

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jerkens Truck & Equipment, Inc. :
Marie Jerkens & Charles Jerkens :
: AFFIDAVIT OF MAILING

For a Prompt Hearing Regarding a Predecision :
Warrant. :

State of New York
County of Albany

Jay Vredenburg, 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 12th day of June, 1981, he served the within notice of Decision by certified mail upon Jerkens Truck & Equipment, Inc., Marie Jerkens & Charles Jerkens, the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Jerkens Truck & Equipment, Inc.
Marie Jerkens & Charles Jerkens
1231 East Jericho Tpk.
Huntington, NY 11743

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
12th day of June, 1981.

Constance A. Haglund

[Signature]

STATE OF NEW YORK
STATE TAX COMMISSION

In the Matter of the Petition :
of :
Jerkens Truck & Equipment, Inc. :
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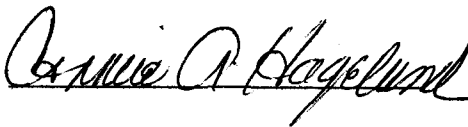
Jay Vredenburg, being duly sworn, deposes and says that he is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 12th day of June, 1981, he served the within notice of Decision by certified mail upon Michael F. Grossman the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

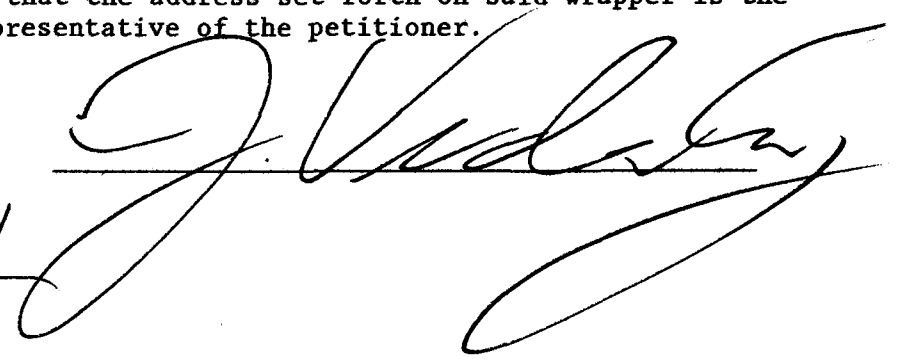
Michael F. Grossman
Samuels & Grossman
217 Broadway
New York, NY 10007

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
12th day of June, 1981.


Carrie A. Hagelund


Jay Vredenburg

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

June 12, 1981

Jerkens Truck & Equipment, Inc.
Marie Jerkens & Charles Jerkens
1231 East Jericho Tpk.
Huntington, NY 11743

Dear Mr. & Mrs. Jerkens:

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, 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
Deputy Commissioner and Counsel
Albany, New York 12227
Phone # (518) 457-6240

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Michael F. Grossman
Samuels & Grossman
217 Broadway
New York, NY 10007
Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
JERKENS TRUCK & EQUIPMENT, INC.	:	DECISION
MARIE JERKENS and CHARLES JERKENS	:	
For a Prompt Hearing Regarding A Predecision Warrant.	:	

Petitioners, Jerkens Truck & Equipment, Inc., Marie Jerkens and Charles Jerkens, 1231 East Jericho Turnpike, Huntington, New York 11743, filed a petition for a prompt hearing regarding a predecision warrant.

A formal 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 April 30, 1981 at 11:00 A.M. and was continued to conclusion at the same location on May 7, 1981 at 1:30 P.M. The petitioners appeared by Samuels & Grossman, PC (Michael F. Grossman, Esq., of counsel). The Department of Taxation and Finance appeared by Ralph J. Vecchio, Esq., (Patricia L. Brumbaugh, Esq., of counsel).

ISSUES

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

II. Whether the amounts of said warrants were appropriate.

FINDINGS OF FACT

1. A sales and use tax field audit of Jerkens Truck & Equipment, Inc. ("the corporation") was commenced by the Audit Division on or about April 17,

1980. The audit covered the sales tax periods starting September 1, 1977 and ending November 30, 1980.

2. On October 20, 1980, the auditor determined that for the periods beginning September 1, 1977 and ending May 31, 1980, sales tax returns for four periods had not been filed, returns for five periods had been filed late and returns for two periods had been filed timely. The reported tax due had been paid for only three of said periods. On November 26, 1980, the auditor provided the corporation's certified public accountant with blank returns for the four periods for which no returns had been filed. On the same date, the accountant submitted the returns to the auditor completed, but without payment.

3. As the result of the audit, on April 1, 1981 the Audit Division issued notices of determination and demand for payment of sales and use taxes due against the corporation, assessing \$178,564.67 in sales taxes due, \$89,282.35 as a penalty for civil fraud and \$58,737.37 in interest, as well as \$1,946.66 in use tax due, \$376.99 in maximum penalty on use tax and \$381.90 in interest on use tax. The Audit Division also issued notices to Charles Jerkens, president and Marie Jerkens, vice-president, each such notice assessing sales tax, penalty and interest as claimed due from the corporation on the grounds that each of the two persons was a "responsible individual" and liable under sections 1131(1) and 1133 of the Tax Law (the notices against Mr. and Mrs. Jerkens did not include the use tax assessed against the corporation). The assessments were placed in the mail at about 4:30 P.M. on April 1, 1981. None of the assessments included self-assessed tax reported on sales tax returns filed by the corporation.

4. Four warrants based on the four assessments referred to above were issued by the Tax Compliance Bureau and were served on the corporation and

Charles Jerkens early in the afternoon of April 1, 1981, some time between noon and 2:30 P.M. Copies were filed in the Suffolk County Clerk's office on April 1, 1981. The Tax Compliance Bureau then levied against funds which its agents believed to be owing to the corporation by the City of New York, arising out of the sale by the corporation to the City of certain vehicles.

5. Petitioners thereupon requested a prompt hearing and review of the above-mentioned warrants. Petitioners also filed a petition protesting the underlying assessments.

6. The Statement of Facts which was served with the warrant stated as follows:

"The enclosed warrant has been filed against you in order to protect the interest of the State of New York. This Department has information which causes it to believe that you plan to dispose of certain real or personal property without satisfying the assessment upon which your warrant is based.

Our information indicates that the liabilities you have incurred will not permit you repay, in lump sum form, the liability now owed to New York State Tax Commission. All realty and personalty assets of corporation and Charles Jerkens and Marie Jerkens are pledged as security for U.S. Small Business Administration Loan obtained by the Corporation through "The Money Store of New York, Inc. 1501 Franklin Avenue, Mineola, NY 11501 (sic). All assets have been assigned to "The Money Store" until loan is paid in full. The loan amount of \$500,000.00 is to be repaid over a ten (10) year period with an interest rate set at 2 3/4% plus prime rate.

You have no other collateral upon which you could borrow an amount equal to the Sales Tax Assessments #S810401001F, S810401002F, S810401003F, S810401000F.

In order to preserve the State's interest in your property based on the current outstanding liability, and under the authority of Article 28, Sec. 1141B of the New York State Tax Law, the enclosed warrant has been filed. You may appeal this judgment if you so desire. The enclosed Notice of Right to Hearing will explain your rights in this matter."

Although two basic grounds are set forth in this Statement of Facts, Michael J. O'Reily, the Tax Compliance agent who issued the warrants, testified

that he issued them because considering a collateralized loan agreement which the corporation had entered into and the past payment history of the corporation, he found it highly unlikely that the State would ever recover the amounts shown due by the assessments. He testified that he had asked the corporation for the money and it was not paid.

7. Mr. O'Reilly and Claire P. Sparke, the auditor assigned to the case, were both aware that the corporation had a history of failure to file returns, late filing, nonpayment of tax or late payment of tax.

The corporation had been audited for sales tax for the period March 1, 1973 through November 30, 1975, resulting in an assessment of tax totalling \$43,464.00, including \$38,764.00 attributable to tax collected recorded in the corporation's sales tax accrual account exceeding tax reported on sales tax returns filed. The corporation executed a consent and waiver in regard to this liability.

On or about October 1, 1980, Mr. O'Reilly had been assigned to collect over \$100,000.00 from the corporation based on corporate franchise tax, personal income tax withholding and sales tax assessments for certain periods starting in 1975 and ending in 1980. In October 1980 warrants based on these assessments were filed against the corporation and were docketed by the Suffolk County Clerk. Since no payment agreement was reached with the corporation at that time, Mr. O'Reilly threatened to seize the business and issued five tax collecting levies against the bank accounts of the corporation (two levies were for withholding tax, two for corporation tax and one for sales tax).

The Tax Compliance Bureau removed the levies on or about October 31, 1980 after confirming that the corporation had a commitment from The Money Store of New York, Inc. ("The Money Store") dated October 13, 1980 for a Small Business

Administration ("SBA") loan in the amount of \$500,000.00. The Bureau stood to collect only in the area of \$9,300.00 from funds in the levied bank accounts, but stood to collect the full amount of the warrants upon the closing of the loan.

8. The \$500,000.00 SBA loan closed on December 11, 1980. The proceeds of the loan were distributed as follows: Two checks were issued by The Money Store to "N.Y. State Tax Commission & Jerken's Truck & Equipment (sic)" in the amounts of \$82,634.11 and \$34,183.74. Checks were also issued to Credit Alliance Corp. in the amount of approximately \$75,000.00 to \$80,000.00; and to United Credit Corp. in the amount of approximately \$120,000.00 to \$130,000.00. The Money Store had required that these creditors, who had prior first and second mortgages on the collateral, be paid. In addition, approximately \$50,000.00 was applied to other accounts payable, and an unspecified sum was applied to closing costs. There was an unspecified amount of working capital remaining after the disbursements were made.

9. One of the checks payable to the State Tax Commission and the corporation was delivered to the Department just after the closing; the other check was held by petitioners until February 1981, since petitioners did not know whether it should be given to the Tax Compliance Bureau or to the Audit Division. Petitioners did not want the business seized and wanted the money applied so that it would operate to their best advantage in that respect (at the hearing, neither the Department nor petitioners were clear as to which check was tendered in December and which was tendered in February).

10. The SBA loan was for \$500,000.00 for a term of ten (10) years with interest at the prime rate (floating) plus 2 3/4 percent. Some of the more pertinent provisions of the SBA loan are as follows:

a. The loan was personally guaranteed by Charles Jerkens, Marie Jerkens and Chasway Leasing, Inc. (the relationship of Chasway Leasing, Inc. to petitioners is unclear).

b. The loan was secured by second mortgages on:

(i) The land and building on which the corporation's place of business is situated subject to only a first mortgage not in excess of \$14,659.00.

(ii) The land and building located at 154 Railroad Avenue, Huntington, New York subject to only a first mortgage not in excess of \$24,610.00.

(iii) The land and building located at 21 Harned Road, Commack, New York subject to only a first mortgage not in excess of \$26,490.00.

c. As a condition to the loan the corporation was required to submit appraisals showing the current market value at the time of the loan for the real property listed in the preceding subparagraph "b" was as follows:

(i) Main business premises no less than \$350,000.00.

(ii) 154 Railroad Avenue, Huntington no less than \$150,000.00.

(iii) 21 Harned Road, Commack no less than \$90,000.00.

The appraisals themselves are not in evidence.

d. The lender was granted liens on the corporation's personal property as follows:

(i) Machinery and equipment subject to prior liens not in excess of \$18,210.00.

(ii) Accounts receivable subject to no prior liens.

(iii) Inventory subject to prior liens not in excess of \$410,000.00.

(iv) Certain machinery and equipment owned by Charles Jerkens.

e. Life insurance policies on the life of Charles Jerkens were assigned to the lender.

f. The proceeds of the loan were to be used:

(i) To retire the corporation's debts, including taxes; and

(ii) Working capital.

g. Increases of salary to corporate officers were eliminated and dividends were restricted.

11. The corporation is very actively engaged in business at this time; it is not dormant or in the process of liquidation. The corporation's office manager offered uncontroverted testimony to show that the corporation's sales

were one and a half to two times what they were a year prior to the hearing. He also claimed that the corporation's financial picture was no worse at the time of the hearing than when the earlier levies were lifted in October. The corporation was agent for Crane Carrier Trucks in the sale of thirty garbage trucks to the City of New York in 1980; the corporation's office manager claims that the City has had certain problems involving the fiberglass cabs of a competitor's trucks and as a result, the corporation is in a position where it hopes to sell hundreds of trucks to the City of New York in the near future.

12. The corporation's office manager also testified (and it was not controverted by the Department) that the total value of petitioners' collateral was between one million and one million one hundred thousand dollars.

13. Petitioners are not and do not appear to be designing to quickly depart from New York State or to conceal themselves.

14. Petitioners are not and do not appear to be designing to quickly place their property beyond the reach of the Department either by removing it from New York State or concealing it or by transferring it to other persons or by dissipating it.

CONCLUSIONS OF LAW

A. That since warrants were issued against petitioners and levies were made upon their property prior to the rendering of a decision of the State Tax Commission after a hearing under section 1138 of the Tax Law, petitioners 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 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 the 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 (with one significant difference which will be discussed below) 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 since it has been established that taxes, penalties and interest are claimed to be due and owing the Department from petitioners (Finding of Fact 3) and since the questions of fact raised by items (2)(i) and (2)(ii) of 20 NYCRR 604.9(d) have been resolved in petitioners' favor (Findings of Fact 13 and 14), there remains the question raised by item (2)(iii) of the aforementioned

regulation section, i.e., whether petitioners' financial solvency appears to be imperiled.

D. That the crux of the case is whether the Department has sustained its burden of proof to show that petitioners are insolvent or that their solvency is in peril. There are essentially two tests for insolvency: the "equity" test and the "bankruptcy" test:

"The equity test of insolvency equates insolvency with a lack of liquid funds, or the inability to pay one's debts in the ordinary course of business as the debts mature. This test normally has the lower threshold of compliance; it may be met by companies in temporary financial difficulty which are not on the verge of failure. The bankruptcy test of insolvency, on the other hand, focuses on the balance sheet of a company at discreet intervals of time in order to determine whether the company's liabilities exceed its assets; it will typically be met by companies in serious financial difficulty." Kreps v. C.I.R., 351 F.2d 1 (2d Cir. 1965).

The Second Circuit in Kreps then went on to apply the bankruptcy test. The case involved insolvency for purposes of transferee liability under the Internal Revenue Code.

Section 271.1 of the Debtor and Creditor Law provides as follows:

"A person is insolvent when the present fair salable value of his assets is less than the amount that will be required to pay his probable liability on his existing debts as they become absolute and matured."

The statutory test applied by the Debtor and Creditor Law is essentially the same as the bankruptcy test applied in Kreps. C.B.C. Super Markets, Inc. et al., 54 T.C. 882 (also a transferee liability case).

In view of section 271.1 of the Debtor and Creditor Law and also in view of the fact that the protection afforded the Department by the issuance of predecision warrants could have severe consequences for those against whom such warrants are issued, the test of insolvency with the higher threshold of compliance, i.e., the so-called bankruptcy test applied in Kreps and C.B.C.

Super Markets, Inc. et al., is the appropriate test in predecision warrant cases (See: Johnson, Jr. et al. v. Com., 79-1 U.S.T.C. ¶9272 (1979), involving a Federal jeopardy assessment). In applying this test to the facts of the instant case, it is clear that the Department has not shown that the petitioners are insolvent or are in peril of becoming insolvent. The Department has particularly failed to show the "fair salable value" of petitioners' assets and that such value is less than the amount that will be required to pay petitioner's probable liability on their existing debts as they become absolute and matured.

At this point it would be well to note the major difference between 20 NYCRR 604.9(d) and the Federal criteria set forth in Treas. Reg. secs. 1.6851 - 1(a)(1) and 301.6861 - 1(a) which was alluded to in Conclusion of Law "B". The Federal regulations provide in effect, that the Internal Revenue Service may not consider the anticipated deficiency in determining whether a taxpayer is solvent or insolvent. Johnson, Jr. et al. v. Com., supra. The New York regulations do not contain such a provision, however, and it could be argued that the proposed deficiency or the amount assessed, depending on the tax involved, could be considered in determining solvency. It is not necessary to rule on this point in the instant case, however, because of the Department's failure to sustain the burden of proof, as set forth in the preceding paragraph.

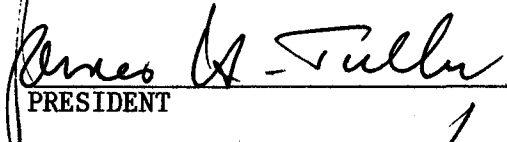
Accordingly, the issuance of the warrants commanding levies on the real and personal property of petitioners was not reasonable under circumstances; the levies should be removed and the warrants vacated. The issue as to the appropriateness of the amounts of the warrants is therefore moot.

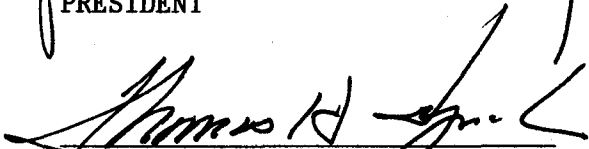
E. That the petition of Jerkens Truck & Equipment, Inc., Charles Jerkens and Marie Jerkens is granted and the levies are to be removed and the warrants vacated.

DATED: Albany, New York

JUN 12 1981

STATE TAX COMMISSION


PRESIDENT


COMMISSIONER


COMMISSIONER

PETITIONER

Jerkins Truck & Equipment, Inc.
Marie Jerkins & Charles Jerkins
1231 East Jericho Tpk.

TAB NO.

REPRESENTATIVE

Michael F. Grossman
Samuels & Grossman
217 Broadway
New York, NY 10007

Huntington, NY 11743

File 494 &
P30 8916168

Mr. and Mrs. Charles Jerkins
21 Harned Road
Commack, NY

P30 - 816167

JUN 12 1981