

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

DANA IRVING

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 December 1, 1980
through November 30, 1981.

Petitioner, Dana Irving, 3 Irving Drive, West Grove, Pennsylvania 19390, 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 December 1, 1980 through November 30, 1981 (File No. 42521).

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 May 22, 1984 at 2:45 P.M. The hearing was adjourned and was to be continued on a later date. In lieu of reconvening the hearing, petitioner submitted the case for decision based on the entire file and upon additional evidence to be submitted by August 15, 1985. After due consideration of the file, the State Tax Commission renders the following decision.

ISSUE

Whether the Audit Division properly imposed use tax on three standardbred racehorses used in New York State during 1981.

FINDINGS OF FACT

1. On November 26, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Dana Irving, for taxes due of \$5,455.00, plus penalty and interest of \$2,038.11, for

a total of \$7,493.11. Said notice was issued as a result of petitioner's failure to file a Report of Casual Sale as required by section 1133 of the Tax Law when he purchased the following racehorses: "Candelaria", "Delroy N" and "Roman Moon". The Audit Division estimated the purchase prices based on the value of the claiming race in which these horses were entered as follows:

<u>Date Entered</u>	<u>Horse</u>	<u>Claiming Price</u>	<u>Track</u>	<u>Tax Due</u>
October 11, 1981	"Candelaria"	\$30,000	Yonkers Raceway	\$2,475.00
February 2, 1981	"Delroy N"	22,000	Roosevelt Raceway	1,540.00
May 1, 1981	"Roman Moon"	18,000	Yonkers Raceway	1,440.00

2. Petitioner was a resident of the Commonwealth of Pennsylvania. However, he was engaged in racing activities at various racetracks in New York State during 1980 and 1981.

3. Petitioner purchased the horse "Candelaria" at the Garden State Standardbred Sales which took place on August 17, 1981 at The Meadowlands, New Jersey. The total purchase price was \$32,000.00. Petitioner argued that he purchased fifty percent interest in the horse and the other fifty percent was owned by Hugh Grant. However, petitioner offered no evidence to show he purchased the horse other than as an individual or as a member of a partnership. Records of the U.S. Trotting Association show that "Candelaria" raced on the following dates and at the following tracks within New York State in 1981 under petitioner's ownership:

August 26, 1981	Vernon Downs
September 2, 1981	Vernon Downs
September 9, 1981	Vernon Downs
September 12, 1981	Vernon Downs
September 19, 1981	Vernon Downs
October 14, 1981	Yonkers Raceway

4. Petitioner purchased the horse "Roman Moon" for \$13,000.00 on April 1, 1981. The horse raced four times at Yonkers Raceway during May, 1981. On June

9, 1981, "Roman Moon" was entered in an \$18,000.00 claiming race at Yonkers Raceway and the horse was claimed by Thomas Coleman from that race. On April 1, 1981, petitioner was conducting racing activities at Roosevelt Raceway in Nassau county.

5. On November 18, 1980, petitioner purchased the horse "Delroy N" from Harness Breeders Sales Co., Inc. in New Jersey for \$6,800.00. "Delroy N" was entered in a \$22,000.00 claiming race at Roosevelt Raceway on February 2, 1981. No further evidence was presented with respect to the racing activities of "Delroy N". Petitioner, at that time, was conducting racing activities at Yonkers Raceway in Westchester County.

CONCLUSIONS OF LAW

A. That section 1110 of the Tax Law imposes a tax "for the use within this state...of any tangible personal property purchased at retail" unless the property has already been subject to the sales tax.

B. That section 1118(2) of the Tax Law provides an exemption from the imposition of the compensating use tax "[i]n respect to the use of property purchased by the user while a nonresident of this state... A person while engaged in any manner in carrying on in this state any employment, trade, business or profession, shall not be deemed a nonresident with respect to the use in this state of property in such employment, trade, business or profession."

C. That a person is considered to be engaged in carrying on a business within New York State and any locality if he races horses on tracks within New York State and the locality (Matter of Jaclyn Stable, State Tax Commission, June 5, 1981). Accordingly, petitioner, for sales tax purposes, was a resident of New York State when he purchased "Candelaria", "Roman Moon" and "Delroy N". At the time petitioner purchased "Roman Moon" (April 1, 1981), he was also a

resident of Nassau County but not Westchester County. Therefore, petitioner is liable only for the New York State tax (4%) on the purchase of said horse. The purchase price is adjusted to \$13,000.00. Likewise, petitioner is liable only for the New York State tax (4%) on the purchase of "Delroy N" since he was not a resident of Nassau County at the time of purchase. "Delroy N" would be subject to the local tax upon the subsequent use of the horse within Nassau County. The purchase price of "Delroy N" is adjusted to \$6,800.00.

D. That section 1118(9) of the Tax Law provides an exemption from use tax "in respect to the use of a thoroughbred, standardbred or quarter horse purchased outside the state and brought into the state, for the purpose of entering a racing event or events on which pari-mutuel wagering is authorized by law...the exemption...shall not apply to any such horse which enters racing events in this state on more than five days in any one calendar year." (as added by Ch. 604, Laws of 1981, effective July 28, 1981).

The policy of the Audit Division with respect to the imposition of use tax on race horses purchased by a resident outside the State and subsequently brought into the State for the purpose of entering pari-mutuel racing events is set forth in Memorandum TSB-M-80(12)S Revised. This memorandum provides examples which illustrate the proper application of the use tax where the same horse is raced in localities with different tax rates. The examples show that the local use tax rate of the locality in which the owner of the horse is a resident is not imposed until after the horse has been entered in more than five pari-mutuel races in that locality.

E. That "Candelaria" was purchased on August 17, 1981 and was entered in more than five pari-mutuel events (five at Vernon Downs and one at Yonkers Raceway) while under the ownership of petitioner. However, the horse was not

entered in more than five races at Yonkers Raceway and, therefore, petitioner is liable only for use tax at the New York State rate of 4½ percent in Westchester County pursuant to TSB-M-80(12)S.

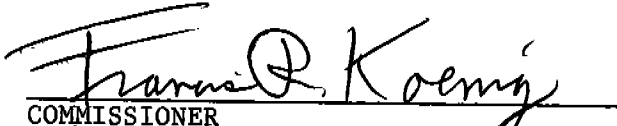
F. That the petition of Dana Irving is granted to the extent indicated in Conclusions of Law "C" and "E"; the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued November 26, 1982; and that, except as so granted, the petition is in all other respects denied.


DATED: Albany, New York

FEB 18 1986

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

