

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nelson B. Hunt :

AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 10/31/77. :
_____ :

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of July, 1984, he served the within notice of Decision by certified mail upon Nelson B. Hunt, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Nelson B. Hunt
2500 1st National Bank Bldg.
Dallas, TX 75202

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
6th day of July, 1984.

David Parchuck

James A. Hargrave

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
Nelson B. Hunt :
AFFIDAVIT OF MAILING
for Redetermination of a Deficiency or Revision :
of a Determination or Refund of Sales & Use Tax :
under Article 28 & 29 of the Tax Law for the :
Period 10/31/77. :

State of New York }
ss.:
County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 6th day of July, 1984, he served the within notice of Decision by certified mail upon Jay D. Gayner, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jay D. Gayner
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, NY 100229931

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
6th day of July, 1984.

David Parchuck

James A. Hansen
Authorized to administer oaths
pursuant to Tax Law section 174

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

July 6, 1984

Nelson B. Hunt
2500 1st National Bank Bldg.
Dallas, TX 75202

Dear Mr. Hunt:

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 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law 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
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Jay D. Gayner
Skadden, Arps, Slate, Meagher & Flom
919 Third Avenue
New York, NY 100229931
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of
NELSON B. HUNT
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 November 30,
1977.

DECISION

Petitioner, Nelson B. Hunt, 2500 1st National Bank Building, Dallas, Texas 75202, 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 November 30, 1977 (File No. 24511).

A formal hearing was held before Daniel J. Ranalli, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on July 11, 1983 at 1:15 P.M., with all briefs to be submitted by September 26, 1983. Petitioner appeared by Skadden, Arps, Slate, Meagher & Flom (Jay D. Gayner, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (Anne W. Murphy, Esq., of counsel).

ISSUE

Whether petitioner was a resident of New York State for use tax purposes and thus liable for use tax on four horses which he had purchased in Kentucky in 1975 and raced in New York in 1977.

FINDINGS OF FACT

1. On October 6, 1978, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner, Nelson B. Hunt, in the amount of \$11,000.00, plus penalty of \$1,865.00 and interest of

\$1,315.00, for a total due of \$14,180.00 for the periods ending September 30 and October 31, 1977. The tax was assessed on the use in New York State of six racehorses. On November 30, 1982, the Audit Division issued an amended assessment against petitioner in the amount of \$13,102.00, plus penalty of \$3,275.00 and interest of \$8,066.62, for a total due of \$24,443.62 for the period ending November 30, 1977. The amended assessment was based on information submitted by petitioner and assessed tax on the use of four racehorses: Swiss, Frontonian, Camarado and Pursuer.

2. Petitioner is, and during the period in issue was, a resident of the State of Texas. In 1975 and during all relevant periods thereafter, petitioner owned thoroughbred horses which he used for racing and breeding purposes and was licensed as an owner by the New York State Racing and Wagering Board.

3. In 1975 and 1976, petitioner purchased four racehorses on the dates and at the prices and place indicated as follows:

<u>Horse</u>	<u>Price</u>	<u>Purchase Date</u>	<u>Place of Purchase</u>
Swiss	\$33,600.00	July 21, 1975	Kentucky
Frontonian	\$55,000.00	August 5, 1975	Kentucky
Pursuer	\$67,000.00	August 5, 1975	Kentucky
Camarado	\$22,000.00	July 20, 1976	Kentucky

4. During the periods when the above-named horses were purchased, petitioner was engaged in racing in New York on an irregular and occasional basis by entering horses in selected races at various locations, rather than at any single racetrack. Such races were selected according to the abilities, competitiveness and readiness of petitioner's horses and on the type and quality of available races. On the specific purchase dates mentioned above, petitioner did not have any horses entered in any races at any racetracks in New York State. From July, 1975 through July, 1976, petitioner owned three horses which

ran in a total of four races at Belmont Park Racetrack in Nassau County¹ in July, 1975; one horse which ran in a total of two races at Saratoga Racetrack in Saratoga County in August, 1975; and four horses which ran in a total of seven races at Aqueduct Racetrack in Queens County in July, 1976.

5. During the periods when petitioner purchased the horses in issue, he did not maintain any racing facilities in New York. Horses which were entered in races in New York State were temporarily maintained in public stables which were secured on an availability basis. Petitioner's horses were handled by public trainers whose services as independent contractors were engaged for limited periods prior to and after such races for the sole purpose of caring for the horse entered in the particular race. Jockeys, training riders and other assistants were engaged by the public trainers at their discretion. Petitioner had no racing employees in New York during any of the periods in issue.

6. The horse Swiss raced at Belmont Park Racetrack in Nassau County on October 4, 1977 and did not race at any other racetrack in New York at any time during 1977. The horse Pursuer raced at Aqueduct Racetrack in Queens County on October 24 and November 2, 1977 and did not race at any other racetrack in New York at any other time during 1977. The horse Camarado raced at Aqueduct Racetrack on October 3, 1977 and did not race at any other racetrack in New York at any other time during 1977. The horse Frontonian raced at Aqueduct Racetrack on November 30, 1977 and did not race at any other racetrack in New York at any other time during 1977.

7. The New York State sales and use tax in effect in October and November, 1977 was four percent. The New York City sales and use tax in effect in

¹ A small portion of Belmont Park Racetrack is located in Queens County; however, for sales tax purposes, the tax rate during the periods in issue was the Nassau County rate.

October, 1977 was four percent. The Nassau County local tax rate in effect in October, 1977 was three percent. The City of Saratoga Springs local tax rate in effect in October and November, 1977 was two percent. The Audit Division asserted that the horses Swiss and Camarado would be subject to both State and local tax; Swiss to a seven percent tax because, at the time of purchase of this horse, petitioner was engaged in racing at Belmont Park Racetrack in Nassau County and he in fact raced this horse at Belmont; Camarado to an eight percent tax because, at purchase, petitioner was engaged in racing at Aqueduct Racetrack in Queens County and the horse was subsequently raced at Aqueduct. The Audit Division acknowledged, however, that the horses Frontonian and Pursuer would be subject to the state tax only since, when petitioner purchased these horses, he was engaged in racing at Saratoga Racetrack in Saratoga Springs but the horses were subsequently raced at Aqueduct Racetrack in Queens County.

The parties agreed at the hearing that if petitioner is liable for use tax, the amount of tax due should be calculated as follows:

<u>Horse</u>	<u>Purchase Price</u>	<u>State Tax</u>	<u>Local Tax</u>	<u>Tax Due</u>
Swiss	\$33,600.00	4%	3%	\$2,352.00
Frontonian	55,000.00	4%	-0-	2,200.00
Pursuer	67,000.00	4%	-0-	2,680.00
Camarado	22,000.00	4%	4%	1,760.00
				<u>\$8,992.00</u>

8. It is the Audit Division's position that, since petitioner possessed a license to race in New York State and entered horses in races, he was engaged in business in New York and thus was not eligible for the nonresident exemption to the use tax. Petitioner maintains that petitioner's business connection to New York State during the months in which the purchases occurred was far too tenuous to conclude that he was engaged in carrying on a trade or business in this state. Petitioner argues alternatively that even if he is found to be a

resident of New York State, the total use tax due should be reduced to the amount computed in Finding of Fact "7" and that penalties and interest over the minimum statutory amount should be waived since the liability depends upon substantial issues of law and failure to pay the tax represented a good faith belief that no tax was due.

9. Petitioner at all times acted in good faith.

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; the hiring of grooms, trainers, jockeys or drivers; and registration with a jockey club at various tracks. The possession of a license by a non-resident 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 (Matter of Jaclyn Stable, State Tax Commission, June 5, 1981).

D. That petitioner was engaged in carrying on a business in New York State during the period in issue and was, therefore, a resident and the racing of the horses, Swiss, Frontonian, Pursuer, and Camarado was subject to the use tax. The horses Frontonian and Pursuer, however, are subject only to the state tax as discussed in Finding of Fact "7" and, accordingly, the tax due is reduced to \$8,992.00 plus minimum statutory interest.

E. That the petition of Nelson B. Hunt is granted to the extent indicated in Conclusion of Law "D"; that the Audit Division is directed to accordingly modify the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued October 6, 1978 and amended November 30, 1982; and that, except as so granted, the petition is in all other respects denied.

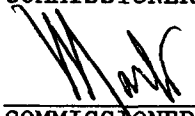
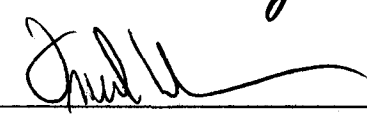
DATED: Albany, New York

STATE TAX COMMISSION

JUL 06 1984


PRESIDENT


COMMISSIONER

 
COMMISSIONER

P 440 977 204

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Ray D. Gayner</i>	
Street and No. <i>919 Third Ave.</i>	
P.O., State and ZIP Code <i>N.Y. 10022-9931</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 440 977 203

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Nelson B. Hunt</i>	
Street and No. <i>2501 Nat'l Bank Bldg</i>	
P.O., State and ZIP Code <i>Dallas, TX 75202</i>	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982