

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
Rochester Truck Stop, Inc. : AFFIDAVIT OF MAILING  
for a Prompt Hearing Regarding a Predecision :  
Warrant. :

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State of New York  
County of Albany

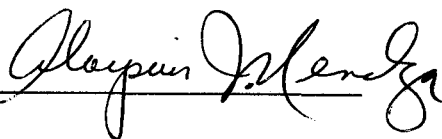
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 9th day of April, 1982, she served the within notice of Decision by certified mail upon Rochester Truck Stop, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

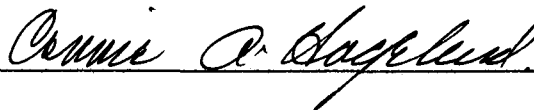
Rochester Truck Stop, Inc.  
P.O. Box 233  
Rochester, NY 14623

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  
9th day of April, 1982.

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

April 9, 1982

Rochester Truck Stop, Inc.  
P.O. Box 233  
Rochester, NY 14623

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

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

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In the Matter of the Petition :  
of :  
ROCHESTER TRUCK STOP, INC. : DECISION  
for a Prompt Hearing Regarding a Predecision :  
Warrant. :

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Petitioner, Rochester Truck Stop, Inc. 1000 Jefferson Road, Rochester, New York 14623, filed a petition for a prompt hearing regarding a predecision warrant (File No. 36292).

A formal hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York, on March 19, 1982 at 10:30 A.M. Petitioner appeared by Donna M. Caceci, President. The Audit Division appeared by Paul B. Coburn, Esq. (James Morris, Esq., of counsel).

ISSUES

I. Whether the issuance of a warrant to petitioner prior to the rendering of a decision by the State Tax Commission was reasonable under the circumstances of the case.

II. Whether the amount of said warrant was appropriate.

FINDINGS OF FACT

1. On February 1, 1982, by telephone, Mr. Robert Weber, supervisor of the miscellaneous tax section of the Audit Division's Rochester District Office, and Ms. Donna M. Caceci, president of Rochester Truck Stop, Inc., scheduled an appointment for February 3 for auditors to commence a sales tax and diesel fuel tax audit of the business. On February 2, Ms. Caceci telephoned Mr. Weber, requesting an extension until February 5.

The Audit Division had received information from a diesel fuel supplier, Augsbury Oil Company, that petitioner had been purchasing diesel fuel from said supplier since June, 1981.

2. On February 2, 1982, the Audit Division issued to Rochester Truck Stop, Inc. a Notice of Determination of Tax Due. The assessment was estimated, based upon the following monthly purchases by petitioner from Augsbury Oil Company:

<u>PERIOD</u>	<u>GALLONS</u>
6/81	8,000
7/81	80,001
8/81	96,000
9/81	88,000
10/81	143,498
11/81	127,999
12/81	96,001
	<u>639,499</u>

Taxes were asserted in the amount of \$63,949.90, plus penalties of \$5,815.99, for a total due of \$69,765.89.

3. On February 5, Mr. Weber, Mr. Steven Brown and Mr. Charles Keen went to the business premises on Jefferson Road to conduct the audit. (At the hearing, the Audit Division offered no reason for the issuance of the Notice of Determination prior to the audit appointment.) Mr. Weber asked Ms. Caceci to produce the books of original entry. Ms. Caceci stated that no such records were maintained. Mr. Weber asked for any check registers. Ms. Caceci informed him that she had no check register because she dealt only in cash. Ms. Caceci produced daily recap sheets of meter readings, reflecting sales of diesel fuel and gasoline for the months of December, 1981 and January, 1982.

While at the business premises, Mr. Weber observed approximately 8 to 12 pumps capable of pumping diesel fuel and gasoline; in addition, he observed sales of fuel being made. Mr. Weber asked Ms. Caceci how fuel was delivered to

Rochester Truck Stop, Inc. She replied that for a charge of two cents per gallon, Mr. Louis Senesgali (phonetic) delivered fuel to the truck stop. A tractor and tanker owned by Senesgali were on the premises during Mr. Weber's visit.

A further appointment was scheduled for February 8, in order to allow Ms. Caceci time to assemble and produce additional records. On the morning of February 8, Ms. Caceci telephoned Mr. Weber to cancel the appointment; she stated that she planned to retain an attorney and an accountant and that after she did so, she would get back to Mr. Weber.

4. A check of Department of Taxation and Finance records by Audit Division personnel revealed that Rochester Truck Stop, Inc. has filed no sales tax, withholding tax or diesel fuel tax returns. Nor has the corporation registered with the Department as a diesel fuel retailer.

Rochester Truck Stop, Inc. did register with the Department for sales tax purposes; the registration form indicates that petitioner began business in New York on November 25, 1981. Ms. Caceci testified that she assumed this registration was sufficient for both sales tax and diesel fuel tax purposes.

5. A check of Department of State records by Audit Division personnel revealed that petitioner was incorporated on May 5, 1981.

On June 5, 1981, Truckstops Corporation of America ("Truckstops America"), 5042 Linbar Drive, Nashville, Tennessee, filed a chattel mortgage against petitioner covering "all equipment, machinery, chattels, furniture, fixtures, inventory, accounts receivable, and sub-lease receivables, now existing or hereafter acquired." The financing statement was filed with the Department of State and with the Monroe County Clerk.

Ms. Caceci testified that on November 25, 1981, she signed, on petitioner's behalf, a financing statement covering the same personal property, and that to her knowledge, the earlier statement was thereby rendered invalid.

6. On March 1, 1982, under the authority of section 289 of the Tax Law, the Tax Compliance Bureau issued a warrant based upon the aforementioned estimated assessment, which warrant was served on petitioner and filed in the Monroe County Clerk's office on March 4.

7. Ms. Caceci requested a prompt hearing and review of the warrant on petitioner's behalf. Her request was received by the Tax Appeals Bureau of the State Tax Commission on March 12, 1982.

8. Ms. Caceci is the sole shareholder and officer of Rochester Truck Stop, Inc.

She had been an employee of Signal Truck Stop, Inc. ("Signal"), which operated the Jefferson Road truckstop before petitioner. When Signal began to experience problems with the Internal Revenue Service, she resigned and sought employment with Truckstops America. After discussions with a Truckstops America representative, she decided to take over the operation of the Jefferson Road truckstop.

Truckstops America holds a lease on the building at 1000 Jefferson Road from Jefferson Project, which in turn holds a lease from New York State. As best as can be gleaned from the testimony, Ms. Caceci makes monthly payments to Truckstops America for rent and on a mortgage, which apparently covers the pumps, furnishings and other equipment. The mortgage is for a three-year term, at the expiration of which petitioner will acquire title to the personal property covered. (Ms. Caceci did not offer a copy of the agreement between Truckstops America and petitioner.)

Her initial investment was \$15,000.00, consisting of one mortgage payment and one month's rent. Ms. Caceci retained an attorney to incorporate the business and paid his fee in cash.

9. Ms. Caceci testified that prior to November 25, 1981, the Internal Revenue Service would not permit petitioner to transact any business, due to the tax problems of the previous operator of the truckstop. Petitioner made its first purchase of diesel fuel in the first week of December, 1981. Ms. Caceci further testified that before December, someone else, possibly Senesgali, may have purchased fuel for petitioner or in petitioner's name.

10. Diesel fuel is delivered to petitioner's premises via trucks owned by Senesgali Wrecking ("Wrecking"). Wrecking charges and bills petitioner two cents per gallon for delivery services, but petitioner has not yet made any payments.

Petitioner pays Augsbury Oil Company for diesel fuel by bank check, given to the Wrecking driver. Ms. Caceci estimated that petitioner receives approximately four fuel deliveries weekly, of 8,000 gallons each.

11. Petitioner sells toiletry items, purchased with cash from Gold Circle and Freddy's Discount Store.

There is also a restaurant on the premises. Ms. Caceci testified that she does not know who owns the restaurant, and further, that petitioner is not involved in the operation thereof.

Petitioner has no facilities for repairing or washing trucks.

12. Petitioner accepts Truckstops of America, Midcontinent and NTS credit card purchases by truck drivers. Ms. Caceci forwards the credit card slips to the appropriate company and receives in return a check for the total amount of charges. She deposits the checks into the corporation's payroll account, the

only checking account that petitioner maintains. (Petitioner maintains the account at the Henrietta branch of the Marine Midland Bank. Ms. Caceci is the only authorized signatory.)

13. Aside from the credit card transactions and the payment of Augsbury Oil Company by bank check, as previously mentioned, Ms. Caceci deals in cash. She keeps the cash on the business premises in a safe. She was unable to supply any figure for cash on hand on a daily, weekly or monthly basis.

14. Petitioner's monthly expenses may be outlined as follows:

Lease and mortgage	\$15,000.00
Payroll	10,000.00
Property insurance	2,000.00
Utilities	10,000.00
Computer payroll service*	150.00
	<u>\$37,150.00</u>

\* The computer service calculates and deducts withholding taxes from employee wages.

Ms. Caceci was unable to state whether petitioner monthly earns more or less than the amount of said expenses.

15. Regarding the assets of the corporation, Ms. Caceci stated, "There are no assets." Mr. Fred Colby, supervisor of the compliance unit at the Rochester District Office, testified that tax compliance agents have been unable to locate any assets of the corporation.

16. In response to questions by counsel for the Audit Division, Ms. Caceci stated that she was not acting for Senesgali nor does she hold a power of attorney for him; she has no agreement with Senesgali regarding her operation of the truckstop on his behalf; Senesgali owns no interest in Rochester Truck Stop, Inc.

17. It is Ms. Caceci's position that commencing on November 25, 1981, she is responsible for the business and any tax liabilities accrued thereafter;



that she has cooperated with the Audit Division to the best of her ability; and that she should not be subject to nor held liable for the previous owner's tax delinquencies. On the other hand, it is the Audit Division's position that where petitioner is actively engaged in a business which would normally generate tax liabilities, petitioner fails to file tax returns (in particular, diesel fuel tax returns) and petitioner refuses or is unable to produce any records, the issuance of a warrant is, and was, proper.

#### CONCLUSIONS OF LAW

A. That since a warrant was issued against petitioner prior to the rendering of a decision of the State Tax Commission after a hearing under section 288 of the Tax Law, petitioner 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 petitioner 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; that with respect to the question of the appropriateness of the amount, the burden of proof is upon petitioner (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 during the period June, 1981 through January, 1982, petitioner purchased approximately 91,360 gallons of diesel fuel each month (on the average) from a supplier and was actively engaged in the business of selling such fuel to retail customers. Petitioner has failed in every respect to comply with the applicable provisions of Article 12-A of the Tax Law which require registration as a distributor of diesel motor fuel, maintenance of complete and accurate records of all purchases and sales of diesel fuel, and filing of returns with remittance of taxes. Sections 282-a, 283, 286 and 287. Nor has petitioner taken any steps to move toward compliance with those provisions.

The Audit Division has been unable to locate any corporate assets. Indeed, petitioner's sole shareholder and officer states that petitioner has no assets, with the exception of cash on hand in an unknown amount.

The Audit Division has established that taxes, penalties and interest are claimed to be due and owing from petitioner.

The Audit Division has also established that petitioner appears to be designing quickly to place its property beyond the reach of the Department of Taxation and Finance by concealing it. See Morris Kerness, 81-1 U.S.T.C. ¶16,364 (D. Minn. 1981). And, petitioner has not offered any evidence to change that appearance. See French v. United States, 483 F.Supp. 523 (E.D. Okla. 1979).

D. That the only evidence introduced by petitioner regarding the amount warranted was Ms. Caceci's testimony that since November 25, 1981, petitioner has received approximately four fuel deliveries per week of 8,000 gallons each, or approximately 128,000 gallons per month. According to the supplier, the monthly gallonage purchased by petitioner was less than 128,000, except for the October, 1981 purchases. Therefore, the amount of the warrant was appropriate.

E. That the petition of Rochester Truck Stop, Inc. is hereby denied in all respects.

DATED: Albany, New York

APR 09 1982

STATE TAX COMMISSION

  
PRESIDENT

  
COMMISSIONER

  
COMMISSIONER