

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions	:	
	:	
of	:	
	:	
LAMCO OIL COMPANY	:	
	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Periods December 1, 1978	:	
through November 30, 1979 and March 1, 1980	:	
through August 31, 1982.	:	

DECISION

In the Matter of the Petition	:	
	:	
of	:	
	:	
MARY A. CONKLIN (Marialice Conklin)	:	
OFFICER OF LAMCO OIL COMPANY	:	
	:	
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, 1980	:	
through August 31, 1982.	:	

Petitioner, Lamco Oil Company, 48 North Road, Poughkeepsie, New York 12601, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1978 through November 30, 1979 and March 1, 1980 through August 31, 1982 (File Nos. 41172, 42168, 42867 and 46127)

Petitioner, Mary A. Conklin (Marialice Conklin), 48 North Road, Poughkeepsie, New York 12601, 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, 1980 through August 31, 1982 (File No. 46128).

A formal hearing was commenced before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, Building #9, State Office Campus,

Albany, New York, on November 2, 1984 at 1:15 P.M., and was continued to conclusion before the same Hearing Officer at the same location on January 7, 1985 at 10:00 A.M., with all briefs to be submitted by April 8, 1985. Petitioners appeared by Pezzo, Vergilis, Stenger & Wallace, Esqs. (Raymond M. Pezzo, Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly issued certain assessments (specifically numbered S820319041A, S820924009A and S821217020A) against petitioner Lamco Oil Company.

II. Whether petitioner Lamco Oil Company has substantiated the assertion that third party data relating to purchases of gasoline, as relied upon by the Audit Division, was inaccurate.

III. Whether a fraud penalty for the period September 1, 1979 through November 30, 1979 was properly assessed against petitioner Lamco Oil Company.

IV. Whether petitioner Mary A. Conklin (Marialice Conklin) is liable for any sales tax owed by petitioner Lamco Oil Company for the period March 1, 1980 through August 31, 1982.

FINDINGS OF FACT

1. During the periods at issue, petitioner Lamco Oil Company ("Lamco") was engaged in the business of selling petroleum products, including fuel oil and gasoline. On September 1, 1978, a Certificate of Conducting Business Under an Assumed Name ("d/b/a certificate") was filed with the Dutchess County Clerk, stating that Marialice Conklin intended to conduct business under the name

Lamco Oil Company. This d/b/a certificate bore the signature of petitioner Marialice Conklin.¹

2. On September 15, 1978, the Audit Division (Sales Tax Bureau) received for filing a hand printed sales tax Certificate of Registration for Lamco Oil Company, indicating that Lamco had commenced doing business in New York State on September 5, 1978, and that Marialice Conklin was Lamco's owner. The Audit Division assigned Vendor Identification Number "NY 8166697" to Lamco.

3. By a memorandum dated September 16, 1981, the Audit Division's Albany Central Office advised its Kingston office to conduct an audit of Lamco Oil Company. This letter provided, in relevant part, as follows:

"[P]reliminary investigation of this vendor's supplier, Mid Valley Oil Co., Inc., indicates that during the period ended May 31, 1980, the vendor's purchases totalled 85,006 gallons which should yield taxable sales of an estimated \$106,257.00. The vendor's tax return for period ended May 31, 1980 indicates taxable sales of \$2,972.00. It appears that the vendor's sales are substantially under reported."

4. On November 12, 1981, the Audit Division issued a letter to Lamco advising that a sales tax field audit of Lamco's records was scheduled for December 8, 1981. The Audit Division was thereafter advised that Lamco's records were in the possession of the company's accountant, one Michael Worona.² An audit appointment letter giving notice of the scheduled December 8, 1981 audit date, was accordingly sent to Mr. Worona. On December 4,

1 "Marialice" Conklin also appears as "Mary Alice" Conklin. The distinction in spelling as reflected on various documents was not clarified.

2 A Power of Attorney form appointing Mr. Worona as attorney, dated March 22, 1982 and signed by William Conklin, was received by the Audit Division on April 19, 1982 (see Exhibit "T").

1981, Mr. Worona requested a postponement of the audit to January 6, 1982. In early January, 1982, Mr. William Conklin (petitioner Marialice Conklin's husband) telephoned the Audit Division on behalf of Lamco and requested that the January 6, 1982 audit appointment be rescheduled for January 20, 1982. On January 16, 1982, Mr. Worona requested a further postponement of the scheduled January 20, 1982 audit appointment.

5. On or about February 11, 1982, the Audit Division wrote to Mid Valley Oil Company ("Mid Valley"), one of Lamco's suppliers, requesting that Mid Valley, as a third party, provide information concerning gallonage and dollar amounts of its sales of petroleum products to Lamco.

