

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

HORACE HARDING 164TH, INC.

DECISION

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, 1979
through May 31, 1982.

Petitioner, Horace Harding 164th, Inc., c/o Nicholas LaMaina, 4332 193rd Street, Flushing, New York 11358, filed a petition 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, 1979 through May 31, 1982 (File Nos. 41170 and 41959).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 30, 1986 at 9:15 A.M., with all briefs to be submitted by May 30, 1986. Petitioner appeared by its President, Nicholas LaMaina. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

ISSUE

Whether the Audit Division properly estimated petitioner's tax liability for the period March 1, 1979 through May 31, 1982 on the basis of external indices.

FINDINGS OF FACT

1. Petitioner, Horace Harding 164th, Inc., operated an Exxon gasoline service station located at 163-19 Horace Harding Boulevard, Flushing, New York 11365. Petitioner also had three service bays to perform repair work. The business was discontinued on May 28, 1982.

2. On September 17, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1979 through November 30, 1979 for taxes due of \$33,113.84, plus penalty and interest of \$20,825.23, for a total of \$53,939.07. On January 27, 1983, a second notice was issued for taxes due of \$132,770.58, plus penalty and interest of \$57,553.54, for a total of \$190,324.02. Said notice covered the period December 1, 1979 through May 31, 1982. On December 3, 1982, the tax due on the notice issued September 17, 1982 was revised to \$29,580.00, plus penalty and applicable interest.

3. Nicholas LaMaina, President of petitioner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through May 31, 1979 to September 20, 1982.

4. On audit, the Audit Division found that petitioner maintained incomplete and inadequate books and records. Petitioner did not have any record of daily gasoline sales or repair sales. In addition, there were no cash receipts or cash disbursements journals for the period March 1, 1979 through May 31, 1981 and purchase invoices were not available. A comparison of corporation tax returns for the fiscal years ended May 31, 1980 and May 31, 1981 with sales tax returns filed disclosed that gross sales on the corporation tax returns were \$905,834.00 greater than on the sales tax returns. In order to verify taxable sales reported, the Audit Division contacted Exxon Oil Corp. to obtain the quantity and the cost of gasoline purchased by petitioner. Exxon's records showed purchases of 1,553,100 gallons at a cost of \$1,311,299.00. The Audit Division added the federal excise tax to arrive at a total cost of \$1,433,423.00. A markup of 6 percent was applied to said amount to determine gasoline sales of \$1,519,428.00. The markup was based on audit experience with similar gasoline

stations. Repair and service sales were also estimated due to the lack of sales invoices and incomplete purchase invoices. Purchases of parts, oil, and accessories for the period September 1, 1981 through November 30, 1981 amounted to \$28,923.00. The Audit Division applied a 200 percent markup (including labor) to these purchases to arrive at sales of \$86,769.00. This amount was considered sold in each of the thirteen sales tax reporting periods under audit in order to estimate total repair and service sales of \$1,127,997.00. The combined audited taxable sales were \$2,647,425.00 as compared to reported taxable sales of \$635,155.00. The total tax deficiency amounted to \$162,350.58.

5. Petitioner argued that the gasoline purchases supplied by Exxon Oil Corp. were erroneous and that the markup percentages for gasoline and repair sales were excessive. Petitioner requested time to obtain supporting documentation. Petitioner was given until May 30, 1986; however, no such documentation was submitted.

CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use

of third party purchases and markup percentages as a basis for determining petitioner's liability was proper pursuant to section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

E. That the petition of Horace Harding 164th, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 17, 1982, as revised by the Notice of Assessment Review issued December 3, 1982, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 27, 1983 are sustained.

DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986

Roderick W. Cern
PRESIDENT

Francis R. Koenig
COMMISSIONER

Mark J. [Signature]
COMMISSIONER