

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
Mira Oil Company, Inc. : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant. :

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of April, 1983, he served the within notice of Decision by certified mail upon Mira Oil Company, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Mira Oil Company, Inc.
53 South Main Street
Spring Valley, NY 10977

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
15th day of April, 1983.

David Parchuck

Danille R. Haglund

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
Mira Oil Company, Inc. : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant. :

State of New York
County of Albany

David Parchuck, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 15th day of April, 1983, he served the within notice of Decision by certified mail upon Thomas A. Condon the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Thomas A. Condon
Birbrower, Montalbono, Condon, Seidenberg & Frank
20 Squadron Boulevard
New City, NY 10956

and by depositing same enclosed in a postpaid properly addressed wrapper in a (post office or official depository) 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
15th day of April, 1983.

David Parchuck

Annice A. Hageluf
AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

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

April 15, 1983

Mira Oil Company, Inc.
53 South Main Street
Spring Valley, NY 10977

Gentlemen:

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) 288 of the Tax Law, any proceeding in court to review an adverse decision by the State Tax Commission can only be instituted under Article 78 of the Civil Practice Laws 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
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Thomas A. Condon
Birbrower, Montalbono, Condon, Seidenberg & Frank
20 Squadron Boulevard
New City, NY 10956
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
MIRA OIL CO., INC. : DECISION
for a Prompt Hearing Regarding a Pre-Decision :
Warrant.

Applicant, Mira Oil Co., Inc., 53 South Main Street, Spring Valley, New York 10977, filed an application for a prompt hearing regarding a pre-decision warrant (File No. 42054).

A prompt hearing was commenced before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on March 1, 1983 at 10:00 A.M. and continued to conclusion at the same offices on March 16, 1983 at 10:00 A.M., with all briefs to be submitted by March 28, 1983. Applicant appeared by Birbrower, Montalbano, Condon, Seidenberg & Frank, P.C. (Thomas A. Condon, Esq., of counsel). The Audit Division appeared at the March 1, 1983 hearing by Paul B. Coburn, Esq. and at the March 16, 1983 hearing by John P. Dugan, Esq. (James Morris, Esq., of counsel).

ISSUES

I. Whether the issuance of a warrant by the Audit Division commanding a levy upon the real and personal property of applicant was reasonable under the circumstances.

II. If so, whether the amount warranted was appropriate under the circumstances.

FINDINGS OF FACT

1. On December 27, 1982, the Audit Division issued to applicant, Mira Oil Co., Inc. ("Mira"), a Notice of Determination of Tax Due under Motor Fuel Tax Law, assessing motor fuel tax under Article 12-A of the Tax Law for the period January, 1980 through April, 1982 in the amount of \$317,073.44, plus interest of \$46,609.80, for a total due of \$363,683.24. On January 18, 1983, the Audit Division issued a warrant, commanding a levy upon the real and personal property of Mira in the aforementioned amount of tax and interest. The Statement of Facts furnished to applicant explained the ground for the issuance of the warrant, as follows:

"We have, as a result of field audit by our White Plains District Office, information which causes us to believe that Mira Oil Company, Inc. is insolvent at this time, inasmuch as total corporate assets are exceeded by total corporate liabilities, including taxes and dissipated real estate valued at \$93,000 in 1978; which insolvent condition has prevented the corporation from paying its lawful and due taxes."

2. Mira is a New York corporation engaged in the sale of gasoline on a wholesale basis, whose sole officer and shareholder is Michael Dattilo. Mira's office is located at 53 South Main Street, Spring Valley, New York, a building which also houses other entities owned and operated by Mr. Dattilo.

3. After making application under the provisions of Article 12-A of the Tax Law, Mira was registered as a distributor of motor fuel on June 16, 1980. Applicant furnished security with the Tax Commission in the form of a \$100,000 treasury note.

4(a). Mira purchases gasoline from suppliers situated in New Jersey, takes delivery in its one tractor-trailer combination or in tractor-trailers leased from independent trucking companies, and distributes the gasoline to retailers, some of which are operated by related corporations. Mira maintains

no storage facilities: generally, when Mira picks up gasoline at a New Jersey terminal, it delivers the fuel directly to its customers. From time to time, as necessary, Mira leases storage facilities.

(b). When Mira obtains refined petroleum products at a supplier's terminal, it is issued a bill of lading, reflecting the gallons of each type of product purchased. Generally, as above-mentioned, the gasoline is then transported to Mira's customers via tank trailer services. The gallonage is metered as it flows from the tank truck to the retailer's pumps, and an invoice, reflecting the gallonage (and the number of the bill of lading from the supplier), is issued to the retailer. Further, the tank trailer service issues to Mira a bill of lading, manifesting the supplier, the customer to whom delivered and the gallonage of each product delivered, and attaches thereto a copy of the invoice furnished to the customer. Finally, the supplier bills applicant by an invoice which sets forth the dates of the transactions, the bill of lading numbers, and the quantity and price of petroleum products. Applicant maintains files of these invoices by supplier in chronological order, and attaches to each invoice the related bills of lading and trucking company invoices.

5. Applicant maintained a purchase journal for the period August, 1980 through June, 1981. Thereafter, applicant eliminated use of the journal and instituted the voucher system, a system which relies upon the actual invoices and bills. When applicant remits payment to a particular supplier, it completes a "voucher", or an accounting of the bills being paid, and appends those bills to the voucher. As above-stated, these vouchers are kept chronologically, by supplier.

6. Commencing August, 1980, applicant filed monthly Returns of Tax on Motor Fuels. For the month of April, 1982, applicant's return showed no

taxable distribution or tax due and was marked, "Final return - ceased doing business in the State of New York". On May 7, 1982, the security Mira had posted with the Tax Commission was returned to Mr. Dattilo at his request, due to the approaching maturity date of the note. Because Mira did not subsequently furnish any other security and because its April, 1982 return had been submitted as a final return, the Audit Division rescinded Mira's registration as a distributor. On August 2, 1982, Mr. Dattilo contacted the Tax Commission, informing the Commission that the April return had erroneously been marked "final" and requesting that the Commission reinstate applicant's registration. To date, applicant's registration has not been reinstated, although it continues to purchase gasoline and to sell to retailers located in New Jersey.

7. In Fall, 1982, the Audit Division commenced an examination of applicant's books and records for the period January, 1980 through April, 1982. The examiner initially noted that Mira did not maintain a purchase journal encompassing the entire period under review, and that information returns filed with the Audit Division by Mira's suppliers were not in agreement with Mira's reported purchases of gasoline. The examiner undertook a review of Mira's purchases with reference to each supplier. With regard to some suppliers, the examiner performed an actual count of Mira's invoices. With regard to certain suppliers situated in New Jersey, he computed Mira's gallonage purchased by resort to the supplier's information returns filed or by count of the supplier's invoices. Exactly whose records he reviewed vis-a-vis each supplier, however, is not clear from the testimony and the final audit report. (For example, the examiner was unable to recollect whether he reviewed Mira's invoices or Lebel Oil Corp.'s invoices in arriving at the assessment.) The examiner proposed additional taxes in the following areas, briefly summarized below:

(a) instances where Mira purchased gallons of petroleum products, paying over to the supplier New Jersey fuel tax thereon, but imported the gallons into New York;

(b) instances where Mira purchased gallons of gasoline, paying over to the supplier New York fuel tax thereon, but the supplier never remitted the tax collected to this Commission, particularly in the case of Mira's purchases from Lebel Oil;

(c) instances where Mira purchased and imported gasoline prior to being registered as a distributor of motor fuel; and

(d) instances where, acting as a New York registered distributor, Mira purchased gallons tax-free, imported them into New York and never paid over New York fuel tax thereon.

The portions of the assessment attributable to Mira's purchases from each supplier are set forth below.

