

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

June 28, 1985

Loula Kelarakos & Eily Kasday
Eily - Lou Service Station, Inc.
227 Dover Green
Staten Island, NY 10301

Dear Madames:

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
Paul Friedman
1450 Broadway
New York, NY 10018
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petitions

of

LOULA KELARAKOS AND EILY KASDAY,
AS OFFICERS OF E & M SERVICE STATION, INC.

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Periods December 1, 1977
through May 31, 1978 and December 1, 1978
through May 31, 1980.

DECISION

In the Matter of the Petitions

of

LOULA KELARAKOS AND EILY KASDAY,
AS OFFICERS OF EILY-LOU SERVICE STATION, INC.

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29
of the Tax Law for the Periods June 1, 1979
through August 31, 1979 and September 1, 1979
through November 30, 1980.

Petitioners, Loula Kellarakos, 227 Dover Green, Staten Island, New York 10301, and Eily Kasday, 61 Cedar Cliff Road, Staten Island, New York 10301, as officers of E & M Service Station, Inc., filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods December 1, 1977 through May 31, 1978 and December 1, 1978 through May 31, 1980 (File Nos. 39359 and 40476).

Petitioners, Loula Kellarakos and Eily Kasday, as officers of Eily-Lou Service Station, Inc., filed petitions for revision of a determination or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the

periods June 1, 1979 through August 31, 1979 and September 1, 1979 through November 30, 1980 (File Nos. 41129 and 41954).

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on October 16, 1984 at 9:15 A.M., with all briefs to be submitted by January 25, 1985. Petitioners appeared by Paul Friedman, Esq. The Audit Division appeared by John P. Dugan, Esq. (Lawrence A. Newman, Esq., of counsel).

ISSUES

I. Whether petitioners, Loula Kellarakos and Eily Kasday, were persons required to collect and pay over sales tax on behalf of E & M Service Station, Inc. and Eily-Lou Service Station, Inc. within the meaning and intent of sections 1131(1) and 1133(a) of the Tax Law during the periods at issue herein.

II. If so, whether the Audit Division properly determined the sales tax due from E & M Service Station, Inc. and Eily-Lou Service Station, Inc.

III. Whether the Audit Division properly asserted a penalty based upon fraud.

FINDINGS OF FACT

1. On June 20, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against E & M Service Station, Inc. ("E & M") assessing taxes due of \$148,117.44, plus a penalty imposed for fraud of \$74,058.72 and interest of \$56,755.59, for a total due of \$278,931.75 for the periods December 1, 1977 through May 31, 1978 and December 1, 1978 through May 31, 1980.

Also on June 20, 1982, the Audit Division issued notices of determination and demand for payment of sales and use taxes due identical as to amounts and periods as the notice issued to E & M against petitioners, Loula Kellarakos and

Eily Kasday. The basis for the notices issued against petitioners was that petitioners were responsible officers of E & M and therefore personally liable for the sales taxes due from said corporation.

2. On September 20, 1982, the Audit Division, as the result of a field audit, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Eily-Lou Service Station, Inc. ("Eily-Lou") assessing taxes due of \$13,774.00, plus a penalty imposed for fraud of \$6,887.00 and interest of \$5,206.57, for a total due of \$25,867.57 for the quarterly period ended August 31, 1979. The tax due on this notice was subsequently reduced by the Audit Division to \$12,497.52, the penalty imposed for fraud to \$6,248.76 and the interest to \$4,724.06, for an adjusted total due of \$23,470.34.

On December 20, 1982, the Audit Division, as the result of a field audit, issued another Notice of Determination and Demand for Payment of Sales and Use Taxes Due against Eily-Lou assessing taxes due of \$63,340.32, plus a penalty imposed for fraud of \$31,670.16 and interest of \$20,354.57, for a total due of \$115,365.05 for the period September 1, 1979 through November 30, 1980.

Also on September 20 and December 20, 1982, the Audit Division issued to each petitioner notices of determination and demand for payment of sales and use taxes due identical as to amounts (including adjustments) and periods as the notices issued against Eily-Lou. The basis for the notices issued against petitioners was that petitioners were responsible officers of Eily-Lou and therefore personally liable for the sales taxes due from said corporation.

3. The aforementioned notices are timely as to all periods including the periods ended February 28 and May 31, 1978 since the sales and use tax returns for said periods were late filed.

4. It is the position of the Audit Division that during the audits of E & M and Eily-Lou respectively, the audit procedures utilized were sound and consistent, that appropriate indirect measurements and analyses were made, that third party information was obtained, and that the deficiencies issued against said corporations are the result of such audit findings. The Audit Division further contends that petitioner Eily Kasday and petitioner Loula Kellarakos were the president and vice-president, respectively, of both E & M and Eily-Lou, and, further, that the failure to pay the taxes due within the required time was due to fraud.

5. At the hearing held herein, the petitioners' representative conceded that the additional tax found to be due from E & M and Eily-Lou on unreported gasoline sales was correct. Petitioners claim that the additional tax determined to be due from E & M and Eily-Lou on unreported repair sales is incorrect. Petitioners further contend that neither of them was an officer or employee of E & M or Eily-Lou.

6. During the period at issue, E & M was a domestic corporation which operated a Shell gas station at 9001 4th Avenue, Brooklyn, New York. Edward Kasday, husband of petitioner Eily Kasday, Mike Kellarakos, husband of petitioner Loula Kellarakos, and Michael Kourkoulakos, 95 Vera Street, Staten Island, New York, each owned 10 shares of the only issued stock of E & M.

On March 16, 1978, Shell Oil Company advised Consolidated Edison of the following:

"Please be advised that the Shell Oil Company with offices located at 3000 Marcus Avenue, Lake Success, New York 11040, has a duly executed lease effective March 20th, 1978 and expiring March 31, 1981 between Mr. E. Kasday the president, of E & M Service Station Inc. covering the subject premises located at 9001 - 4th Avenue, Brooklyn, New York 11209."

Pursuant to a Shareholder's Agreement made on December 20, 1978, it was mutually agreed by the shareholders:

"That each of the shareholders to wit: EDWARD KASDAY, MIKE KELARAKOS AND MICHAEL KOURKOULAKOS agree that so long as he shall remain a stockholder of the corporation, he shall vote for MICHAEL KOURKOULAKOS as President and Director, EDWARD KASDAY as Vice-President and Director, and MIKE KELARAKOS as Secretary-Treasurer Director of the Corporation."

On April 23, 1979, an account was opened in Community National Bank on behalf of E & M which listed as signatories: Mike Kelarakos, Edward Kasday and Michael Kourkoulakos.

7. At the time of the audit, E & M had ceased operations. Therefore, the auditor determined that E & M maintained two service bays based on the observation that the gas station then operating at E & M's location had two operating service bays. The auditor determined repair sales as follows: 8 hours per day x \$30 per hour x 6 days per week x 2 bays = \$2,880.00 per week. Multiplying \$2,800.00 x 136 weeks (audit period) resulted in taxable repair sales of \$391,680.00. The auditor determined additional taxable sales of \$2,484,103.00 (gasoline and repair sales) and additional taxes due of \$198,728.44. E & M and the petitioners were assessed \$148,117.44 of this amount for the period at issue herein, and the balance of \$50,611.00 was to be assessed at a later date. No books or records were made available to the auditor nor were they presented at the hearing.

8. During the period at issue, Eily-Lou was a domestic corporation which operated a Shell gas station at 6414 Fort Hamilton Parkway, Brooklyn, New York. The officers and equal shareholders were Edward Kasday, husband of petitioner Eily Kasday, and Mike Kelarakos, husband of petitioner Loula Kelarakos.

9. At the time of the audit, Eily-Lou had ceased operations. Since the present operator of the gas station maintained three service bays and two

mechanics, the auditor, based on experience obtained from audits of other gas stations, estimated repair sales to be \$2,000.00 per week. The auditor determined total additional taxable sales of \$947,973.00 (gasoline and repair sales) and additional taxes due of \$75,837.84. Eily-Lou and petitioners were assessed this amount. No books or records were made available to the auditor nor were they presented at the hearing.

10. Mike Kelarakos and Edward Kasday attended training classes provided by the Shell Oil Company which are required before an individual is eligible to become a dealer or operator of a Shell gas station. On October 30, 1980, Mike Kelarakos and Edward Kasday executed a termination agreement with the Shell Oil Company on behalf of E & M.

11. Eily-Lou was a "gas only" service station. At the time Mike Kelarakos and Edward Kasday took over the premises, the bays were boarded up by the Shell Oil Company and remained that way for as long as they operated the station. Eily-Lou performed no repair sales.

12. During the period at issue and at the present time, petitioner Loula Kelarakos resided at 227 Dover Green, Staten Island, New York, with her husband, Mike Kelarakos, and their four children. Loula Kelarakos was a housewife and never owned stock in either E & M or Eily-Lou and was never an officer or employee of E & M or Eily-Lou. Loula Kelarakos never attended any training classes provided by the Shell Oil Company. Loula Kelarakos never maintained any books or records on behalf of Eily-Lou or E & M.

13. During the period at issue and at the present time, petitioner Eily Kasday resided at 61 Cedar Cliff Road, Staten Island, New York, with her husband, Edward Kasday, and their two children. Eily Kasday was a housewife and never owned stock in either E & M or Eily-Lou and was never an officer or

employee of E & M or Eily-Lou. Eily Kasday never attended any training classes provided by the Shell Oil Company. Eily Kasday never maintained any books or records on behalf of Eily-Lou or E & M.

14. The Certificates of Registration of both E & M and Eily-Lou indicate petitioner Eily Kasday as president and petitioner Loula Kelarakos as vice-president. This was the basis for the Audit Division's issuance of the notices against petitioners. The petitioners could not explain how their names came to appear on the Certificates and the auditor made no other inquiry into the identity of the officers of the corporations.

15. The Audit Division offered no evidence that the failure to pay the taxes at issue within the time required was due to fraud.

CONCLUSIONS OF LAW

A. That section 1133(a) of the Tax Law provides, in pertinent part, that:

"(E)very person required to collect any tax imposed by (Article 28) shall be personally liable for the tax imposed, collected or required to be collected under (Article 28)."

B. That section 1131(1) of the Tax Law defines "person required to collect any tax imposed by (Article 28)" to include:

"(E)very 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 (Article 28) and any member of a partnership."

C. That 20 NYCRR 526.11(b)(2) provides:

"(2) Whether an officer or employee of a corporation is a person required to collect, truthfully account for, or pay over the sales or use tax is to be determined in every case on the particular facts involved. Generally, a person who is authorized to sign a corporation's tax returns or who is responsible for maintaining the corporate books, or who is responsible for the corporation's management, is under a duty to act."

D. That within the meaning and intent of sections 1133(a) and 1131(1) of the Tax Law and 20 NYCRR 526.11(b)(2), petitioners Loula Kellarakos and Eily Kasday were not persons required to collect tax on behalf of E & M Service Station, Inc. or Eily-Lou Service Station, Inc.

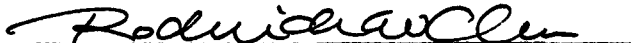
E. That in view of Conclusion of Law "D", supra, Issues "II" and "III" are hereby rendered moot.


F. That the petitions of Loula Kellarakos and Eily Kasday are granted and the notices of determination and demand for payment of sales and use taxes due issued against them on June 20, September 20, and December 20, 1982 are hereby cancelled.


DATED: Albany, New York

STATE TAX COMMISSION

JUN 28 1985


PRESIDENT


COMMISSIONER


COMMISSIONER