

COMMONWEALTH OF MASSACHUSETTS

APPELLATE TAX BOARD

FREDERICK BRODSKY

v.

COMMISSIONER OF REVENUE

Docket No. C322186

Promulgated:
April 12, 2016

This is an appeal filed under the formal procedure pursuant to G.L. c. 58A, § 7 and G.L. c. 62C, § 39, from the refusal of the Commissioner of Revenue ("appellee" or "Commissioner"), to abate use tax, along with related interest and penalties, assessed against the appellant, Frederick Brodsky ("appellant" or "Mr. Brodsky"), on his storage and use in Massachusetts of a sailing vessel beginning in May of 2009.

Commissioner Good heard this appeal. Chairman Hammond and Commissioners Scharaffa, Rose, and Chmielinski joined her in the decision for the appellee.

These findings of fact and report are made pursuant to requests by both the appellant and appellee under G.L. c. 58A, § 13 and 831 CMR 1.32.

Randall T. Weeks, Jr., Esq. and Timothy D. Wegner, Esq. for the appellant.

Jamie Szal, Esq. and Marikae G. Toye, Esq. for the appellee.

FINDINGS OF FACT AND REPORT

On the basis of all of the evidence, including the testimony of the appellant, who was the sole witness at the hearing of this appeal, and the parties' Agreed Statement of Facts with exhibits, the Appellate Tax Board ("Board") made the following findings of fact.

I. PROCEDURAL HISTORY AND JURISDICTION

Prior to and during the period relevant to this appeal, appellant Frederick Brodsky and his wife, Darla, maintained a primary residence in Dallas, Texas.¹ However, they had a longstanding practice of coming to the Northeast seashore during the warmer months of the year. Initially, the Brodskys rented vacation homes in Maine and Cape Cod, but in September of 2003, they purchased a residence in Fairhaven, Massachusetts, which they have owned since. Mr. Brodsky testified that they typically came to their Fairhaven home anywhere from May to July of each year and returned to their primary home in the fall, usually around mid-October.

The Brodskys were avid sailors. In decades past, they owned a 60-foot sailboat called *My Way*, which was based out of the Caribbean and which they used to take extended sailing excursions. Subsequently, they acquired *My Way Too*, a 43-foot

¹ In 2012, following the period relevant to this appeal, the Brodskys moved from Texas to Florida.

trawler boat equipped with a galley kitchen and sleeping quarters. *My Way Too* was moored in New Bedford, Massachusetts. Mr. Brodsky sold *My Way Too* in mid-2009, after purchasing a 59-foot Symbol Pilothouse vessel ("*Odyssey*"), which is the vessel at issue in this appeal. *Odyssey* was not purchased in Massachusetts but was later brought here, as discussed further below.

When Mr. Brodsky purchased *Odyssey*, it came equipped with a ten-foot 2003 Nautica tender ("*Tender*"), a small boat which was used to get to and from shore when *Odyssey* was at anchor. For reasons that are discussed in more detail below, Mr. Brodsky decided to sell *Odyssey*, together with *Tender*, in late 2010. According to documents entered into the record, during the process of selling *Odyssey* and *Tender*, it came to the buyer's attention that *Tender* had not been registered. The buyer requested that *Tender* be registered to provide proof of chain of title.

The evidence indicated that Mrs. Brodsky registered *Tender* at the Customer Service Bureau office of the Massachusetts Department of Revenue ("Department") on September 22, 2011, paying a Massachusetts use tax of \$86.50 on the purchase price of *Tender*, plus \$54.09 in penalties. According to the Assessment Narrative prepared by the Department's auditor, when Mrs. Brodsky submitted her paperwork for *Tender*, the examiner on

duty also noticed documentation related to *Odyssey*, for which no use tax had been paid. The Assessment Narrative, which was among the stipulated documents entered into the record, noted that when questioned about *Odyssey*, Mrs. Brodsky refused to answer and "covered the documents" relating to *Odyssey*. The examiner subsequently referred the matter to the Department's Boat Unit for audit.

On March 30, 2012, the Commissioner issued a Notice of Failure to File a Return for the tax period ended May 31, 2009, the end of the first month that *Odyssey* was moored in Massachusetts. The appellant was issued a Notice of Assessment on April 4, 2013 assessing a use tax of \$40,750, based on the original purchase price of \$815,000, along with a \$20,375 penalty for failure to file, and interest. The appellant filed an Application for Abatement on April 22, 2013, seeking full abatement of the tax and penalties, which was denied by the Commissioner by Notice of Abatement Determination dated February 11, 2014. On March 10, 2014, the appellant filed an appeal with the Board. Based on the foregoing, the Board found and ruled that it had jurisdiction to hear and decide this appeal.

