

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition
of

A. Tarricone, Inc. :

AFFIDAVIT OF MAILING

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

State of New York }

ss.:

County of Albany }

David Parchuck, being duly sworn, deposes and says that he is an employee of the State Tax Commission, that he is over 18 years of age, and that on the 21st day of September, 1984, he served the within notice of Decision by certified mail upon A. Tarricone, Inc., the petitioner in the within proceeding, by enclosing a true copy thereof in a securely sealed postpaid wrapper addressed as follows:

A. Tarricone, Inc.
Attn: Edwin Goldwasser, V.P.
1337 Saw Mill River Rd.
Yonkers, NY 10710

and by depositing same enclosed in a postpaid properly addressed wrapper in a post office 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
21st day of September, 1984.

David Parchuck

Edwin Goldwasser

Authorized to administer oaths
pursuant to Tax Law section 174

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

September 21, 1984

A. Tarricone, Inc.
Attn: Edwin Goldwasser, V.P.
1337 Saw Mill River Rd.
Yonkers, NY 10710

Gentlemen:

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

You have now exhausted your right of review at the administrative level. Pursuant to section(s) 283 of the Tax Law, a proceeding in court to review an adverse decision by the State Tax Commission may be instituted only under Article 78 of the Civil Practice Law and Rules, and must be commenced in the Supreme Court of the State of New York, Albany County, within 4 months from the date of this notice.

Inquiries concerning the computation of tax due or refund allowed in accordance with this decision may be addressed to:

NYS Dept. Taxation and Finance
Law Bureau - Litigation Unit
Building #9, State Campus
Albany, New York 12227
Phone # (518) 457-2070

Very truly yours,

STATE TAX COMMISSION

cc: Taxing Bureau's Representative

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition	:	
of	:	
A. TARRICONE, INC.	:	DECISION
for a Hearing with Regard to a Bond Required	:	
under Section 283 of Article 12-A of the Tax	:	
Law.	:	

Petitioner, A. Tarricone, Inc., 1337 Saw Mill River Road, Yonkers, New York 10710, filed a petition for a hearing with regard to a bond required under section 283 of Article 12-A of the Tax Law.

A formal hearing was held before Frank W. Barrie, Hearing Officer, at the offices of the State Tax Commission, Building 9, State Campus, Albany, New York, on November 21, 1983 at 10:00 A.M. with all briefs to be submitted by May 25, 1984. Petitioner appeared by Edwin Goldwasser, Vice President/Finance. The Audit Division appeared by John P. Dugan, Esq. (Thomas C. Sacca, Esq., of counsel).

ISSUE

Whether the Audit Division properly required petitioner, as a condition of maintaining its registration as a motor fuel distributor, to file a surety bond in the amount of \$2,900,000.

FINDINGS OF FACT

1. On January 27, 1983, the Audit Division notified petitioner, A. Tarricone, Inc. (hereinafter, "ATI"), via form letter: (i) that the State Tax Commission could require a surety bond to be filed by distributors of gasoline and similar motor fuels; (ii) that petitioner was required to complete and file a Motor Fuel Distributor Information Report (hereinafter, "distributor informa-

tion report") and to submit a copy of its most recent certified financial statement in order to enable the Audit Division to determine whether petitioner would be required to file a bond and if so, the appropriate amount of such bond; and (iii) that failure to submit a completed distributor information report and copy of a certified financial statement by February 28, 1983 could result in the cancellation of petitioner's registration as a distributor of gasoline and similar motor fuels.

2. On or about February 9, 1983, petitioner submitted to the Audit Division a completed distributor information report. The report stated that: (i) petitioner was a retailer of motor fuel; (ii) it was incorporated on December 8, 1960; (iii) it had not previously filed a surety bond with the Audit Division; (iv) during the six-month period preceding the information report, it had reported motor fuel tax due of approximately \$2,900,000; (v) its purchases of motor fuel were "primarily spot purchases in New Jersey from various companies" which it then imported into New York by barge; and (vi) it purchased approximately 6,000,000 gallons of motor fuel per month.

3. The Audit Division notified petitioner by a letter dated March 4, 1983 that it was required to post a surety bond in the amount of \$2,900,000. The following explanation was provided:

"An analysis of your financial statement which was sent with Form TP-187.16 (Motor Fuel Distributor Information Report) discloses that the current ratio (current assets divided by current liabilities) and/or the net worth do not meet our established criteria in relation to the potential tax liability".

4. The Audit Division submitted into evidence a document entitled Solution to Motor Fuel Distributors Re-Registration Problems, which provides guidelines to be utilized by the Audit Division for the purposes of reviewing distributor information reports and determining the need for and amount of a surety bond

upon the re-registration of a distributor. These guidelines set forth a current ratio test (current assets divided by current liabilities) and a net worth test. Where the ratio of a distributor's current assets to its current liabilities is less than 1:1 or where the distributor's net worth is insufficient to meet six months' tax liability, the Audit Division will require the filing of a surety bond. The guidelines provide as follows:

"If current ratio is less than 1:1, request bond for difference between current assets and current liabilities notwithstanding the adequacy of net worth to cover 6 months tax liability. If net worth is less than six months tax liability, bond should be required for the difference plus the amount of the difference in the current ratio".

The guidelines further specify that any exception will be resolved on an individual basis after consultation.

5. The "Audited Consolidated Financial Statements and Other Financial Information" (hereinafter, "certified financial report") of petitioner dated October 29, 1982 and certified by Ernst & Whinney provided the following financial data which the Audit Division used in its determination that petitioner would be required to file a bond to secure the payment of tax due under Article 12-A of the Tax Law:

CURRENT ASSETS

Cash	\$12,714,384
Trade Accounts and notes receivable	13,195,542
Inventories	10,550,792
Prepaid expenses and other current assets	528,822
Refundable income taxes	<u>26,690</u>

<u>TOTAL CURRENT ASSETS</u>	\$37,016,230
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CURRENT LIABILITIES

Trade accounts payable	\$37,988,165
Accrued expenses and other liabilities	1,050,278

Income taxes payable	198,689
Current portion of long-term debt	<u>1,661,953</u>
<u>TOTAL CURRENT LIABILITIES</u>	\$40,899,085

Petitioner's net worth as of August 31, 1982 was \$2,005,654 calculated as follows:

STOCKHOLDER'S EQUITY

Common Stock, no par value: authorized 200 shares; issued and outstanding 57.5 shares	\$ 17,250
Additional paid-in capital	254,901
Retained earnings	<u>1,733,503</u>
	\$2,005,654

6. The Audit Division using the data noted in Finding of Fact "5, supra, determined that (i) petitioner's current liabilities exceeded its current assets by \$3,882,855 or petitioner's current ratio of current assets to current liabilities was .91, and (ii) petitioner's estimated six month motor fuel tax liability exceeded its net worth by \$894,346.

Applying the guidelines noted in Finding of Fact "4", supra, the Audit Division determined that petitioner should be required to post a surety bond of \$2,900,000, an amount equal to petitioner's estimated six month tax liability for motor fuel tax.

7. Petitioner maintains on hand an inventory of gasoline of approximately six million gallons which is carried on its books, pursuant to the last-in, first-out ("LIFO") method of valuation, at 8½¢ to 10½¢ per gallon. Petitioner's last purchases of gasoline have been at approximately 93¢ per gallon and Note "B" of the certified financial report notes that petitioners motor fuel inventory has a surplus value of \$4,511,000 which is not reflected in the value for inventories of \$10,550,792 noted in Finding of Fact "5", supra. However, this

increase in the value of petitioner's inventories must be offset by a related increase in income taxes payable of \$2,250,000 as noted in Note "H" of the certified financial report. If the surplus value for inventories and the related increase in income taxes payable are considered, petitioner's current liabilities exceed its current assets by \$1,621,855 or petitioner's current ratio of current assets to current liabilities would be .96. Its net worth would be increased to \$4,266,654¹ which exceeds its previous six months motor fuel tax liability by \$1,366,654.

8. Petitioner has obtained independent appraisals for certain fixed assets including land, buildings and equipment. The appraised fair market values are substantially greater than the book values (or carrying amounts) which were considered in determining petitioner's net worth as noted in Finding of Fact "5", supra. If such fixed assets are factored in at their newly appraised, fair market values, petitioner's net worth would be increased by \$6,229,000.

¹ This amount is calculated as follows:

Surplus value of gasoline inventory	\$4,511,000
Increase in income taxes	<u>-2,250,000</u>
Increase in value of current assets	2,261,000
Net worth as noted in Finding of Fact "5", <u>supra</u>	<u>+2,005,654</u>
	<u>\$4,266,654</u>

In Note "H" of petitioner's certified financial statement, it is noted that petitioner's "retained earnings" would increase from \$1,734,000 to \$3,990,000 (an increase of \$2,256,000) to reflect the surplus value of the gasoline inventory and the increased income taxes. There is no explanation in the record why such increase in retained earnings of \$2,256,000 is \$5,000 less than the increase in value of current assets of \$2,261,000 noted above.

9. Petitioner, which is wholly owned by one shareholder², was incorporated on December 8, 1960. Until 1976, it was operated as a Subchapter "S" corporation³. Since 1976, it has expanded its operation considerably, and at present operates approximately 110 gasoline stations in New York State from New York City to the Menands/Troy area and has 260 to 270 employees.

10. Petitioner has timely paid its motor fuel taxes in the past. According to the Audit Division, gross receipts taxes under Tax Law §182a, in the amounts of \$114,700, \$3,009,492, and \$1,945,653 are due from petitioner for the periods ended August 31, 1981, August 31, 1982 and June 30, 1983. Such allegations were raised by the Audit Division by a letter received on May 17, 1984, approximately six months after the hearing held herein. Petitioner responded to such allegations by a letter received on June 22, 1984. According to petitioner, such gross receipts taxes were charged by and paid to the major oil companies from whom petitioner purchased its motor fuel in New Jersey.

CONCLUSIONS OF LAW

A. That pursuant to Tax Law §283, the State Tax Commission has the authority to require a distributor of motor fuel to file with the Department of Taxation and Finance a surety bond in such amount as the Commission may fix in order to secure the payment of sums due from a distributor under Article 12-A, "Tax On Gasoline And Similar Motor Fuel", of the Tax Law. The Commission may

² The record is unclear concerning the name of such individual. However, according to the distributor information report petitioner's president is Anthony Tarricone and its vice-president, Arthur Tarricone.

³ Internal Revenue Code §§1371-1379 (1981).

require a bond to be filed before a distributor is registered, or at any time when in its judgment the filing of a bond is necessary to protect the revenues under Article 12-A.

B. That in determining the need for and amount of a bond as security for the payment of sums due under Article 12-A, consideration is given to the distributor's overall financial situation, including its history of timely filing motor fuel tax returns and remitting the tax. Review of all relevant factors may support a departure from the application of the current ratio and/or net worth standards in a particular instance. Matter of Simon Oil Co., Inc., State Tax Comm., August 12, 1983 and Matter of Award Energy Corp., State Tax Commission, January 31, 1984.

C. That in light of (i) the surplus value of petitioner's gasoline inventory which, when considered, increases petitioner's net worth to \$4,266,654 (an amount \$1,366,654 greater than its previous six months motor fuel tax liability) and which also results in a reduction in the amount that petitioner's current liabilities exceed its current assets to \$1,621,855; (ii) the fact that the appraised fair market values of certain fixed assets, as noted in Finding of Fact "8", supra, exceed the carrying amount by \$6,229,000; and (iii) petitioner's compliance record in filing and remitting motor fuel taxes, the filing of a surety bond in the amount of \$1,000,000 is deemed adequate.


D. That the petition of A. Tarricone, Inc. is granted to the extent indicated in Conclusion of Law "C", and the Audit Division is directed to

continue petitioner's registration upon the filing of a surety bond in the amount of \$1,000,000.


DATED: Albany, New York

STATE TAX COMMISSION

SEP 21 1984


PRESIDENT


COMMISSIONER


COMMISSIONER