STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
LELAND STATIONS, INC., STUART & JOSHUA HACKER, AS OFFICERS	:	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 June 1, 1980 through August 31, 1982.	:	

Petitioners Leland Stations, Inc., Stuart Hacker and Joshua Hacker, as officers, 70 Church Street, New Rochelle, New York 10805, filed an exception to the determination of the Administrative Law Judge issued on October 12, 1989 with respect to their 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 June 1, 1980 through August 31, 1982 (File Nos. 801501, 801502 and 801503). Petitioners appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Anne W. Murphy, Esq., of counsel).

Petitioners did not file a brief on exception. The Division of Taxation filed a letter brief. Petitioners' attorney made a motion to reopen the record but this motion was denied. Petitioners' request for an adjournment of the scheduled oral argument was denied and no oral argument was held.

After reviewing the entire record in this matter, the Tax Appeals Tribunal renders the following decision.

ISSUES

I. Whether petitioners were sellers of gasoline for resale.

II. Whether petitioners' books and records were inadequate so that resort to external indices was appropriate.

III. Whether the audit conducted was unreasonable.

IV. Whether petitioners are liable for penalty and interest for failure to collect sales tax.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge. These facts are set forth below.

On July 20, 1984, the Division of Taxation issued to petitioner Leland Stations, Inc. ("Leland") a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which set forth tax due in the sum of $159,181.65, penalty of $79,590.81 and interest of $58,544.62, for a total amount due of $297,317.08. The explanation for said assessment was stated as follows:

> "The following taxes have been determined to be due in accordance with Section 1138 of the Tax Law, and are based on an audit of your records. In addition, fraud penalties of 50% of the amount of the tax due plus statutory interest have been added pursuant to section 1145(A)(2).
>
> THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS OF SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS.

Period Ended	Tax Due	Penalty	Interest
8/31/80 - 181	$ 5,407.76	$ 2,703.88	$ 2,887.14
11/30/80 - 281	11,464.15	5,732.07	5,739.19
2/28/81 - 381	13,322.04	6,661.02	6,230.85
5/31/81 - 481	13,451.28	6,725.64	5,838.79
8/31/81 - 182	21,535.57	10,767.78	8,572.66
11/30/81 - 282	33,296.50	16,648.25	11,962.10
2/28/82 - 382	24,595.55	12,297.77	7,899.35
5/31/82 - 482	14,534.56	7,267.28	4,118.07
8/31/82 - 183	21,574.24	10,787.12	5,296.47"

On the same date, the Division issued to petitioners Stuart Hacker and Joshua Hacker, alleged officers of Leland, notices of determination and demands for payment of sales and use taxes due for the period June 1, 1980 through August 31, 1982, which set forth the same amount of tax, penalty and interest due as that indicated on the corporate assessment. On the notices sent to Stuart and Joshua Hacker was this explanation:

"You are personally liable as officer of Leland Stations, Inc., under Sections 1131(1) and 1133 of the Tax Law for the following taxes determined to be due in accordance with section 1138(A) of the Tax Law. In addition, fraud penalties of 50% of the amount of the tax due plus statutory interest have been added pursuant to section 1145(A)(2).

THE TAX ASSESSED HEREIN HAS BEEN ESTIMATED AND/OR DETERMINED TO BE DUE IN ACCORDANCE WITH THE PROVISIONS IN SECTION 1138 OF THE TAX LAW AND MAY BE CHALLENGED THROUGH THE HEARING PROCESS BY THE FILING OF A PETITION WITHIN 90 DAYS.

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At hearing, the Division withdrew its assertion of the fraud penalty and asserted penalty to be due pursuant to Tax Law § 1145(a)(1)(i).

Leland was a self-described gasoline wholesaler which made "sales" of gasoline to retail businesses. Generally, Leland distributed products which it bought from other wholesale distributors and sold to customers who purportedly resold it at retail. Leland did not collect sales tax and only filed one annual report to reflect its business practice.

Leland's customers were lessees of service stations which were owned by Leland or companies related to Leland either by interlocking directorates or identical shareholders. The premises were leased to an individual or a business for whom Leland would purchase gasoline, diesel fuel and other products.

The instant audit originated while the Division's auditor was performing an audit of one "Moses Garage Repairs" located at 295 Sanford Boulevard, Mount Vernon, New York which business subsequently moved to 308 Riverdale Avenue, Yonkers, New York. In speaking with the manager, Mr. Moses Gordon, it was determined that Mr. Gordon leased the station from a

company by the name of Franklin Stations, Inc. ("Franklin Stations"), located at 70 Church Street, New Rochelle, New York, the same address as Leland. The lease agreement between Mr. Gordon and Franklin Stations, dated July 10, 1980, indicated that Mr. Gordon agreed to buy all his gasoline and petroleum products from the landlord, its agent or "designee" at the regular dealer's posted price, for the entire period of the lease, July 1, 1980 through June 30, 1983. It also provided that the tenant would keep in force fire insurance, liability insurance and all licenses and permits which were necessary to the operation of the demised premises but did not require Mr. Gordon to collect sales taxes. The lease was signed by Mr. Gordon and Stuart Hacker, as a vice president of Franklin Stations. An addendum to the lease was signed by Stuart Hacker as vice president of Park Stations, Inc.

Mr. Gordon purportedly signed an undated consignment agreement which provided that he would accept gasoline from Leland Stations or Franklin Stations on a consignment basis, and that Franklin would send gas to the station at its own expense and collect the money from sales on a daily basis since Mr. Gordon did not have sufficient capital to purchase the gasoline. Profits were to be returned to the dealer less any rent due. The consignment agreement also provided that the "dealer [was] responsible for all taxes, fees, utilities, etc. which may accrue to the operation of the business." When the auditor confronted Mr. Moses Gordon with this document, Mr. Gordon explained that he had never signed said agreement and created a handwriting sample of his signature to prove same. Mr. Gordon also stated that he did not pay any taxes on the sale of the gasoline at the station.

While at the station in Yonkers, the auditor was introduced to a man measuring the gasoline in the tanks by the name of Stuart A. Hacker. Mr. Hacker produced a business card which he gave to the auditor setting forth his position as president of Leland Stations, Inc. and his address at 70 Church Street, New Rochelle, New York. However, this was the last meeting the auditor had with Mr. Stuart Hacker. All further meetings and conversations were with Mr. Joshua Hacker and all further references herein to "Mr. Hacker" or "Hacker" are to Joshua Hacker.

The auditor decided that an investigation into the relationship between Moses Garage Repairs and Leland and Franklin Stations was necessary in order to determine who had liability for payment of sales taxes and whether or not they were being paid.

On May 2, 1983 the Division of Taxation sent appointment letters to Leland and Franklin Stations, Inc. for an appointment on May 16, 1983 which stated that Leland Stations was to produce all books and records pertaining to the sales tax liability for the period March 1, 1980 through February 28, 1983 including journals, ledgers, sales invoices, purchase invoices, cash register tapes, exemption certificates and all sales tax records.

When the auditor visited Leland on June 9 and 10, 1983, he was provided with only a loose leaf binder containing sales by Leland and its accounts receivable. The loose leaf book was in very poor condition and petitioners produced no other records other than check stubs, representing purchases of fuel and other items from suppliers. Subsequently, Leland produced the lease between Franklin Stations and Moses Gordon.

On June 10, 1983, the auditor made another request for books and records. Petitioners did not comply with this second request. On June 23, 1983, the auditor sent letters to various suppliers, including Hudson Oil, Power Test Corporation, Premium Petro, Dino Oil, and Rad Oil Co., inquiring as to whether these companies did business with Leland, and whether Leland purchased gasoline, oil and tires, batteries and accessories ("t/b/a") for the period June 1, 1979 through August 31, 1982. It also asked for the addresses to which deliveries were made and all purchases made by Leland, both in gallons and dollars. The only company which responded affirmatively was Rad Oil Co., Inc. of New Rochelle, New York which attached a list to its letter setting forth the addresses to which deliveries were made by Rad on behalf of Leland. The following list includes all of those locations listed by Rad Oil Co., Inc.:

Edson Service Station, Bronx, New York;
Meineke Muffler, Bronx, New York;
Westchester Taxi, Bronx, New York;
Emergency Beacon, New Rochelle, New York;
Fred's Service Station, Mt. Vernon, New York;
Gene's Gordon Service Station, Mt. Vernon, New York;
Service Manufacturing, Hastings, New York;
E & A Service Station, Mt. Vernon, New York;

Joe's Service Station, Mt. Vernon, New York;
O'Dee Service Station, Mt. Vernon, New York;
SOS Service Station, Mt. Vernon, New York;
Bianco Service Station (a/k/a Sandford Service Station),
Mt. Vernon, New York;
Riverdale Moses Service Station, Yonkers, New York;
Steven's Service Station (a/k/a Abdul Aziz),
Mt. Vernon, New York; and
Wraggs, Mt. Vernon, New York.

Of these locations, five constitute the basis for the instant assessment. They are: Edson Service Station; Gene's Gordon Service Station; Bianco Service Station (a/k/a Sandford Service Station); Steven's Service Station (a/k/a Abdul Aziz); and Wraggs. E & A Service Station was initially considered but was dismissed after disclosing records which indicated payment of tax for fuel purchased from Leland.

On June 27, 1983 the Division of Taxation sent questionnaires to the purported customers of Leland asking what relationship the customer had with Leland, whether a consignment agreement existed between Leland and the customer, the customer's sales tax registration number, whether the customer's gasoline purchase invoices were readily available, the name and address of the customer's landlord, whether or not the customer was responsible for paying the sales tax on gasoline sold in its location and whether or not it provided resale certificates for its purchases. These letters were sent to the following customers:

Shelter Cove Marina, Bronx, New York;
Service Manufacturer, Hastings, New York;
E & A Service Station; Mt. Vernon, New York;
Fine Wheels Auto Rental, Inc., Brooklyn, New York;
Herb Wragg Service Station, Mt. Vernon, New York;
Meineke Muffler, Bronx, New York;
O'Dee Rental Equipment Corp., Bronx, New York;
Minifold Yacht, Bronx, New York; and
Steven's Service Station
a/k/a "Abdul Aziz", Mt. Vernon, New York.

On October 12, 1983 the auditor and his team leader went to Leland's place of business in New Rochelle, New York, but found no one available. Another appointment was made for October 18, 1983, which conference did take place, but Leland failed to produce any records other than the loose leaf sales journal and check stubs referred to above. Resale certificates were

requested from Leland but none were produced. They were again requested on October 27, 1983, but once again the taxpayer failed to produce them.

Since petitioner's books and records were deemed to be inadequate, the Division calculated an estimated assessment based upon available records and third-party records received from Rad Oil for the purchase of gasoline, gasoline products, and tires, batteries and accessories (hereinafter "t/b/a"). The purchase records from Rad substantially agreed with the loose leaf notebook provided by Leland. It showed that during the audit period purchases were made in the name of Leland Stations, Inc. and delivered to gas stations which were operated on property owned by Leland or companies directly related to Leland by interlocking directorates or identical shareholders. The Division utilized the loose leaf notebook to verify the sales by Leland (gallons delivered) to the various service stations. It indicated the address to which the gasoline was delivered and the cost of the gasoline. It did not indicate the price allegedly charged to the customers. The check stubs indicated only the supplier's name and the amount paid.

Using these items, the Division was able to determine what was delivered to each of the stations in issue and thus the sales to each customer. Since it was determined by the Division that Leland was actually the retailer as well as the wholesaler, the 2,356,164 gallons of gasoline purchased by Leland was multiplied per quarter by the applicable average taxable retail selling price of gasoline as computed per miscellaneous tax surveys provided by the Central Office Audit Bureau, dated April 5 and December 7, 1982, yielding audited taxable sales of $2,000,394.40 including a reduction of 748,045 gallons of gasoline assessed in the Moses Garage Repair audit. Additional tax due on gasoline was computed to be $155,030.57 and $728.23 for diesel sales. Motor oil and purchases of t/b/a were marked up at 100% of cost and an additional tax of $3,422.85 was assessed. The total additional tax due was calculated to be $159,181.65. Petitioner did not dispute the use of the average statewide selling price or the markup on motor oil and t/b/a.

