

STATE OF NEW YORK
STATE TAX COMMISSION

Sales & Use
Anne Hochman
28+29
1971

In the Matter of the Petition

of

ANNE HOCHMAN

For a Redetermination of a Deficiency or
a Refund of Sales and Use
Taxes under Article(s) 28 & 29 of the
Tax Law for the (Year(s) 3/30/68

AFFIDAVIT OF MAILING
OF NOTICE OF DECISION
BY (CERTIFIED) MAIL

State of New York
County of Albany

Linda Wilson, being duly sworn, deposes and says that
she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1st day of March, 1971, she served the within
Notice of Decision (or Determination) by (certified) mail upon ANNE HOCHMAN

(representative of) the petitioner in the within
proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows: Anne Hochman
1A Box Woodmal
Old Bridge, New Jersey 08857

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) petitioner herein and that the address set forth on said wrapper is the last
known address of the (representative of the) petitioner.

Sworn to before me this

1st day of March, 1971

Martha Funnaro

Linda Wilson

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition

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For a Redetermination of a Deficiency or
a Refund of Sales and Use
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State of New York
County of Albany

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she is an employee of the Department of Taxation and Finance, over 18 years of
age, and that on the 1st day of March, 1971, she served the within
Notice of Decision (or Determination) by (certified) mail upon MORRIS EHRLICH,
ESQ. (representative of) the petitioner in the within

proceeding, by enclosing a true copy thereof in a securely sealed postpaid
wrapper addressed as follows:

Mr. Morris Ehrlich
94-15 69th Avenue
Forest Hills, New York 11375

and by depositing same enclosed in a postpaid properly addressed wrapper in a
(post office or official depository) under the exclusive care and custody of
the United States Post Office Department within the State of New York.

That deponent further says that the said addressee is the (representative
of) petitioner herein and that the address set forth on said wrapper is the last
known address of the (representative of the) petitioner.

Sworn to before me this

1st day of March, 1971.

Martha Tamaro

Linda Wilson

STATE TAX COMMISSION

Anne Hochman timely filed an application for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law relating to a transaction occurring on March 30, 1968. A formal hearing was held before Lawrence A. Newman, Hearing Officer, in the offices of the State Tax Commission in the City of New York, on September 23, 1970. The applicant was represented by William Hochman, and the Sales Tax Bureau was represented by Edward H. Best, Esq. (Solomon Sies, Esq., of counsel).

3. The horse was destroyed and an autopsy was performed on the grounds of the Aqueduct Race Track, in the City and State of New York. Thereafter, the officials of the race track disposed of the carcass.

4. The applicant filed an application for refund of Sales and Use Tax in the amount of \$625.00.

5. The rules for claiming races are contained in Volume 19 of the New York Codes, Rules and Regulations, Part 38, which reads in part, ".....the person determined at the closing time for claiming to have the right of claim shall become the owner of the horse when the start is effected, whether it be alive or dead, sound or unsound or injured before or during the race or after it."

6. The applicant became the owner of the destroyed horse at the start of the race, and the carcass was available to her within the City and State of New York. Subsequently, the disposal of the carcass occurred within the City and State of New York.

DETERMINATION

A. The purchase by and delivery of the horse to the applicant, occurred within the City and State of New York.

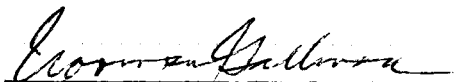
B. A Sales Tax of \$625.00 was correctly collected by the New York Racing Association from the applicant.

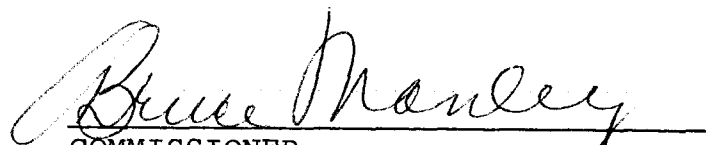
C. The application for refund is denied.

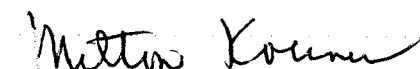
DATED: Albany, New York

March 1, 1971

STATE TAX COMMISSION


COMMISSIONER


COMMISSIONER

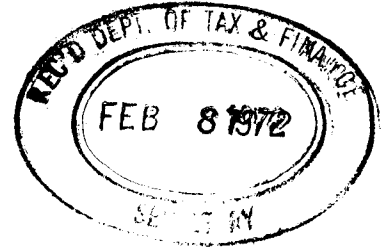

COMMISSIONER

**BUREAU OF LAW
MEMORANDUM**

TO : Fred W. Tierney, Director

FROM : Saul Hochman, Director

SUBJECT: Anne Hochman vs. State Tax Commission



Attached are copies of Justice Edward S. Conway's December 1, 1971 Order and Judgment and Assistant Attorney General Thomas F. Zolozzi's February 2, 1972 letter in the above sales tax case, involving the successful bidder for a horse in a claiming race, which sustained an injury during the race and required its destruction. Also attached is a copy of Justice Conway's decision.

Justice Conway's decision was favorable. However, it is not based on the merits. Rather, the proceeding was dismissed because the undertaking submitted had not been approved by a Justice of the Supreme Court nor did it mention an amount sufficient to cover the costs of prosecution of the proceeding. Therefore, the undertaking was not in compliance with Section 1139(b) of the Tax Law.

The Sales Tax Bureau file is also returned herewith. This matter will be reflected on our records as a closed case.

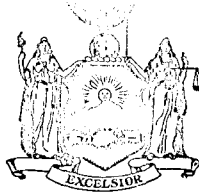
ALFRED

JS:lk/ejf

Enc.

February 7, 1972

**cc: Commissioners Gallman, Manley and Koerner
Edward Rock
Benjamin Shober
Art Raskin**



STATE OF NEW YORK

DEPARTMENT OF LAW

LOUIS J. LEFKOWITZ
ATTORNEY GENERAL

ALBANY, N. Y. 12224

Telephone 474-1394

February 2, 1972

James A. Scott, Esq.
Department of Taxation and Finance
State Office Building Campus
Building 9
Albany, New York 12226

Re: Hochman v. State Tax Commission

Dear Jim:

I am enclosing the file on the Hochman case. This case was won in Supreme Court on the fact that a bond had not been filed prior to instituting the Article 78 proceeding. Hochman did not appeal within 30 days, thus, the case is closed.

Very truly yours,

LOUIS J. LEFKOWITZ
Attorney General

By *Tom*

THOMAS P. ZOLEZZI
Assistant Attorney General

Enclosure

RECEIVED
FEB 14 1972
T. P. ZOLEZZI
12224
ALBANY, N. Y.

AT a Special Term of the Supreme Court
of the State of New York, held in
and for the County of Albany, at the
Courthouse in the City of Albany,
on the 22d day of October, 1971.

PRESENT:

HON. EDWARD S. CONWAY,
Justice Presiding.

In the Matter of the Application of

ANNE HOCHMAN,

Petitioner,

For an Order pursuant to Article 78
of the CPLR

-against-

STATE TAX COMMISSION,

Respondent.

ORDER
AND
JUDGMENT

Index No.

8897-71

The petitioner commenced a proceeding pursuant to Article 78, CPLR, to review and annul a final determination of the respondent State Tax Commission, which denied the petitioner a refund of a sales tax of the amount of \$625 contending that the determination of the respondent was erroneous, arbitrary and capricious; and that the requirement of section 1139(b) of the Tax Law that an undertaking be filed as a condition of this proceeding is unconstitutional;

AND the respondent State Tax Commission cross-moved to dismiss the petition as a matter of law on the principal ground that the undertaking filed by the petitioner was not issued by a surety company recognized to transact business in New York State, nor was it approved by a Justice of the Supreme Court pursuant to section 1139(b) of the Tax Law of the State of New York, and that the petition should be dismissed because it did not comply with the statutory requirements for reviewing a determination by the State Tax Commission;

NOW, after reading and filing the notice of petition dated the 24th day of June, 1971, the petition of Anne Hochman in support of the proceeding sworn to on the 14th day of June, 1971, and the brief of petitioner's attorney, Morris Ehrlich, Esq.,

in support of the petition, and upon reading and filing the notice of motion of Louis F. McEwitt, Attorney General of the State of New York (Thomas P. Holman, Assistant Attorney General, of counsel), attorney for the respondent seeking to dismiss the proceeding upon an objection in point of law, and having read respondent's brief in support of the cross-motion, and after deliberation having been had, and the Court having rendered a decision in writing, a copy of which is attached to and made a part of this order;

NOW, on motion of Louis F. McEwitt, Attorney General of the State of New York, it is

ADJUDGED, that the undertaking has not been approved by a Justice of the Supreme Court, nor does it mention an amount sufficient to cover the costs of the prosecution of this proceeding and, therefore, not in compliance with section 1139(b) of the Tax Law and,

IT IS FURTHER ADJUDGED, that the statute does not violate the constitutional rights of the petitioner, and it is

ORDERED AND ADJUDGED, that the cross-motion of the respondent State Tax Commission to dismiss this proceeding be and the same is hereby granted.

C O N C L U S I O N :

Dated: December 15, 1971
Albany, New York

H. Edward J. Conway
Edward J. Conway
Justice of the Supreme Court

STATE OF NEW YORK,
COUNTY OF ALBANY, CLERK'S OFFICE. } ss.:

I, JOHN S. BARTLETT, JR., Clerk of the said County, and also Clerk of the Supreme and County Courts, being Courts of Record held therein, DO HEREBY CERTIFY that I have compared the annexed copy Index 9 with the original thereof filed in this office on the 2 day of Dec 19 71 and that the same is a correct transcript therefrom, and of the whole of said original.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal, this 2 day of Dec 19 71
John S. Bartlett Jr.
Clerk

Nº 230

NOV 18 971

Docket Clerk
Mr. Zolezzi

CHAMBERLAIN

STATE OF NEW YORK
SUPREME COURT

COUNTY OF ALBANY

In the Matter of the Application of
ANNE HOCHMAN,

Petitioner,

For an Order Pursuant to Article 78 of the CPLR,

-against-

STATE TAX COMMISSION,

Respondent.

Supreme Court, Albany County Special Term, October 22, 1971

Justice Edward S. Conway, presiding

(Calendar #231)

APPEARANCES:

Morris Ehrlich, Esq.
Attorney for Petitioner
94-15 69th Avenue
Forest Hills, New York 11375

Louis J. Lefkowitz
Attorney General of the State of New York
By Thomas P. Zolezzi, Esq., of Counsel
Attorney for Respondent
State Capitol
Albany, New York 12224

CONWAY, J:

This is an Article 78 proceeding brought to review and annul a final determination of the respondent, the State Tax Commission, which denied the petitioner a refund of a sales tax of the amount of \$625.

Respondent cross-moves to dismiss the petition as a matter of law on the principal ground that the undertaking filed by the petitioner was not issued by a surety company recognized to transact business in New York State nor was it approved by a Justice of the Supreme Court pursuant to Section 1139 (b) of the Tax Law of the State of New York.

On March 30, 1968, the petitioner, a non-resident of the State of New York, was the successful bidder for a horse known as "Holly War" in a claiming race at Aqueduct Race Track. Her account with the New York Racing Commission was charged with the bid price of \$12,500 plus the New York State and local sales tax of \$625. During the race the horse sustained an injury and had to be destroyed. The track officials disposed of the carcass.

The petitioner filed an application for refund of the sales and use tax in the amount of \$625. A hearing was held on September 23, 1970, and the application for a refund was denied by the Tax Commission on March 1, 1971.

The petitioner contends that the determination of the respondent was erroneous, arbitrary and capricious; and that the requirement of Section 1139 (b) that an undertaking be filed as a condition of this proceeding is unconstitutional.

The respondent contends that since the petitioner did not comply with the statutory requirements for reviewing a determination by the Tax Commission, the petition should be dismissed.

The Tax Law, Section 1139 (b) which deals with the procedure for obtaining a refund of a sales tax provides, in so far as pertinent, as follows:

"....Such determination after a hearing may be reviewed by a proceeding pursuant to article seventy-eight of the civil practice law and rules, provided such proceeding is instituted within four months after the giving of the notice of such determination, and provided that a final determination of tax due was not previously made. Such a proceeding shall not be instituted unless an undertaking is filed with the tax commission in such amount and with such sureties as a justice of the supreme court shall approve to the effect that if such proceeding be dismissed or the tax confirmed, the petitioner will pay all costs and charges which may accrue in the prosecution of such proceeding."

The undertaking which the petitioner in this case has submitted has not been approved by a Justice of the Supreme Court and does not mention an amount sufficient to cover the costs of the prosecution of this proceeding. The undertaking therefore is not in compliance with Section 1139 (b) of the Tax Law. Matter of H. M. C. Supply Corporation v. Gerosa, 13 Misc. 2d 754, 756. The statute does not violate the constitutional rights of the petitioner. See Matter of Western Electric Co. v. Taylor, 276 NY 309.

The Court must agree with the contention of the respondent. The petition is dismissed and the cross-motion of respondent is granted.

Respondent to submit order.

All papers to the attorney for the respondent for filing upon entry of the order hereon.
Opinion mailed 11/17/71.