

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

ACTION BOATWORKS, INC.,)
)
 Petitioner,)
)
 vs.) Case No. 98-4152
)
 DEPARTMENT OF REVENUE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was held in this case on January 28, 1999, by video teleconference with the Petitioner appearing from Miami, Florida, before J. D. Parrish, a designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Jack Stein, Esquire
Arthur Rosenberg, Esquire
Stein, Rosenberg & Winikoff
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4875 North Federal Highway
Fort Lauderdale, Florida 33308

For Respondent: Eric Taylor, Assistant Attorney General
401 Northwest Second Avenue, N607
Miami, Florida 33128

STATEMENT OF THE ISSUES

Whether Petitioner owes the assessment for sales and use tax as alleged by the Department of Revenue.

PRELIMINARY STATEMENT

This case began on July 13, 1998, when the Department of Revenue (Department) issued a use tax notice to Petitioner, Action Boatworks, Inc. Such notice claimed a tax in the amount of \$34,294.56 was past due for a vessel known as the "Action Lady." Such notice further alleged a penalty in the amount of \$17,147.28 with interest at \$8,129.21 to be also due for such vessel. The total amount of the use tax claim was \$59,571.05.

Thereafter, Petitioner filed a challenge to the claim and requested an administrative hearing as to the matter. The case was forwarded to the Division of Administrative Hearings for formal proceedings on September 22, 1998.

At the hearing, Petitioner presented testimony from George Schoenrock, a principal with the company Action Boatworks, Inc. Petitioner's composite Exhibit 1 was admitted into evidence. Respondent's Exhibits A, B, C, and D have also been received into evidence.

The Transcript of the proceedings was filed on March 15, 1999. The parties were granted ten days' leave from such date to file their proposed recommended orders. To date, neither party has filed a proposed order.

FINDINGS OF FACT

1. George Schoenrock is a resident of the State of Florida. His address is 7600 Miami View Drive, Northgate Village, Miami, Florida.

2. Mr. Schoenrock is the owner of a company known as Action Marine. This company is located in the State of Florida and manufactures and sells new boats.

3. In 1996 Mr. Schoenrock also formed a company in North Carolina called Action Boatworks. This company, Action Boatworks, is the Petitioner in this cause.

4. In 1996 Petitioner purchased a boat made in Wanchese, North Carolina and named it the "Action Lady."

5. The boat was purchased to re-sell for profit by Petitioner, a dealer in North Carolina. Action Boatworks is not registered in Florida to sell boats nor does it possess a Florida sales tax dealer's license or a tax number from the Florida Department of Revenue.

6. At the time of purchase Mr. Schoenrock considered the "Action Lady" unfinished as it lacked canvas, fishing equipment, chair rigging, and electronic equipment for navigation.

7. The total paid to Davis Boatworks, Inc. (the manufacturer) for the "Action Lady" was in excess of \$571,000.00. The invoice for this purchase, dated May 21, 1996, did not list Petitioner as the purchaser of the vessel but identified a "Barney Schoenrock."

8. After the purchase of the boat, Mr. Schoenrock brought the "Action Lady" to South Florida where he intended to complete the installation of the items noted above and re-sell it. The

vessel entered the State of Florida by the end of May 1996, and proceeded down the coast to a dock at Mr. Schoenrock's residence.

9. One deterrent to the re-sale of the "Action Lady" was immediately discovered by Mr. Schoenrock. That is, the diesel engines did not pass a "P.I.D." inspection required for the warranty to be effective. This inspection required Detroit Diesel to complete the P.I.D. test and to certify the engines were acceptable.

10. The vessel eventually passed this inspection some eight or nine months after Mr. Schoenrock had received the boat. The first effort to repair the vessel in order to pass the P.I.D. test was in June of 1996 when it was taken to a repair facility known as Safety Harbor. The "Action Lady" remained at Safety Harbor until August 7, 1996, when it returned to Mr. Schoenrock's residence.