6. By a letter dated February 22, 1982, the Audit Division advised Lamco that the field audit was rescheduled to March 29, 1982, that consent forms extending the period of limitation on assessment were enclosed and that failure to execute and return such forms by March 15, 1982 would result in the issuance of an estimated assessment. The consent forms were not executed or returned.

7. On March 18, 1982, the Audit Division issued to Lamco a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S820319041A) for the period December 1, 1978 through May 31, 1979 in the amount of \$12,254.04, plus penalty and interest. This assessment was issued due to Lamco's failure to make its records available for audit, notwithstanding the above-detailed requests therefor, and its unwillingness to extend the period of limitation for assessment. Tax asserted due per this assessment was based on third party information concerning Lamco's purchases of gasoline during the assessment period (see Finding of Fact "3").

8. On April 19, 1982, the Audit Division's auditors met with William Conklin at Lamco's place of business. During this meeting, Mr. Conklin showed

the auditors a sales journal, but requested that the journal be reviewed at the offices of Lamco's accountant, Mr. Worona. On May 10, 1982, Mr. Conklin agreed to an audit appointment for June 9, 1982, and indicated that he should have Lamco's records from Mr. Worona by such date.

9. On June 9, 1982, the Audit Division's auditors met with Mr. Conklin, who advised that all of Lamco's records were with Mr. Worona. The auditors then met with Mr. Worona, who stated that Lamco did not maintain a sales journal. Mr. Worona also stated that he had not prepared sales tax returns for Lamco subsequent to November 1980, or income tax returns for the Conklins for the years 1978 through 1982, because he thought that Lamco was grossly understating its receipts. During this meeting, Mr. Worona furnished the examiners with bank statements and some sales invoices pertaining to Lamco.

10. On July 8, 1982, Mr. Worona requested by phone that an audit appointment scheduled for July 13 and 14 be postponed until the end of July. The reason given for the requested postponement was that Mr. Conklin had not furnished Mr. Worona with necessary records. The auditors did not grant this request for postponement.

11. On July 12, 1982, the auditors received some limited records, including meter slips for December, 1981 and a list of Lamco's customers. Requests for information were issued by the Audit Division to Lamco's suppliers and customers. It was asserted on behalf of Lamco that some of its fuel oil sales were taxable, but that all gasoline sales were for resale. No resale certificates were among the records made available to the auditors.

12. On September 20, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S820924009A) to Lamco asserting sales tax due for the period June 1, 1979 through August 31,

1979 in the amount of \$20,000.00, plus penalty and interest. The amount due per this assessment was estimated because neither Lamco nor Mr. Worona had furnished the records necessary to conduct a detailed audit.

13. On December 16, 1982, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S821217020A) to Lamco, asserting sales tax due for the period September 1, 1979 through November 30, 1979 in the amount of \$20,000.00, plus fraud penalty [Tax Law §1145(a)(2)] and interest. The tax due per this assessment was again estimated because adequate records for the period had not been made available for audit.

14. On May 20, 1983, the Audit Division issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S830520005A) to Lamco, asserting sales tax due for the period March 1, 1980 through August 31, 1982 in the amount of \$103,514.02, plus penalty and interest. On the same date, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due (Notice No. S830520004A) was issued to Mary Alice Conklin as an Officer of Lamco Oil Company, asserting liability against Mrs. Conklin as a person responsible for sales tax due from Lamco for the period March 1, 1980 through August 31, 1982 in the amount of \$103,514.02, plus penalty and interest. The tax asserted due per these assessments consisted of four components: sales tax collected but not remitted on sales of fuel oil for the period March 1, 1980 through November 30, 1980; unreported sales of fuel oil; unreported sales of kerosene; and unreported sales of gasoline, as follows:

(a) tax collected but not remitted: the auditors reviewed Lamco's fuel oil sales invoices for the period March 1, 1980 through May 31, 1980. While 57 numbered invoices for this period were missing, the auditors determined from the existing invoices that Lamco had collected sales tax on fuel oil sales

for this period in the amount of \$882.82, but had remitted tax of only \$118.88. The auditors projected the resultant error ratio for this period to the period June 1, 1980 through November 30, 1980, yielding tax due in the amount of \$3,189.74.

(b) unreported fuel oil and kerosene sales: the auditors conducted a markup audit of Lamco's fuel oil sales and kerosene sales for the period December 1, 1980 through February 28, 1982. Information concerning Lamco's purchases was derived from two sources; Lamco's suppliers and Lamco's check disbursements journal. A markup of 16.23 percent on fuel oil and 10.28 percent on kerosene was obtained from a review of sales invoices for December, 1981. Audited sales for the period December 1, 1980 to February 28, 1982 were, based on the foregoing markups, computed to be \$1,146,126.00. Application of the various tax rates per jurisdiction (determined from the invoices), yielded tax due of \$20,042.90.

(c) unreported gasoline sales: the auditors also conducted a markup audit on Lamco's sales of gasoline. The auditors received data directly from three gasoline wholesalers, Queen City, Mid Valley and Tarricone, as to the amount of gasoline purchased by Lamco. Data on sales of gasoline to Lamco by the Power Test Corporation were obtained via a computer printout of information on file with the Albany office of the Audit Division. This third party information regarding purchases revealed an average purchase price of \$1.166 per gallon while gasoline sales invoices submitted by Lamco revealed an average selling price of \$1.182 per gallon, yielding a markup of 1.37 percent. This markup was applied to gasoline purchased by Lamco between March 1, 1980 and August 31, 1982, resulting in gasoline sales of \$1,577,261.00 and tax due of \$80,281.38.

15. The auditors noted that given the comparatively low markup on gasoline sales, Lamco may have only been charging a delivery fee to its customers. Accordingly, during the course of the audit, the auditors requested copies of any resale certificates received by Lamco. No such certificates were furnished during the audit. However, subsequent to the audit, a number of resale certificates were submitted by Lamco. Upon review, three of these certificates were accepted by the auditors.³ The balance of the certificates were rejected based on one or more of the following defects:

- a) the certificates were unsigned, and/or undated, and/or did not contain a vendor ID number;
- b) there was no indication from sales invoices or any of Lamco's other records made available that the entity listed on the certificate purchased gasoline from Lamco, or had done business with Lamco;

3 The certificates accepted by the auditors were:

- Joe's Apple Valley Sunoco
- Dover Service Center
- Crazy Carmine's Auto Service

Although these certificates were accepted, there does not appear from the record to have been any adjustment to the deficiency (i.e. a reduction of taxable sales and tax due) based on sales to these vendors.

c) the certificates, although otherwise complete contained a vendor ID number which upon computer crosscheck did not exist on the Audit Division's records.⁴

16. Sales tax returns were filed on behalf of Lamco as follows:

<u>PERIOD</u>	<u>DATE FILED</u>
12/1/78 - 2/28/79	3/14/79
3/1/79 - 5/31/79	12/31/80
6/1/79 - 8/31/79	no return filed
9/1/79 - 11/30/79	12/31/80
12/1/79 - 2/28/80	12/31/80
3/1/80 - 5/31/80	12/31/80
6/1/80 - 8/31/80	12/31/80
9/1/80 - 11/30/80	12/31/80

No returns were filed for periods after November 30, 1980. It appears that all of the above returns were signed either by Mr. William Conklin or by Mr. Michael Worona. One return pertaining to a prior period (September 1, 1978 through November 30, 1978) was signed by Mrs. Conklin.

17. Mrs. Conklin gave birth to the Conklins' fifth child between the two hearing dates. Mrs. Conklin did not appear personally and give testimony on either hearing date.

18. Lamco Oil Company, Inc. was incorporated in New York State on or about November 26, 1979. Its sole incorporator was one Sharon Kiethley. Service of process was to be delivered to M & W Management, Inc., a corporation owned by

⁴ The certificates rejected because the I.D. numbers thereon did not exist when checked to Audit Division records were:

- T. J. Mobil
- Frank Sorbello Farms
- Jim's Amoco
- C & V Service Center
- Mariner's Harbor
- Redl's Garage
- Marbell Texaco

Mr. Worona. Lamco's Certificate of Incorporation indicates the authorization of 200 shares of no-par value stock. The minutes of the organizational meeting of Lamco Oil Company, Inc. were signed in blank by the sole incorporator. The spaces for directors' names in the minutes of said meeting were left blank and never filled in. No directors or officers were appointed or elected, nor was any stock ever issued. Mr. Conklin was not involved in the incorporation process. He never attended any corporate meetings nor does it appear any such meetings were ever held. He did assume use of the title "President".

19. Until the above-noted incorporation, the business was operated essentially as a partnership by Mr. Conklin and one Joseph LaManna. Mr. Worona was Lamco's accountant from the outset. It was at the urging of Mr. Worona and Mr. LaManna that Lamco was incorporated. Prior to incorporation and for some time thereafter, Mr. LaManna and Mr. Worona handled the financial aspects of the business, while Mr. Conklin drove the delivery truck and also installed furnaces and repaired oil burners. At the time of incorporation, it was envisioned that Mr. Conklin would take over the entire business, without Mr. LaManna being involved.

