

STATE OF NEW YORK

TAX APPEALS TRIBUNAL

In the Matter of the Petition

of

WIZARD CORPORATION : DECISION
d/b/a WIZARD PETROLEUM : DTA NO. 804831

for a Hearing with Regard to a Bond Required :
under Section 283 of Article 12-A of the Tax :
Law.

Petitioner, Wizard Corporation d/b/a Wizard Petroleum, 364 Maspeth Avenue, Brooklyn, New York 11211, filed an exception to the determination of the Administrative Law Judge issued on February 19, 1988 with respect to its petition for a hearing with regard to a bond required under section 283 of Article 12-A of the Tax Law (File No. 804831).

Petitioner appeared by Borenkind and Mondschein (Samuel H. Borenkind, Esq. and Morris A. Mondschein, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Thomas C. Sacca, Esq., of counsel).

The petitioner filed a memorandum of law in support of its exception. The Division did not file a brief or memorandum of law.

This proceeding is governed by section 3000.12 of the Tribunal's Rules of Practice and Procedure which provides that where the Division proposes an increase in the amount of a bond or other security, the registrant may request a hearing on such increase and that within three months from the application for such hearing a decision either denying or granting the petition must be rendered. The three month period is determined with regard to any

postponements of any scheduled hearing or conference or other delay made at the request of the applicant.

The expedited hearing in this matter was held on December 18, 1987 with all briefs to be submitted by February 8, 1988. The determination of the Administrative Law Judge was issued on February 19, 1988.

Oral argument, at the request of the petitioner, was heard on July 12, 1988.

At oral argument petitioner proposed a settlement to the Division. By letter dated November 22, 1988 the Division stated its settlement offer to petitioner with a deadline of December 9, 1988 for reply. By letter dated December 16, 1988 the Division informed this Tribunal that no response had been received from petitioner. The Division requested that the Tribunal render its decision in this matter.

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

ISSUE

Whether the Division of Taxation properly required petitioner, as a condition of maintaining its registration as a motor fuel distributor, to file a surety bond in the amount of \$3,982,000.00.

FINDINGS OF FACT

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

On or about June 16, 1987 petitioner, Wizard Corporation, filed an Application for Motor Fuel Tax and Sales and Use Tax Reregistration. At the time of the application petitioner had a surety bond in the amount of \$500,000.00 on file with the Department of Taxation and Finance.

On October 7, 1987 the Division advised petitioner that it was requested to provide security in the amount of \$3,982,000.00. The level of security approximated petitioner's motor fuel and sales tax liability for the six-month period December 1986 through May 1987.

The Division declined to consider petitioner's offer of an accountant's compilation of petitioner's balance sheet as of January 31, 1985 as a basis for reducing the amount of security required. This balance sheet revealed the following information:

(a) current ratio: current assets = \$686,001.00 = 1.15:1
current liabilities \$595,552.00

(b) net worth (assets minus liabilities) = \$90,449.00

(c) only current assets were reported in the asset section of petitioner's balance sheet

On November 10, 1987 the Division issued a Notice of Determination of Tax Due under Motor Fuel Tax Law to petitioner assessing penalty of \$117,270.65 and interest of \$40,947.90 for the period June 1986 through July 1986. The notice stated "[s]ince additional tax liability was paid per late filing of the returns, this assessment represents penalty and interest due on said return." At the time of the hearing, petitioner's representatives were in the process of preparing a petition to protest this assessment. With the possible exception of the foregoing notice, petitioner has been current in its payment of motor fuel tax and, with the possible exception of one other month, has been current in the payment of sales tax.

OPINION

At the hearing and on exception, petitioner asserts that the level of the bond is a legislative function that cannot be delegated; that the requirement of a six-month bond is both arbitrary and penal in nature; that the Tax Law's provisions with respect to motor fuel are unconstitutional inasmuch as they discourage New York distributors from exporting because the interest which the State pays on refunds is insufficient to compensate for the initial cost of posting the security; and that the security requirement discourages distributors from doing business in New York.

The Division asserts that the quantity of fuel imported by petitioner together with the failure of the petitioner to comply with the conditions set forth in 20 NYCRR 414.1(c) requires a \$3,982,000.00 bond.

We sustain the determination of the Administrative Law Judge in its entirety.

Tax Law section 283(3) provides in part:

"The tax commission shall require a distributor to file with the department of taxation and finance a bond issued by a surety company approved by the superintendent of insurance as to solvency and responsibility and authorized to transact business in this state or other security acceptable to the tax commission, 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 this article 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 to the revenues under this article and articles twenty-eight and twenty-nine of this chapter."

By section 18 of chapter 282 of the Laws of 1986 the foregoing function of the Tax Commission was transferred to the Commissioner of Taxation and Finance.

Pursuant to the above statutory authority the State Tax Commission adopted regulation former part 20 NYCRR 414.1 applicable to the period herein which provided the method by which the bond or other security was determined.

20 NYCRR 414.1(c) provided:

"(c) The department, in order to protect article 12-A revenues, will periodically review the financial status of registered distributors and may, at any time, subsequent to registration of any person, as a distributor, require any such distributor to submit to the department a completed:

(1) motor fuel distributor information report (form TP 187.16); and

(2) current unqualified financial statement certified by a certified public accountant pursuant to an audit conducted by him."

Said regulation, at subdivision (d)(2), further provides, in relevant part, as follows:

" (2) Generally, if a distributor fails to supply an unqualified current financial statement as required by paragraph (c)(2) of this section, such distributor's registration will be cancelled. However, the State Tax Commission, on petition, either through the hearing process or on the motion of the State Tax Commission, may waive the requirement for an unqualified current financial statement. If the State Tax Commission waives the requirement for an unqualified financial statement, it may instead require the distributor to file a bond in such amount as it deems appropriate, regardless of the net worth or financial status of the distributor.

Section 414.2(b) of the Motor Fuel Tax Regulations provide 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.

Petitioner has not submitted, as required, an unqualified financial statement certified by a certified public accountant pursuant to an audit by such certified public accountant. In Matter of Benak Corp. (State Tax Commn., January 15, 1985) the State Tax Commission noted that "[t]he purpose of this requirement is to provide independent verification of the reliability of a distributor's financial statements and, in turn, its financial condition." Since petitioner has not submitted the required statement, the Division could have cancelled petitioner's registration. However, in the alternative, it chose to permit a bond based on six months' potential tax liability. Such a requirement was justified in order to secure the collection of taxes in view of the difference between petitioner's net worth and petitioner's six-month potential tax liability. (Compare, Matter of Barrier Oil Corp., State Tax Commn., March 18, 1986, security representing six months' potential tax liability was upheld on the basis of the applicable regulation, with Matter of Campbell Oil Company, Inc., State Tax Commn., March 24, 1986, the State Tax Commission considered, among other things, the fair market value of petitioner's fixed assets when deciding the amount of the bond to require.) We find the Division's actions herein in complete accord with the statute and regulations.

The final issue concerns petitioner's assertions concerning the constitutionality of section-283(3). The jurisdiction of the Tribunal, as prescribed in its enabling legislation, does not encompass such constitutional challenges. It is presumed, for our purposes, that statutes are constitutional, and that section 283(3) in particular is constitutional (see generally, Matter of Fourth Day Enterprises, Inc., Tax Appeals Tribunal, October 27, 1988).

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Wizard Corporation d/b/a Wizard Petroleum is in all respects denied;
2. The determination of the Administrative Law Judge is affirmed; and
3. The petition of Wizard Corporation d/b/a Wizard Petroleum is in all respects denied.

Dated: Albany, New York
January 12, 1989

/s/ John P. Dugan
President

/s/ Francis R. Koenig
Commissioner