II. THE APPELLANT'S PURCHASE AND USE OF ODYSSEY

On November 5, 2008, Mr. Brodsky purchased *Odyssey* for a total consideration of \$815,000.² Although Mr. Brodsky purchased *Odyssey* from a California vendor, he took possession of it in international waters off the coast of San Diego and sailed directly to Mexico. Contemporaneous documents entered into the record showed that Mr. Brodsky structured the transfer this way deliberately to avoid incurring California sales or use tax, and he testified to this fact as well. Mr. Brodsky did not pay a sales or use tax to any jurisdiction in connection with his purchase or use of *Odyssey*.

It was during the trip to Mexico that Mr. Brodsky first experienced problems with *Odyssey's* functioning. Even though *Odyssey* had been thoroughly inspected prior to his purchase, Mr. Brodsky stated that on the way from California to Mexico, they began to notice "intermittent electrical" problems.

After sailing *Odyssey* to Mexico, Mr. Brodsky arranged to have it shipped to Florida, where it arrived in December of 2008. Mr. Brodsky secured a month-to-month slip lease for *Odyssey* at Harbour Towne Marina in Dania Beach. Mr. Brodsky testified that it had been his plan to permanently moor *Odyssey*

² Although the Purchase and Sale Agreement recited a purchase price of \$805,000, it appeared from documents entered into the record that an additional \$10,000 had been previously escrowed toward the total purchase price.

in Florida, and that he had no intention of bringing *Odyssey* to Massachusetts at the time he purchased it, despite his longstanding practice of spending several months in Massachusetts each year. He stated that it was very easy to drive or fly from Massachusetts to Florida to use the boat if they wished to go cruising during a time when they were typically in Massachusetts.

With *Odyssey* safely moored in Florida, Mr. Brodsky hired boat mechanics to look into the problems that had surfaced en route to Mexico. Subsequent inspections revealed additional problems, including issues with the boat's hydraulics, air conditioning, and automatic identification system. Invoices for the work performed on *Odyssey* during this time were introduced into evidence.

In February of 2009, the Brodskys departed on *Odyssey* for a cruise of the Bahamas. This tour lasted approximately three weeks, after which they arrived back in Florida. During this cruise, they once again experienced problems with *Odyssey's* systems, including leaks as well as problems with the electronics, hydraulics, and stabilizer. Again, Mr. Brodsky hired mechanics to conduct the necessary repairs on *Odyssey*.

Mr. Brodsky testified that in March of 2009, he became concerned that the repairs would not be completed by the time the Brodskys planned to depart for Massachusetts as they did

each year. Mr. Brodsky stated that it was important for him to be able to oversee the repairs performed on *Odyssey* because it was a new boat to him and he wanted to fully understand its mechanics and operation. Accordingly, Mr. Brodsky testified that he began thinking at that point of bringing the boat up to Massachusetts for the summer and having the remainder of the repairs performed there, where he could oversee them.

Mr. Brodsky testified that in March of 2009, he began contacting marinas within an hour of his Fairhaven home. On March 18, 2009, Mr. Brodsky signed a seasonal slip contract with Gear Locker Marina in New Bedford.³ Gear Locker Marina was the same marina where Mr. Brodsky had previously moored *My Way Too*.

Mr. Brodsky testified that he left Florida aboard *Odyssey* on May 9, 2009, reaching Fairhaven on May 18, 2009, which was corroborated by credit card statements. Again, Mr. Brodsky arranged to have work performed on *Odyssey*, and several work orders and invoices for repairs performed on *Odyssey* in Massachusetts during the summer of 2009 were entered into the record.

³ The slip contract showed that it was originally printed in November 2008. The Commissioner argued that this constituted evidence that Mr. Brodsky requested the contract in the fall of 2008. Mr. Brodsky claimed that it was the custom of Gear Locker to print contracts at the end of each summer boating season to offer to existing customers wishing to moor their boats there again in the coming year. The Board found that there was no evidence that Mr. Brodsky received the contract prior to March 2009. As such, the Board found that the date of the contract's original printing was not relevant to whether Mr. Brodsky intended to use the vessel in Massachusetts at the time of purchase.

Odyssey made three voyages in the summer of 2009, which Mr. Brodsky characterized as "sea trials" designed to test the repairs. According to *Odyssey's* cruising log, on June 8, 2009, Mr. Brodsky, his dogs, and five companions sailed from New Bedford to Provincetown, Massachusetts. The next day, the Brodskys sailed from Provincetown to Marblehead, Massachusetts. On June 10, 2009, the Brodskys returned from Marblehead to New Bedford. From August 13, 2009 to August 22, 2009, the Brodskys sailed from New Bedford to Maine, stopping en route in Gloucester, Massachusetts. Finally, the Brodskys and two companions sailed *Odyssey* to Provincetown on September 19, 2009.

On November 2, 2009, the Brodskys sailed *Odyssey* back to Florida. They again moored at Harbour Towne Marina, under a month-to-month slip lease arrangement.

In June of 2010, the Brodskys returned to Massachusetts, consistent with their longstanding seasonal practice of spending the warmer months at their Fairhaven home. As he had in 2009, Mr. Brodsky sailed *Odyssey* to Massachusetts. He testified that he brought *Odyssey* to Massachusetts in 2010 with the hope of cruising off the coast of Maine, and he did. The evidence showed that the Brodskys took extended cruises off the coast of Maine during the summer that year. In 2010, *Odyssey* was again moored at Gear Locker Marina.

However, during 2010, *Odyssey* continued to experience mechanical issues. Mr. Brodsky testified that he became tired of these problems and made the decision to sell *Odyssey*. On October 12, 2010, the Brodskys brought *Odyssey* to Annapolis, Maryland, where it was stored until it was sold on September 22, 2011. Mr. Brodsky commissioned the building of a new 71-foot yacht, *John Bow*, which was completed and entered the water in 2012. *John Bow* was also moored seasonally in New Bedford and used and stored in Massachusetts and elsewhere.

III. THE BOARD'S CONCLUSIONS

On the basis of all of the evidence, the Board found that *Odyssey* was stored and used in Massachusetts during the period relevant to this appeal and that Mr. Brodsky purchased *Odyssey* for storage and use in Massachusetts, among other places.

The Board did not find Mr. Brodsky's testimony with respect to his intentions for *Odyssey* to be credible, as it was inconsistent and contradicted by contemporaneous documents entered into the record.⁴ Specifically, the Board rejected Mr. Brodsky's assertion that unexpected events - namely, the mechanical issues that arose following his purchase of *Odyssey*

⁴ Mr. Brodsky's testimony was at times evasive, which further damaged his credibility. When asked directly by the hearing officer whether the boats he previously owned were *registered* in Massachusetts, which would generally have meant that a sales or use tax was paid on them, he answered a seemingly different question, replying: "The mooring was in Massachusetts, yes." As is demonstrated by the facts of the present appeal, mooring a boat in Massachusetts does not mean that a sales or use tax has been paid.

and his need to personally oversee the repairs - caused him to bring *Odyssey* to Massachusetts in 2009, contrary to his original plans.

First, the Board notes that the explanation offered by Mr. Brodsky during the hearing of this appeal for bringing *Odyssey* to Massachusetts was much narrower than the reasons stated in his Petition to the Board. In that Petition, Mr. Brodsky cited the "exorbitant insurance costs to keep the *Odyssey* in Florida full time," along with the possibility of using a Massachusetts mooring as "a launching point to travel outside of Massachusetts" as reasons for bringing *Odyssey* to Massachusetts, in addition to the need to "undertake various repairs." More importantly, the explanation offered by Mr. Brodsky at the hearing for bringing *Odyssey* to Massachusetts in 2009 was seriously undermined on cross-examination. When questioned by counsel for the Commissioner, Mr. Brodsky conceded that he had not remained present in Florida to personally oversee the repairs being performed on *Odyssey* at that time.

It was clear from the record that Mr. Brodsky deliberately structured his acquisition of *Odyssey* in a way that allowed him to avoid paying a sales or use tax in California. Despite his testimony that it had been his intent from the start to permanently moor *Odyssey* in Florida, the Board notes that he did not pay a use tax there either, or to any other jurisdiction in

connection with his purchase or use of *Odyssey*, nor did he insure or document *Odyssey* in Florida.

Instead, the evidence showed that Mr. Brodsky obtained an insurance policy on *Odyssey* at the time of purchase which identified New Bedford, Massachusetts as its permanent mooring location. Mr. Brodsky testified that he did not intentionally name New Bedford as *Odyssey's* permanent mooring location on the insurance policy and that his insurance agent had done so without asking him. In fact, he claimed to be unaware that New Bedford was the place of mooring listed in the insurance documents until he was preparing for the hearing of this appeal.

Mr. Brodsky's professed ignorance on this matter stood in contrast to his familiarity with other provisions in his insurance policy for *Odyssey*. In particular, when questioned at the hearing, Mr. Brodsky demonstrated a thorough understanding of the expansive navigational limits set within the policy, which included the entire Atlantic and Gulf coast, from Newfoundland to Mexico, among other areas. He testified that he specifically arranged for the extensive navigational limits and that he had to pay an additional premium for the expanded coverage. The Board found it dubious that Mr. Brodsky would be so familiar with these aspects of his insurance policy but completely ignorant of the listed place of mooring.

Furthermore, *Odyssey* was documented with the United States Coast Guard on November 6, 2008, identifying Fairhaven, Massachusetts as its hailing port. In addition to being emblazoned as the hailing port on the stern of *Odyssey*, Fairhaven was listed as the hailing port on *Odyssey's* certificate of documentation, required by the United States Department of Homeland Security, dated November 17, 2008. The Board found that these contemporaneous documents, including *Odyssey's* insurance policy, supported the conclusion that it was Mr. Brodsky's intent at the time of *Odyssey's* purchase to store and use *Odyssey* in Massachusetts.

The Board found that the record contradicted Mr. Brodsky's claim that bringing *Odyssey* to Massachusetts in 2009 was an unforeseen event, precipitated by the unexpected need to oversee additional repairs. Instead, the Board found that bringing *Odyssey* to Massachusetts was consistent with the Brodskys' established pattern of storing and using boats in Massachusetts, first with *My Way Too*, then with *Odyssey*, and later with *John Bow*. Moreover, despite his claim that bringing *Odyssey* to Massachusetts in 2009 was an anomaly, Mr. Brodsky brought *Odyssey* back to Massachusetts in 2010, for the admitted purpose of taking extended cruises off of the Northeast coast. In fact, evidence was entered into the record to suggest that Mr. Brodsky had been hoping to use a large vessel in

Massachusetts as early as 2008. The Commissioner entered into the record a copy of a letter to the editor of a local newspaper, written by Mr. Brodsky in 2013, in which he stated that he had placed himself on a waiting list for a slip for larger boats at Pope's Island Marina in New Bedford several years earlier. When questioned about the article, Mr. Brodsky conceded that he put himself on the wait list at Pope's Island Marina in 2008, before he had acquired *Odyssey*.^{5,6} The Board found that all of these actions, taken together, undercut Mr. Brodsky's claim that he never intended to store or use *Odyssey* in Massachusetts at the time of its purchase.

On the basis of all of the evidence, including the contemporaneous documents and the reasonable inferences drawn therefrom, the Board found and ruled that the appellant purchased *Odyssey* for storage and use in Massachusetts, among other places, and therefore the Commissioner properly assessed the use tax at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

⁵ Although Mr. Brodsky owned *My Way Too* in 2008, it was a smaller "local use" type of boat, in Mr. Brodsky's words, for which slips were readily available, unlike *Odyssey* and the "yachts" discussed by Mr. Brodsky in the letter to the editor.

⁶ Several times during his testimony, Mr. Brodsky emphasized that *Odyssey* was a large, ocean-going vessel, as opposed to a small local-use vessel, like *My Way Too*, presumably in an effort to support his claim that he purchased *Odyssey* for the purpose of taking extended cruises, primarily in the Caribbean. The Board found this testimony to be unavailing. At 71-feet, *John Bow* was an even larger vessel than *Odyssey*, and the evidence showed that Mr. Brodsky stored and used *John Bow* in Massachusetts, too.

OPINION

During the period at issue, General Laws c. 64I, § 2 imposed a five percent tax on the "storage, use or other consumption in the commonwealth of tangible personal property purchased ... for storage, use or consumption within the commonwealth."⁷ The taxable storage or use of a marine vessel includes the sailing, mooring, or repair of the vessel within the Commonwealth. See ***M & T Charters, Inc. v. Commissioner of Revenue***, 404 Mass. 137, 141-42 (1989); ***Towle v. Commissioner of Revenue***, 397 Mass. 599, 605 (1986); ***Liberty Marine, LLC v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports 2008-1, 11. Property need not be used exclusively or even primarily in Massachusetts to be considered purchased for use within the Commonwealth. ***Towle***, 397 Mass. at 605. Because *Odyssey* was stored and used in the Commonwealth beginning in May of 2009, the Board found and ruled that *Odyssey* was stored and used in the Commonwealth for purposes of G.L. c. 64I, § 2.