20. All of Lamco's check stubs were given to Mr. Worona upon his advice that he could take care of all required tax filings therefrom. Mr. Conklin testified that all sales by Lamco were recorded in a sales journal based on deliveries showing sales in gallons and dollar amounts, and that such journal would show all sales which were for resale or were otherwise exempt sales. Mr. Worona had initially explained how to set up this journal and (during the course of the audit) had advised Mr. Conklin not to show such journal to anyone but Mr. Worona. While Mr. Conklin testified that such journal was available, it was neither produced at the time of audit nor presented at the hearing.

21. Mr. Conklin had inquired why sales tax returns were not being filed and was told by Mr. Worona not to worry about it and that the business was not making enough money to file such returns. Sales tax collected by Lamco was put into the company's regular account and used in the business.

22. During the periods in issue, Mr. and Mrs. Conklin had four children and Mrs. Conklin was a homemaker. Other than the specific documents noted herein, Mrs. Conklin did not prepare or maintain any of Lamco's records, nor did she have any participation in or duties with regard to the business operations of Lamco. She did no physical work at Lamco's premises. Mr. and Mrs. Conklin took salary payments from Lamco. Mr. Conklin testified that Mrs. Conklin was paid "as a housewife", but had no dealings with the operations of the business. Mrs. Conklin signed one of the protest letters filed herein (Exhibit "F"), and Mr. Conklin signed one such protest letter (Exhibit "O"), while the remaining protest letters (Exhibits "G" and "H") were prepared by Mr. Worona, who signed Mrs. Conklin's name thereto.

23. A large number of checks issued by Lamco during January, 1982 were offered in evidence. Two of such checks were signed by Mrs. Conklin and were each payable to her in the amount of \$309.00. Such checks were dated January 19, 1982 and January 26, 1982. The remaining checks were all signed by Mr. Conklin.

24. It was asserted that certain gasoline purchases from Mid Valley attributed to Lamco were actually made by Parker Avenue Extra Gasoline Station ("Parker Avenue Extra"). Lamco leased Parker Avenue Extra from Mid Valley and, in turn, subleased the station to third parties. No written leases or subleases were offered in evidence. Parker Avenue Extra was operated by one Charles Tedesco from September, 1980 through August, 1981, and thereafter operated by L & L Service, Inc., whose principal owner was Mr. LaManna. At some point, it

is alleged, L & L Service, Inc. owed Mid Valley approximately \$8,000.00 for gasoline delivered to Parker Avenue Extra and that Mid Valley sought payment from Lamco. Mr. Conklin, in turn, "shut down" L & L Service, Inc., at which time he found in a drawer at the premises several cancelled checks from Parker Avenue Extra payable to Mid Valley. The checks were for varying amounts, were dated during the months of November and December of 1980, were signed by Charles Tedesco and, in some cases, indicated "gas", "paying invoices", and "rent" under their legend memos. It is asserted that such checks prove that Parker Avenue Extra was independently operated and that any sales thereto by Lamco were clearly sales for resale and not properly includible as sales by Lamco subject to tax.

25. On May 24, 1983, a Certificate of Discontinuance of Business (under an assumed name) was filed with the Dutchess County Clerk cancelling Lamco's original d/b/a certificate (see Finding of Fact "1") for the reason that Lamco had been incorporated. This Certificate of Discontinuance bore the signature of Marialice Conklin.

CONCLUSIONS OF LAW

A. That where a return required to be filed by Article 28 is either not filed, or when filed is incorrect or insufficient, the amount of tax due shall be determined from such information as may be available and, if necessary, the tax may be estimated on the basis of external indices [Tax Law §1138(a)]. Furthermore, every person required to collect tax is under a duty to keep records pertaining thereto and to make such records available for examination by the Audit Division [Tax Law §§1135, 1142.5].

B. That returns were not filed by or on behalf of Lamco for the period June 1, 1979 through August 31, 1979, or for any periods subsequent to November 30,

1980. In addition, the Audit Division was in possession of information indicating that, at least for the quarterly period ended May 31, 1980, Lamco appeared to be substantially underreporting both its sales and its tax liability (see Finding of Fact "3"). Finally, numerous scheduled audit dates to review Lamco's records were continually postponed by Lamco and/or by its accountant, and records requested were not made available. Accordingly, based on information on hand as specified, and in view of the foregoing, the Audit Division's calculation of an assessment of \$12,254.04 in tax for the six month period spanning December 1, 1978 through May 31, 1979 was proper (Notice No. S820319041A).

