

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

July 28, 1983

John Courtney Mobil, Inc.
and John Cortney, Individually and as an Officer
931 Clinton Avenue South
Rochester, NY 14620

Gentlemen:

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

Very truly yours,

STATE TAX COMMISSION

cc: John Cortney
1832 Wheatland Center Rd.
Scottsville, NY 14546
AND

Petitioner's Representative:
Thomas M. DiPiazza
Jack M. Battaglia, P.C.
Suite 1111, First Federal Plaza
Rochester, NY 14614
AND

Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Application	:	
of	:	
John Courtney Mobil, Inc.	:	
and John Cortney, Individually and as an Officer	:	AFFIDAVIT OF MAILING
	:	
for a Prompt Hearing Regarding Predecision	:	
Warrants.	:	

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 28th day of July, 1983, she served the within notice of Decision by certified mail upon Thomas M. DiPiazza 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 M. DiPiazza
Jack M. Battaglia, P.C.
Suite 1111, First Federal Plaza
Rochester, NY 14614

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
28th day of July, 1983.

Jean A. Schuttz

Connie D. Hagelund

In the Matter of the Applications :
of :
JOHN COURTNEY MOBIL, INC. :
and :
JOHN COURTNEY, Individually and as an Officer :
for a Prompt Hearing Regarding Predecision :
Warrants. :

DECISION

A prompt hearing was held before Dennis M. Galliher, Hearing Officer, at the offices of the State Tax Commission, One Marine Midland Plaza, Rochester, New York on June 20, 1983 at 10:00 A.M., with all briefs to be submitted by July 8, 1983. Petitioner appeared by Jack M. Battaglia, P.C. (Thomas M. DiPiazza, Jr., Esq., of counsel). The Audit Division appeared by John P. Dugan, Esq. (James F. Morris, Esq., of counsel).

I. Whether the issuance of warrants by the Audit Division commanding a levy upon the real and personal property of the applicants, prior to the issuance of a decision by the State Tax Commission on the tax assessment underlying such warrants, is authorized.

II. Whether there was authority to conduct a prompt hearing to determine whether the issuance of such warrants was reasonable under the circumstances of the case.

III. Whether, in the event the issuance of warrants and the prompt hearing conducted thereon were authorized, the issuance of such warrants was reasonable.

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

FINDINGS OF FACT

1. On January 14, 1983, the Audit Division issued to John Courtney Mobil, Inc. 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 June 1, 1979 through May 31, 1982 in the amount of \$90,848.63, plus penalty of \$19,177.03 and interest of \$21,282.99, for a total amount due of \$131,308.65. The Audit Division also issued, on the same date, a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to John Courtney, president of John Courtney Mobil, Inc., assessing sales tax, penalty and interest as claimed due from the corporation on the grounds that Mr. Courtney was personally liable pursuant to sections 1131(1) and 1133 of the Tax Law as an officer of the corporation for the foregoing amounts determined to be due in accordance with section 1138(a) of the Tax Law. On September 15, 1982 applicant John Courtney Mobil, Inc., by its president, applicant John Courtney, had executed a consent allowing sales and use taxes for the periods June 1, 1979 through November 30, 1979 to be assessed at any time on or before March 20, 1983.

2. On March 21, 1983, the Audit Division issued a warrant to each of the applicants commanding a levy upon their real and personal property in the aforementioned amount of taxes, penalty and interest. The warrants were filed in the Monroe County Clerk's office on March 22, 1983. A Statement of Facts

was furnished to each applicant explaining the grounds for the issuance of the warrants as follows:

"[t]his department has information which causes it to believe that John Courtney Mobil, Inc., (and John Courtney, President, John Courtney Mobil, Inc.), is insolvent at this time, inasmuch as total corporate assets (his total assets) are exceeded by total corporate liabilities (his total liabilities), including taxes; which insolvent condition has prevented the corporation (him) from paying its (his) 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 1141(b) of the New York State Law."

3. On or about April 11, 1983, applications requesting a prompt hearing on the warrants were filed on behalf of both the corporation and Mr. Courtney. By a letter dated April 12, 1983, applicants' representative, Thomas M. DiPiazza Jr., Esq., requested that the prompt hearing be scheduled later than the required ten day period [see 20 NYCRR 604.6(a) and (c)]. Thereafter, applicants (by their representative) and the Tax Appeals Bureau of the State Tax Commission set June 20, 1983 as a mutually acceptable date for the prompt hearing.

4. John Courtney Mobil, Inc. ("the corporation"), operates a retail gasoline service station. John Courtney is the president of the corporation and, together with his wife Rita Courtney, who is not a party to this proceeding, owns all of the outstanding stock of the corporation. The corporation files sales tax returns on a quarterly basis.

5. The sales tax assessment noted herein results from a "multiaudit" of the corporation conducted by the Audit Division.¹ In brief, the method by which such assessment was computed is as follows:

¹ A multiaudit is an audit to determine potential additional tax liability for several different taxes conducted at the same time. The instant multiaudit covered sales, personal income and corporate franchise taxes.

- a) A comparison of sales tax, as computed on sales per the corporation's books and records, to sales tax shown on and remitted with the corporation's sales tax returns revealed a substantial understatement of tax on such returns;
- b) A markup test was performed to determine the accuracy of sales figures reported in the corporation's books and records;
- c) the markup test verified sales shown per books and records, and thus sales tax was computed from such sales figures contained in the corporation's books and records;
- d) the actual computation of sales tax is summarized as follows:

Actual sales (dollars) per books per quarter;

less: gasoline tax included in above sales (at 8 cents per gallon times number of gallons sold; subtracted since the State gas tax itself is not subject to sales tax.);

divide: actual sales less gas tax by 107 percent to arrive at taxable sales (the retail pump price for gas before sales tax is added.);

multiply: taxable sales, as computed, by the 7 percent sales tax rate applicable to arrive at sales tax due on sales per books;

- e) the additional sales tax assessed as due (\$90,848.63) represents the difference between sales tax as computed above and sales tax² reported and remitted with the corporation's sales tax returns.

6. In addition to computing sales tax due, the Audit Division's auditor also prepared balance sheets showing, to the extent he knew of or was able to discover, assets and liabilities of each applicant as follows:³

² Subsequent to the Audit Division's computation, a credit of \$3,140.72 reducing computed tax due was allowed based on information showing sales tax paid by the corporation to one of its suppliers. Said credit is included in the tax as assessed.

³ The full value or balance of known assets and liabilities owned or owed jointly by Mr. Courtney and his wife are included in the balance sheet.

JOHN COURTNEY'S MOBIL SERVICE

Statement of Net Worth
at
November 8, 1982

November 8, 1982

Assets:

Checking #296-528-3	\$ 3,980.26
Inventory (Estimated)	8,711.00
Other Assets	<u>2,295.00</u>
Total	<u>\$14,986.26</u>

Liabilities:

-0-

Net Worth: \$14,986.26

JOHN & RITA COURTNEY

Statement of Net Worth
at
November 8, 1982

November 8, 1982

Assets:

Checking #621-982-8 (Lincoln) (J)	\$ 572.77
Savings #01-03-35586-4 (Lincoln)(H)	790.96
Savings #20-03-91111-2 (Lincoln)(H)	244.80
Savings #01-03-40071-0 (Lincoln)(J)	358.26
House 1832 Wheatland Center Road FMV (J)	<u>60,000.00</u>
Total	<u>\$ 61,966.79</u>

Liabilities:

Mortgage on Home (J)	\$ 12,000.00
Lincoln Installment Loan #100-118-189-853(J)	1,381.25
Lincoln Installment Loan #101-018-246-042(H)	<u>3,490.20</u>
Total	<u>\$ 16,871.45</u>

Net Worth: \$ 45,095.34

Checking and savings account balances for each applicant as of November 8, 1982 were supplied to the auditor at his request, following canvass letters to Rochester area banks, by Lincoln First Bank, N.A. "Inventory" and "other assets" reflected as assets of the corporation were taken from the balance sheet attached to and included as part of the corporation's 1981 State of New York Corporation Franchise Tax Report (Form CT-4) dated March 14, 1982. The value of applicant John Courtney's house (\$60,000.00; listed as an asset) represents the auditor's estimation of the value of the house. The auditor admitted he is not a real estate broker, has never sold real estate and is "...not really qualified to make appraisals of property". The auditor "...drove by the residence and made an estimation of (its) fair market value". No other appraisal was utilized in valuing the home, nor was the value of the corporation's assets determined by resort to outside appraisal or sources other than the aforementioned corporation franchise tax balance sheet.

7. The Audit Division asserts that having determined the applicants' assets and liabilities to the extent possible (as reflected on the balance sheets), and thereafter calculating insolvency based thereon and with inclusion, as a liability, of the sales tax assessed, establishes the applicants' insolvency (as of November 1982). The Audit Division maintains that such insolvent condition continues, that no evidence has been discovered by the Audit Division or produced by the applicants to refute this condition of insolvency, that reasonable basis existed for issuance of the warrants and that such warrants should not be vacated by the Commission.

8. The corporation is, at present, doing business. No evidence has been presented to indicate that the applicants are or appear to be designing to quickly depart from New York State. Furthermore, there is no evidence that the

applicants are or appear to be designing to quickly place their property beyond the reach of the Audit Division by removing it from New York State, concealing it, transferring it to other persons or dissipating it.

9. Applicants assert that the asset and liability figures contained in the Audit Division's balance sheets reflecting applicants' net worth as of November 8, 1982 may not be accurate as to asset valuations, are based on stale information and should not be used in a determination of the applicants' solvency. In this regard, applicants note that there may be additional existing assets not included on the balance sheets, that the applicants' financial situation may have changed between November 8, 1982 and the March 21, 1983 issuance date of the warrants, that the values assigned to the corporation's assets were taken from the 1981 franchise tax balance sheet, and that no independent appraisals of the value of the corporation's assets or of applicant John Courtney's home were utilized. Furthermore, applicants assert the sales tax assessed should not be included in the determination of solvency or insolvency. Applicants have submitted no evidence of any assets in addition to those reflected on the Audit Division's balance sheets, of the elimination or significant reduction of liabilities shown thereon, or of any change in either applicants' financial situation.

10. Applicants assert further that both the issuance of the subject warrants and the instant prompt administrative hearing thereon are improper as beyond the scope of authority granted by the Tax Law. Applicants maintain that timely petitions for a hearing under section 1138(a) of the Tax Law to contest the assessments have been filed, and that there has been no final determination of the tax due by the Commission.

CONCLUSIONS OF LAW

A. That subdivision(a) of section 1138 of the Tax Law, pursuant to which the warranted tax herein was assessed, in pertinent part provides that where a return required to be filed under Article 28 of the Tax Law is either not filed or is filed but is incorrect or insufficient, the amount of tax due shall be determined from available information (including external indices if necessary), with notice of such determination required to be given to the person liable for the collection or payment of the tax. This section further provides that "...[s]uch determination shall finally and irrevocably fix the tax unless the person against whom it is assessed, within ninety days after giving of notice of such determination, shall apply to the tax commission for a hearing, or unless the tax commission of its own motion shall redetermine the same."

B. That subdivision(a) of section 1141 of the Tax Law in pertinent part provides:

"Sec. 1141. Proceedings to recover tax. - (a) Whenever any person required to collect tax shall fail to collect or pay over any tax, penalty or interest imposed by this article [Article 28] as therein provided, ..., the attorney general shall, upon the request of the tax commission, bring or cause to be brought an action to enforce the payment of the same on behalf of the state of New York in any court of the state of New York or of any other state or of the United States."

Subdivision (b) of section 1141 of the Tax Law provides, as an additional or alternative remedy, that the tax commission may issue a warrant commanding a levy upon the real and personal property of any person liable for the tax. Section 1141 contains no mandate that proceedings to recover tax be initiated pursuant to subdivision (a) of said section to the exclusion of or prior to proceeding via the issuance of a warrant pursuant to subdivision (b) of said section. Furthermore, neither subdivision (a) nor (b) restricts collection activities on the amount of assessed tax, notwithstanding that the amount of

such assessed tax may not be finally and irrevocably fixed and may still, or later, be challenged via an administrative hearing before the tax commission upon timely application for such hearing.

C. That since warrants were issued against applicants prior to the rendering of a decision by the State Tax Commission after a hearing under section 1138 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 prompt hearing procedure contained in 20 NYCRR 604, authorized in this instance by Tax Law sections 171 (paragraph first), 171 (paragraph twenty first) and 1142(1), and requested by applicants herein, provides the basis for the rendering of a decision on whether the issuance and amount of the warrants was reasonable. The February 13, 1981 effective date of the regulations providing the prompt hearing procedure (20 NYCRR 604) is subsequent to the date of the Appellate Division's decision in Arthur Treacher's Fish & Chips v. State Tax Commission, 69 A.D.2d 550, [3rd Dept., July 26, 1979; holding subdivision (b) of section 1141 of the Tax Law unconstitutional insofar as it failed to provide a prompt post levy hearing into the probable validity of the (warranted) claim].

D. That in view of the foregoing there was authority for both the issuance of the subject warrants and for conducting a prompt hearing thereon.

E. That 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 procedures 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)].

F. 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 State 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 State 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).⁴

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

H. 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

⁴ While the federal regulations provide that the Internal Revenue Service may not consider the anticipated deficiency in determining whether a taxpayer is solvent or insolvent, there is no such provision in the New York regulations (See Matter of Jerkens Truck & Equipment, Inc., et al., State Tax Comm., June 12, 1981).

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 existing debts as they become absolute and matured.

I. That the balance sheets concerning applicants' net worth as of November 8, 1982, as prepared and submitted by the Audit Division utilizing known and discovered assets and liabilities, discloses net worth (assets less liabilities) for the corporation to be \$14,986.26 and for Mr. Courtney to be \$45,095.34. Without inclusion of the sales tax assessment as a liability, applicants are not insolvent; inclusion of the full assessment, however, results in a net deficiency exceeding the combined net worth of both applicants by \$71,227.65.⁵ The sole apparent reason for issuance of the warrants herein is that the underlying assessment renders the applicants insolvent. Accordingly, the determination of whether or not the applicants' solvency appears to be imperiled rests upon whether or not the assessment may be considered in such determination.

J. That the applicants have not presented evidence that the amount of the assessments may be less than is shown on the notices of determination and demand or that the method of computation used was of doubtful validity. In fact, such assessment was based on applicants' own books and records. As such, applicants have cast no doubt as to the probable validity of the Department's claim underlying the warrant. Furthermore, applicants have not established the existence of additional assets or different (increased) values for those assets

⁵ Corporation's net worth	\$ 14,986.26
Mr. Courtney's net worth	45,095.34
Combined net worth	\$ 60,081.60
Less: assessed tax, penalty and interest	[131,308.65]
equals: (net deficiency)	<u>[\$ 71,227.05]</u>

reflected on the Audit Division's net worth balance sheets, nor have applicants demonstrated any change in their financial picture between the date of such balance sheets and the present. Absent any showing of invalidity as to the basis for or method of computing the assessments (the underlying claim), such assessments may properly be considered in the determination of applicants' solvency (cf. Matter of Mira Oil Co., Inc., State Tax Comm., April 15, 1983; wherein the applicant cast sufficient doubt as to the validity of several portions of the underlying assessment thereby reducing the amount of the assessment to a level that the applicant was capable of remitting without thereby being rendered insolvent).


K. That the Audit Division has established that the applicants' financial solvency is imperiled and that the issuance of warrants was reasonable under the circumstances. Furthermore, applicants have failed to sustain their burden of proving that the amount warranted was not appropriate.


L. That the applications of John Courtney Mobil, Inc., and John Courtney, individually and as officer, are denied and the warrants issued by the Audit Division on March 21, 1983 are sustained.


DATED: Albany, New York

STATE TAX COMMISSION

JUL 28 1983


PRESIDENT


COMMISSIONER


COMMISSIONER

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Applications :
of
John Courtney Mobil, Inc.
and John Cortney, Individually and as an Officer : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding Predecision :
Warrants.

State of New York
County of Albany

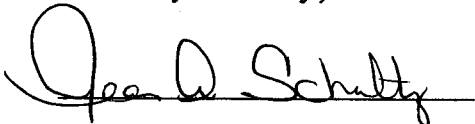
Connie Hagelund, being duly sworn, deposes and says that she is an employee of the Department of Taxation and Finance, over 18 years of age, and that on the 28th day of July, 1983, she served the within notice of Decision by certified mail upon John Courtney Mobil, Inc. and John Cortney, Individually and as an Officer the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

John Courtney Mobil, Inc.
and John Cortney, Individually and as an Officer
931 Clinton Avenue South
Rochester, NY 14620

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
28th day of July, 1983.





STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Applications :
of
John Courtney Mobil, Inc.
and John Cortney, Individually and as an Officer : AFFIDAVIT OF MAILING
for a Prompt Hearing Regarding Predecision :
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State of New York
County of Albany

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John Courtney
1832 Wheatland Center Rd.
Scottsville, NY 14546

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
28th day of July, 1983.

Jean D. Schully

Connie R. Hagelund

P 481 208 121

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
John Courtney	
Street and No.	
1832 Wheatland Center Rd.	
P.O., State and ZIP Code	
Scottsville, NY 14546	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 208 122

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
Thomas M. DiPiazza	
Street and No.	
Jack M. Battaglia, P.C.	
Suite 1111, First Federal Plaza	
P.O., State and ZIP Code	
Rochester, NY 14614	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982

P 481 208 120

RECEIPT FOR CERTIFIED MAIL

NO INSURANCE COVERAGE PROVIDED—
NOT FOR INTERNATIONAL MAIL

(See Reverse)

Sent to	
John Courtney Mobil, Inc.	
and John Courtney, Individually, and	
Street and No. as an officer	
931 Clinton Avenue South	
P.O., State and ZIP Code	
Rochester, NY 14620	
Postage	\$
Certified Fee	
Special Delivery Fee	
Restricted Delivery Fee	
Return Receipt Showing to whom and Date Delivered	
Return Receipt Showing to whom, Date, and Address of Delivery	
TOTAL Postage and Fees	\$
Postmark or Date	

PS Form 3800, Feb. 1982