

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Jaclyn Stable

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: AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or a Revision :
of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the Years :
1976 & 1977.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of June, 1981, he served the within notice of Decision by mail upon Jaclyn Stable, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jaclyn Stable
c/o Leon Levy, 1212 Pennwalt Bldg.
1845 Walnut St.
Philadelphia, PA 19102

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 Postal Service within the State of New York.

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

Sworn to before me this
5th day of June, 1981.

Ann A. Hagelst

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition
of
Jaclyn Stable

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of a Determination or a Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Years 1976 & 1977.

State of New York
County of Albany

Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 5th day of June, 1981, he served the within notice of Decision by mail upon Owen A. Knopping the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mr. Owen A. Knopping
Fox, Rothschild, O'Brien & Frankel
2000 Market St., 9th Fl.
Philadelphia, PA 19103

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 Postal Service within the State of New York.

That deponent further says that the said addressee is the representative of the 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
5th day of June, 1981.

Carmie A. Haglund

J. Vredenburg

STATE OF NEW YORK
STATE TAX COMMISSION
ALBANY, NEW YORK 12227

June 5, 1981

Jaclyn Stable
c/o Leon Levy, 1212 Pennwalt Bldg.
1845 Walnut St.
Philadelphia, PA 19102

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 1138 & 1243 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Owen A. Knopping
Fox, Rothschild, O'Brien & Frankel
2000 Market St., 9th Fl.
Philadelphia, PA 19103
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
JACLYN STABLE
for a Hearing to Review a Determination of Tax
Due or a Determination Denying a Refund of
Sales and Use Tax under Articles 28 and 29 of
the Tax Law for the Years 1976 and 1977.

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DECISION

Jaclyn Stable, c/o Leon Levy, 1212 Pennwalt Building, 1845 Walnut Street, Philadelphia, Pennsylvania, filed an application for a hearing to review a determination denying a refund of sales and use tax due under Articles 28 and 29 of the Tax Law for the years 1976 and 1977 (File Nos. 21413 and 21414).

A formal hearing was held before James T. Prendergast, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 27, 1979. Petitioner appeared by Owen A. Knopping, Esq. The Audit Division appeared by Peter Crotty, Esq. (Aliza Schwadron, Esq., of counsel).

ISSUE

Whether the use in New York State of four racehorses purchased out of state was subject to New York use taxes.

FINDINGS OF FACT

1. Petitioner, Jaclyn Stable, did not file New York State and local sales and use tax returns for the calendar years 1976 and 1977.
2. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$4,680.00, including \$3,600.00 in taxes and \$1,080.00

in penalties or interest, covering the use of the thoroughbred, "Double Ack", was issued against petitioner on December 6, 1977.

3. A Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$8,338.40, including \$6,960.00 in taxes and \$1,378.40 in penalties or interest, covering the use of the thoroughbreds "Cheeky Cheetah", "Viking Charm", and "Brave Leo", was issued against petitioner on January 31, 1978.

4. Petitioner, Jaclyn Stables, subsequently filed a timely perfected petition for a review of these determinations.

5. During the calendar years 1974, 1975, 1976 and 1977 the petitioner was a Pennsylvania partnership with its administrative office located at 1845 Walnut Street, Philadelphia, Pennsylvania.

6. The partnership had two partners, Dr. Leon Levy and Blanche P. Levy, both of whom resided during 1974, 1975, 1976 and 1977 at 3250 West School House Lane, Philadelphia, Pennsylvania.

7. Petitioner is engaged in the business of owning and racing horses. Its partners were licensed as owners by the New York State Racing and Wagering Board for the years 1955 through 1977.

8. Petitioner maintains permanent stables in the states of New Jersey and Florida.

9. At no time during the years 1974, 1975, 1976 and 1977 did the petitioner maintain stables in the state of New York. It transported horses into the state for the races and took them out again soon afterward.

10. Petitioner purchased the following horses in Kentucky on the following dates:

<u>Date</u>	<u>Horse</u>	<u>Amount</u>
July 22, 1974	Double Ack	\$45,000.
July 19, 1975	Cheeky Cheetah	10,000.
July 22, 1975	Viking Charm	61,000.
Sep. 13, 1976	Brave Leo	16,000.

11. The petitioner did not participate in a meeting in New York in 1974 prior to the purchase of "Double Ack", but it participated in the Saratoga and Belmont meetings subsequent to the purchase. The petitioner participated in the Aqueduct and Belmont Spring meetings prior to the purchases of "Cheeky Cheetah" and "Viking Charm" and subsequently in the Saratoga, Belmont Fall and Aqueduct final meetings. In 1976, the petitioner participated in the Belmont Spring and Saratoga meetings prior to the purchase of "Brave Leo", and in the Belmont and Aqueduct fall meetings subsequent to such purchase.

12. The petitioner admits in its reply that "Double Ack" ran at Aqueduct on November 3, 1976, "Cheeky Cheetah" ran at Belmont on July 18, 1977 and "Brave Leo" ran at Belmont on July 5, 1977. The Bureau alleged, and the petitioner denied in its reply that "Viking Charm" ran at Aqueduct on May 9, 1977. Exhibit A, in evidence, consists of three forms, one of which is the notice issued by the Audit Division that "Viking Charm" was so used.

13. Petitioner did not submit evidence that each horse was raced outside the state for more than six months, and that the market value at the time of first use in New York was less than the cost.

14. Petitioner's failure to pay use taxes was based on a good faith belief that it did not owe any use taxes, and there was sufficient merit to this belief to merit a hearing.

CONCLUSIONS OF LAW

A. That when a horse is purchased out of state, and is run in a race within the state, such utilization is an exercise of right or power over tangible personal property which constitutes a "use" within the meaning of

section 1101(b)(7) of the Tax Law, which use would be subject to tax under section 1110 of the Tax Law, and local taxes enacted under Article 29 of the Tax Law, and the additional tax imposed under section 1107 of the Tax Law in the City of New York. Jacobs v. Joseph, 282 A.D. 622, 126 N.Y.S.2d 274 (1st Dept. 1953).

B. That any nonresident person, including a partnership, while engaged in carrying on in this state a trade or business is deemed a resident with respect to the use in this state of tangible personal property or services in such trade or business. Section 1118(2) of the Tax Law.

C. That a person is considered to be engaged in carrying on business within New York State and 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; the hiring of grooms, trainers, jockeys or drivers; and registration with a jockey club at various tracks. The possession of a license by a nonresident which is not accompanied by one or more of the other activities described above will not result in a resident status until one or more of the additional acts occur.

D. That property purchased by a user, while a nonresident of the state is exempt from use tax. Section 1118(2) of the Tax Law.

E. That the evidence shows the petitioner was not engaged in racing in New York at the time of purchase of "Double Ack"; therefore, use tax would not be due on the purchase of "Double Ack", as at that time it was not deemed a resident.

F. That the evidence shows the petitioner was engaged in racing in New York at the time of the purchases of "Cheeky Cheetah", "Viking Charm" and "Brave Leo". Therefore, the petitioner is deemed a resident at the time of such purchases, with respect to its business.

G. That the burden of proving the assessment is in error is upon the petitioner; the petitioner did not sustain its burden of proof that "Viking Charm" was not raced in New York.

H. That the petition is denied in part and granted in part. Use taxes are due on the thoroughbreds, "Cheeky Cheetah", "Viking Charm" and "Brave Leo"; but they are not due on the thoroughbred, "Double Ack". Penalties and interest in excess of the minimum statutory rate shall not be assessed. The Audit Division is directed to recompute the taxes due in accordance with this decision.

DATED: Albany, New York

JUN 5 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER