

COMMONWEALTH OF MASSACHUSETTS
TRIAL COURT DEPARTMENT

SUFFOLK, ss.

SUPERIOR COURT
CIVIL ACTION

NO. 2484CV00713-C

IN THE MATTER OF THE
TAX INDEBTEDNESS OF:

SIMCO'S RESTAURANT INC. d/b/a SIMCO'S

APPLICATION OF COMMISSIONER OF REVENUE
TO ENTER PREMISES TO EFFECT LEVY

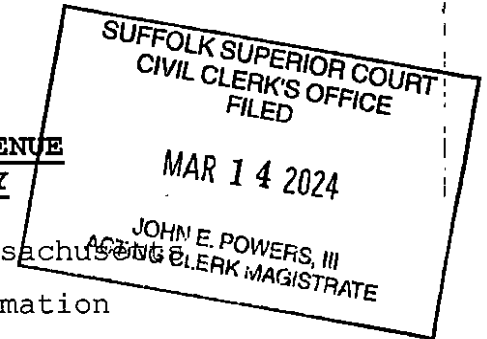
Geoffrey E. Snyder, Commissioner of the Massachusetts Department of Revenue, on the basis of the information submitted, seeks an Order authorizing himself and/or his designated agents to enter the premises located at 1509A Blue Hill Ave, Mattapan, Massachusetts, for the purpose of levying property belonging to the delinquent taxpayer, Simco's Restaurant Inc. d/b/a Simco's. This property will be levied pursuant to G.L. c. 62C, sec. 53 to collect outstanding Massachusetts meal taxes, withholding taxes, and paid family medical leave taxes in the amount of \$735,728.02, together with interest and penalties as allowed by law.

GEOFFREY E. SNYDER
COMMISSIONER OF REVENUE

By his attorney,

/s/ John M. Parcellin
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Dated: March 11, 2024



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CIVIL CLERK'S OFFICE
FILED

MAR 14 2024

JOHN E. POWERS, III
ACTING CLERK MAGISTRATE

MEMORANDUM IN SUPPORT OF APPLICATION
TO ENTER PREMISES TO EFFECT LEVY

PRELIMINARY STATEMENT

Geoffrey E. Snyder, Commissioner of the Massachusetts Department of Revenue ("Commissioner"), seeks an Order For Entry to levy property of a delinquent taxpayer, Simco's Restaurant Inc. d/b/a Simco's ("taxpayer"), who owes the commonwealth meal taxes, withholding taxes, and paid family medical leave taxes in the total amount of \$735,728.02.

STATEMENT OF FACTS

According to the records at the Office of the Massachusetts Secretary of State, Simco's Restaurant Inc. d/b/a Simco's was incorporated on March 27, 1991. The records name Nicholas Fotopoulos as corporate president. The corporation operates a Restaurant/Bar at 1509A Blue Hill Ave, Mattapan, Massachusetts.

The Commissioner assessed meal taxes, withholding taxes, and paid family medical leave taxes due to the Commonwealth for the applicable periods. Despite numerous demands, the taxpayer has continued to refuse or neglect payment.

As set forth in the Affidavit of Sean Hoar, the Commissioner's usual collection methods have proven unsuccessful.

NEW YORK STATE
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THE ATTORNEY GENERAL
ALBANY, N.Y.

The taxpayer is aware of its liability but has failed to submit an acceptable payment agreement to the Department of Revenue.

The Commissioner of Revenue served Notices of Levy on several banks in an attempt to reach the taxpayer's bank account(s). To date, the Commissioner has received \$20,000.00 from this effort. As of the date of this application, however, the taxpayer still owes the Department taxes in the amount of \$735,728.02.

On June 3, 2019, January 28, 2019, April 1, 2019, September 2, 2020, April 8, 2022, April 8, 2022, April 22, 2022, April 26, 2023, and August 30, 2023 the Commissioner of Revenue filed a Notice of Massachusetts Tax Lien against the taxpayer in the amounts of \$12,792.97, \$68,265.25, \$10,454.12, \$24,743.89, \$19,370.75, \$145,113.96, \$8,122.28, \$350,353.92, and \$5,736.30, which represent different periods of tax at issue.

Applicable interest and penalties have continued to accrue on these balances, and, as of the date of this application, the taxpayer owes the Department of Revenue a total outstanding amount of \$735,728.02 in tax, interest, and penalties for the periods at issue. Statutory additions will continue to accrue on this amount until the balance is paid in full.

On August 3, 2023, the Commissioner of Revenue sent the taxpayer a Notice of Collection.

On January 16, 2024, the Commissioner of Revenue sent the taxpayer a Notice of Intent to Seize.

ARGUMENT

I. THE COMMISSIONER IS EMPOWERED TO LEVY.

The laws of the Commonwealth impose a tax on retail sales

of tangible personal property within the Commonwealth. G.L. c. 64H, sec. 1 & 2.

The laws of the Commonwealth require every employer who pays wages to employees to deduct and withhold a tax upon such wages. G.L. c. 62B, sec. 2.

Upon refusal or neglect to pay any tax after demand, a lien arises in favor of the Commonwealth in the amount of the taxes due including interest and penalties. G.L. c. 62C, sec. 50(a).

The Commissioner is empowered to collect the tax so imposed by levy upon the property of any taxpayer who neglects or refuses to pay.

General Laws, chapter 62C, sec. 53(a) and (b) provide as follows:

If any person liable to pay any tax neglects or refuses to pay the same within ten days after demand, it shall be lawful for the Commissioner to collect such tax, and such further sum as shall be sufficient to cover the expenses of levy, by levy upon all property and rights to property . . . belonging to such person or on which there is a lien provided in this chapter . . . "levy" as used in this chapter includes the power of distraint and seizure by any means. A levy shall extend only to property possessed and obligations existing at the time thereof.

In any case in which the commissioner may levy upon property, he may seize and sell such property or rights to property, whether real or personal, tangible or intangible.

II. THE COMMISSIONER IS ENTITLED TO SUMMARY PROCEEDINGS TO COLLECT TAX DEBTS.

The use of summary proceedings to collect tax debts has a strong historical background. The Supreme Court noted, "summary proceedings to secure prompt performance of pecuniary obligations to the government have been consistently sustained." Phillips v. Commissioner, 283 U.S. 589, 595 (1931). The Court further stated that "[w]here only property rights are involved,

mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for ultimate judicial determination is adequate." Id. at 596-97. States are not required to provide process prior to the exaction of taxes. See McKesson Corp. v. Div. of Alcoholic Bevs. & Tobacco, 496 U.S. 18, 37 (1990). "States may employ various financial sanctions and summary remedies. . .to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment." McKesson, 496 U.S. at 37. The Court has recognized "that where a State must act quickly, or where it would be impractical to provide predeprivation process, postdeprivation process satisfies the requirements of the Due Process Clause." Gilbert v. Homar, 520 U.S. 924, 930 (1997).

The authority to levy is an essential tool for the administration and enforcement of the tax laws. It encourages voluntary compliance by taxpayers and assures the government of the availability of revenues. See G.M. Leasing Corp. v. United States, 429 U.S. 338, 351 (1977).

Seizures can be and often are done without the aid of judicial authorization and certainly without input from the delinquent taxpayer. However, the Commissioner may not enter upon the private premises of a taxpayer for the purpose of effecting a levy without first obtaining either the consent of the taxpayer or judicial authorization. The fourth amendment requires a warrant when property to be seized is situated in private areas.

It is one thing to seize without a warrant property resting in an open area or seizable by levy without an intrusion into privacy, and it is quite another thing to effect a warrantless seizure of property, even that owned by a corporation, situated on private premises to which access is not otherwise available for the seizing officer.

429 U.S. at 354-55.

The standard for issuing a seizure warrant is not the same as the standard for issuing a criminal warrant. Blakley v. United States, 1996 U.S. Dist. LEXIS 15899, at *60-61 (D. Tex. 1996). The Internal Revenue Service must establish that there is probable cause to believe there are assets which may be seized upon entry onto the property. See Blakley, 1996 U.S. Dist. LEXIS 15899 at *61. In reviewing a warrant application to determine whether probable cause exists, a court considers the following factors:

- (1) An assessment of tax has been made against the taxpayer;
- (2) Notice and demand have been properly made;
- (3) The taxpayer has neglected or refused to pay said assessment within ten days after notice and demand; and
- (4) Property, subject to seizure, presently exists at the premises sought to be searched and that said property either belongs to the taxpayer or is property upon which a lien exists for the payment of the taxes.

Id. at *60; see also United States v. Dime Sav. Bank, 1995 U.S. Dist. LEXIS 5950, at *3 (D.N.Y. 1995) (citations omitted).

Courts have held that the probable cause determination is not made according to a strict set of rules, but instead turns on factual circumstances in a given case. In re Coppola, 810 F. Supp. 429, 435 (D.N.Y., 1992), aff'd, 99 F.3d 402 (2d Cir. N.Y. 1995) (citations omitted). In seeking to establish probable cause for entry and seizure there need not be a prima facie showing, but there must be a fair probability that the requested entry will produce assets subject to seizure. Id.

The warrant requirement of G.M. Leasing does not nullify

the Commissioner's right to summary proceedings; an ex parte search and/or entry order may still issue. It is long established that in tax collection cases, the Internal Revenue Service can obtain writs of entry ex parte. United States v. Coppola, 1995 U.S. App. LEXIS 39937, *3 (2d Cir. 1995). Neither the due process clause nor the fourth amendment entitles the taxpayer to intervene in pre-seizure enforcement proceedings. Carlson v. United States District Court, 580 F.2d 1365 (10th Cir. 1978).

No one would contend that a suspect has a right to intervene in opposition to an application by a police officer for a search warrant.

The policies favoring expeditious tax enforcement procedures are as compelling as the need to effect a speedy search of a suspect's premises.

Id. at 1374.

Failure to give notice to the taxpayer is not fatal to the constitutionality of ex parte proceedings. The assessment and collection procedures used by the Internal Revenue Service "provide notice to the taxpayer that he or she is delinquent in his or her taxes from which the taxpayer will recognize a reasonable expectation that action possibly will be taken by the [taxing agency] if payment is not forthcoming". In re Gerwig, 461 F. Supp. 449, 453 (C.D. Cal. 1978).

In cases involving executive urgency, the Supreme Court has "permitted the ex parte seizure of real property when the Government was collecting debts or revenue." United States v. James Daniel Good Real Property, 510 U.S. 43, 59 (1993). The Good Court noted that the prompt collection of taxes represents such urgency, as tax revenue is vital to the existence of government. Id. at 60, citing Springer v. United States, 102

U.S. 586, 593-594 (1881).

The taxpayer should not be unreasonably surprised by the Commissioner's levy. The Commissioner has made repeated demands for payment and has sent the taxpayer a Notice of Intent to Seize.

CONCLUSION

Based on the foregoing reasons, the Commissioner requests that this court grant his Application for an Order For Entry onto the premises of Simco's Restaurant Inc. d/b/a Simco's, for the purpose of seizing, selling and/or disposing of the taxpayer's property in accordance with the provisions of G.L. c. 62C, sec. 53-64.

**GEOFFREY E. SNYDER
COMMISSIONER OF REVENUE**

By his attorney,

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