

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

November 9, 1984

Saratoga Harness Racing, Inc.  
Nelson Ave.  
Saratoga, NY 12866

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 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  
Francis E. Dorsey  
Dorsey, LeCain & Morris  
One Court St., P.O. Box 456  
Saratoga Springs, NY 12866  
AND  
Jeffrey J. Sherrin  
Segal & Sherrin  
90 State St.  
Albany, NY 12207  
Taxing Bureau's Representative

## STATE TAX COMMISSION

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 3/1/79-11/30/81.

County of Albany }

Ernie Richmond  
Authorized to administer oaths  
pursuant to Tax Law section 174

STATE TAX COMMISSION

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

Francis E. Dorsey  
Dorsey, LeCain & Morris  
One Court St., P.O. Box 456  
Saratoga Springs, NY 12866

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.

David Parshuck

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

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Saratoga Harness Racing, Inc. :  
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 3/1/79-11/30/81. :  
:

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AFFIDAVIT OF MAILING

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 9th day of November, 1984, he served the within notice of Decision by certified mail upon Jeffrey J. Sherrin, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jeffrey J. Sherrin  
Segal & Sherrin  
90 State St.  
Albany, NY 12207

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  
9th day of November, 1984.

David Parchuck

James P. Segal

Authorized to administer oaths  
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
SARATOGA HARNESS RACING, INC.	:	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 March 1, 1979	:	
through November 30, 1981.	:	

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Petitioner, Saratoga Harness Racing, Inc., Nelson Avenue, Saratoga Springs, New York 12866, 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 March 1, 1979 through November 30, 1981 (File No. 39104).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Office Campus, Albany, New York, on October 19, 1983 at 9:45 A.M., with all briefs to be submitted by February 13, 1984. Petitioner appeared by Dorsey, LeCain & Morris, Esqs. (Francis E. Dorsey, Esq., of counsel) and Segal & Sherrin, Esqs. (Jeffrey J. Sherrin, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether receipts from sales of the publication Saratoga Harness Official Program-Features-News are exempt from sales and use taxes as receipts from sales of a newspaper.

FINDINGS OF FACT

1. On July 16, 1982, following a field audit, the Audit Division issued to petitioner, Saratoga Harness Racing, Inc., a Notice of Determination and

Demand for Payment of Sales and Use Taxes Due for the period March 1, 1979 through November 30, 1981 in the amount of \$47,381.77, plus interest.<sup>1</sup>

2. Petitioner operates a harness race track located in Saratoga Springs, New York, and has done so continuously since 1941 under licenses granted by the New York State Racing and Wagering Board ("the Board"). Racing licenses granted by the Board are on file as a public record of the State of New York and are renewable annually upon application.

3. Petitioner applies annually to the Board for racing dates, which dates must be approved by the Board in conjunction with the renewal of petitioner's license. These racing dates, in recent years, have exceeded 200 days per year due to the addition of a winter racing season to petitioner's schedule. In general, the track is closed during December, operates only on weekends during January, February and March, is open for a few days at the end of April and operates on a six day per week basis the rest of the time (excepting Monday nights in the fall when the track is closed).

4. The Board's rules require, inter alia, that printed programs be published and offered for sale at every licensed harness race meeting (racing day). The rules specify certain minimum requirements as to the program contents, including information on the past six performances of the horses entered in each race, but do not place a limitation on a program's contents (see 9 NYCRR 4103.1).

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<sup>1</sup> Petitioner contests the underlying legal basis but not the dollar amount of the instant assessment. It is noted, further, that although the audit period encompasses March 1, 1979 through November 30, 1981, tax is assessed only for the quarterly periods ended May 31, 1980 through November 30, 1981. During quarterly periods prior to the period ended May 31, 1980, petitioner had collected and remitted tax due on the sale of its programs.

5. Prior to petitioner's opening night on April 17, 1980, the Saratoga Harness Official Program was sold for seventy-five cents, contained sixteen pages, did not contain any feature story or news reports and was subject to sales tax.

6. Sometime before April 17, 1980, the (independent) printer of Saratoga Harness Official Program contacted petitioner's president, David W. Morris, to advise Mr. Morris that the cost of printing the program was going to increase from 23 cents per program to 28 cents per program. Mr. Morris asked the printer for a printing cost quote on adding a fold (4 pages), thereby increasing the publication to 20 pages. He was told that with an additional fold, the printing cost would be 35 cents per program.

7. Mr. Morris requested and was provided by the Audit Division with a copy of the State Tax Commission's sales tax regulations.

8. Commencing with the opening night issue of April 17, 1980, the format and selling price of petitioner's program changed to reflect an increase in size from sixteen to twenty pages and an increase in selling price from seventy-five cents to one dollar per program.

9. Prior to the change in format, petitioner had hired a full-time writer at an annual salary of \$12,000.00. This writer was responsible for filling two of the four new pages of the program, one of which was the front cover while the other was an inside page or, on occasion, two inside pages.