<u>SUPPLIER</u>	<u>REPORTED GALLONS</u>	<u>AUDITED GALLONS</u>	<u>DIFFERENCE</u>
Ashland Oil	1,352,103	1,681,248	329,145
Atlantic Richfield	1,981,036	2,469,439	488,403
Bulk Sales Corp. of New Jersey	738,146	852,209	114,063
Coastal States Marketing	899,453	1,051,418	151,965
General Oil Distributing	522,050	609,327	87,277
Getty Oil Refining	155,217	155,217	-0-
Gulf Oil	8,506	50,909	42,403
Kimber-Allen Petroleum	10,883,989	12,449,799	1,565,810
Lebel Oil	-0-	356,607	356,607
Marin Motor Oil	2,464,962	3,014,403	549,441
A. Tarricone	-0-	92,007	92,007
G.E. Warren	-0-	143,680	143,680
	<u>19,005,462</u>	<u>22,926,263</u>	<u>3,920,801</u>

8. Because the proposed assessment was in excess of \$25,000.00, the audit was reviewed by the Audit Division's Central Office in Albany. Central Office also determined that an inquiry into applicant's solvency should be initiated. The examiner who conducted the audit was instructed to search the records of the county clerk in the counties of Bergen (New Jersey), Orange (New Jersey) and Rockland (New York), and also to make inquiry of the New York State Department of Motor Vehicles regarding vehicles owned by or registered to Mira. The

examiner discovered that Mira owned no real property but that it did own one tractor-trailer and several automobiles of not very recent vintage.

Central Office examined the end-of-the-year balance sheet (Schedule L of Mira's federal corporation income tax return for 1981) submitted with applicant's 1981 franchise tax report, and an interim balance sheet as of September 30, 1981 submitted to the Audit Division on or about November 10, 1981 by Mr. Dattilo in connection with his own application for registration as a distributor. The Audit Division in essence accepted the December 31, 1981 balance sheet as submitted, inserted the assessment as a liability, and determined that applicant was thereby rendered insolvent. The Audit Division's computation is set forth below.

<u>ASSETS</u>	<u>12/31/81</u>	TAX AND INTEREST LIABILITY <u>4/30/82</u>	<u>4/30/82</u>
Cash	\$(485,111)		\$(485,111)
Trade notes, accounts receivable			
less allowable bad debts	308,168		308,168
Inventories	356,000		356,000
Govt. obligations	100,000		100,000
Other current assets - loans	51,584		51,584
Other investments	3,000		3,000
Buildings and other depreciable			
assets, less depreciation	202,410		202,410
Other assets	7,830		7,830
Total assets	<u>\$ 543,881</u>		<u>\$ 543,881</u>
 <u>LIABILITIES AND STOCKHOLDERS' EQUITY</u>			
Accounts payable	\$ 343,995		\$ 343,995
Mortgages, notes, bonds payable in			
less than 1 year	1,250		1,250
Other current liabilities - taxes	1,452		1,452
Mortgages, notes, bonds payable 1 year			
or more	5,436		5,436
Other liabilities	10,207		10,207
Capital stock - common	500		500
Retained earnings, unappropriated	181,041	(363,683)	(182,642)
Miscellaneous tax audit liability		363,683	363,683
Total liabilities and stockholders' equity	<u>\$ 543,881</u>		<u>\$ 543,881</u>

In the course of the insolvency determination, the Audit Division took into consideration an apparent deterioration in applicant's cash position from September 30, 1981 to December 31, 1981 (from \$898,171.06 to negative \$485,111.00, a decrease of \$1,383,282.00); no inquiries were made of applicant's bank or of Mr. Dattilo.

9. Prior to the hearing, Mira retained the services of Mr. Joseph Reiss, an experienced public accountant registered to practice in the State of New Jersey, to review the audit. Mr. Reiss's examination, still in progress, has endeavored to verify all Mira's purchases and the destination of all deliveries. The initial stage involved comparing the purchase journal or voucher system with the cash disbursements journal; later on, Mr. Reiss anticipates reconciliation with Mira's bank statements and cancelled checks. A detailed examination of Mira's purchases from Marin Motor Oil by reference to the invoices and bills of lading has been completed for the period August, 1980 through March, 1981. The results are set forth below.

<u>MONTH</u>	<u>GALLONS PURCHASED AND DELIVERED TO NEW YORK</u>	<u>GALLONS PURCHASED AND DELIVERED TO NEW JERSEY</u>	<u>TOTAL</u>	<u>GALLONS REPORTED ON TAX RETURN</u>
7/80	122,905	10,504	133,409	-0-
8/80	315,706	46,009	361,715	315,706
9/80	60,049	19,515	79,564	60,052
10/80	113,629	8,051	121,680	113,629
11/80	25,007	-0-	25,007	25,007
12/80	469,056	61,312	530,368	469,056
1/81	640,535	111,651	752,186	661,187
2/81	335,067	57,217	392,284	335,067
3/81	485,258	101,567	586,825	485,258

10. Applicant engages an outside payroll services firm, Automatic Data Processing, to prepare, among other things, end-of-the-year financial reports. Applicant introduced in evidence the statement prepared as of December 31, 1982, not yet certified, the balance sheet portion of which is set forth below.

<u>ASSETS</u>	<u>12/31/82</u>
Current Assets	
Cash	\$476,387.22
Accounts receivable	(208,075.49)
Loan receivable	11,584.00
Inventory	3,384.00
Prepaid expenses	994.20
Total current assets	<u>284,273.93</u>
Fixed Assets	\$316,882.65
Accumulated depreciation	141,537.00
	<u>175,345.65</u>
Other assets	
Investment reserve fund	3,000.00
Investment - Bank of NY, Dreyfus	5,000.00
Investment - M. Lynch Cert. Dep.	100,000.00
Intercompany exchanges	<u>122,682.60</u>
Total other assets	<u>230,682.60</u>
TOTAL ASSETS	\$690,302.18

LIABILITIES AND CAPITAL

Liabilities	
Notes payable	7,585.79
Payroll tax payable	88.94
Tax provision	146,635.00
Accounts payable	5,602.57
Security payable	2,750.00
Accrued expenses	<u>208,935.11</u>
Total liabilities	<u>362,392.27</u>
Capital	
Capital stock	500.00
Retained earnings	181,041.62
Net profit	<u>146,368.29</u>
Total capital	<u>327,909.91</u>
TOTAL LIABILITIES AND CAPITAL	\$690,302.18

11. There is no evidence that applicant is or appears to be designing to quickly depart from New York State.

12. There is no evidence that applicant is or appears to be designing to quickly place its property beyond the reach of the Department 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 applicant prior to the rendering of a decision of the State Tax Commission after a hearing under section 288 of the Tax Law, applicant is 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 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 applicant (20 NYCRR 604.8(a)). 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 person 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 applicant.

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 applicant's assets is less than the amount which will be required to pay its probable liability on its existing debts as they become absolute and matured.

E. That applicant's balance sheet as of December 31, 1982 discloses assets remaining, after payment of its liabilities, in the amount of \$327,910. Without interposition of the motor fuel tax assessment on the liabilities side, applicant is unmistakably solvent; with interposition of the full assessment, a net deficiency results in the amount of \$35,773.¹

¹ It should be noted that: the motor fuel tax assessment takes priority over certain other liabilities on the balance sheet; and further, if the assessment was paid or accrued as a liability in 1982, applicant's federal taxable income would be reduced to near zero, thereby obviating the need for the "tax provision" on the liabilities side.

Applicant has shown by its presentation on the second issue that the amount of the assessment may not be as great as shown in the Notice of Determination. With reference to applicant's purchases from Lebel Oil Co. on which it paid to the supplier New York motor fuel tax, that portion of the assessment may not be due and owing from applicant. With regard to applicant's purchases from Marin Motor Oil for the period August, 1980 through March, 1981, applicant may have submitted correct and sufficient returns. Eliminating only these aspects of the assessment reduces it to a level which applicant is capable of remitting without thereby being rendered insolvent. This Commission has no jurisdiction to consider the merits of the assessment in this proceeding and renders no decision thereon. But considering all relevant evidence adduced at the prompt hearing, including evidence not known to the Audit Division at the time it issued the warrant (see 20 NYCRR 604.9(c)), the issuance of the warrant against Mira under all these circumstances was not reasonable.

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

G. That the application of Mira Oil Co., Inc. is hereby granted, and the warrant is vacated.

DATED: Albany, New York

STATE TAX COMMISSION

APR 15 1983

Roderick W. Allen
PRESIDENT

Francis R. Koenig
COMMISSIONER

[Signature]
COMMISSIONER