

STATE OF NEW YORK

STATE TAX COMMISSION

\_\_\_\_\_  
In the Matter of the Petition :  
of

Horace Harding 164th, Inc. : AFFIDAVIT OF MAILING

for Redetermination of a Deficiency or Revision :  
of a Determination or Refund of Sales & Use Tax :  
under Article(s) 28 & 29 of the Tax Law for the :  
Period 3/1/79-5/31/82. :  
\_\_\_\_\_ :

State of New York :

ss.:

County of Albany :

David Parchuck/Janet M. Snay, being duly sworn, deposes and says that he/she is an employee of the State Tax Commission, that he/she is over 18 years of age, and that on the 7th day of October, 1986, he/she served the within notice of Decision by certified mail upon Horace Harding 164th, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Horace Harding 164th, Inc.  
c/o Nicholas LaMaina  
4332 193rd St.  
Flushing, NY 11358

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  
7th day of October, 1986.

David Parchuck  
Authorized to administer oaths  
pursuant to Tax Law section 174

Janet M. Snay

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

October 7, 1986

Horace Harding 164th, Inc.  
c/o Nicholas LaMaina  
4332 193rd St.  
Flushing, NY 11358

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  
Audit Evaluation Bureau  
Assessment Review Unit  
Building #9, State Campus  
Albany, New York 12227  
Phone # (518) 457-2086

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition

of

HORACE HARDING 164TH, 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 May 31, 1982.

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Petitioner, Horace Harding 164th, Inc., c/o Nicholas LaMaina, 4332 193rd Street, Flushing, New York 11358, 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 May 31, 1982 (File Nos. 41170 and 41959).

A hearing was held before Arthur Johnson, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on January 30, 1986 at 9:15 A.M., with all briefs to be submitted by May 30, 1986. Petitioner appeared by its President, Nicholas LaMaina. The Audit Division appeared by John P. Dugan, Esq. (William Fox, Esq., of counsel).

#### ISSUE

Whether the Audit Division properly estimated petitioner's tax liability for the period March 1, 1979 through May 31, 1982 on the basis of external indices.

#### FINDINGS OF FACT

1. Petitioner, Horace Harding 164th, Inc., operated an Exxon gasoline service station located at 163-19 Horace Harding Boulevard, Flushing, New York 11365. Petitioner also had three service bays to perform repair work. The business was discontinued on May 28, 1982.

2. On September 17, 1982, as the result of an audit, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against petitioner covering the period March 1, 1979 through November 30, 1979 for taxes due of \$33,113.84, plus penalty and interest of \$20,825.23, for a total of \$53,939.07. On January 27, 1983, a second notice was issued for taxes due of \$132,770.58, plus penalty and interest of \$57,553.54, for a total of \$190,324.02. Said notice covered the period December 1, 1979 through May 31, 1982. On December 3, 1982, the tax due on the notice issued September 17, 1982 was revised to \$29,580.00, plus penalty and applicable interest.

3. Nicholas LaMaina, President of petitioner, executed a consent extending the period of limitation for assessment of sales and use taxes for the period March 1, 1979 through May 31, 1979 to September 20, 1982.

4. On audit, the Audit Division found that petitioner maintained incomplete and inadequate books and records. Petitioner did not have any record of daily gasoline sales or repair sales. In addition, there were no cash receipts or cash disbursements journals for the period March 1, 1979 through May 31, 1981 and purchase invoices were not available. A comparison of corporation tax returns for the fiscal years ended May 31, 1980 and May 31, 1981 with sales tax returns filed disclosed that gross sales on the corporation tax returns were \$905,834.00 greater than on the sales tax returns. In order to verify taxable sales reported, the Audit Division contacted Exxon Oil Corp. to obtain the quantity and the cost of gasoline purchased by petitioner. Exxon's records showed purchases of 1,553,100 gallons at a cost of \$1,311,299.00. The Audit Division added the federal excise tax to arrive at a total cost of \$1,433,423.00. A markup of 6 percent was applied to said amount to determine gasoline sales of \$1,519,428.00. The markup was based on audit experience with similar gasoline

stations. Repair and service sales were also estimated due to the lack of sales invoices and incomplete purchase invoices. Purchases of parts, oil, and accessories for the period September 1, 1981 through November 30, 1981 amounted to \$28,923.00. The Audit Division applied a 200 percent markup (including labor) to these purchases to arrive at sales of \$86,769.00. This amount was considered sold in each of the thirteen sales tax reporting periods under audit in order to estimate total repair and service sales of \$1,127,997.00. The combined audited taxable sales were \$2,647,425.00 as compared to reported taxable sales of \$635,155.00. The total tax deficiency amounted to \$162,350.58.

5. Petitioner argued that the gasoline purchases supplied by Exxon Oil Corp. were erroneous and that the markup percentages for gasoline and repair sales were excessive. Petitioner requested time to obtain supporting documentation. Petitioner was given until May 30, 1986; however, no such documentation was submitted.

#### CONCLUSIONS OF LAW

A. That section 1138(a) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That petitioner provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use

of third party purchases and markup percentages as a basis for determining petitioner's liability was proper pursuant to section 1138(a) of the Tax Law.

D. That the estimate procedures adopted by the Audit Division were reasonable under the circumstances and petitioner failed to sustain its burden of showing that the method of audit or the amount of tax assessed was erroneous (Matter of Surface Line Operators Fraternal Organization, Inc. v. State Tax Commission, 85 A.D.2d 858).

E. That the petition of Horace Harding 164th, Inc. is denied and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued September 17, 1982, as revised by the Notice of Assessment Review issued December 3, 1982, and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued January 27, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

OCT 07 1986

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 319 117 347

**RECEIPT FOR CERTIFIED MAIL**

NO INSURANCE COVERAGE PROVIDED  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

★ U.S.G.P.O. 1985-480-794

PS Form 3800, June 1985

Sent to <b>Horace Harding 164<sup>th</sup> St.</b>	
Street and No. <b>c/o Nicolas LaMina</b>	
City, State, and ZIP Code <b>Flushing, N.Y. 11358</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	