

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant.

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 23rd day of January, 1985, he served the within notice of Decision by certified mail upon Cosmos Petroleum, Inc. the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Cosmos Petroleum, Inc.
6600 Queens Expressway
Maspeth, NY 11278

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
23rd day of January, 1985.

David Parchuck

James A. Hayward

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant. :

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 23rd day of January, 1985, he served the within notice of Decision by certified mail upon Myron Beldock the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Myron Beldock
Beldock, Levine & Hoffman
585 Fifth Ave.
New York, NY 10017

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
23rd day of January, 1985.

David Parchuck

James A. Beldock

Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant.

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 23rd day of January, 1985, he served the within notice of Decision by certified mail upon Seth D. Friedland the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Seth D. Friedland
Friedland, Laifer & Robbins
233 Broadway
New York, NY 10279

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
23rd day of January, 1985.

David Parchuck

Anne A. Sagols
Authorized to administer oaths
pursuant to Tax Law section 174

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

January 23, 1985

Cosmos Petroleum, Inc.
6600 Queens Expressway
Maspeth, NY 11278

Gentlemen:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Myron Beldock
Beldock, Levine & Hoffman
585 Fifth Ave.
New York, NY 10017
AND
Seth D. Friedland
Friedland, Laifer & Robbins
233 Broadway
New York, NY 10279

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant.

State of New York :

ss.:

County of Albany :

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Dogan Aygoren
2 Swan Court
Hunting, NY 11743

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
23rd day of January, 1985.

David Parchuck

James D. Haglund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant. :

State of New York :

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Myron Beldock
Beldock, Levine & Hoffman
585 Fifth Ave.
New York, NY 10017

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
23rd day of January, 1985.

David Parchuck

Samuel R. Hagelund
Authorized to administer oaths
pursuant to Tax Law section 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition :
of :
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant. :

State of New York :
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Seth D. Friedland
Friedland, Laifer & Robbins
233 Broadway
New York, NY 10279

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Sworn to before me this
23rd day of January, 1985.

David Parchuck

James P. O'Connell

Authorized to administer oaths
pursuant to Tax Law section 174

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

January 23, 1985

Dogan Aygoren
2 Swan Court
Huntington, NY 11743

Dear Mr. Aygoren:

Please take notice of the Decision of the State Tax Commission enclosed herewith.

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Myron Beldock
Beldock, Levine & Hoffman
585 Fifth Ave.
New York, NY 10017
AND
Seth D. Friedland
Friedland, Laifer & Robbins
233 Broadway
New York, NY 10279

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Applications :
of :
COSMOS PETROLEUM, INC. and DOGAN AYGOREN : DECISION
for a Prompt Hearing Regarding a Pre-Decision :
Warrant.

Applicants, Cosmos Petroleum, Inc., 6600 Queens Midtown Expressway, Maspeth, New York 11278, and Dogan Aygoren, 2 Swan Court, Huntington, New York 11743, filed applications for a prompt hearing regarding a pre-decision warrant.

A prompt hearing was held before Robert F. Mulligan, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York on December 20, 1984 at 10:00 A.M., with the final brief submitted on January 7, 1985. Petitioners appeared by Myron Beldock, Esq. and Seth Friedland, Esq. The Department of Taxation and Finance appeared by John P. Dugan, Esq. (James Morris, Esq., of counsel).

ISSUES

I. Whether the issuance of warrants by the Department of Taxation and Finance commanding a levy upon the real and personal property of applicants was reasonable under the circumstances.

II. If so, whether the amounts warranted were appropriate under the circumstances.

FINDINGS OF FACT

1. On May 25, 1984, the Department of Taxation and Finance issued to "Dogan Aygoren, as officer KAV Enterprises, Inc." a Notice of Determination and Demand for Payment of Sales and Use Taxes Due in the amount of \$604,596.89 in

sales tax, plus \$302,298.45 in penalty and \$59,390.65 in interest for a total amount due of \$966,285.99.

The notice stated:

"You are personally liable as a responsible officer of KAV Enterprises, 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.

<u>Period</u>	<u>Tax Due</u>	<u>50% Fraud Penalty Due</u>	<u>Interest Due</u>
6/30/83 - 1/84	\$138,517.68	\$ 69,258.84	\$14,794.77
7/31/83 - 2/84	\$466,079.21	\$233,039.61	\$44,595.88

'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 WITHIN 90 DAYS.'"

2. Petitioner Dogan Aygoren subsequently filed a petition dated August 20, 1984 protesting the above assessment.

3. On December 7, 1984, the Department of Taxation and Finance mailed the following to petitioner Dogan Aygoren:

- (a) A copy of revised Assessment #S840524001N, similar to that referred to in Finding of Fact "1", except that it was addressed to, "Dogan Aygoren, as Officer KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc."
- (b) A copy of a "Statement of Facts" stating that a warrant had been filed against Dogan Aygoren, as Officer KAV Enterprises, Inc., and/or Cosmos Petroleum, Inc. for the following reasons: "We have information which causes us to believe that the the above corporations are insolvent at this time, inasmuch as total corporate and/or personal assets are exceeded by total liabilities, including taxes; which insolvent condition has prevented the corporations from paying their lawful and due taxes. Said warrant has been filed in order to preserve the State's interest in your property based on the outstanding liability and under authority of Article 28, Section 1138 of the New York State Tax Law".
- (c) A copy of the pre-decision warrant docketed on December 7, 1984 against "Dogan Aygoden (sic), as Officer KAV

Enterprises, Inc. and/or Cosmos Petroleum, Inc., 2 Swan Court, Huntington, New York 11743."

- (d) An application for a prompt hearing on a pre-decision warrant (form TA-11.2).
- (e) A copy of taxpayer's right to a prompt hearing regarding issuance of a pre-decision warrant (form TA-12).

4. Also, on December 7, 1984, the Department of Taxation and Finance mailed the following documents to "KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc., 640 Fulton Street, Suite 2, Farmingdale, New York 11735":

- (a) A copy of a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, a revised assessment under Notice #S840524000N, dated May 24, 1984. This assessment was for the same amounts and the same periods as the assessment issued against Dogan Aygoren (Finding of Fact "1" and "3(a)").
- (b) A copy of a statement of facts similar to that quoted in Finding of Fact "3(b)", supra, except that it referred only to the corporations and not to Mr. Aygoren.
- (c) A copy of a pre-decision warrant docketed on December 7, 1984 against KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc., with respect to the sales tax assessment.
- (d) An application for a prompt hearing on a pre-decision warrant (form TA-11.2).
- (e) A copy of taxpayer's right to a prompt hearing regarding issuance of a pre-decision warrant (form TA-12).

5. In a separate certified mailing to KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc. on December 7, 1984, the Department of Taxation and Finance sent the following documents:

- (a) A copy of a "Notice of Determination of Tax Due under Motor Fuel Tax Law (Article 12(A) Section _____)". The notice was marked "Revised Assessment" and is dated May 25, 1984. The notice assessed motor fuel tax and penalties due as follows:

"Audit Period: June & July 1983

Field audit of your records disclosed additional tax due.

Additional Tax Due: \$521,813.43

Penalty: \$70,444.81

Total Due: \$592,258.24"

- (b) A copy of a statement of facts similar to that quoted in Finding of Fact "3(b)", supra, except that it referred only to the corporations and referred to Article 12A, Section 289 and Article 28, Section 1141(b) of the Tax Law.
- (c) A copy of a pre-decision warrant docketed on December 7, 1984 against KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc. with respect to the motor fuel tax assessment.
- (d) An application for a prompt hearing on a pre-decision warrant (Form TA-11.2).
- (e) A copy of taxpayer's right to a prompt hearing regarding issuance of a pre-decision warrant (form TA-12).

6. The motor fuel and sales tax assessments were issued to the corporation on the basis that KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc. reported tax free sales to a corporation which was no longer in business (Efco, Inc.) during June and July, 1983. The assessment issued against Mr. Aygoren was issued on the basis that Mr. Aygoren was a person required to collect tax on behalf of KAV Enterprises, Inc.

7. Applications for prompt hearings on pre-decision warrants were filed by Dogan Aygoren and Cosmos Petroleum, Inc. Mr. Aygoren's application was received by the Tax Appeals Bureau on December 12, 1984. It is unclear when the corporate application was received.

8. On December 10, 1984, the Department of Taxation and Finance Warrant Agents levied on the personal property of KAV Enterprises, Inc. and/or Cosmos Petroleum, Inc. located at 1201 Sunrise Highway, Copiague, New York. They

seized a briefcase containing \$1,362.00 and a 1981 Lincoln automobile registered to Cosmos Petroleum, Inc. They also seized \$43.50 in cash found in the automobile. The agents locked the gas station's pumps and closed the business. They also levied on a safe deposit box at National Westminster Bank, but the contents of the box were unknown to the agents at the time of the hearing. Warrants were filed in New York County and transcripts filed in Nassau and Suffolk Counties.

9. Dogan Aygoren and his wife, Norma S. Aygoren, filed separate New York State resident income tax returns on a combined form for the year 1983. The form was dated by the preparer March 20, 1984 and by Mr. and Mrs. Aygoren July 11, 1984. It is unclear when it was received by the Department of Taxation and Finance. Wage and tax statements attached to the form indicate that Mr. Aygoren was paid \$8,750.00 by "Kav Enterprises, Inc." and \$11,400.00 by Cosmos Petroleum, Inc. in 1983. Mr. Aygoren reported a gain on the sale of "KAV Enterprises" in the amount of \$30,000.00. He reported that he acquired the business on January 1, 1981 for \$100,000.00 and sold it on May 10, 1983 for \$130,000.00.

10. Cosmos Petroleum, Inc. filed a New York State Corporation Franchise Tax Report for the "taxable period begun 2/83" and "ended 8/31/83". The computation of capital (Schedule C of the report) indicated that it was the corporation's first year of operation and that its end of year financial information was as follows:

	<u>End of Year</u>	<u>Average Fair Market Value</u>
Total Assets	\$439297	\$219649
Current Liabilities	364319	182160
Total Capital	----	37489
Issued Capital Stock	50000	25000
Paid in Capital Surplus & Reserves	2497	2497

(Note: No decimal points or commas are visible on the copy of the schedule in evidence; thus it would appear that all figures are rounded dollars.)

The report also showed that Dogan Aygoren was president and Ibrahim Kanay vice president of the corporation. The return was signed by Dogan Aygoren as president and dated September 23, 1983.

11. The evidence offered by the Department of Taxation and Finance consisted, for the most part, of hearsay, which, while admissible in an administrative proceeding, was insufficient in this case to make findings of fact other than those set forth above. It is noted that with the exception of the tax returns referred to in Findings of Fact "9" and "10", there appears to have been no investigation of the assets and liabilities of the applicants.

12. There is no evidence that applicants are or appear to be designing to quickly depart from New York State or conceal themselves.

13. There is no evidence that applicants are or appear to be designing to quickly place property beyond the reach of the Department of Taxation and Finance by removing it from New York State, concealing it, transferring it to other persons, or dissipating it.

CONCLUSIONS OF LAW

A. That since a warrant was issued against applicants prior to the rendering of a decision of the State Tax Commission after a hearing under section 288 of the Tax Law, applicants are entitled to a prompt hearing to determine the probable validity of the Department's claim (20 NYCRR 604.3). The term "probable validity of the Department's claim" means that the issuance of a warrant is reasonable under the circumstances and the amount so warranted is appropriate under the circumstances (20 NYCRR 604.1(c)). Decisions in prompt hearing procedure cases are to be limited to findings of fact and

conclusions of law as to whether the issuance of a warrant commanding a levy on the real and personal property of the applicant is reasonable under the circumstances and whether the amount so warranted is appropriate under the circumstances (20 NYCRR 604.9(b)).