C. That the Audit Division also issued estimated assessments for \$20,000.00 in tax for each of the quarterly periods June 1, 1979 through August 31, 1979 (Notice No. S820924009A), and September 1, 1979 through November 30, 1979 (Notice No. S821217020A). In view of the noted filing failures by Lamco, the information on hand and the fact that Lamco's records were not made available despite repeated requests therefor, the Audit Division was justified in issuing estimated assessments for the quarterly periods ended August 31, 1979 and November 30, 1979. However, it is appropriate to reduce each of such assessments to \$6,127.02 (one-half of the tax as calculated and assessed for the immediately preceding six month period), inasmuch as each of such estimated assessments spans only a three month period and the \$20,000.00 estimated assessments do not appear to have been based on any particular external indices or method of calculation.

D. That Lamco did not make available complete or adequate books and records such that upon audit, taxable and nontaxable sales could be verified and tax liability determined therefrom with any degree of exactness. Although it was asserted that a complete sales journal was maintained which would detail such information, this journal was never made available either upon audit

"If the failure to file a return or to pay over any tax to the tax commission within the time required by this article is due to fraud, there shall be added to the tax a penalty of fifty percent of the amount of the tax due (in lieu of the penalty provided for in subparagraph (i) of paragraph one), plus interest..."

Section 1145(a)(2) of the Tax Law was enacted by the Legislature with the intention of having a penalty provision in the Sales and Use Tax Law which was similar to that which already existed in the Tax Law with respect to deficiencies of, inter alia, personal income tax (N.Y. Legis. Ann., 1975, p. 350). Thus, the burden placed upon the Audit Division to establish fraud at a hearing involving a deficiency of sales and use tax is the same as the burden placed upon the Audit Division in a hearing involving a deficiency of personal income tax. A finding of fraud at such a hearing "...requires clear, definite and unmistakable evidence of every element of fraud, including willful, knowledgeable and intentional wrongful acts or omissions constituting false representations, resulting in deliberate nonpayment or underpayment of taxes due and owing." (Matter of Walter Shutt and Gertrude Shutt, State Tax Commission, June 4, 1982).

G. That based on the evidence presented, the Audit Division has not sustained its burden of proving that the imposition of a fraud penalty is warranted. However, there nonetheless emerges a pattern of conduct by Lamco sufficient to warrant the imposition of a penalty pursuant to Tax Law section 1145(a)(1) for the period September 1, 1979 through November 30, 1979.

H. That section 1133, subdivision (a) of the Tax Law places personal liability for the taxes imposed, collected or required to be collected under Article 28 upon "every person required to collect any tax" imposed by said article. Section 1131, subdivision (1) furnishes the following definition for the term "persons required to collect tax":

"Persons required to collect tax' or 'person required to collect any tax imposed by this article' shall include: every vendor of tangible personal property or services; every recipient of amusement charges; and every operator of a hotel. Said terms shall also include any officer or employee of a corporation or of a dissolved corporation who as such officer or employee is under a duty to act for such corporation in complying with any requirement of this article and any member of a partnership."

I. That resolution of the issue of personal liability for sales tax due turns upon a factual determination in each case (Vogel v. Dep't. of Taxation and Finance, 98 Misc.2d 222; Chevlowe v. Koerner, 95 Misc.2d 388). Relevant factors in making such determination include, inter alia, day-to-day responsibilities in the business, involvement in, knowledge of and control over the business's financial affairs and its management, the right to hire and fire employees, the preparation or signing of tax returns and the authority to sign checks and to keep books or financial records [Vogel, supra; see also 20 NYCRR 526.11(b)].

J. That petitioner Marialice Conklin was not a person under a duty to collect and remit tax on behalf of Lamco. She appears to have been, at most, a nominee who, as a homemaker with four children, had no actual participation in, control over or responsibility for the operation of Lamco's business.

K. That the petitions of Lamco Oil Company are granted to the extent indicated by Conclusions of Law "C" (reduction of estimated assessments), "E" (reduction of taxable gasoline sales) and "G" (elimination of fraud penalty), but are in all other respects sustained; notices of determination and demand numbers S830520005A, S820924009A and S821217020A are to be recomputed accordingly, and such notices as recomputed, together with notice number S820319041A, are sustained. The petition of Mary A. Conklin (Marialice Conklin) is granted and


the Notice of Determination and Demand for Payment of Sales and Use Taxes Due issued to her (Notice No. S830520004A) is cancelled.


DATED: Albany, New York

AUG 21 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER