

STATE OF NEW YORK  
DIVISION OF TAX APPEALS

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In the Matter of the Petition	:	
of	:	
LELAND STATIONS, INC.,	:	DETERMINATION
STUART & JOSHUA HACKER, AS OFFICERS	:	
for a Redetermination of a Deficiency/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.	:	

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Petitioners, Leland Stations, Inc., Stuart Hacker and Joshua Hacker, as officers, 70 Church Street, New Rochelle, New York 10805, filed a petition for redetermination for a deficiency or revision of a determination or for refund of sales and use tax under Articles 28 and 29 of the Tax Law for period June 1, 1980 through August 31, 1982 (File Nos. 801501, 801502 and 801503).

A hearing was held before Joseph W. Pinto, Jr., Administrative Law Judge, at the offices of the Division of Tax Appeals, Two World Trade Center, New York, New York, on, December 6, 1988 at 1:15 P.M., with all briefs to be filed by March 24, 1989. The Audit Division appeared by William F. Collins, Esq. (Anne W. Murphy, Esq. of counsel). Petitioners appeared by David A. Yablon, C.P.A.

ISSUES

I. Whether petitioners are liable for additional sales and use taxes as determined by the Audit Division in a field audit of petitioners' books and records for the period June 1, 1980

through August 31, 1982.

II . Whether petitioners Stuart Hacker and Joshua Hacker are persons responsible for the collection of said taxes pursuant to Tax Law §§ 1131(1) and 1133(a) in their positions as officers of Leland Stations, Inc.

### FINDINGS OF FACT

1. On July 20, 1984, the Audit Division issued to Leland Stations, Inc. a Notice of Determination and Demand for Payment of Sales and Use Taxes Due which set forth the tax due in the sum of \$159,181.65, penalty of \$79,590.81 and interest of \$58,544.62, for a total amount 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.

<u>Period Ended</u>	<u>Tax Due</u>	<u>Penalty</u>	<u>Interest</u>
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, July 20, 1984, the Audit Division issued to Stewart [Stuart] Hacker and Joshua Hacker, officers of Leland Stations, Inc., identical notices of determination and demand

for payment of sales and use taxes due. For the period June 1, 1980 through August 31, 1982 which set forth total tax due of \$159,181.65, penalty of \$79,590.81, interest of \$58,544.62, for a total amount due of \$297,317.08. The only difference in the two notices were the notice numbers, Joshua Hacker's notice number being S840720116C and Stuart Hacker's being notice number S840720117C and the petitioners' respective social security numbers on each notice. On both notices was this identical 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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2. At hearing, the Audit Division withdrew its assessment of fraud penalty and instead asserted penalty to be due pursuant to Tax Law § 1145(a)(1)(i).

3. Leland Stations, Inc. was a self-described gasoline wholesaler which made "sales" of gasoline to retail businesses. Generally, Leland distributes products which it buys from other

wholesale distributors and sells it to customers who resell at retail. Leland did not collect taxes and only filed an annual report to reflect this situation.

4. Leland's customers were lessees of service stations which were owned by companies which were related to Leland either by interlocking directorates or common shareholders. Generally speaking, Leland a related company would release the service station which it owned to an individual or a business and Leland would sell that tenant its gasoline, diesel fuel and other products.

5. The audit originated when the auditor in question, Mr. Merquide Leo was doing an audit of one Moses Garage Repairs located at 295 Sanford Boulevard, Mount Vernon, New York. Speaking with the owner, Mr. Moses Gordon, it was learned that Mr. Gordon leased the station from a company by the name of Franklin Stations, Inc., located at 70 Church Street, New Rochelle, New York, the same address as Leeland Stations, Inc. The lease agreement between Mr. Gordon and Franklin Stations indicated that Mr. Gordon agreed that all gasoline and petroleum products would be bought by Mr. Gordon solely from the landlord, its agent or "designee" at the regular dealer's posted price for the entire period of the lease. The lease provided that the tenant would keep in force fire insurance, liability insurance and all licenses and permits which are necessary to the operation of the demised premises. It did not require Mr. Gordon to collect sales taxes. Mr. Gordon also signed a consignment agreement which provided

that since Mr. Gordon did not have sufficient capital to purchase gasoline, he would purchase his gasoline from Leland Stations or Franklin Stations on a consignment basis, and that Franklin would send gas to the station and collect the money from sales on a daily basis withholding profits which would be returned to the dealer and rent taken from the profits. The consignment agreement also provided that it was stated that "dealer is responsible for all taxes, fees, utilities, etc. which may accrue to the operation of the business". When auditor confronted Mr. Moses Gordon with this document, Mr. Gordon explained that he had never signed said agreement and produced a handwriting sample to prove same.