10. The front cover under the changed format consisted of a signed feature story on some aspect of harness racing, while the new interior page(s) contained reports both on sports and on matters of general interest. Eight or ten contributing writers, in addition to petitioner's salaried writer, have authored articles for the front cover feature story.

11. The news reports included under the new format were culled by petitioner's writer from his review of reports in the Albany Times Union. This arrangement was with the prior knowledge and consent of the Albany Times Union. Petitioner's program is published the day before the races which are presented therein are to be run. The reports taken from the Times Union for use in petitioner's program were from issues of the Times Union published on the morning of the day petitioner's program was published.

12. A survey made at the request of Mr. Morris and entered in evidence as petitioner's Exhibit "4" showed that for the period from April 17, 1980 to March 14, 1981, numerous articles on a variety of subjects appeared in the Saratoga Harness publication.

13. The name of the publication under its new format was changed from Saratoga Harness Official Program to Saratoga Harness Official Program-Features-News.

14. The annual cost for the addition of the described new pages of the program under its new format was calculated by petitioner to be approximately \$37,000.00, consisting of \$12,000.00 for the writer's salary and \$25,000.00 in added printing costs.

15. Approximately 700,000 programs were sold in 1980 and yearly thereafter. Of this amount, approximately 135,000 programs were sold off track through 50 to 60 outlets. These outlets consisted of newsstands, drug stores, restaurants and other establishments and involved an area comprising Albany to the south, Plattsburgh to the north, Amsterdam to the west and Rutland, Vermont to the east.

16. Five people are involved in the distribution of programs to off-track sites. About 600 programs are sold off track per day of publication, and about 250 are sold on track per day of publication for the following night's races.



17. Copies of petitioner's program are sold to certain individuals, other race tracks, horse magazines and breeding farms via a mailing list maintained by petitioner.

18. The July 22, 1981 edition of the National Daily Program published by Armstrong Newspapers, Inc. and entered into evidence as petitioner's Exhibit "11" contains a "News Capsule" which comprises about one half of one column out of sixteen columns. The "News Capsule" contains four news reports, each of no more than one paragraph in length. The area devoted to the news reports constitutes approximately 3 percent of the entire available space in the July 22, 1981 edition of this publication.

19. The October 16, 1983 edition of the Daily Racing Form which was entered in evidence as petitioner's Exhibit "1" contains twenty-four pages. Of these, two pages are devoted to articles about thoroughbred racing at tracks concerning which the publication carries past performances. Approximately one-ninth of one page is devoted to "Reuters News Briefs" which contain nine news accounts, none more than one paragraph in length and most with only one sentence. The area devoted to the thoroughbred articles and news briefs comprise about 9 percent of the entire space available in the October 16, 1983 edition of this publication.

20. Both of the above-quoted publications have been accorded sales tax-exempt status as newspapers. Each provides information concerning thoroughbred racing at a number of different tracks, and is published on a daily basis.

21. Thoroughbred race track programs differ from harness race track programs under Board regulations in that programs for thoroughbred racing are not required to contain past performances. Past performances of thoroughbred racehorses do appear in the Daily Racing Form.

22. The twelve issues of Saratoga Harness Racing Official Program-Features-News which were introduced as petitioner's Exhibit "3" each contain two pages devoted to the feature article and news reports. This constitutes about 10 percent of the entire space available in these publications.

23. Petitioner has submitted (unnumbered) proposed Findings of Fact which have been incorporated herein.

CONCLUSIONS OF LAW

A. That section 1115(a)(5) of the Tax Law exempts receipts from the sale of newspapers and periodicals from the sales and use taxes imposed pursuant to sections 1105(a) and 1110 of the Tax Law. Petitioner seeks exemption under section 1115(a)(5) for its official racing program upon the claim that such program constitutes a newspaper as defined by the sales and use tax regulations. Petitioner makes no claim that its publication is exempt as being a periodical.

B. That regulations of the State Tax Commission, in effect as of January 31, 1979, provide, in relevant part, as follows:

"(b) Definition of newspaper. (1) In order to constitute a newspaper, a publication must conform generally to the following requirements:

(i) it must be published in printed or written form at stated short intervals, usually daily or weekly;

(ii) it must not, either singly or, when successive issues are put together, constitute a book;

(iii) it must be available for circulation to the public; and

(iv) it must contain matters of general interest and reports of current events.

(2) Notwithstanding the fact that a publication may be devoted primarily to matters of specialized interest, such as legal, mercantile, financial, theatrical, political, religious or sporting matters, nevertheless, if, in addition to the special interest it serves, the publication contains general news, it is entitled to the classification of a newspaper.

Example 3: A daily publication which consists of entries and selections at various race tracks with articles on matters of general interest and reports of current events is a newspaper. However, publications which are merely tip sheets or form sheets are subject to tax. [20 NYCRR 528.6(b)]."

C. That the Audit Division admits petitioner's publication conforms to items (ii) and (iii) enumerated in 20 NYCRR 528.6(b)(1), but asserts it does not conform to items (i) and (iv) contained therein. More specifically, the Audit Division asserts that during the period at issue, the publication contained no printed statement on its face or in its body of the frequency of its publication, was not published at stated short intervals and did not contain any more than a modicum of current news items and matters of general interest.

D. That whether petitioner did or did not state, on the face or in the body of its publication, the frequency of its publication is not dispositive of the issue.<sup>2</sup> We note in this regard that petitioner's license with its listing of the dates petitioner is allowed to conduct races is a public record, as are the Racing and Wagering Board's Rules, including 9 NYCRR 4103.1 which requires (at a minimum) publication of a program for sale on each racing day. Furthermore, regarding the content of petitioner's publication, 20 NYCRR 528.6(b)(1)(iv) contains no requirement as to the quantity or substantiality of the "matters of general interest and reports of current events" to be contained in a newspaper. It cannot be said that the matters presented in petitioner's publication do not constitute, inter alia, such matters.

E. That the phrase "stated short intervals" means publication evidencing a pattern of some established regularity or near regularity [Hanscom v. Meyer, 82 N.W. 114 (Neb. 1900); Black's Law Dictionary 1579 (Revised 4th ed. 1968)].

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<sup>2</sup> Sometime after the period at issue, a listing of the dates of publication was included in the body of petitioner's publication.

F. That Racing and Wagering Board Rules mandate, as noted, that petitioner must publish and offer for sale a program on every date when it conducts a racing meet. Saratoga Harness Official Program-Features-News exceeds the minimum requirements for a program specified in these rules, specifically by including the feature story and the other noted articles. Petitioner asserts, thereby, that it is publishing a "newspaper", within the meaning and intent of Tax Law section 1115(a)(5) and 20 NYCRR 528.6(b).

Petitioner is limited by the grant of its harness racing license as to the number and dates of racing meets it is allowed to conduct each year. However, no such limitation exists on the number of times petitioner is entitled to publish Saratoga Harness Official Program-Features-News. Petitioner could publish on dates other than, and in addition to, its racing dates. Petitioner, however, chooses to publish only on those dates when it conducts racing. Such choice does not indicate the intent to publish a newspaper, as defined, in order to impart matters of general news as well as matters of specialized interest to its readers on a regular or near regular basis. Rather, it evidences an intent to comply with the Racing and Wagering Board Rules by publishing a program when required and, also, by the insertion of the added material, an attempt to fall within the definition of a newspaper but only on those dates when publication was mandated, thereby (for those dates when publication was required) becoming exempt from the imposition of sales tax. In sum, publication occurring on dates other than only those dates when publication was mandated, would have been an indication that petitioner, in fact, intended to publish a newspaper rather than a required program.


Finally, we note that the result of publishing only on those dates when racing meets are conducted is that publication occurs, in fact, not at stated short intervals but rather on an irregular basis. During seven months of the year, publication occurs essentially on a six days per week basis. During three months of the year, publication occurs on weekends only (January, February and March). Publication ceases entirely during lapses encompassing the full month of December and nearly all of April (see Finding of Fact "3"). Such lapses result in irregular publication rather than publication at stated short intervals within the intendment of the regulation. Accordingly, petitioner's publication is not a newspaper and there is no entitlement to exemption from sales (and use) tax.

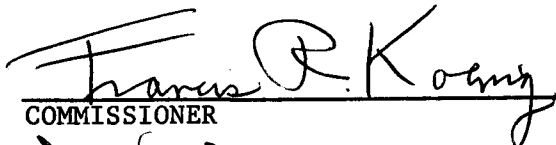
G. That the petition of Saratoga Harness Racing, Inc. is hereby denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated July 16, 1982 is sustained.

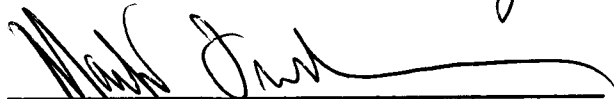
DATED: Albany, New York

STATE TAX COMMISSION

NOV 09 1984

  
\_\_\_\_\_  
PRESIDENT

  
\_\_\_\_\_  
COMMISSIONER

  
\_\_\_\_\_  
COMMISSIONER

P 693 168 924

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <b>Jeffrey J. Sherrin</b>	
Street and No. <b>Segal &amp; Sherrin</b>	
P.O., State and ZIP Code <b>90 State St.</b>	
Postage <b>Albany, NY 12207</b>	
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 693 168 923

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517  PS Form 3800, Feb. 1982	Sent to <b>Francis E. Dorsey</b>	
	Street and No. <b>Dorsey, LeCain &amp; Morris</b>	
	P.O., State and ZIP Code <b>One Court St., P.O. Box 456</b>	
	Postage <b>Saratoga Springs, NY 12866</b>	
	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		

P 693 168 922

## RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1983-403-517  PS Form 3800, Feb. 1982	Sent to <b>Saratoga Harness Racing Tr.</b>	
	Street and No. <b>Nelson Avenue</b>	
	P.O., State and ZIP Code <b>Saratoga, NY 12866</b>	
	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		