11. Thereafter, on or about October 24, 1996, the vessel went back to Safety Harbor for additional repairs which lasted approximately two weeks.

12. After the repairs were completed, sometime in November 1996, the boat was returned to Mr. Schoenrock's residence.

13. In October 1996 Mr. Schoenrock listed the "Action Lady" for sale with Walsh Yachts. The asking price was noted at \$695,520.00. Also at this time it was placed in the Fort Lauderdale boat show.

14. Except for the time the boat was in repairs or on exhibition during the October boat show, the "Action Lady" remained docked at Mr. Schoenrock's residence.

15. Eventually, Petitioner sold the vessel in South Florida to Joseph Gregory in March of 1997.

16. According to Mr. Schoenrock the boat was not used for his own personal use. It was not used by others for personal use. It was subject to repairs, testing, and demonstration the entire time it was in Florida prior to its sale.

17. According to Mr. Schoenrock, when he purchased the boat in North Carolina, he paid sales tax in that state totaling \$2500.00.

18. Mr. Schoenrock's company, Action Marine, was never in any way an owner of the "Action Lady."

19. Mr. Schoenrock insured the vessel for its value and was the beneficiary of the policy.

20. From June 1, 1996, through its resale in March 1997, the "Action Lady" did not leave the State of Florida.

CONCLUSIONS OF LAW

21. The Division of Administrative Hearings has jurisdiction over the parties to, and the subject matter of, these proceedings.

22. Section 212.05, Florida Statutes, provides, in pertinent part:

It is hereby declared to be the legislative intent that every person is exercising a

taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

23. Section 212.08(7)(t), Florida Statutes, provides:

1. Notwithstanding the provisions of chapters 327 and 328, pertaining to the registration of vessels, a boat upon which the state sales or use tax has not been paid is exempt from the use tax under this chapter if it enters and remains in this state for a period not to exceed a total of 20 days in any calendar year calculated from the date of first dockage or slippage at a facility, registered with the department, that rents dockage or slippage space in this state. If a boat brought into this state for use under this paragraph is placed in a facility, registered with the department, for repairs, alterations, refitting, or modifications and such repairs, alternations, refitting, or modifications are supported by written documentation, the 20-day period shall be tolled during the time the boat is physically in the care, custody, and control of the repair facility, including the time spent on sea trials conducted by the facility. The 20-day time period may be tolled only once within a calendar year when a boat is placed for the first time that year in the physical care, custody, and control of a registered repair facility; however, the owner may request and the department may grant an additional tolling of the 20-day period for purposes of repairs that arise from a written guarantee given by the registered repair facility, which guarantee covers only those repairs or modifications made during the first tolled period. Within 72 hours after the date upon which the registered repair facility took possession of the boat, the facility must have in its possession, on

forms prescribed by the department, an affidavit which states that the boat is under its care, custody, and control and that the owner does not use the boat while in the facility. Upon completion of the repairs, alternations, refitting, or modifications, the registered repair facility must, within 72 hours after the date of release, have in its possession a copy of the release form which shows the date of release and any other information the department requires. The repair facility shall maintain a log that documents all alternations, additions, repairs, and sea trials during the time the boat is under the care, custody, and control of the facility. The affidavit shall be maintained by the registered repair facility as part of its records for as long as required by s. 213.35. When, within 6 months after the date of its purchase, a boat is brought into this state under this paragraph, the 6-month period provided in s. 212.05(1)(a)2. or s. 212.06(8) shall be tolled.

2. During the period of repairs, alternations, refitting, or modifications and during the 20-day period referred to in subparagraph 1., the boat may be listed for sale, contracted for sale, or sold exclusively by a broker or dealer registered with the department without incurring a use tax under this part; however, the sales tax levied under this part applies to such sale.

3. The mere storage of a boat at a registered repair facility does not qualify as a tax-exempt use in this state.

4. As used in this paragraph, "registered repair facility" means:

a. A full-service facility that:

(I) Is located on a navigable body of water;

(II) Has haulout capability such as a dry dock, travel lift, railway, or similar

equipment to service craft under the care, custody, and control of the facility.

(III) Has adequate piers and storage facilities to provide safe berthing of vessels in its care, custody, and control; and

b. A marina that:

(I) Is located on a navigable body of water;

(II) Has adequate piers and storage facilities to provide safe berthing of vessels in its care, custody, and control; and

(III) Has necessary shops and equipment to provide repairs or warranty on vessels; or

c. A shoreside facility that:

(I) Is located on a navigable body of water;

(II) Has adequate piers and storage facilities to provide safe berthing of vessels in its care, custody, and control; and

(III) Has necessary shops and equipment to provide repairs or warranty work.

24. Rule 12A-1.0071, Florida Administrative Code, provides guidelines for boats temporarily docked in Florida. Petitioner did not comply with any of the provisions of this rule in order to secure an exemption from use tax provisions. In fact, Petitioner did not maintain it was entitled to an exemption until after inquiries were made into the dockage history of the vessel.

25. In this case Petitioner bears the burden to challenge the accuracy of the use tax assessment issued by the Department.

The Petitioner has not contested the amount of the tax, the penalty assessed, nor the interest due on the assessment. Instead, the Petitioner maintains that a use tax is not owed as the vessel was purchased and brought to the State of Florida merely for repairs and resale, and not for the personal use of the taxpayer. Mr. Schoenrock, a Florida resident, maintains he did not use the vessel but that it was stored at his residence. Petitioner maintains it spent the entire time repairing or installing improvements to the boat, and that the boat P.I.D. test was not completed and successful until February of 1997, one month before the boat was sold. Petitioner cites the case of Department of Revenue v. Yacht Futura Corporation, 510 So. 2d 1047 (Fla. 1st DCA 1987) in support of its position.

26. In the Futura case the yacht was purchased elsewhere and brought to Florida for warranty repairs. The vessel arrived in Florida in October of 1984 and was ready to leave the state in January 1985. The court found that the act of "sailing the Futura into Florida waters and docking it at various marinas in Florida for the purpose of effectuating extensive repairs and alterations upon it did not constitute a use or storage so as to activate Florida's taxing statutes." Futura at 1049.

27. Unlike the Futura vessel which was required to be repaired in Florida, the "Action Lady" was brought to Florida for the owner's convenience. The vessel was never reported or registered for repair in a facility designated by statute or

rule. Moreover, the repairs and testing performed for the "Action Lady" were done to enhance its resale value. Without the P.I.D. approval the warranty would not have been available for the engines. Nothing in this record demonstrates that the P.I.D. could not be completed in North Carolina, the state of original manufacture. Further, unlike the Futura, the "Action Lady" was docked at the owner's residence for extensive periods. It was not in marinas receiving repairs on a continuous basis. Of the ten months it was owned by Petitioner and within Florida (primarily at Mr. Schoenrock's personal residence), the "Action Lady" was being repaired, at best, 117 days. The remainder of the time it was available for use and was stored on the Intracoastal Waterway.

28. Additionally, unlike the Futura case cited by Petitioner, the beneficiary of this boat transaction was a resident of Florida. Mr. Schoenrock acquired the boat with the intent of bringing it to Florida for resale. He made improvements to the vessel to increase its value. He did not follow the exemption criteria to seek an exemption under the repairs provision for boats temporarily docked in Florida. His North Carolina company (who it is claimed was the purchaser of the vessel) did not document, by any of the appropriate affidavits, the repair information cited by the rule.

29. Despite the delays in obtaining the P.I.D. certification, Mr. Schoenrock did not submit any documentation

regarding the necessity for such repairs in Florida. In fact, if, as he claims, the P.I.D. was needed for warranty purposes, it is curious that he accepted the vessel from its manufacturer in North Carolina without such certification.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Department of Revenue enter a Final Order affirming the use tax assessment.

DONE AND ENTERED this 5th day of May, 1999, in Tallahassee, Leon County, Florida.

J. D. PARRISH
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 5th day of May, 1999.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.