

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition :
of :
MAJOR OILS : **DECISION**
(GEORGE DUNN D/B/A MAJOR OILS) : **DTA No. 804793**
for a Hearing with Regard to a Bond Required to :
be Filed Under Section 283 of Article 12-A of the :
Tax Law. :

Petitioner, Major Oils (George Dunn d/b/a Major Oils), 455 Empire Boulevard, Rochester, New York 14609, filed an exception to the determination of the Administrative Law Judge issued on September 3, 1987 with regard to a bond required to be filed under section 283 of Article 12-A of the Tax Law (File No. 804793). Petitioner appeared by Henry W. Williams, Jr., Esq. The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of Counsel).

Oral argument was scheduled at petitioner's request and subsequently canceled at petitioner's request. Only the Division submitted a brief on exception.

After reviewing the entire record, the Tax Appeals Tribunal renders the following decision.

ISSUE

I. Whether the Administrative Law Judge properly determined that the petitioner must file a surety bond in the amount of \$50,000 as a condition to maintain his registration as a motor fuel distributor.

II. Whether the amount of the surety bond may be reduced to less than \$50,000.

III. Whether the Tribunal can properly decide, where the issue has been raised for the first time on exception, that the petitioner should not be registered as a motor fuel distributor.

FINDINGS OF FACT

We find the facts as stated in the Administrative Law Judge determination and such facts are incorporated herein by this reference.

In summary these facts are:

Petitioner, Major Oils, is a sole proprietorship operated by George Dunn. In 1983, Mr. Dunn and Major Oils went bankrupt. Since the bankruptcy, the petitioner and Mr. Dunn have not participated in the oil business. Prior to the bankruptcy, petitioner had purchased from 10,000 to 50,000 gallons of motor fuel a month from Sipco Corp. at Sipco's Buffalo, New York storage facilities.

Petitioner's registration as a motor fuel distributor was reviewed by the Division of Taxation as part of its ongoing review of motor fuel distributors. On his application for reregistration, petitioner indicated that Major Oils had operated as a petroleum broker and that Major Oils was not currently purchasing or reselling any product. The application indicated petitioner did not have any surety bond on file with the Division.

Petitioner did not submit a financial statement to the Division for review. A computer printout from the Division and copies of petitioner's motor fuel returns indicate from at least September 12, 1983, petitioner has done no business as a motor fuel distributor.

Petitioner desires to retain his registration as a motor fuel distributor in order to regenerate an oil business. If petitioner did regenerate his oil business, petitioner anticipates he would not be importing product, but rather purchasing from an importer.

After reviewing petitioner's application for reregistration, the Division required the petitioner to file a \$100,000 joint motor fuel/sales tax security bond.

The Administrative Law Judge reduced the petitioner's bond from \$100,000 to \$50,000. Petitioner filed an exception requesting that the Tribunal reduce the required bond to \$1.00.

. The Division of Taxation responded to the petitioner's exception opposing a further reduction in the amount of the bond and arguing that the Administrative Law Judge erred in reducing the amount of the bond to \$50,000.

In addition, the Division requested that the Tribunal cancel the petitioner's registration because petitioner does not meet the definition of "distributor" in section 282(1) of the Tax Law.

OPINION

We reverse the determination of the Administrative Law Judge on the amount of the bond which we find the Division properly set at \$100,000 under section 414.2(b)(5) of the motor fuel tax regulations (20 NYCRR 414.2[b][51]). Further, we find no authority for the Tribunal to consider the issue of whether petitioner should be denied registration.

We deal first with the determination of the Administrative Law Judge reducing the bond amount to \$50,000.

Section 283(3) of the Tax Law provides, in part, as follows:

[t]he tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company. . . , in such amount as the tax commission may fix, in an amount determined in accordance with rules and regulations prescribed by it, to secure the payment of any sums due from such distributor (i) pursuant to [Article 12-A] and (ii) pursuant to articles twenty-eight and twenty-nine of this chapter with respect to sales and uses of motor fuel. The tax commission shall require that such a bond or other security be filed before a distributor is registered, and the amount thereof may be increased at any time when in its judgment the same is necessary as a protection of the revenues under [Article 12-A] and articles twenty-eight and twenty-nine of this chapter.

The purpose of the statute is to protect the revenues of New York State by requiring the registration of distributors and the filing by such distributors of a bond or other security to secure the payment of motor fuel and sales and use taxes.

The Department adopted regulations pursuant to section 283(3) which provide the method by which the bond or other security is determined. Section 414.2(b) of the Motor Fuel Tax Regulations provides as follows:

Bond Required. In all cases a distributor is required to file with the department a bond, the amount of which shall be at least adequate to meet the requirements of paragraphs (1) through (6) of this subdivision.

Paragraphs (1) through (4) provide the various methods by which the amount of the security of a distributor is to be determined. These methods involve an analysis of a distributor's ratio of current assets to current liabilities and a comparison of its net worth to its six month maximum potential tax liability. The current ratio measures the distributor's liquidity, that is, the ability of a business to meet current debts as they became due. The net worth analysis is done to judge the solvency of the distributor. A review is also made of the financial statements to determine the types of assets and liabilities of the business, the amount of cash on hand, how inventory is valued, the value of fixed assets and whether and to what extent they are encumbered. The Division, by analyzing the financial statements of the distributor, attempts to determine the ability of a distributor to pay its taxes as they become due in the short-term and to forecast the distributor's chances of long-range success. The results of these analyses are compared to the distributor's six month maximum potential tax liability to determine the security required to be filed.

Since the petitioner failed to provide a financial statement of his business operation, the Division was unable to evaluate petitioner's financial status and to set a bond pursuant to paragraphs (1) through (4) of the regulations. Therefore, the Division relied upon 20 NYCRR 414.2(b)(5) to set the amount of security at \$100,000. Paragraph (5) of 414.2(b) provides as follows:

However, notwithstanding the provisions of paragraphs (2), (3), (4) and (6) of this subdivision, the amount of any bond required to be filed pursuant to the provisions of this section shall in no event be less than \$50,000. Additionally, where the amount of liability of a distributor cannot be determined, for example where the distributor is unable to furnish an average monthly gallonage sold, a bond of not less than \$100,000 will be required if the distributor's ratio of current assets to current liabilities is at least one to one and the net worth does not equal or exceed \$100,000.

We find that the Division properly applied its own regulation. The fact that the petitioner had not been active in the petroleum business for almost four years made it impossible to reliably predict the level of petitioner's future business activity. The Division of Taxation reasonably determined that these were circumstances "where the amount of liability of a distributor cannot be determined" and set the bond at \$100,000 pursuant to the second sentence of paragraph (5) of section 414.2(b)(5) of the regulations.

Since the Division correctly applied its regulation, we find that the Administrative Law Judge erred in reducing the bond amount to \$50,000.

Our conclusion that the bond amount was properly set at \$100,000 disposes of petitioner's request to reduce the required bond amount to \$1.00.

We now turn to the Division's argument, made for the first time in its brief on exception, that petitioner should be denied registration because he is not an Article 12-A distributor as defined by Tax Law § 282(1).

Whatever the merits of the Division's argument, the issue is not properly before this Tribunal.

Section 283(5) of the Tax Law provides, with certain exceptions not here relevant, that a registration shall not be cancelled or suspended until the registrant has had an opportunity for a hearing. The record indicates that prior to its brief the Division never raised the issue of cancelling the petitioner's registration in this proceeding, except to suggest that the petitioner might consider giving up his registration. We find that the petitioner has not had an opportunity for a hearing on the cancellation issue and, therefore, that we do not have the authority to cancel the petitioner's registration on such facts.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of the petitioner, Major Oils (George Dunn d/b/a Major Oils) is in all respects denied;
2. The determination of the Administrative Law Judge is reversed; and
3. The petition of Major Oils (George Dunn d/b/a Major Oils) is denied and the decision of the Division of Taxation dated April 16, 1987 requiring a \$100,000 joint motor fuel/sales tax surety bond is sustained.

DATED: Albany, New York
May 12, 1988

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner