

STATE OF NEW YORK
TAX APPEALS TRIBUNAL

In the Matter of the Petition	:	
of	:	
CERTIFIED HEATING OILS, INC.	:	DECISION
for a Hearing with Regard to a Bond Required	:	DTA No. 807944
under Section 283 of Article 12-A of the	:	
Tax Law.	:	

Petitioner Certified Heating Oils, Inc., 93 Wright Avenue, Staten Island, New York 10303, filed an exception to the determination of the Administrative Law Judge issued on June 21, 1990 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. 807944). Petitioner appeared by DeGraff, Foy, Conway, Holt-Harris & Mealey, Esqs. (James H. Tully, Jr., Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Carroll R. Jenkins, Esq., of counsel).

Neither party filed a brief on exception. Oral argument, at the request of petitioner, was heard on September 25, 1990.

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

ISSUE

Whether the Division of Taxation properly determined that petitioner must file a surety bond in the amount of \$439,000.00, increased from \$186,000.00, as a condition of maintaining its registration as a New York State motor fuel distributor.

FINDINGS OF FACT

We find the facts as determined by the Administrative Law Judge and such facts are restated below.

Petitioner, Certified Heating Oils, Inc., is engaged in the distribution of gasoline and home heating fuel and has been operating as a fuel distribution business since 1946.

Petitioner is registered with the New York State Department of Taxation and Finance as a motor fuel distributor pursuant to section 283 of Article 12-A of the Tax Law and part 411 of the regulations.

By a Notice of Cancellation or Termination dated February 5, 1990, the Fireman's Fund Insurance Company notified the New York State Department of Taxation and Finance that a surety bond covering Certified Heating Oils, Inc. in the amount of \$186,000.00 would be cancelled and/or terminated effective March 6, 1990.

On or about February 23, 1990, the Division of Taxation requested from Certified Heating Oils, Inc. a copy of petitioner's certified financial statement. The Division received the compiled financial statements of both Certified Heating Oils, Inc. and Joseph Marino, its president. These compiled statements are not "certified financial statements pursuant to an audit" but are rather statements prepared from information that is the representation of management.

In a letter dated March 6, 1990, Certified Heating Oils, Inc. and its president, Joseph J. Marino, were informed that the Division of Taxation had reviewed the amount of the surety bond required to be filed. The correspondence indicated that a replacement security in the amount of \$439,000.00 was being required and that either a surety bond or other acceptable collateral must be filed according to the regulations within 30 days of March 6. Petitioner was also apprised of its right to protest this decision within seven days by written petition.

The Division of Tax Appeals received the petition of Certified Heating Oils, Inc. on March 20, 1990.

A hearing was scheduled for Tuesday, April 3, 1990 for the purpose of determining the same issue herein. At that time, petitioner requested an opportunity to post a bond or other security in the amount of \$186,000.00, the amount of surety bond that had recently been

cancelled, with an opportunity to pursue the additional \$250,000.00 necessary to post the new bond being requested by the Division of Taxation. The case was then rescheduled to be heard on April 25, 1990 for the purpose of determining whether the preliminary bond of \$186,000.00¹ should be increased to \$439,000.00.

On April 13, 1990, the Division of Taxation issued a Notice of Suspension of Motor Fuel Registration under Article 12-A of the Tax Law to Certified Heating Oils, Inc. since it was unable to submit the security amount of \$186,000.00.

On or about April 20, 1990, the Division of Taxation confirmed receipt and acceptance of a letter of credit from the Community National Bank & Trust Company of New York in the amount of \$189,000.00 on behalf of Certified Heating Oils, Inc. upon which the Division acted to withdraw the suspension of petitioner's registration as a motor fuel distributor.

Certified Heating Oils, Inc. remained under obligation to file an additional bond of \$250,000.00 until final disposition of this matter at the April 25, 1990 hearing since petitioner did not submit additional security before this proceeding. The registration was suspended effective midnight April 24, 1990. The Administrative Law Judge ordered the Division of Taxation to lift the suspension of the registration pending the outcome of this determination.

The Division of Taxation presented as its witness, Jack Butler, a supervisor of the Motor Fuel Bond Unit. Mr. Butler was responsible for review of petitioner's file to make a determination as to whether the security which the Division was holding was sufficient or whether it should be revised in some way. Mr. Butler testified that he received a computer printout showing the number of gallons of gasoline involved in transactions by Certified Heating Oils, Inc. for the past six months. The number of gallons of motor fuel expected to be imported into this State, sold, transferred or otherwise distributed within New York State is the amount of gallonage that is used in a computation indicating the potential future tax liability of the company.

¹ Periodically during the hearing, this amount (\$186,000.00) was also referred to as \$189,000.00.

Mr. Butler further testified that other factors considered included the availability of a current certified financial statement, the filing history of the company, any outstanding liabilities or current balance owed by the company.

The computation performed by Mr. Butler with respect to the gallonage for a six-month period led him to conclude that the six-month activity of Certified Heating Oils, Inc. involved 3,026,823 gallons of motor fuel. This was multiplied by 14.5¢ sales and motor fuel tax combined rates, resulting in a potential six-month liability of \$438,889.34. For the purpose of revising the surety bond, petitioner was notified that the new bond requirement would be raised to \$439,000.00.

Joseph Marino, president of Certified Heating Oils, Inc., testified that when he received the information with respect to the increase of the surety bond amount from \$186,000.00 to \$439,000.00, he immediately contacted his insurance broker requesting replacement of the bond at the newly determined amount. Introduced into evidence was a letter from Countrywide Facilities Corporation, the insurance broker who attempted to obtain a bond by contacting eight different companies on behalf of petitioner. At least half of these companies indicated they would not write such insurance and several others indicated they would consider writing such a bond only with full collateral in the form of a letter of credit or cash. The Countrywide correspondence stated that many of the bonding companies are now cancelling these bonds industry-wide as a matter of course and those who are still willing to write such bonds have now imposed "collateral requirements and premiums [which] have become outrageous."

Petitioner further presented correspondence dated April 24, 1990 from Community National Bank & Trust Company of New York indicating that the bank was in the process of considering a request from Certified Heating Oils, Inc. for a letter of credit in the amount of \$250,000.00. Mr. Marino testified that the basis for the line of credit was to be the equity in the commercial building at which Certified Heating Oils was located. This building is owned personally by the president of the company, Joseph Marino.

Mr. Marino testified that his expectation of sales of fuel will be approximately 25% less in the first six months of 1990 than in the last six months of 1989, the months upon which the computation by Mr. Butler was made. However, no evidence was offered to prove such decline during those months in 1990 which preceded this hearing.

It has been stated by both parties and agreed that petitioner's filing history has been commendable and its compliance without blemish.

OPINION

The Administrative Law Judge determined that the Division acted properly and in accordance with Tax Law § 283(3) and its own regulations (20 NYCRR 411.1 and 411.2) in requiring a bond in the amount of \$439,000.00 as a condition for petitioner to maintain its registration as a New York motor fuel distributor.

Petitioner asserts that the amount of the bond is excessive and that the Division has acted in an arbitrary and capricious manner in determining the amount of the bond because it failed to take into account the "excellent" record of compliance of the petitioner.

The Division asserts that as a motor fuel distributor, petitioner was required by the Tax Law and the Commissioner's regulations to furnish the State with security sufficient to assure the collection of the taxes properly due it. The Division asserts that the failure of petitioner to furnish a certified financial statement for the applicant corporation requires that petitioner file a bond in the amount of \$439,000.00, the dollar amount of its tax liability for a six month period.

We affirm the determination of the Administrative Law Judge.

We outline first the statutory and regulatory material applicable to this case. Tax Law § 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..." (emphasis added).

This function of the former State Tax Commission was transferred to the Commissioner of Taxation and Finance by section 14 of chapter 282 of the Laws of 1986.

The purpose of Tax Law § 283(3) 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 (see, Matter of Major Oils, Tax Appeals Tribunal, August 4, 1988). The Commissioner adopted regulations pursuant to Tax Law § 283 which describe the information that a person must submit to the Division of Taxation before it may be registered as a distributor of motor fuel.

20 NYCRR 411.1(b) requires the following:

"Before any person may be registered as a distributor of motor fuel, such person must submit to the department:

(1) a completed application for registration as a distributor of motor fuel (form TP-128.3);

(2) current unqualified financial statements certified by a certified public accountant pursuant to an audit conducted by such accountant; and

(3) an estimate of the monthly number of gallons of motor fuel expected to be:

(i) imported or caused to be imported into the State for use, distribution, storage or sale within the State;

(ii) produced, refined, manufactured or compounded within the State; and

(iii) sold, transferred, used or otherwise distributed within the State."

Regulation 20 NYCRR 411.1(c) provides, in pertinent part, that:

"The department (in order to protect article 12-A-revenues and articles 28 and 29-revenues with respect to motor fuel) 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:

* * *

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

If a distributor fails to supply such current unqualified financial statements, the distributor's registration will be cancelled. If the requirement to supply such statements is waived, then the distributor can be required to file a bond or other acceptable security deemed appropriate by the Division regardless of the distributor's financial status (20 NYCRR 411.1[d][2]).

Pursuant to Tax Law § 283(3), the Commissioner adopted regulations to determine the amount of a bond. The regulation (20 NYCRR 411.2[b][1] entitled "Determination of the amount of a bond") provides, in relevant part, that:

"Prior to the approval of an application for registration as a distributor of motor fuel and during any subsequent review of a registered distributor, the Department of Taxation and Finance, in determining the amount or sufficiency of a bond, will:

- (i) determine the estimated or representative six-month maximum potential tax liability of the applicant or of the distributor (see paragraph [2] of this subdivision);
- (ii) analyze the certified financial statements of the applicant or distributor with particular emphasis on the ratio of current assets to current liabilities and net worth (total assets less total liabilities) as determined in accordance with generally accepted accounting principals;
- (iii) evaluate any independent information concerning an applicant's or distributor's nature of operations, reliability, overall financial status, liquidity, or history of financial solvency and stability; and
- (iv) review the taxpayer's compliance record to determine whether there are or were any delinquencies in filing returns and/or payment of taxes as a distributor of motor fuel or for any other taxes due New York State for which the applicant or distributor may be or may have been responsible."

Paragraph (2) of this subdivision indicates that the maximum potential tax liability is determined based on an anticipated number of gallons of motor fuel expected to be sold or otherwise distributed within New York State during a representative six-month period. The number of gallons of motor fuel determined for such representative six-month period is then multiplied by the rate of motor fuel tax per gallon and by the applicable tax rate of the prepaid sales tax per gallon. In this case, the combined motor fuel tax and prepaid sales tax was indicated to be 14.5¢ per gallon.

We turn now to petitioner's assertion that the amount of the bond required by the Division is excessive and that the Division's actions in determining the amount of petitioner's bond were arbitrary and capricious. We disagree.

In this case, since petitioner did not submit the required certified financial statement by a certified public accountant pursuant to an audit by such accountant, the Division of Taxation, pursuant to the regulations, could have cancelled petitioner's registration; or, in the alternative, as it did here, reviewed petitioner's filing history, compliance record and overall reliability, as well as computed a bond based on six months' potential tax liability. The Division of Taxation's actions and computation with respect to an increase in the bond amount is in complete accord with the statute and regulations. The computer printouts submitted by the Division of Taxation, indicate the gallonage for a period of 20 months totalled 9,162,122 gallons. When reduced to a six-month average representative period, the result is a bond of approximately \$400,000.00. Reference to the 12 months of gallonage encompassing the calendar year 1989 indicates a bond requirement in an amount just over \$441,000.00. From the information submitted with respect to the gallonage, petitioner's business seemed to be on a steady upward pace. We find nothing to indicate that the calculation based on the six months between July 1989 and December 1989 is not an accurate reflection of petitioner's business.

Petitioner could have submitted information showing that the calculation should be revised in some way. Further, petitioner was given an opportunity to submit certified financial statements. Although having to bear the financial cost of doing so, such submission may have resulted in an alternative arrangement.

Accordingly, petitioner's assertion that the bond is excessive must be rejected. Similarly, petitioner's assertion that the Division has abused its discretion and acted in an arbitrary and capricious manner is also rejected. The Division has applied the regulations as written. Petitioner's past "excellent" filing record, while laudable, does not achieve the goal of preserving State current and future tax revenues, the goal of both the statute and regulations. In reaching this conclusion, we are cognizant of the practical difficulties faced by petitioner and

the industry of which it is a part with regard to obtaining proper surety bonds. However, any relief in this regard is properly the subject of legislative action.

Accordingly, it is ORDERED, ADJUDGED and DECREED that:

1. The exception of Certified Heating Oils, Inc. is denied;
2. The determination of the Administrative Law Judge is affirmed;
3. The petition of Certified Heating Oils, Inc. is denied; and
4. The bond requirement of \$439,000.00 is sustained.

DATED: Troy, New York
November 15, 1990

/s/John P. Dugan
John P. Dugan
President

/s/Francis R. Koenig
Francis R. Koenig
Commissioner

/s/Maria T. Jones
Maria T. Jones
Commissioner