The issue in this appeal was whether Mr. Brodsky purchased *Odyssey* with the intent to use it in the Commonwealth, as the Commissioner contended, or whether, as Mr. Brodsky maintained, he did not foresee its use in Massachusetts at the time of purchase.

⁷ The tax rate has since been increased to 6.25%. See G.L. c. 64I, § 2.

Property is presumed to have been purchased for use in Massachusetts if it was delivered or brought into the Commonwealth within six months of its purchase. G.L. c. 64I, § 8(f) ("Section 8(f)"). When property is brought into the Commonwealth more than six months after purchase, the statutory presumption of Section 8(f) does not apply. Mr. Brodsky took possession of the *Odyssey* on November 5, 2008. He began sailing *Odyssey* to Massachusetts on May 9, 2009, which was 6 months and 4 days from the date of purchase. He arrived in Massachusetts on May 18, 2009, 6 months and 13 days from the date of purchase. Accordingly, the Board found and ruled that the statutory presumption does not apply in this instance.

However, Section 8(f) is not dispositive of the ultimate issue of taxability. See ***Macton Corp. v. Commissioner of Revenue***, Mass. ATB Findings of Fact and Reports, 1993-95, 106. "[T]he presumption alone does not conclusively establish [liability] for the use tax. The board must still resolve, on the basis of all of the evidence of record, the ultimate issue of whether the [property] was purchased for storage, use, or consumption in Massachusetts." In the present appeal, the Board found and ruled that the preponderance of the evidence indicated that the appellant purchased *Odyssey* with the intent to store and use it, at least some of the time, in Massachusetts.

First, the Brodskys' storage and use of *Odyssey* was consistent with their long-standing practice of storing and using a vessel in Massachusetts each summer. Mr. Brodsky brought *Odyssey* to the same marina that he used to moor the vessels he purchased both prior to and after purchasing *Odyssey*. The Board found Mr. Brodsky's testimony that he only brought *Odyssey* to Massachusetts so he could personally supervise repairs to be less than credible for a number of reasons, including the fact that he had not remained present in Florida to oversee all of the repairs performed on *Odyssey* earlier in 2009. The Board thus rejected Mr. Brodsky's claim that the unforeseen need for repairs was the reason he brought *Odyssey* to Massachusetts in 2009 and instead concluded that Mr. Brodsky purchased *Odyssey* with the intent to store and use it during the warmer months in Massachusetts, just as he did again with *Odyssey* in 2010 as well as with the boats he owned before and after *Odyssey*.

In addition, the contemporaneous documents entered into the record consistently listed Massachusetts as the hailing port or place of mooring for *Odyssey*. See ***M & T Charters***, 404 Mass. at 141 (rejecting taxpayer's claim that boat purchased in Florida was not purchased for use in Massachusetts when contemporaneous documents - including the purchase and sale agreement - listed Massachusetts as the documentation port). Although, in

accordance with 46 C.F.R. § 67.119, a marine vessel owner may select any place in the United States as its registered hailing port, Mr. Brodsky used Fairhaven as *Odyssey's* hailing port on U.S. Coast Guard and Homeland Security documentation and listed New Bedford as its permanent place of mooring on its insurance policy. See ***Liberty Marine, LLC***, Mass. ATB Findings of Fact and Reports at 2008-13 (taxpayer failed to prove that the mooring of a vessel was outside of the Commonwealth when forms filed with the U.S. government and the insurance carrier all listed a Massachusetts address). Despite Mr. Brodsky's purported intention to permanently moor *Odyssey* in Florida, the slip rental he obtained for it there was shorter term - month-to-month - than the slip rental he obtained in Massachusetts, which was a seasonal slip covering the boating season. Moreover, he did not insure or otherwise document *Odyssey* in Florida, nor did he pay a use tax there. See ***Towle***, 397 Mass. at 600, 605.

The Board found that these facts, taken together, contradicted Mr. Brodsky's stated intent to permanently moor *Odyssey* in Florida and instead supported the conclusion that he purchased *Odyssey* with the intent to bring it to Massachusetts, consistent with his established seasonal pattern of coming to, and boating in, Massachusetts during the warmer months of each year. On the basis of all of the evidence, the Board found and ruled that Mr. Brodsky purchased *Odyssey* for storage and use in

the Commonwealth and that the Commissioner properly assessed the use tax at issue. Accordingly, the Board issued a decision for the appellee in this appeal.

THE APPELLATE TAX BOARD

By: _____
Thomas W. Hammond, Jr., Chairman

A true copy,

Attest: _____
Clerk of the Board