

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 Ended May 31,	:	
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 ended May 31, 1981 (File No. 49143).

A hearing was held before Frank A. Landers, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on June 4, 1985 at 9:15 A.M. with all briefs to be submitted by August 16, 1985. Petitioner appeared by John T. Konther, Esq. The Audit Division appeared by John P. Dugan, Esq. (Mark F. Volk, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly imposed a use tax on petitioner for his use within this State of a standardbred racehorse.

II. If so, whether penalty and interest in excess of the statutory minimum should be waived.

III. Whether the imposition of use tax, in this case, violates the United States Constitution or the Constitution of the State of New York.

FINDINGS OF FACT

1. On October 7, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against the petitioner, Dana Irving, for taxes due of \$2,000.00, plus penalty of \$500.00 and interest of \$610.80, for a total amount due of \$3,110.80 for the period ended May 31, 1981.

2. It is the position of the Audit Division that at the time of his purchase of the standardbred racehorse Bugle, the petitioner was a resident of the State for sales and use tax purposes, and, therefore, was liable for use tax on his subsequent use of the horse Bugle in races in New York State.

3. It is the position of petitioner that the imposition of use tax in this case, based upon the rather limited activities conducted in this State by petitioner, is an unnecessary and unfair burden on interstate commerce and violates the United States Constitution and the Constitution of the State of New York.

4. Petitioner is, and during the period in issue was, a resident of the Commonwealth of Pennsylvania. Petitioner engaged in racing activities at various tracks throughout the United States. At no time was the petitioner a resident of New York State nor did he maintain a stable in this State. Horses racing at New York tracks were brought in for limited periods (sometimes overnight) and then returned to their stables outside New York State. The petitioner maintained a license to race in New York and did whatever was minimally necessary to race in this State.

5. On January 22, 1981, the petitioner purchased the horse Bugle in the State of New Jersey for \$10,500.00. The horse Bugle raced twice in New York State, at Yonkers Raceway in Westchester County, on April 20 and April 27 of

1981 and finished last on both occasions. Presumably, petitioner earned no money from racing the horse Bugle in this State. Also, on January 22, 1981, the petitioner raced two horses in New York, Luannes Gem and Pullman, at Roosevelt Raceway in Nassau County. Between February 2 and April 4, 1981, four of petitioner's horses (Delroy N, Pullman, Luannes Gem and Faster & Faster) ran in a total of twenty (20) races at Roosevelt Raceway. On April 10 and 24 of 1981 the horse Pullman raced at Yonkers Raceway.

6. On May 15, 1981, the Audit Division sent a "Report of Casual Sale" to petitioner requesting information on his purchase of the horse Bugle and also requesting that he submit any use tax which might have been due. When the petitioner failed to respond to this report, the Audit division issued the above notice of determination. The tax due was based on an estimated purchase price. At a pre-hearing conference, the petitioner presented evidence as to the actual purchase price of the horse Bugle and the tax due was reduced to \$840.00.

7. The petitioner offered no substantial evidence to show that the failure to pay the tax was due to reasonable cause.

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 carries on activity preparatory to racing, maintains a stable, or races horses on tracks within New York and the locality. Activities preparatory to racing are those acts of a person which enable him to pursue a racing operation, such as the possession of a license to race in New York State and, in conjunction therewith, the entry of horses in races (Matter of Jaclyn Stable, State Tax Commission, June 5, 1981).

D. That the petitioner was engaged in carrying on business in New York State and, more specifically, in Nassau County on the date that he purchased the horse Bugle in New Jersey, and is therefore liable for use tax on the subsequent use of said horse in this State. However, the petitioner was not a resident of Westchester County at the time of purchase of the horse Bugle and, therefore, the petitioner is liable only for the New York State tax on the purchase of said horse.

E. That the penalty and interest in excess of the statutory minimum, imposed pursuant to Tax Law §1145(a), are sustained.

F. That the constitutionality of the laws of the State of New York is presumed at the administrative level of the State Tax Commission.

G. That the petition of Dana Irving is granted to the extent indicated in Conclusion of Law "D", supra; that the Audit Division is hereby directed to modify the Notice of Determination and Demand for Payment of Sales and Use

Taxes Due, issued October 7, 1983 and adjusted at the pre-hearing conference (see Finding of Fact "6"); and that, except as so granted, the petition is denied.

DATED: Albany, New York

NOV 07 1985

STATE TAX COMMISSION

Roderick W. Allen
PRESIDENT

Francis R. Koening
COMMISSIONER

John J. Miller
COMMISSIONER