6. While at the station, the auditor was introduced to a man delivering gasoline by the name of Stuart A. Hacker who represented himself as the president of Leland Stations, Inc. 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.

7. The auditor decided that an investigation into the relationship between the Moses Garage Repairs and Leland Stations and Franklin Stations, Inc. was necessary in order to determine who had liability for payment of sales taxes and whether or not anyone was paying same. An audit was determined to be proper for Leland Stations, Inc. and on May 2, 1983 the Audit Division sent appointment letters to Leland Stations 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.

8. When the auditor visited the premises of Leland Stations on June 9, 1983 through June 10, 1983, he was only given a loose leaf binder which contained sales by Leland and their accounts receivable. The loose leaf book was in very poor condition and vendor produced no other records other than check stubs. Since that time, Leland Stations produced the lease between Franklin Stations and Moses Gordon. On June 10, 1983 the auditor also made a supplemental oral request for more books and records. This request was not complied with by the vendor. On June 23, 1983, the auditor sent letters to various suppliers including Hudson Oil, Power Test Corporation, Premium Petro, Deno Oil, and Rad Oil Co., inquiring as to whether these companies did business with Leland Stations, or purchases, if any, of gasoline, oil, and t/b/a for the period June 1, 1979 through August 31, 1982 were made by Leland, the addresses to which deliveries were made and per the \_\_\_\_\_, gallons and dollars of gasoline purchases made by Leland. The only company which responded affirmatively was Rad Oil Co., Inc. of New Rochelle, New York which attached a list to its letter which set forth the addresses to which deliveries were made by Rad on behalf of Leland Stations. The following list includes all of those listed by Rad Oil Co., Inc.: Edson Service Station of Bronx, New York, Meineke of Bronx,

New York, Westchester Taxi of Bronx, New York, Emergency Beacon of New Rochelle, New York, Fred's Service Station of Mt. Vernon, New York, Gene's Gordon Service Station of Mt. Vernon, New York, Service Manufacturing of Hastings, New York, ENA Service Station of Mt. Vernon, New York, Joe's Service Station, O-DEE Service Station, SOS Service Station, Bianco Service Station of Mt. Vernon, New York, Riverdale Moses Service Station of Yonkers, New York, Steven's Service Station of Mt. Vernon, New York and Wraggs of Mt. Vernon, New York.

9. On June 27, 1983 the Audit Division sent questionnaires to purported customers of Leland Stations, Inc. asking what relationship the customer had with Leland Stations, whether a consignment agreement existed between Leland Stations 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 and whether or not the customer was responsible for paying the sales tax on gasoline sold in its location or whether or not it provided a resale certificate for its purchases. These letters were sent to the following customers: Shelter Cove Marina of Bronx, New York, Service Manufacturer of Hastings, New York, E & A Service Station of Mt. Vernon, New York, Fine Wheels Auto Rental, Inc. of Brooklyn, New York, Herb Wragg Service Station of Mt. Vernon, New York, Meineke Muffler of Bronx, New York, \_\_\_\_\_ Rental Equipment Corp. of Bronx, New York, Minifold Yacht of Bronx, New York, Steven's Service Station of "Abdul Aziz" of Mt. Vernon, New York. On October 12, 1983 the

auditor and his team leader went to the vendor's place of business in New Rochelle, New York, but the taxpayer failed to appear. Another appointment was made for October 18, 1983, which conference did take place, but taxpayer failed to produce any other records than the loose leaf sales journal and check stubs. Resale certificates were requested from the taxpayer but none were produced. They were again requested on October 27, 1983, but once again the taxpayer failed to produce them. At this juncture, the auditor made the determination that petitioner's records were not adequate for proper audit of the records and therefore requested and obtained records from the third party, Rad Oil Co. The purchase records produced by Rad Oil Co. substantially agreed with the sales journal provided by the taxpayer. The total gallons purchased were multiplied by the statewide selling price which was provided by the Albany District Office, the Central Office Audit Bureau.

10. Prior to issuing a proposed schedule of deficiency of tax due on motor oil and diesel fuel, the auditor prepared a 30-day letter and sent same with workpapers to the vendor. The vendor disagreed at which time in February 1984 he was once again asked to provide resale certificates. Once again he failed to do so. Prior to the issuance of the 30-day letter, the auditor had made a visit to each of the gas stations and establishments provided on a list by Rad Oil Co. His visit to Abdul Aziz of Sierra Avenue, Mt. Vernon, New York, he found that the manager informed him that the gas station was owned by Leland Stations and that they kept all records

with regard to the sales of gasoline. With regard to the Edson Service Station located in the Bronx, the person spoken to was Wilfred Tindale, who explained to the auditor that he rented the station from Leland and he pumped gasoline for Leland which paid him commission at the end of each month. As with the other gas station, Edson did not have records of its sales, instead referred to his "boss" Mr. Hacker of Leland Stations. With regard to the E & A Garage Corp., the auditor found that gas was purchased from Leland but that E & A did file its own returns.

With regard to the Gene Gordon d/b/a Gene's Service Station on Sanford Boulevard in Mt. Vernon, the owner refused to speak with the auditor concerning the business, but the auditor, when questioning Mr. Hacker, found that the station was owned by Mr. Hacker and that a commission was paid to Mr. Gordon for pumping the gas. Mr. Gordon said that he filed returns, no returns were found on record. With regard to the Sanford Gas Station on Sanford Boulevard, Mt. Vernon, New York, the auditor spoke to a Mr. Stecker, who said he was the manager of the station but that he was also an employee of Leland Stations. He pointed out to the auditor that he had seen him numerous times in the office of Leland Stations, Inc. in New Rochelle, New York.

With regard to the Herb Wragg Service Station in Mt. Vernon, Mr. Wragg told the auditor that he purchased gasoline from Mr. Hacker and that Rad delivered the gas to him. He claimed that he paid a monthly rental to Mr. Hacker as the landlord. Once again no returns were filed by this station for sales tax purposes. Finally, the auditor revisited Moses Gordon whose statements and

situation were relayed pursuant to the findings of fact listed above.

11. At formal hearing, petitioner was unable to produce any books or records, not even those produced on audit with the exception of the nine resale certificates it was able to discover from the Audit Division at the formal hearing. The following are all the resale certificates received at formal hearing:

<u>Vendor's Name</u>	<u>Purchaser's Name</u>	<u>Date</u>
Park Stations, Inc.	Clyde Service Station	Undated
Leland Stations, Inc.	Eddie abibom	Undated
Leland Stations, Inc.	Kiplin Chalwell	Undated
Leland Oil	Glatzer Industries Corp.	2/1/80
Leland	George's Auto	Undated
Leland Stations, Inc.	Miniferd Yacht Yard, Inc.	12/18/81
Leland Stations, Inc.	Mini Bus	9/1/72
Leland Stations, Inc.	Service Manufacturing Co.	1/8/80
Leland Stations, Inc.	5th & 5th Service Center	9/27/76

#### SUMMARY OF PETITIONER'S POSITION

12. It is the petitioner's position that it is a gasoline wholesaler which purchases from other wholesale dealers and did sell to retail during the period, thereby not subject to the sales tax. Furthermore, petitioner, Stuart Hacker, states that he was not a responsible officer or person liable for said sales tax pursuant to Tax Law §§ 1131(1) and 1133(a), by virtue of the fact that he was not an officer of the corporation nor was he an employee or had any responsibilities with regard to the bookkeeping or operation of the business of Leland Stations, Inc. The other officer, Joshua Hacker, does not deny that he was a responsible officer of the corporation but maintains that Leland Stations' position as a wholesaler exempts it from sales tax.

## SUMMARY OF THE AUDIT DIVISION'S POSITION

13. Since petitioner's books and records were woefully inadequate and not substantial enough to do an adequate audit of the books and records of the company for the audit period reverted to an estimated assessment based upon a third party verification. By going to the supplier of gasoline, gasoline products, and tires, batteries and accessories, Rad Oil Corp., Inc., it found that for 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 companies directly related either by interlocking directorate or identical shareholders, to Leland Stations \_\_\_\_\_ 356,164 gallons of gasoline which was multiplied by the average taxable retail selling price of gasoline as computed per a miscellaneous tax survey provided by the Central Office Audit Bureau. This calculation yielded 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 is \$155,030.57 and a tax due of \$728.23 for diesel sales. With regard to motor oil and purchases of t/b/a it was found that an additional tax was due after 100% mark up of \$3,422.85. The total additional tax due therefore is \$159,181.65. Due to the fact that the petitioner Leland Stations, Inc. was unable to provide any resale certificates to substantiate its position as a wholesaler and in light of the fact the taxpayer was unable to produce any further records other than the basic consignment agreement with its tenants both which have limited books.

## CONCLUSIONS OF LAW

A. In accordance with Tax Law § 1138(a) the Audit Division properly estimated the taxes of petitioner since the records provided by petitioner after several requests by the Audit Division were shown to be woefully inadequate. Where records are shown to be woefully inadequate after requests, the Audit Division is within its rights to estimate the taxes for the audit period. Citing cases, regulations, and statute.

It is not necessary that the Audit Division be exact in its methodology if it has been determined that an estimate is proper. Citing cases, statute and regulations. Since petitioner was under an obligation to keep accurate books and records pursuant section 1135 of the Tax Law and did not do so the estimate was proper.