In October 1983, the auditor presented Leland with the proposed tax due and his workpapers. Petitioners disagreed, saying that Leland was a wholesaler and not subject to sales

tax. However, when asked to provide resale certificates, leases and consignment agreements with regard to all the gasoline stations it supplied, they failed to do so.

Prior to the issuance of the 30-day letter, the auditor made a visit to each of the five gas stations listed on the Rad list referred to above which constituted the basis of the assessment of additional tax on gasoline.

The manager of Steven's Service Station, a/k/a Abdul Aziz, at 181 Steven Avenue, Mt. Vernon, New York, was Kiplin Chalwell. The auditor spoke to Mr. Chalwell on December 13, 1983 and was told that all records of the gasoline business were kept at Leland's office and that Leland owned the station.

At the Edson Service Station, Bronx, New York, the auditor spoke with one Wilford Tyndale who told him that he rented the station from Leland and pumped the gas Leland delivered for a monthly commission. Mr. Tyndale said he had no records but that his "boss", Mr. Hacker, would speak to the auditor about them.

When the auditor visited Gene Gordon d/b/a Gene Service Station, Mr. Gordon refused to speak with him and referred him to Mr. Hacker. Mr. Hacker told him he owned the property, that Leland orders and pays for the gasoline sold at the station and that Mr. Gordon is paid a commission for pumping it.

The Sandford Service Station (a/k/a Bianco & Pepe) at 140 West Sandford Boulevard in Mt. Vernon was operated by a Mr. Stecker who identified himself as an employee of Leland. He told the auditor that the station was owned and operated by Leland.

The auditor also spoke with one Herbert Wragg who managed the Wragg Service Station at 360 South 5th Avenue in Mt. Vernon, New York. He was told by Mr. Wragg that he purchases the gas from Hacker, who owns the station, and that Rad delivered it to the station. However, subsequent investigation by the auditor revealed that Mr. Wragg did not report gasoline sales on sales tax returns.

At formal hearing, nine resale certificates were produced. They were as follows:

Vendor's Name	Purchaser's Name	Date
Park Stations, Inc.	Clyde Service Station	Undated
Leland Stations, Inc.	Eddie Abibom [sic]	Undated
Leland Stations, Inc.	Kiplin Chalwell	Undated
Leland Oil Glatzer Industries Corp./ Emergency Beacon		2/01/80
Leland	George's Auto Undated	
Leland Stations, Inc.	Minneford Yacht Yard, Inc.	12/18/81
Leland Stations, Inc.	Mini Bus	9/01/72
Leland Stations, Inc.	Service Manufacturing Co.	1/08/80
Leland Stations, Inc.	5th & 5th Service Center	9/27/76

OPINION

In his determination below, the Administrative Law Judge found that petitioner Leland and petitioner Joshua Hacker were not sellers of gasoline for resale, and that petitioners made retail sales of gasoline. Furthermore, the Administrative Law Judge determined that petitioners' books and records were inadequate and resort to external indices was proper. Lastly, petitioners were found to have willfully failed to pay sales tax.

In their exception, petitioners assert that they were, in fact, selling gasoline for resale. Therefore, they contend that since their sales of gasoline were for resale, their sales are not taxable. Furthermore, they argue that they kept sufficient books and records of all their transactions so that the use of external indices by the Division of Taxation (hereinafter the "Division") was improper. Lastly, petitioners contend that since their sales of gasoline were for resale and not taxable, then it necessarily follows that no sales tax is owed and no penalty and interest are owed.

The Division argues that the burden of proving that petitioners' sales were not subject to sales tax is upon petitioners, and they have not sustained their burden. Moreover, because petitioners only produced a loose leaf binder containing sales by petitioners, and no other records other than check stubs representing purchases of fuel and other items from suppliers, the Division asserts that petitioners' books and records were insufficient. Lastly, the Division asserts that petitioners have failed to establish any reasonable cause for failure to pay the taxes and, thus, the penalties should not be abated.

We affirm the determination of the Administrative Law Judge.

Section 1105(a) of the Tax Law imposes a sales tax, in pertinent part, on "the receipts from every retail sale of tangible personal property." Section 1101(b)(4) defines "retail sales", in pertinent part, as: "[a] sale of tangible personal property to any person for any purpose, other than for resale." Under § 1132(c) of the Tax Law, the burden of showing that a receipt is not subject to tax is on the person required to collect tax or on the customer. Accordingly, in the instant case, petitioners bear the burden of proof to establish that they were engaged in selling gasoline for resale.

We agree with the Administrative Law Judge that petitioners failed to sustain their burden of proof to establish that they were selling gasoline for resale. The only evidence introduced by petitioners was certain resale certificates. A resale certificate is used to claim exemption from tax on purchases of tangible personal property which will be resold as such or as a physical component part of tangible personal property (20 NYCRR 532.4[d][1][i]). A certificate is considered to be properly completed when it contains the date prepared, the name and address of the purchaser, the name and address of the vendor, the purchaser's identification number, the signature of the purchaser and any other information required to be completed on the particular form (20 NYCRR 532.4[c][2]).

It is quite obvious that the certificates submitted by petitioners do not establish that petitioners were selling gasoline for resale. Petitioners submitted nine resale certificates, none of which represent any of the stations upon which the assessment in question was based. Moreover, half of the submitted resale certificates were not even dated. In the absence of any other evidence, we conclude that petitioners have failed to sustain their burden of proof on this issue.

The next issue to address is whether petitioners kept sufficient books and records from which to conduct an audit.

Section 1135(a)(1) of the Tax Law places the responsibility upon a vendor to maintain adequate records of each sale and Tax Law § 1135(d) requires a vendor to furnish these records to the Division upon request.

The only records produced by petitioners were a loose leaf notebook containing the amounts of gasoline delivered to the various stations and the cost of said gasoline, and check stubs which listed the supplier of the petroleum and petroleum products and the amount paid for said products. We agree with the determination of the Administrative Law Judge that such records do not comply with the provisions of § 1135 of the Tax Law.

Having determined that the records were incomplete and inaccurate, the Division was justified in resorting to external indices to estimate the tax (Matter of Urban Liquors v. State Tax Commn., 90 AD2d 576, 456 NYS2d 138). The estimate methodology utilized must be reasonably calculated to reflect the taxes due, but exactness is not required from such a method (Matter of W.T. Grant Co. v. Joseph, 2 NY2d 196, 159 NYS2d 150, cert denied 355 US 869, 2 L Ed 2d 75). The burden then rests upon the taxpayer to demonstrate by clear and convincing evidence that the method of audit or the amount of the tax assessed was erroneous (Matter of Surface Line Operators Fraternal Org. v. Tully, 85 AD2d 858, 446 NYS2d 451).

Again, petitioners failed to submit any evidence to indicate that the audit methodology employed by the Division was erroneous. Therefore, petitioners have failed to sustain their burden of proof and, thus, we agree with the Administrative Law Judge that the method used by the Division was reasonable.

Lastly, we must address whether petitioners are liable for penalty and interest. In their exception, petitioners allege that they are not liable for any penalty and interest because there is no underlying sales tax deficiency. As decided above, there is sales tax owed since petitioners failed to show that they were engaged in selling gasoline for resale. Thus, we affirm the imposition of penalty and interest upon petitioners for their failure to collect sales tax.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Leland Stations, Inc. and Joshua Hacker is denied;

2. The determination of the Administrative Law Judge is affirmed;

3. The petitions of Leland Stations, Inc. and Joshua Hacker are denied; and

4. The Notices of Determination and Demand for Payment of Sales and Use Taxes Due dated July 20, 1984 are sustained.

DATED: Troy, New York
January 25, 1991

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner