

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

January 4, 1983

A & G Service Station, Inc.
Anthony Cruciata, President
44 Echo Avenue
New Rochelle, NY 10801

Dear Mr. Cruciata:

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
Law Bureau - Litigation Unit
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Petitioner's Representative
Ira Levin
174 A Meriline Avenue
W. Patterson, NJ 07424
AND
Michael Cannata
400 Madison Avenue
New York, NY 10017

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application
of
A & G SERVICE STATION, INC.
for a Prompt Hearing Regarding a Pre-Decision
Warrant.

DECISION

Applicant, A & G Service Station, Inc., 44 Echo Avenue, New Rochelle, New York 10801, filed an application for a prompt hearing regarding a pre-decision warrant (File No. 38968).

A prompt hearing was held before Doris E. Steinhardt, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on November 3, 1982 at 1:30 P.M. and on December 14, 1982 at 10:00 A.M. Applicant appeared by Michael E. Cannata, Esq. The Audit Division appeared by Paul B. Coburn, Esq. (Alfred Rubinstein, 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 September 20, 1982, the Audit Division issued to A & G Gas Station, Inc. (sic) a Notice of Determination and Demand for Payment of Sales and Use Taxes Due, assessing sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1980 through August 31, 1981 in the amount of

\$38,857.27, plus penalty of \$19,428.65 and interest of \$7,862.29, for a total amount due of \$66,148.21. On or about September 27, 1982, the Audit Division issued a warrant, commanding a levy upon the real and personal property of A & G Gas Station, Inc. (sic) in the aforementioned amount of taxes, penalty and interest. The Statement of Facts furnished to applicant explained the ground for the issuance of the warrant, as follows: "This department has information which causes it to believe that A & G Gas Station, Inc. (sic) is insolvent at this time...which insolvent condition has prevented the corporation from paying its lawful and due taxes."

2. On or about October 8, 1982, the president of A & G Service Station, Inc. ("A & G"), Mr. Antonio Cruciata, filed on its behalf an application for a prompt hearing. The Tax Appeals Bureau of the State Tax Commission scheduled a prompt hearing on October 20, 1982, which hearing was adjourned upon applicant's written request to November 3, 1982. The hearing was commenced on November 3 and continued, again at applicant's request, in order to afford applicant's accountant an opportunity to review records turned over to the Audit Division and returned to applicant on October 1, 1982 and to present testimony regarding the amount warranted.

3. A & G is a franchise station of Power Test Petroleum Distributors, Inc. ("Power Test") which owns the station itself, although the owner of the land upon which it is situated is undisclosed. Applicant sells regular, unleaded and premium gasoline and gasohol and performs some repairs on motor vehicles.

4. For motor fuel tax and sales tax purposes, Power Test reports to the Audit Division's central office the combined monthly gallonage sold to A & G.

During the period under consideration, the number of gallons sold to applicant, as reported by Power Test, were as follows:

<u>PERIOD</u>	<u>COMBINED GALLONS</u>
3/80	42,770
4/80	42,758
5/80	44,728
6/80	37,253
7/80	39,951
8/80	45,236
9/80	38,996
10/80	39,834
11/80	36,941
12/80	41,035
1/81	36,445
2/81	31,407
3/81	36,464
4/81	33,053
5/81	36,769
6/81	37,767
7/81	33,601
8/81	30,001
	<u>685,009</u>

Because these amounts exceeded the number of gallons reported as taxable sales by A & G on its sales and use tax returns, the Audit Division assigned a sales tax examiner to conduct an audit. Applicant made available to the examiner checkbook stubs, bank statements and Power Test purchase invoices for the years 1979, 1980 and 1981. The dated purchase invoices reflected the number of gallons and the price of the product purchased, and were signed and filed by Mr. Cruciata or by Mr. Gunter Wulf (the only other officer of applicant) upon receipt from Power Test. Applicant introduced in evidence the purchase invoices from its files which showed the following gallonage of petroleum products purchased during the audit period:

<u>PERIOD</u>	<u>COMBINED GALLONS</u>
3/80	24,720
4/80	17,423
5/80	39,913
6/80	25,307
7/80	29,201
8/80	35,746
9/80	35,196
10/80	27,809
11/80	22,574
12/80	37,610
1/81	30,245
2/81	24,006
3/81	13,050
4/81	22,063
5/81	21,741
6/81	15,578
7/81	16,901
8/81	19,901
	<u>458,984</u>

The examiner concluded that applicant's records were insufficient to conduct a full audit and therefore estimated applicant's taxable sales by multiplying the number of gallons, as reported by Power Test, by a selling price of \$1.25 per gallon. The examiner arrived at taxable sales for the audit period in the amount of \$856,261.25.

5. According to the purchase invoices for the audit period, A & G purchased regular gasoline from Power Test at a cost ranging from \$1.10 to \$1.298 per gallon and unleaded gasoline from \$1.15 to \$1.34 per gallon.

6. A & G filed sales and use tax returns for the quarterly periods at issue, reflecting sales of fuel, as well as sales of accessories and of repair services, and paid tax in the total amount of \$21,081.00.

7. The sales tax examiner subsequently investigated applicant's financial status and ascertained that applicant had "very few assets, if any at all." The examiner used the balance sheet (Schedule L) of applicant's 1980 federal

small business corporation income tax return to compute applicant's net worth, as follows:

(a) Assets	
Cash	\$ 1,493.20
Inventories	3,926.00
Buildings and other depreciable assets, less accumulated depreciation	13,067.00
Total assets	<u>\$18,486.20</u>
(b) Liabilities	
Accounts payable	\$ 942.20
BOOK VALUE OF ASSETS	\$17,544.00

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

9. 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.

10. Applicant is presently engaged in business.

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 1138 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, penalty and interest are claimed to be due and owing the Audit Division from applicant.

D. That a person is considered 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." Debtor and Creditor Law section 271.1. See also C.B.C. Super Markets, Inc. et al., 54 T.C. 882; Matter of Jerkens Truck & Equipment, Inc. et al., State Tax Comm., June 12, 1981. The Audit Division has failed to show that applicant is insolvent

under this test or is in danger of becoming insolvent. The Audit Division introduced the abbreviated balance sheet attached to applicant's 1980 federal income tax return and the testimony of the sales tax examiner that applicant has "very few assets"; the nature of the examiner's inquiry regarding applicant's assets is unknown. Applicant's financial position in 1981 and at present is completely unknown. The evidence is insufficient to show the present salable value of applicant's assets and that such value is less than that amount required to pay applicant's probable liability on its existing debts as they mature. Furthermore, assuming without deciding that the assessment can be considered in determining solvency, the evidence is insufficient to show that applicant's assets would be inadequate to satisfy the assessment if it is eventually determined that applicant has sales and use tax liability in the amount assessed.

E. That the issuance of the warrant commanding a levy upon the real and personal property of applicant was not reasonable under the circumstances. The issue as to the appropriateness of the amount warranted is therefore moot.

F. That the application of A & G Service Station, Inc. is granted, and the warrant is vacated.

DATED: Albany, New York

JAN 4 1983

STATE TAX COMMISSION

ACTING PRESIDENT

COMMISSIONER

COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application :
of :
A & G Service Station, Inc. :
Anthony Cruciata, President : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision :
Warrant. :

State of New York
County of Albany

Kathy Pfaffenbach, 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 4th day of January, 1983, he served the within notice of Decision by certified mail upon A & G Service Station, Inc., Anthony Cruciata, President the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A & G Service Station, Inc.
Anthony Cruciata, President
44 Echo Avenue
New Rochelle, NY 10801

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
4th day of January, 1983.

Joan Q. Schultz

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Kathy Pfaffenbach

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
A & G Service Station, Inc.	:	
Anthony Cruciata, President	:	AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision	:	
Warrant.	:	

State of New York
County of Albany

Kathy Pfaffenbach, 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 4th day of January, 1983, he served the within notice of Decision by certified mail upon Ira Levin the representative of the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

Ira Levin
174 A Meriline Avenue
W. Patterson, NJ 07424

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
4th day of January, 1983.

Jean O. Schultz

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Kathy Pfaffenbach

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
A & G Service Station, Inc.	:	
Anthony Cruciata, President	:	AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding a Pre-Decision	:	
Warrant.	:	

State of New York
County of Albany

Kathy Pfaffenbach, 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 4th day of January, 1983, he served the within notice of Decision by certified mail upon Michael Cannata 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 Cannata
400 Madison Avenue
New York, NY 10017

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
4th day of January, 1983.

Jean A. Schult

AUTHORIZED TO ADMINISTER
OATHS PURSUANT TO TAX LAW
SECTION 174

Kathy Pfaffenbach

P 278 401 575
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO
 Ira Levin
 STREET AND NO.
 174 A Meriline Ave.
 P.O., STATE AND ZIP CODE
 W. Patterson, N.J. 07424

POSTAGE \$

CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
		RESTRICTED DELIVERY	\$
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	\$
		SHOW TO WHOM, DATE, AND ADDRESS OF DELIVERY	\$
		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	\$
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

P 278 401 574
RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
 NOT FOR INTERNATIONAL MAIL
 (See Reverse)

SENT TO
 AAG Service Station, Inc.
 STREET AND NO. Anthony Cruciaty, Pres.
 44 Echo Ave.
 P.O., STATE AND ZIP CODE
 New Rochelle, NY 10801

POSTAGE \$

CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
		SPECIAL DELIVERY	\$
		RESTRICTED DELIVERY	\$
	RETURN RECEIPT SERVICE	SHOW TO WHOM AND DATE DELIVERED	\$
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		SHOW TO WHOM AND DATE DELIVERED WITH RESTRICTED DELIVERY	\$
TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

PS Form 3800, Apr. 1976

PS Form 3800, Apr. 1976

SENT TO
 Michael Cannata
 STREET AND NO.
 400 Madison Ave.
 P.O., STATE AND ZIP CODE
 NY, NY 10017

POSTAGE \$

CONSULT POSTMASTER FOR FEES	OPTIONAL SERVICES	CERTIFIED FEE	\$
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		RESTRICTED DELIVERY	\$
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TOTAL POSTAGE AND FEES		\$	
POSTMARK OR DATE			

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