The Audit Division's use of Rad Oil Company's invoices to petitioner Leland Stations and the application to said gallonage figures of the statewide selling price for the quarters in issue was a proper method of estimating the taxes due on sales of gasoline, diesel fuel, motor oil and t/b/a. Figures more substantially similar to those reported by the petitioner in its loose leaf folder even more credences lent to the methodology. Since petitioner failed to produce any evidence to contradict the findings of the Audit Division, and since it was unable to produce resale certificates which would have provided a reason to exempt its sales from taxation, the audit methodology and results are hereby sustained. (See Matter of Spindex Corporation,

Administrative Law Judge Decision, December 1988.)

B. Evidence produced at hearing clearly establishes that petitioner was making sales of gasoline to the stations to which gasoline was delivered, gasoline, motor oil, diesel fuel, and t/b/a, to the gas stations. By the alternative Leland itself was retailing these products since it clearly established that the realty upon which the stations rested were owned by Leland or an associated corporation. The gas stations were owned by Leland and in fact the only participation of the businesses doing business at these locations was that they were tenants of Leland or a Leland affiliate. These affiliated corporations were either interlocking directorates or had identical shareholders. Mr. Joshua Hacker indicated at hearing that he in fact was a participant in every one of the realty holding corporations which owned the gas stations. The lease agreement which was produced between Franklin Stations and Moses Gordon clearly indicated that it was the express intent of the landlord to have its tenant purchase all of its gasoline from Leland as a designee of the landlord and, as shown in the consignment agreement, it was the intent of Leland, Franklin, and the other affiliated companies to collect on a daily basis all receipts from the sales of gasoline. From these receipts the gas station operators were paid a commission in some instances on a monthly basis for the pumping of the gasoline. Given these circumstances and the facts which could be gleaned from speaking with the various managers and employees of the service stations themselves Leland was essentially making what were tantamount to retail sales

and to hold to the contrary would fly in the face of common sense.

C. Tax Law §§ 1133(a) and 1131(1) provide for the responsible officers of the corporation as persons liable for the collection of sales and use taxes found due from the corporation to which they are affiliated. Section 1131 states as follows:

Section 1133(a) states as follows:

See regulations \_\_\_\_\_ also Matter of Vogel v. State Tax Commission (Appellate Division).

There is no dispute that Joshua Hacker was a responsible officer of the corporation and in fact he conceded said fact at hearing. The remaining issue is whether Stuart Hacker, son of Joshua Hacker, was a responsible officer of Leland Stations, Inc. From the business card presented to the auditor at the gas station managed by Moses Gordon which indicated he was president of Leland Stations, from the fact that he had an intricate part or position with the company in that he was there on behalf of Leland measuring the amount of gas in the tank at the time the auditor visited Moses Gordon's gas station, the fact that he held himself out as a responsible person on behalf of Leland Stations, Inc. throughout the audit of Leland indicate that he was a responsible officer of the corporation. At no time did petitioner Stuart Hacker present any evidence to the contrary and in fact he did not appear nor testify at the formal hearing. Corporate documents were produced to show that he was not an officer of the corporation and in

light of this lack of evidence it can only be held that Stuart Hacker was a responsible officer of the corporation.

D. With respect to the assessment of penalty provided for in section 1145(a)(1)(i) of the Tax Law, the Audit Division has successfully shown that petitioner's failure to pay over its tax was due to neglect and that there was no reasonable cause for said failure to pay the tax.

Although petitioner claims that it was a wholesaler, it could not produce any relevant resale certificates. Those that were provided were either from parties having nothing to do with the instant proceeding, were undated, and for periods that were not covered by this audit. Petitioner's failure to respond to numerous requests for additional books and records, resale certificates through the time of the formal hearing afforded an ample opportunity to provide an explanation for its failure to pay tax, however it did not do so and it never proffered a reasonable cause for said failure. \_\_\_\_\_ set up for which it ordered and delivered gasoline to stations which were operated by tenants who operated under leases and consignment agreements with Leland or its corporate affiliates and also the testimony of Joshua Hacker indicate that petitioner should have had reason to doubt that taxes were being paid or sales tax returns were being filed by its tenants. (Question this last sentence.) For this reason, the Audit Division has shown that petitioners are liable for the penalty provided for in section 1145(a)(1)(i) of the Tax Law. (See also Matter of Ilter Sener, Tax Appeals Tribunal, February 1988.)

E. The petition of Leland Stations, Inc., Joshua Hacker and Stuart Hacker are hereby denied and the notices of determination and demands dated \_\_\_\_\_, are hereby sustained together with penalty and such additional interest as may be lawfully owing.

DATED: Albany, New York

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ADMINISTRATIVE LAW JUDGE