we find affirmance of the final order is proper.

We approve DOR's determination that HMY was liable for a use tax on "The Bandit" based on its conclusion that HMY's converting the yacht "from an inventory item to a capital asset was not incident to resale of the property, but was a purposeful use in order to claim depreciation on federal income tax returns" and that "by signing a federal income tax return in which it claimed a deduction for depreciation with respect to the yacht, Petitioner declared that the yacht was not in its inventory of stock in trade held primarily for resale, and that the yacht was used in its trade or business. We also approve the agency's interpretation of the statutory definition of "use" with respect to demonstration and promotional activities, i.e., that such activities related solely to resale of the vessel do not constitute a taxable "use," but that when such activities are also related to the sale of other vessels or to the general promotion of the dealer's business or another business, they constitute a taxable "use" of the vessel.

Notwithstanding the agency's improper factfinding with respect to the actual use of the yacht, the final order determining that HMY is liable for use tax on "The Bandit," including interest, is AFFIRMED.

KAHN, J., and SMITH, SENIOR JUDGE, CONCUR.

ENDNOTE

1/ Section 327.13 relates to the registration by dealers and manufacturers of boats used for demonstration, sales promotional, or testing purposes:

A manufacturer or dealer shall not use or authorize the use of any vessel registered pursuant to this section for other than demonstration, sales promotional, or testing purposes. Such vessel shall not be used for any commercial or other use not specifically authorized by this section.