

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
James E. Leith :  
Officer of Rock Hambleton Oil Corp. : AFFIDAVIT OF MAILING  
:  
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 :  
9/1/78-11/30/79. :

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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 31st day of December, 1984, he served the within notice of Decision by certified mail upon James E. Leith, Officer of Rock Hambleton Oil Corp., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

James E. Leith  
Officer of Rock Hambleton Oil Corp.  
5808 Benning Rd.  
West Falls, NY 14170

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  
31st day of December, 1984.

David Parchuck

Michael J. Williams  
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 :  
James E. Leith :  
Officer of Rock Hambleton Oil Corp. : AFFIDAVIT OF MAILING  
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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 9/1/78-11/30/79. :

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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 31st day of December, 1984, he served the within notice of Decision by certified mail upon George E. Riedel, the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

George E. Riedel  
1345 Statler Bldg.  
Buffalo, NY 14202

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  
31st day of December, 1984.

David Parchuck

Nicole J. Williams  
Authorized to administer oaths  
pursuant to Tax Law section 174

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

December 31, 1984

James E. Leith  
Officer of Rock Hambleton Oil Corp.  
5808 Benning Rd.  
West Falls, NY 14170

Dear Mr. Leith:

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  
George E. Riedel  
1345 Statler Bldg.  
Buffalo, NY 14202  
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition	:	
	:	
of	:	
	:	
JAMES E. LEITH	:	DECISION
OFFICER OF ROCK HAMBLETON OIL CORP.	:	
	:	
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 September 1, 1978	:	
through November 30, 1979.	:	

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Petitioner, James E. Leith, Officer of Rock Hambleton Oil Corp., 5808 Benning Road, West Falls, New York 14170, 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 September 1, 1978 through November 30, 1979 (File No. 36976).

A formal hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, General Donovan State Office Building, 125 Main Street, Buffalo, New York, on April 25, 1984 at 10:45 A.M., with all briefs to be submitted by July 3, 1984. Petitioner appeared by George E. Riedel, Esq. The Audit Division appeared by John P. Dugan, Esq. (James Della Porta, Esq., of counsel).

ISSUE

Whether petitioner was a person required to collect and pay sales and use taxes on behalf of Rock Hambleton Oil Corp. pursuant to the terms of sections 1131(1) and 1133(a) of the Tax Law.

FINDINGS OF FACT

1. On June 29, 1981, the Audit Division issued to petitioner, James E. Leith, a Notice of Determination and Demand for Payment of Sales and Use Taxes

Due for the period September 1, 1978 through November 30, 1979, assessing tax due in the amount of \$207,791.55, plus penalty and interest. This Notice was premised upon the assertion that Mr. Leith was a person responsible under the terms of sections 1131(1) and 1133(a) of the Tax Law for the collection and remittance of sales and use taxes due on behalf of Rock Hambleton Oil Corp. ("the corporation").

2. Rock Hambleton Oil Corp. was, until its January 13, 1980 closing due to financial problems (more specifically the nonpayment of sales tax), engaged in the business of selling gasoline and oil through five gasoline service stations in the Buffalo, New York area. These stations were owned by the corporation and were leased to other persons who actually operated the stations.

3. The corporation was founded in the early 1940's by Ernest E. Hambleton, who later took his brother, Herbert Hambleton, Sr., into the business. Each brother owned 50 percent of the stock with Herbert, Sr. serving as president and vice president and Ernest serving as secretary and treasurer. The business proved successful and, in 1970, Ernest and Herbert decided to retire and divest themselves of their stock in the corporation. Herbert gave his fifty percent interest in the corporation to his son, Herbert Hambleton, Jr., while Ernest gave his fifty percent interest in the corporation to his daughter, Dolores Leith. Dolores Leith is the wife of petitioner James E. Leith. Certain non-voting preferred stock was also issued to the grandchildren of Ernest and Herbert, Sr. Petitioner and Herbert Hambleton, Jr. were to continue operation of the business and share in the earnings as Ernest and Herbert, Sr. had done for almost 30 years.

4. Herbert Hambleton, Jr. assumed the titles of president and vice president of the corporation and, in fact, took charge of the conduct of the

corporate business. Petitioner assumed the titles of secretary and treasurer of the corporation at the same time. These titles did not change during the tenure of the business association of Herbert, Jr. and petitioner.

5. Petitioner testified that Herbert Hambleton, Jr. was raised in an upper middle class neighborhood. Herbert, Jr. attended a private high school and then spent several years in college. He claimed, to petitioner and others, to be familiar with financial matters, and is about five years older than petitioner. By contrast, petitioner was raised in a rural community. Petitioner graduated from a public high school, where he studied agriculture, and he did not attend college. Petitioner claims to be unfamiliar with financial matters pertaining to businesses.

6. Each morning, Herbert, Jr. and petitioner would pick up money from the different gasoline stations owned by the corporation, count the money and generally inspect each station. Upon returning to the office, Herbert, Jr. completed bank deposit slips, usually made the actual deposits to the bank, and always took care of reconciling the corporation's bank accounts with its bank statements.

7. Before turning over their stock to Herbert, Jr. and petitioner, the corporation's founders directed that all checks issued by the corporation had to be signed by both Herbert, Jr. and petitioner. During the years Herbert, Jr. and petitioner were officers of the corporation, only a few corporate checks were issued or honored which did not bear both signatures. Those few checks were signed only by Herbert, Jr.

8. Herbert, Jr. and not petitioner actually controlled the corporation's checkbook and wrote all checks, with petitioner merely co-signing such checks. Many times, at Herbert, Jr.'s request, blank checks were signed by petitioner

in advance of their preparation by Herbert, Jr., ostensibly to allow issuance in petitioner's absence.

9. Petitioner had previously worked for the corporation for a period of about two years, in or about 1963 or 1964, as a truck driver. He left the corporation thereafter to drive trucks for himself (as an independent driver) and then returned to work for the corporation, in or about 1967, driving trucks and working generally in and around the corporation's five gasoline stations. At this time, his work duties were directed by the corporation's two founders. After his wife acquired fifty percent of the corporation's stock, petitioner's role in the corporation's affairs was, in fact, directed by and subordinate to Herbert, Jr., with petitioner's primary duties being as follows:

- a. Checking the daily work sheets from the stations.
- b. Filing.
- c. Assisting the corporation's maintenance man with manual repairs.
- d. Supervising the male employees of the corporation.
- e. Responding to "robbery night calls".

10. All of the corporation's major financial and operating decisions were made by Herbert, Jr. Herbert, Jr. always made out the payroll and computed withholding tax and F.I.C.A. amounts. Herbert, Jr. alone, and not petitioner, dealt with the corporation's attorneys regarding all legal matters, including the corporation's profit sharing plan. Herbert, Jr., and not petitioner, dealt with the corporation's accountant regarding all Federal and State income taxes, franchise tax, sales tax, etc. Herbert, Jr. prepared and assembled all information regarding the corporation's Annual Statement of (Financial) Condition and presented it to the corporate accountant.

11. Herbert, Jr. normally determined the selling price of the gas and oil sold by the corporation.

12. Herbert, Jr. alone, and not petitioner, communicated with bank personnel who bought and sold commercial paper and bonds for the corporate account.

13. When the corporation was seeking gasoline and oil suppliers, Herbert, Jr. decided who the corporation would purchase from, when, and at what price.

14. Herbert, Jr. determined the amount of the salaries paid to himself and to petitioner and when they should be increased.

15. Herbert, Jr. assembled all the information for the quarterly sales tax returns, prepaid the returns, and filed them. When New York State sales tax personnel phoned the corporate office, they always asked for Herbert, Jr. They did not deal with petitioner or inform him of any problem, and they communicated only with Herbert, Jr.

16. Through the years, petitioner and Herbert, Jr. had many heated arguments and disagreements, but Herbert, Jr.'s wishes always prevailed.

17. Herbert, Jr. never made petitioner aware that there were any problems in the business and petitioner had no knowledge of any taxes that were due.

18. In Herbert, Jr.'s absence (e.g. vacation, illness, etc.), petitioner would collect the money, make the bank deposits, order gasoline, and direct its delivery to the proper stations. Petitioner could, in such situations, handle the daily physical operations of the corporation, but did not become involved in the tax reporting, legal or financial functions of the corporation.

19. The titles assumed by Herbert, Jr. and petitioner (see Finding of Fact "4") were determined by the founders at a meeting of the corporation's shareholders when the founders passed their stock to their children in 1970. No



subsequent annual meetings of the board of directors or shareholders were held during the remainder of the business's existence.

20. Herbert, Jr. maintained the corporation's books and balanced its checkbook on an ongoing basis. Any questions petitioner asked of Herbert, Jr. in this area were responded to with hostility.

21. Petitioner testified that Herbert, Jr. was presented to him by the corporation's founders as having business and financial knowledge and experience, and petitioner deferred to Herbert, Jr. in these matters. Petitioner did not review corporate finances or tax returns with the corporation's accountants. All questions by the accountants were asked of or referred to Herbert, Jr. Petitioner placed reliance in these areas on Herbert, Jr. and on the accountants.

22. In addition to Herbert, Jr. and petitioner, the corporation employed one other person, Mr. Carl Sauer, for a period of about forty years until the closing of the business. Mr. Sauer drove trucks and handled repairs and maintenance for the corporation. Mr. Sauer testified that Herbert, Jr. took care of the books, made all decisions and actually ran the company. Mr. Sauer's wages were paid, in cash, by Herbert, Jr. Petitioner worked with Mr. Sauer, when needed, on maintenance and repairs. Petitioner generally spent the largest part of his day verifying and filing gasoline checkup sheets (gallonage verification sheets from the corporation's five gasoline stations).

23. Herbert, Jr. had the final word on who was allowed to lease and operate the corporation's five gasoline stations.

24. Petitioner never signed any sales tax returns or other tax returns or reports on behalf of the corporation during the period at issue. Petitioner testified that Herbert, Jr. signed all tax returns and reports filed by the corporation.

25. On or about July 31, 1981 (after the period in issue), petitioner signed a series of Quarterly (Sales Tax) Returns for Part Quarterly Filers (Forms ST-810) covering the entire period at issue. This was done at the Buffalo District (Sales Tax) Office after the corporation had been closed for nonpayment of sales tax and at the request of the Audit Division's auditor, Mr. Denny. Petitioner testified that he had a friend go through the corporation's records to determine the amount of gallons involved during the period at issue, that Mr. Denny then computed tax due on such gallonage and placed this information on the returns and that petitioner then signed the returns "...so that (the Audit Division) would be able to complete their audit". Petitioner was not represented at this meeting. He noted that Herbert, Jr., Ernest Hambleton, and the corporation's accountant were asked but refused to become involved in the matter and, in fact, ignored petitioner's requests to become involved. Petitioner sent a letter to Herbert, Jr. by certified mail requesting his presence to hold a corporate meeting, which letter was not responded to.

26. Petitioner's "filing" duties were limited to posting pump gallon verifications to ledger sheets, and petitioner performed no other bookkeeping functions for the corporation.

27. Petitioner usually accompanied Herbert, Jr. to the bank when deposits were made. Petitioner had a pistol permit and acted as "a kind of guard" on these trips.

28. Petitioner relied on Herbert, Jr. to pay all taxes and handle corporate affairs.

29. The corporation's three employees were covered by a profit sharing plan, the trustees of which were Herbert, Jr. and petitioner. Herbert, Jr. handled all aspects of the plan, including contributions, determination of the

securities to be purchased and sold, dealings with stockholders in conjunction therewith, etc. Although the plan, at one time, had about \$1,800.00 in it, petitioner has never received a distribution therefrom.

30. Petitioner could recommend to Herbert, Jr. the firing of an employee at one of the leased stations, or the termination of a lease, but Herbert, Jr. was the one with final authority to fire or terminate.

31. Immediately after petitioner became secretary and treasurer of the corporation, petitioner asked if he could accompany Herbert, Jr. to meetings with the corporation's attorneys. However, petitioner never attended any such meetings, and was discouraged from attending by Herbert, Jr.'s comments that petitioner "...didn't know what they are talking about anyway".

32. Petitioner testified that he and Herbert, Jr. had many discussions and arguments, but that petitioner never won. Petitioner testified that Herbert, Jr. "...was the president and vice president. He made all the decisions and I never could beat him."

33. The corporation filed no sales tax returns during the entire period at issue.

34. Petitioner assumed the offices of secretary and treasurer, even though he had no experience in business or financial matters, with the assurance that Herbert, Jr. had business knowledge and the ability to handle such matters, and that the physical operation of the business would leave plenty to occupy petitioner's time.

35. Petitioner first became aware of the instant sales tax problem when Mr. Denny closed the business premises on behalf of the Audit Division. Until such time, Herbert, Jr. was in fact in charge of operation of the corporation. Thereafter, Herbert, Jr. had nothing to do with the corporation. Petitioner

noted that he felt Mr. Denny never discussed sales tax with him because all prior dealings had been with Herbert, Jr. as the person actually handling the corporation's books and finances.

36. The business has, since its closing, entered into bankruptcy proceedings and some of its assets have been sold, including gasoline in inventory. The proceeds from this latter sale were turned over to the Audit Division in payment of sales tax. Petitioner, by the attorneys involved in the bankruptcy and winding up of the corporation's affairs, attempted to call a corporate meeting on January 22, 1982 to allow the corporation to sell off one of its assets. Letters to Mr. Hambleton sent by certified mail for this purpose were not responded to. Mr. Hambleton has not resigned his corporate offices nor has petitioner resigned his.

37. Petitioner testified he was treated in the business as an assistant to Herbert, Jr., and all the decision making was done by Herbert, Jr.

38. Petitioner asserts his activities on behalf of the corporation after its closing were in an attempt to comply with requests made by the Audit Division, in the hope that the business could continue to operate.

39. By a letter dated September 13, 1982, the Audit Division indicated a reduction in the amount of tax assessed from \$207,791.55 to \$146,561.67, plus penalty and interest.

#### CONCLUSIONS OF LAW

A. 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."

B. 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 corporation, involvement in, knowledge of and control over the corporation'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 [Vogel, supra; see also 20 NYCRR 526.11(b)].

C. That in view of all the evidence presented, including the credible testimony of petitioner and Carl Sauer, petitioner was not a person under a duty to collect tax on behalf of the corporation. Petitioner's actual role in the corporation was that of a subordinate employee, with Herbert Hambleton, Jr. handling the operation of the business. Petitioner had check-signing authority and signed checks, but only because of the two signature requirement imposed by the founders of the corporation. Petitioner's signing was in essence a "rubber stamp" act, with his signature often affixed before the check was actually written. Petitioner was not involved in the finances of the business and was unaware of any problems until the business was closed. He never prepared or signed any tax returns or reports, except for the sales tax returns signed after the period at issue at the Audit Division's office. This latter signing, as well as other acts on behalf of the corporation, were undertaken by petitioner after he was made aware of the sales tax deficiency and in an effort to comply


with Audit Division requests and, albeit unsuccessfully, aid in resolving the corporation's difficulties. Petitioner was not one who shirked responsibilities legitimately his, but rather was never actually involved in or aware of the corporation's financial matters. His sphere of authority was, in fact and in petitioner's perception, always subordinate to that of Herbert Hambleton, Jr. Finally, petitioner's title was conferred on him but carried with it no real authority. Petitioner viewed himself as, acted, and was treated as having no involvement in, awareness of or control over those aspects of the business which would subject petitioner to personal responsibility for tax on behalf of the corporation.

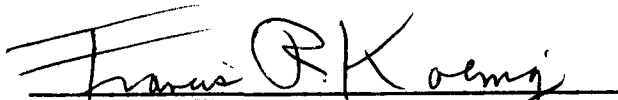
D. That the petition of James E. Leith, Officer of Rock Hambleton Oil Corp. is granted and the Notice of Determination and Demand for Payment of Sales and Use Taxes Due dated June 29, 1981, and subsequently reduced, is cancelled.

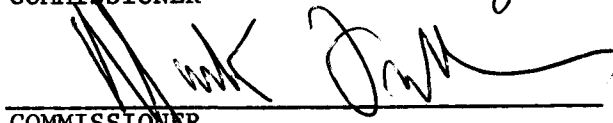
DATED: Albany, New York

STATE TAX COMMISSION

DEC 31 1984

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER

P 470 316 383

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>George E. Liedel</i>	
Street and No. <i>1345 Skottler Bldg</i>	
P.O., State and ZIP Code <i>Buffalo NY 14202</i>	
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	

PS Form 3800, Feb. 1982

P 470 316 382

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—  
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to <i>Thomas E. Keith</i>	
Street and No. <i>Blue Bird Apartments Oak Bay</i>	
P.O., State and ZIP Code <i>5808 Sunny Rd. West Falls NY 14170</i>	
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	

PS Form 3800, Feb. 1982