B. That with respect to the question as to whether the issuance of a warrant is reasonable under the circumstances, the burden of proof is upon the Department; with respect to the question of the appropriateness of the amount, the burden of proof is upon the applicant (20 NYCRR 604.8(a) and (b)). The regulations also provide as follows:

"The Tax Commission in rendering its decision with respect to the issue of whether the issuance of the warrant commanding a levy upon the real and personal property of any persons is reasonable under the circumstances, shall make findings of fact and conclusions of law as to whether (1) taxes, penalties or interest are claimed to be due and owing the Department from such person, and (2)(i) such person is or appears to be designing to quickly depart from New York State or to conceal himself; (ii) such person is or appears to be designing quickly to place his property beyond the reach of the Department either by removing it from New York State, or by concealing it, or by transferring it to other persons, or by dissipating it; or (iii) such person's financial solvency appears to be imperiled. The decision of the Tax Commission shall also contain findings of fact and conclusions of law as to whether the amount warranted is appropriate under the circumstances." 20 NYCRR 604.9(d).

The language used in items (2)(i), (ii) and (iii), above, is similar to that used in Treasury Department regulations involving Federal income tax termination and jeopardy assessments. See Treas. Reg. secs. 1.6851-1(a)(1) and 301.6861-1(a).

C. That it has been established that taxes and interest are claimed to be due and owing the Audit Division from applicants.

D. That, as decided in Matter of Jerkens Truck & Equipment, Inc. et al. (State Tax Comm., June 12, 1981), the "bankruptcy test" of insolvency is the appropriate test in pre-decision warrant cases, in view of Debtor and Creditor

Law section 271.1 and the severe consequences the issuance of pre-decision warrants may entail for those against whom they are issued. The pertinent inquiry, therefore, is whether the present fair salable value of applicants' assets is less than the amount which will be required to pay the probable liability on its existing debts as they become absolute and matured.

E. That the Department of Taxation and Finance has chosen to perform virtually no investigation as to the solvency of the applicants, apparently relying instead on the magnitude of the assessments. Since, as noted above, the issuance of pre-decision warrants may result in severe consequences against those to whom they are issued, they should be issued only on a reasonable basis, and after investigation of solvency. In this case, the Department has not sustained its burden of proof to show that the issuance of the warrants was reasonable under the circumstances.¹ This is not altered by the fact that applicant Dogan Aygoren did not testify at the hearing² nor by the fact that Mr. Aygoren's tax return (showing that the sale of KAV Enterprises, Inc. took place prior to the periods covered by the assessment) was apparently filed well after it had been known that the periods covered by the assessment were under investigation.

1 It is also noted that the burden of proof would be on the Department with respect to fraud penalties included in the assessments.

2 Matter of Philip P. Zipes, State Tax Commission, February 22, 1980, cited by the Department is distinguishable, since in that case the nontestifying petitioner had the burden of proof. Matter of Rosenberg, State Tax Commission, April 6, 1983, also cited by the Department, deals with a taxpayer who structured a transaction being required to accept the consequences of such structuring and is not relevant to this case.

F. That the issue as to the appropriateness of the amount warranted is moot.

G. That the applications of Cosmos Petroleum, Inc. and Dogan Aygoren are hereby granted and the warrants issued against them are vacated.

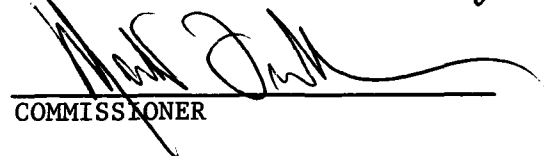
DATED: Albany, New York

JAN 23 1985

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER